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Marc Blessing

**Introduction to Arbitration –
Swiss and International
Perspectives**

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Introduction to Arbitration –
Swiss and International
Perspectives

by
Marc Blessing

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I. International Bibliography

1. Preface and Significance

This Introduction to Chapter Twelve has two objectives: firstly, to discuss **worldwide developments** in international arbitration by way of a wide **general review** right up to the present date and, secondly, within that international context, to discuss **developments in Switzerland** and particularly the most salient characteristics of Chapter Twelve. This general review must, of necessity, be a mere outline: a great deal more space would be required to discuss all the individual aspects in detail. Even the references to other literature made within the Introduction are a mere beginning. The bibliography below provides a more extensive review.

There is a substantial amount of literature available in the international arbitration field. A **bibliography** covering standard works, as well as a wider selection of articles on individual aspects of arbitration, would run to several thousand titles. For the purposes of this Introduction to Chapter Twelve, the selection was intentionally restricted to **more recent literature**, with older literature (including many standard works cited) being omitted. Now that Swiss international arbitration law has been fundamentally changed by Chapter Twelve so that “Concordat” law now only plays a marginal role, the following bibliography (with a few exceptions, such as the standard work by Jolidon) **does not contain any literature or articles relating to “Concordat” law**. For reasons of space, a large number of important papers, from both Switzerland and abroad, on specific aspects of arbitration to be taken into account when commenting on the individual articles in Chapter Twelve could not be included here.

There is hardly any other national legislation which is so **internationally oriented** as international arbitration law (normally known as an “**Arbitration Act**”, even if it is not an individual legislative act). Thorough consideration in all respects should be given to **international literature**. Whilst it is true that Swiss writers have made a considerable contribution to this literature, it should also be noted that (particularly in the last 10 years) a large number of foreign authors have also played a major part and have written papers which also deserve lasting respect in Switzerland and should also, in our opinion, be fully taken into account when commenting on the individual articles in the Swiss Private International Law Act. This is particularly so since the legal questions arising out of Chapter Twelve also apply analogously abroad; any discussion must therefore be concentrated at a global level. **Any modern international arbitration law – including Swiss law – must take supraregional and international perceptions into account!** Only then can a modern arbitration centre both assert and consolidate its position. Only then is there also any guarantee that people will learn not to take their own attitudes as gospel.

It should therefore be emphasised that it is a matter of particular concern to the author of this Introduction that **mere Swiss expertise** in the manifold legal questions raised **is no longer sufficient** (something which is probably “truer” in international

arbitration than anywhere else). It is only through a comprehensive assessment of all the relevant international literature that it is possible to deduce sufficiently comprehensive and considered answers and solutions. The views of respected foreign authors are therefore essential “*milestones*” along the route to our own path and our own solutions; this path must not form a path (or even a regression) towards a self-complacent and self-sufficient solipsism, but should lead to a widely reinforced international debate so as to express a truly international line of thought.

- 5 In the commentary on the individual articles of the Swiss “Arbitration Act” contained in this volume it has regrettably only been possible to cover part of the wealth of foreign literature which plays an extremely vital role in both legal and arbitration practice in Switzerland. It is therefore essential, particularly for a Swiss arbitrator, to look also beyond this commentary to a wider arena. Many of the following foreign contributions heavily consulted by the author of this Introduction are just as much a **tool of the trade** in Swiss legal practice (amongst both lawyers and arbitrators) as is the standard work by Lalive/Poudret/Reymond. Those publications and periodicals which are of particular and general importance to legal practitioners in Switzerland – so-called **standard works** – have been accentuated in the following bibliography **in bold face**; literature on individual topics has not been highlighted.

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3. Periodicals

- 6 The following is a list of leading periodicals in the field of international arbitration, the most important ones being highlighted in bold letters; as the mode of quotation is not used consistently throughout this publication, the one used for the purpose of this Introduction is indicated in square brackets [...].
- **ASA Bulletin** (Bulletin of the Swiss Arbitration Association, quarterly (Ed. ASA), edited by Pierre Lalive, Geneva, since 1983 [cit.: Bull ASA, Year, Page])
 - **Journal of International Arbitration**, quarterly (Ed. Jacques Werner, Geneva, published by Kluwer), since 1984 [cit.: *JIntArb*, Heft/Year, Page], publication taken over by Kluwer
 - *Arbitration Materials*, quarterly (Ed. Jacques Werner, Geneva, published by Kluwer), 1989–1993 [cit. *Arbitration Materials*, No./Year, Page]

- **World Trade and Arbitration Materials**, quarterly (Ed. Jacques Werner, Geneva), since 1994 [cit. World Trade and Arbitration Materials, No./Year, Page], publication taken over by Kluwer
- **Recht und Praxis der Schiedsgerichtsbarkeit (RPS)**, Deutsche Institution für Schiedsgerichtsbarkeit (DIS, Ed.), quarterly Supplement to the Betriebsberater (Zeitschrift für Recht und Wirtschaft)
- **Revue de l'arbitrage**, quarterly (Ed. Comité Français de l'Arbitrage), edited by Philippe Fouchard [cit.: Rev.arb., Year, Page]
- **Rivista dell' Arbitrato** (Ed. Associazione Italiana per l'Arbitrato), three issues p.a.
- **The ICC International Court of Arbitration Bulletin**, half yearly [cit. ICC Bulletin, No./Year, Page]
- **Arbitration International**, quarterly (Ed. London Court of International Arbitration), edited by Jan Paulsson, since 1985 [cit.: ArbInt, Year, Page]
- **LCIA Newsletter** (since 1996)
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- **Lloyd's Arbitration Reports**, 1988–1992; thereafter continued by the Lloyd's Arbitration and Dispute Resolution Journal, since 1993
- **The Arbitration and Dispute Resolution Law Journal**, quarterly (General Editor: Andrew Burr, LLP) [cit.: ADRLJ, Year, Page]
- **International Arbitration Law Review** (Sweet & Maxwell), monthly, since December 1997 [cit. [year] Int.A.L.R.]
- **Arbitration & Dispute Resolution Law Newsletter**, 10 issues per year (Editor: Andrew Burr)
- **Arbitration Journal**, (Ed. American Arbitration Association), quarterly
- **Dispute Resolution Times**, (Ed. American Arbitration Association), quarterly
- **The American Review of International Arbitration** (Parker School Publication), quarterly
- **World Arbitration & Mediation Report**, monthly (Ed. Transnational Juris Publications, Inc.)
- **International Arbitration Report** (Mealey), monthly (Ed. Mealey Publications, Inc.)
- **The Arbitrator**, quarterly, Journal of The Institute of Arbitrators of Australia, since 1982
- **ICSID Review** (Foreign Investment Law Journal), semi-annually since 1986 (Ed. International Centre for Settlement of Investment Disputes)
- **Negotiation Journal – On the Process of Dispute Settlement**, quarterly, since 1985 (Ed. Plenum Publishing Corp., New York, in cooperation with the Program on Negotiation, an Inter-University Consortium guided by the Program on Negotiations of the Harvard Law School, Mass.)
- **ADR Currents**, The News Letter of Dispute Resolution Law and Practice, edited by the American Arbitration Association, quarterly, since 1996

4. Looseleaf and Series; CD-Rom

- **CA Yearbook Commercial Arbitration** (Ed. ICCA – International Council for Commercial Arbitration), Editor: Pieter Sanders 1976–1985, thereafter Albert Jan van den Berg, 1986–1997
- **CA Congress Series, Vol. 1–7**
- **International Handbook on Commercial Arbitration** (Ed. ICCA – International Council for Commercial Arbitration), Vols. 1–4
- **Jahrbuch der Schiedsgerichtsbarkeit** (Ed. Ottoarndt Glossner, in connection with DAS/DIS), 1987–1990 (discontinued thereafter)

- World Arbitration Reporter (Ed. Parker School), Editor Hans Smit und Vratislav Pechota, 6 Volumes
- Arbitration and the Law (Ed. Transnational Juris Publications, Inc., Editor: American Arbitration Association)
- Arbitration Law (edited by Professor R M Merkin, published by Lloyd's Commercial Law Library)
- **Arbitration CD-Rom, Kluwer, 1998 and 1999**
- WTO Trade Policy Review CD-Rom, 1998

5. Swiss Legislative Materials

- 7 Schlussbericht, 288–302 (Art. 171–182); Vernehmlassung, N 1227– 1298 (Art. 171–182; Botschaft, Ziff. 2101 (Art. 169–180); AmtlBull StR 1985, 173–179; 1987, 193–199, 509s.; AmtlBull NR 1986, 1363–1369; 1987, 1070–1072.

II. Swiss Tradition and Legal Culture

1. Tradition

Switzerland's current important – even leading – position as one of the most sought after countries in which to conduct international arbitration proceedings is primarily due to its deeply rooted **tradition of arbitration**. International arbitration in commercial issues, in disputes between corporations and also in relation to the status of citizens can be traced right back to the Middle Ages. The three **Feldkirch Charters of 1367, 1377 and 1381** (*“Feldkircher Freiheitsbriefe”*) should be mentioned here as an interesting example of the fact that the town of Zürich, for instance, already enjoyed a high reputation during the Middle Ages, extending beyond its boundaries:

In 1376, Count Rudolf V. of Montfort-Feldkirch, living in constant fear of his life from invaders (particularly the Habsburgs), wished to grant the citizens of the town of Feldkirch generous rights. He embodied these in a charter, a kind of Magna Carta. In that charter the citizens of the town were assured of certain freedoms and stabilization of taxes. The citizens were given an assurance of inheritance rights. The citizens were also assured that they would not have to swear an oath of allegiance to any foreign lord (Regent) before he had sworn to respect those provisions and rights. If any dispute arose between the citizens and a new Regent it was provided that the issue would be referred to the mayor (*Bürgermeister*) and the town council of Zürich, which was therefore granted (arbitral) jurisdiction to decide the matter. The *Bürgermeister* and the town council of Zürich would in such cases have to decide whether the citizens had fulfilled their obligations to their lord (the Regent of Feldkirch), or whether the latter had impinged upon the “favours” (freedoms) granted to those citizens (see the original vellum document in the Zürich C.I. Stadt und Land State Archives, No. 986, 75 x 59 cm format). One particularly interesting feature of this document is the fact that Count Rudolf of Montfort also stipulated which sanctions would apply if one or other of the parties were not to abide by the decision arrived at by the *Bürgermeister* and the town council of Zürich. If the new lord (Regent) were not to comply with the ruling, the town of Feldkirch was to be given its freedom. On the other hand, if the town of Feldkirch did not comply with the decision, both the document and the freedom charters embodied in it would immediately be null and void. As a great deal of importance came to be attached to that freedom charter of 17 December 1376, the town of Zürich was asked, in a letter of 3 April 1377, to also affix its seal to that document and hold it in its safekeeping. The town of Zürich acknowledged receipt in a letter of confirmation dated 9 April 1377 (Zürich State Archives, document C.I. Stadt und Land No. 991). Just a few months later, on 13 November 1377, the Feldkirch dominion was bought by the House of Habsburg. From the arbitration point of view, it is regrettable that no such arbitration proceedings were in the end conducted before the *Bürgermeister* and town council of Zürich, the reason being that Duke Leopold III of Habsburg did, in fact, expressly acknowledge the rights of the Feldkirch inhabitants in his letter of 23 November 1377 (Zürich State Archives document C.I. Stadt und Land No. 992). – In April 1996, these famous Charters in their originals were returned by the Canton of Zürich to Feldkirch.

- 10 This is not the place to give a full historical account of the development of international arbitration in Switzerland. Some examples must suffice, such as the well-known **Alabama Arbitration** which took place in Geneva. These were proceedings between the United States and England, in which the point at issue was whether England had infringed its neutrality obligations by allowing the warship “Alabama” (which subsequently sank 70 ships belonging to the United States, before itself being sunk in the Atlantic off Cherbourg in the year 1864), to be built and fitted out in England. Both the United States and Great Britain agreed to arbitration proceedings in Geneva to determine the issues of fact and to decide on the substantial claims in damages brought by the United States against Great Britain. The arbitral tribunal sat at the *Hôtel de ville* in Geneva (in the very room in which the First Red Cross Convention was signed on 22 August 1864; the conference room has since been known as the “Alabama Room”) and pronounced its award on 14 September 1872, which held that Great Britain had been in breach of its neutrality obligations and that the United States should be awarded damages in the then enormous amount of more than 50 million gold dollars.
- 11 The Alabama Arbitration can be considered as the birth of modern **public-law arbitration**; it was followed by other proceedings, based on the Yag Convention of 1874 between America and Great Britain. Thereafter, in **The First Hague Peace Conference of 1899**, procedural provisions were drawn up for this purpose, which were revised in **The Second Hague Conference of 1907**, when the **Permanent Court of Arbitration** at the Hague was founded.
- 12 It was not until the 20th century, however, that private international commercial arbitration, as we know it today, increased dramatically. The trend towards arbitration mirrors the upturn in international trade. Switzerland’s geographic location in the centre of Europe, its development into a modern industrial country with particular emphasis on service industries, its neutrality and political stability, together with the fact that Swiss legal thinking is deeply rooted in both Roman and Germanic law, have all culminated in **Switzerland being the natural choice** for hosting international arbitration, particularly for the so-called **third country arbitration**. The latter concept is understood to mean arbitration on “neutral ground” (not necessarily “neutral” in a political sense), i.e. in a country to which neither of the antagonists belongs.
- 13 It is, therefore, not surprising that, after the Alabama Arbitration, quite a number of other major disputes became resolved by way of arbitration proceedings which have taken place in Switzerland. For instance:
- the Award of 18 March 1930 in re *Hellenic Railways v. The Government of Greece*, rendered by the Arbitrators Thomas, Zakas and Bernard (British Yearbook of International Law, 1964, 201 ss.), or
 - the Award rendered by Louis Python on 22 December 1954 in re *Alsing Trading Co. and Swedish Match Co. v. The Greek State* (International & Comparative Law Quarterly (ICLQ) 1959, 320 ss.), or
 - the Award rendered by Panchaud and Ripert on 2 July 1956 in re *Société Européenne d’Etude et d’Entreprises (SEEE) v. The Socialist Republic of Yugoslavia* (Clunet 1959, 1074 ss.), or

- the Award of 23 August 1958 rendered by Sauser-Hall, Badawi/Hassan and Habachy) in re *Arabian-American Oil Company (Aramco) v. The Government of Saudi Arabia* (Rev. crit. 1963, 272 ss.), or
- the Award rendered by Pierre Cavin on 15 March 1963 in re *Sapphire International Petroleum Limited v. National Iranian Oil Company* (International Law Reports 1967, 136 ss.), or
- the Award rendered by René-Jean Dupuy on 19 January 1977 in re *Texaco/Calasiatic v. The Libyan Government* (ILM 1978, 3 ss.), or
- the Beagle Channel Dispute between *Argentina v. Chile* adjudicated by an Award of 22 April 1977 by Fitzmaurice, Gros, Petrèn, Onyeama and Dillard (ILM 1978/AFDI 1977, 408 ss.), or
- the Taba arbitration between *Egypt v. Israel* adjudicated by the Award of 29 September 1988 rendered by Lagergren, Bellet, Schindler, Sultan and Lapidoth (ILM 1988, 1421 ss.).

Certainly, the arbitration between Greenpeace and France adjudicated under the chairmanship of Professor Claude Reymond and many other major cases with very substantial monetary claims involved would also be worth mentioning in this context. 14

The Swiss tradition also includes **ad hoc arbitration**. *Ad hoc* arbitral tribunals, as the name implies, are set up *ad hoc* on the basis of an appropriate arbitration clause or arbitration agreement – i.e. without being administered by any arbitral institution. 15
Until the Swiss Private International Law Act came into force on 1 January 1989, they were governed either by the individual Cantons' codes of civil procedure (which contained provisions, in varying shades of emphasis, relating to the appointment, challenge, dismissal and replacement of arbitrators, as well as rules governing arbitration procedure and recourse to set aside an award) or by the Intercantonal Concordat on Arbitration of 1969 (referred to below as the “**Concordat**”), according to the successive dates on which the Cantons acceded to the “Concordat”.

In the second half of the 19th century, a new phenomenon started to flourish, surfacing at first amongst associations covering particular businesses and industries: the so-called **institutional arbitration**. We will come back to it in more detail. 16

2. Acknowledged Legal Culture

Swiss law has developed (within the context of Roman and Germanic law) into an outstanding legal system of precision, balance, liberalism and liberality. Amongst foreign contracting parties, in particular, it has therefore become a **legal system to trust**, i.e. a legal system of preference in those cases where a contract between two non-Swiss parties was to be based on a “neutral” system of substantive law. There is therefore a high percentage of choice of law clauses in favour of Swiss substantive law to be found in contracts between non-Swiss parties, e.g. on the construction of off-shore oil platforms, the construction of pipelines in oil producing countries, the construction of infrastructure projects in developing countries (e.g. telecommunications 17

equipment, water and electricity supplies, power stations, port facilities, highways, military installations, hospitals, universities, dams, airports etc.) – in fact for the construction of all kinds of industrial plants and the supply of equipment. Choice of law clauses in favour of Swiss substantive law are found equally often in all kinds of commercial contracts, in joint-venture agreements, in long-term power and natural gas supply contracts, in mining concessions as well as in transactions on commodity futures exchanges.

18 This combination of two factors, namely the Swiss tradition as a neutral place of arbitration and the worldwide acceptance of its legal system, have culminated over the last 50 years in **Switzerland achieving a predominant position** in the international scene as one of the leading centres of arbitration.

19 This position would nevertheless be inconceivable if the two factors above were not supplemented by a third one: namely, the presence of a **modern arbitration law** in line with present-day needs and expectations.

20 What are these **needs and expectations in relation to a modern place of arbitration**? How can it be said that the Swiss “*Arbitration Act*”, Chapter Twelve of the Swiss Private International Law Act discussed here, fulfils these expectations? These questions will be discussed, in particular, in Part III of this Introduction. However, we will first attempt to provide a brief outline of the current international arbitration scene (Part III).

III. Brief Review of International Developments

The last few decades have shown that it is the leading **arbitral institutions** which have been the **driving force in the development** of international arbitration law, rather than the national legislative bodies, where legislative progress has been somewhat slow. 21

This development will be outlined below.

1. The Principal Arbitral Institutions

a) *Trade Associations*

A large number of institutions with arbitration rules for merchants dealing in certain types of goods, or for the members of certain associations, had developed already during the **19th century**. In London, for example, the well-known Grain and Feed Trade Association (**GAFTA**), was established in 1878 (Arbitration Rules No. 125 of 1994 and GAFTA Codes of Practice), furthermore the Federation of Oils, Seeds and Fats Associations Limited (**FOSFA**; Rules of Arbitration and Appeal of 1995), the International Petroleum Exchange (**IPE**), the Cocoa Association of London Limited (**CAL**), the Sugar Association of London, the Refined Sugar Association (Rules Relating to Arbitration of 1994), the Coffee Trade Federation (**CTF**), the London Rice Brokers' Association (**LRBA**), the London Metal Exchange (**LME**; Arbitration Regulations 1995), to name just a few (cf. Johnson, International Commodity Arbitration, 1991; see also Delden, English Commodity Arbitrations: A Foreigner Looking Around in London, in: Liber amicorum Sanders 1982, 95 ss.; Slabotzky, Grain Contracts and Arbitration, 1984). In Holland, the Netherlands Oils, Fats and Oilseeds Trade Association (**NOFOTA**) and the Netherlands Coffee Trade Association were created. Hamburg became famous for its "amicable arbitration" ("*Hamburger Freundschaftliche Arbitrage*"). Of particular importance in the USA are the American Fat and Oils Association (**AFOA**, in New York) and the North American Export Grain Association (**NAEGA**, in Washington) (cf.: Covo, Commodities, Arbitrations and Equitable Considerations, ArbInt 1993, 57 ss.). Typically, the procedures under these rules are quality arbitrations aiming to determine the conformity of goods as to their quality and condition with the specifications of the relevant contract. Quick decisions are required for this purpose; the procedures are sometimes characterized as "look-sniff" arbitrations. 22

Are these procedures arbitrations at all? If the decision declared that the buyer was well-founded to reject the goods, it will quite certainly qualify as an arbitral decision, because the decision involves the determination of a legal issue. However, if only a kind of factual determination is made, or if a decision merely determines that the quality of the goods is such as to justify a reduction of the purchase price by say 14%, the decision will rather be a kind of factual determination as is typically made by an examiner or valuer. Thus, in Germany these procedures are qualified as "*Schiedsgut-*" 23

achten” and the resultant decision will not qualify as an enforceable award. However, in Holland, England and in the United States these procedures are qualified as proper arbitrations (even if only a determination of the quality or condition of goods are made).

b) Maritime Arbitration

- 24 Another important institutional arbitration field which developed is **maritime arbitration**. The most important arbitration centre was established in London: the **LMAA** – London Maritime Arbitration Association, deciding over 500 cases a year; its new rules “The L.M.A.A. Terms (1997)”, effective as of 31 January 1997, are published in World Trade and Arbitration Materials 2/1997, 171–188; see also LCIA Newsletter, May 1998, 9 ss.). Important centres then also followed in Hamburg and Bremen (under the auspices of the **GMAA** – German Maritime Arbitration Association, founded in 1983), in Oslo, Stockholm, Moscow (cf. the well-known MAC Rules), in Vancouver and Tokyo (**TOMAC Rules** – Arbitration Rules of the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange Inc.; cf. Tanimoto, Sources of Law Relating to Maritime Arbitration in Japan, JIntArb 1/1995, 101 ss.), in Beijing (Maritime Arbitration Commission of the China Council for the Promotion of International Trade, since 1958), in Paris (Chambre Arbitrale Maritime), in Alexandria (as a branch organisation of the Cairo Regional Centre for International Arbitration) and in New York (**SMA** – Society of Maritime Arbitrators of New York, with approximately 150 cases a year; the SMA revised its Rules on 10.5.1994; cf. specifically with regard to this latter institution Bülow, The Revised Arbitration Rules of the Society of Maritime Arbitrators, JIntArb 1/1995, 87–99). A general review is provided in Trappe, Maritime Schiedsgerichtsbarkeit, Trappe, Maritime Arbitration Rules of Different Arbitral Institutions; see also Harris/Summerskill/Cockeril, London Maritime Arbitration, Arbitration International 1993, 275 ss., Van Gelder, Maritime Arbitration: *Quo vadis?*, JIntArb 1/1995, 79; Haight, Maritime Arbitration – The American Experience, ADRLJ 1995, 2–17; Harris, Procedural Reform in Maritime Arbitration, ADRLJ 1995, 18 ss.; Yang, Multi-Party Maritime Arbitrations, ADRLJ 1995, 30 ss.

c) National and Bilateral Chambers of Commerce

- 25 A large number of continental European chambers of commerce have developed their own arbitration rules, for example the Stockholm Chamber of Commerce and the **Zürich Chamber of Commerce**, to name just two outstanding examples with a long-standing tradition.
- 26 In Central and Eastern Europe, *arbitration courts* were set up by the national chambers of commerce in all former CMEA countries to conduct arbitration proceedings based on the **1972 Moscow Convention**. The Uniform Rules for Arbitration in the Arbitration Courts at the Chambers of Commerce of the CMEA Countries of 1974 were applied (cf. ICCA Yearbook Commercial Arbitration 1976, 147 ss.).
- 27 Mention should also be made of the arbitration rules of **bilateral chambers of commerce**, such as the **Franco-German Chamber of Commerce** and the

German/Swiss Chamber of Commerce, the latter having been established in the year 1912 and having developed its first own arbitration rules between the two World Wars, which have since been revised on several occasions, most recently on 4 October 1991.

The older arbitration rules developed amongst traders and merchants are still greatly influenced by **local rules, traditions and perceptions**; they are specifically designed to meet certain requirements at a given commodity exchange or a particular chamber of commerce and, even now, they are characterised by a corresponding **emphasis on local procedural law** and local custom. Where such rules of procedure incorporate “local colour”, they cannot be termed “modern”, although they will certainly be able to meet the distinctive requirements of the trade concerned.

28

d) The International Chamber of Commerce (ICC), Paris

The **ICC (International Chamber of Commerce – Chambre de Commerce internationale)**, with its headquarters in Paris, was established in 1919 and quite rightly claims to be the most important private international organisation in the world’s economy. It covers approximately 1,500 industrial organisations and 5,000 large companies, is established in over 50 countries through its own national groups and provides a worldwide operating and discussion forum for the main concerns of economic activity throughout the world. Its many expert committees, made up of representatives from all over the world, compile commentaries and reports on central topics in the law of finance, international payment transactions, credit insurance, insurance law, tax harmonisation, environmental protection law, energy law, privatisation, merger controls, marketing, international transportation (including maritime law and air traffic law), telecommunications, commercial practices (to name just a few of the committees). The ICC’s list of specialist publications runs over 500 titles. Information on its current activities is provided by the periodicals “**ICC Business World**” and the annual **ICC Handbook**. As a result of its intensive efforts, particularly during the reconstruction period after the Second World War, the ICC must take most of the credit for having promoted and achieved harmonisation and legal progress in central topics in international commerce and trade. Recent ICC World Congress took place in Shanghai in April 1997 and in Geneva in September 1998.

29

Of particular interest here is the vital part played by the ICC in international arbitration, particularly through two institutions: the **ICC’s Institute of International Business Law and Practice** as a scientific institution (presided over by Professor Pierre Lalive, Geneva) and, even more importantly, the **International Court of Arbitration of the ICC**, the world’s foremost arbitral institution. In June 1998 the ICC registered its 10,000th case.

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The ICC Court was set up in the year 1923. It has at present 55 court members which – on proposal of the ICC national committees – are elected by the ICC Council for a tenure of 3 years. Their function is an honorary one in that Court members are not paid and are not reimbursed for their travelling expenses to attend the numerous Court sessions in Paris. Due to the above election process, all regions of the world are equally represented. In fact, 34 countries have established ICC national committees,

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which justifies the characterization of the ICC Court as being a **truly global institution** headquartered in Paris. Indeed, it is the ICC's ambition to be seen as an institution of world-wide stature, and it does not want to be seen as an institution pertaining to one particular hemisphere, or confined to the Western and industrialized world.

32 The Court's function is to handle the tasks incumbent on it in connection with the administration of arbitral proceedings. Most importantly, the Court, in plenary sessions, has the **function to approve the arbitral awards rendered by the arbitral tribunals** constituted pursuant to the ICC Rules and submitted to it by the ICC's Secretariat. Regularly, such awards are reviewed by a *rapporteur* selected from among the Court members who will report on the case (or occasionally present a written report). This element, i.e. the **scrutiny and approval of arbitral awards** prior to their notification to the parties, is one of the outstanding and indeed unique features of ICC arbitration and has earned the ICC arbitral process a lot of confidence from parties/"users" around the globe. The ICC Court has basically three sources of income: the contributions of the ICC national committees, the arbitration fees (administrative charges) and the interest income earned on the deposits paid by the parties.

33 During the last decade the ICC Court was presided over by Alain Plantey (who succeeded Michel Gaudet). As of 1 January 1997, Dr Robert Briner from Geneva, has taken over. Eric Schwartz, who had been the ICC secretary general, stepped down as of end of September 1996; his successor is someone equally well-known and highly regarded in the "arena" of international arbitration: the Argentinian Horacio Grigera Naon. The president and the secretary general are assisted by the ICC Secretariat which consists at present of 35 full-time employees, among them the counsels who are monitoring the pending cases from beginning to end.

34 The first *Règlement de Conciliation et d'Arbitrage de la CCI* (Rules of Conciliation and Arbitration of the ICC) was drawn up in the year 1923. The ICC Rules were then subsequently revised for the first time in 1927 (following the Geneva Conventions of 1923 and 1927). The ICC was instrumental in the shaping of the Geneva Convention and the New York Convention of 1958 ("NYC"), the European Convention of 1961, the Strasbourg Model Law of 1965, the ECAFE Arbitration Rules of 1965, the ECE Arbitration Rules of 1966, the UNCITRAL Arbitration Rules of 1976, the UNCITRAL Conciliation Rules of 1980 and, finally, the UNCITRAL Model Law of 1985 (Glossner, *Die Bedeutung der Internationalen Handelskammer für die Rechtsfortbildung*, Schriftenreihe DIS, Vol. 8, 1989, 83 ss., 88 s.).

35 There is a great deal of **ICC literature** available on arbitration proceedings under the ICC Rules. Here, reference is to be made to just some of the best known standard works: Craig/Park/Paulsson, *International Chamber of Commerce Arbitration*, and Reiner, *ICC Schiedsgerichtsbarkeit*. The new Rules in force as from 1 January 1998 are commented in books that came on the market in 1998: Derains/Schwartz, *A Guide to the New ICC Rules of Arbitration*, and Craig/Park/Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules, With Commentary*.

36 Particular aspects of arbitration proceedings under the ICC Rules are discussed in the semi-annual (purple) **ICC Bulletin**, which not only provides insight into ICC arbitral awards which have been rendered, but also contains important research arti-

cles and editorial contributions such as e.g. those by Imhoos, on the Constitution of the Arbitral Tribunal, ICC Bulletin 1991, followed by Schäfer on The Terms of Reference, in conjunction with the detailed report by the Working Party on the Terms of Reference, submitted by Lazareff, in ICC Bulletin 1/1992 and, most recently, Reiner in ICC Bulletin 2/1996, 59–71; reference is further made, with regard to the conduct of arbitration proceedings, to Blessing, The ICC Arbitral Process – The Procedure before the Arbitral Tribunal, in ICC Bulletin 2/1992, 18–45; for the arbitral decision see Fontaine, Lloyd and McGovern in: ICC Bulletin 1/1994, 30–47 and, on the law applicable, Derains in: ICC Bulletin 1/1995, 10 ss.; for costs see Schwartz in ICC Bulletin 1/1993, 8–30 as well as Byrne in ICC Bulletin 2/1996, 84 ss.; on conciliation procedure see Schwartz, International Conciliation and the ICC, in: ICC Bulletin 2/1994, 5–19; on multiparty arbitration see Delvolle in ICC Bulletin 1/1995, 26–50 and Gravel in ICC Bulletin 2/1996, 45–53; on truncated tribunals see Schwebel in ICC Bulletin 2/1995, 19–32; on arbitration and the community law see Hetsch in ICC Bulletin 2/1995, 47–59; on the status of the arbitrator see Fouchard in ICC Bulletin 1/1996, 27–58; on issues concerning arbitration clauses see Dimolitsa in ICC Bulletin 2/1996, 14–23; on joinder of proceedings and third party interventions see Level in ICC Bulletin 2/1996, 36–44; on the scrutiny of draft awards by the ICC see Hascher in ICC Bulletin 1/1997, 17. Moreover in May 1997 a very helpful index was published covering the Bulletins 1990–1995. The November 1998 issue of the Bulletin was devoted to discuss the most salient aspects of the revision of the ICC Rules.

In addition to its semi-annual bulletins, the ICC also publishes special publications on individual topics and conference reports (also in purple); see in this respect the bibliography under “ICC”. The ICC Bulletins are published in both English and French. 37

Other important sources of information for the arbitration practitioner include the light blue and white “**ICC Dossiers**” published by its associated organisation, The Institute of International Business Law and Practice; see the titles listed in the bibliography. 38

Selected **ICC arbitral awards** are discussed each year in Clunet (Journal du Droit International). Three major compilation volumes have now also appeared and form part of the arbitration practitioner’s general “working tools”: Jarvin/Derains: ICC Arbitral Awards 1974–1985, Jarvin/Derains/Arnaldez: ICC Arbitral Awards 1986–1990 and Arnaldez/Derains/Hascher: ICC Arbitral Awards 1991–1995. Moreover, Hascher has compiled a very useful volume on “Procedural Decisions in ICC Arbitration 1993–1996”. 39

As far as daily arbitral practice in Switzerland is concerned, the ICC hosts the most important arbitral institution (although on a worldwide scale the arbitration institution in China (CIETAC) has become the Number-One-Institution measured by the number of new cases submitted to it each year; see below). The **ICC statistics** reported in the ICC Bulletin 1/1998, 4–9, show that, in **1997**, 452 new cases were filed. In 67 of those cases, the parties had agreed to a venue in Switzerland to host their arbitration, whereas the parties had opted for France in 90 cases, for the United Kingdom in 37 cases, for the USA in 35 cases, Austria 12 cases, Sweden 9 cases, Germany 7 cases etc. As of 40

1 January 1997, 935 cases were pending and, during 1997, 169 final awards were rendered. During 1997, from the total of arbitrators nominated and confirmed by the ICC, 121 were Swiss, 92 French, 96 English, 80 American, 45 German, 40 Italian, 39 Canadian, 31 Austrian.

41 Although the ICC Arbitration Rules have been criticised in certain individual respects, e.g. with regard to the compulsory requirement of so-called **Terms of Reference** and with regard to the formal scrutiny of arbitral awards by the ICC Court (which characteristics are praised by others, with just as good reason, as being a particular advantage of the ICC Rules), the Rules have nevertheless quite rightly found **worldwide recognition** and worldwide confidence. The liberality of its procedure is proof of the excellent way in which it meets the current requirements of a modern arbitral process (cf. Blessing, The ICC Arbitral Process/Part III: The Procedure Before The Arbitral Tribunal, ICC Bulletin 2/1992, 18–45). The ICC Rules are in the **forefront** of the development of the arbitral process. Certain excellent provisions have also paved the way for national legislation in the international arbitration field, e.g. (i) Article 11 on the **arbitrators’ procedural autonomy**, (ii) Article 13(3) on the **arbitrators’ autonomy in determining the conflict of laws** rule and (iii) Article 19 on the **presiding arbitrator’s authority to decide alone** if no majority decision can be reached. All these three key aspects have – after a long and difficult process through the legislature – also found their way into the Swiss Arbitration Act (i.e. into Chapter Twelve of the Private International Law “PIL”). Even before, by 1981, the first two points had already been incorporated in the new French International Arbitration Act (i.e. Articles 1492 to 1507 of the French Nouveau Code de Procédure civile).

42 Fundamental **revisions of the ICC Rules** took place in 1955 and 1975, followed by a minor revision as of 1 January 1988. Until the end of 1997 the 1975/1988 Rules still apply (along with the Schedule of Fees as per Appendix III of 1 January 1993). (For the historical development of the International Chamber of Commerce Court of Arbitration, see Eisemann, La Cour d’Arbitrage: Esquisse de ses mutations depuis l’origine, in: 60^{em} Anniversaire de la Cour d’Arbitrage de la CCI/Regard sur l’avenir, 1984, 407 ss.) The “mini-revision” as of 1 January 1988 had shown that the ICC Rules had become so “ingrained” internationally that it was becoming extremely difficult to find a consensus of opinion on any fundamental change to the Rules. Nevertheless, the Bureau of the ICC submitted a draft for a “soft” revision of the ICC Arbitration Rules in March 1995 (thus after another 20-year interval). This draft confined itself to making a few clarifications and additions to the existing Arbitration Rules. It provided, *inter alia*, for an addition in Article 2(4) relating to the appointment of the whole arbitral tribunal by the International Court of Arbitration of the ICC should multiple claimants or respondents not be able to agree on a mutual arbitrator; an addition in Article 2(12) concerning the replacement of an arbitrator; minor additions and amendments in Articles 5(2), 6(2), 10, 12, 13(2), 18(2) and 20(2); the welcome clarification in Article 8 that the applicable ICC Rules should be those in force as of the date of filing the request for arbitration (subject to any agreement to the contrary), a more express provision relating to provisional or interim measures of protection in a new Article 8(6), the express embodiment of the confidentiality of arbitration proceedings in a new subparagraph in Article 15, plus a new provision

(contained in a further subparagraph of Article 24) relating to the correction or interpretation of arbitral awards. It was also proposed that the provisions of Article 1 and Articles 13–16, until then contained in Appendix II, should become incorporated in the body of the Rules.

Would such a “mini-revision” have been sufficient? Or would it just have amounted to a “piecemeal approach” which would not suffice and would not result in a set of rules deserving to be considered as being fit and state-of-the-art for the year 2000 and beyond? This very question was the subject of heated debates at the meeting of the ICC Commission on 21 April 1995, at which an overwhelming majority of the members of the Commission clearly stated (against the view expressed by the then President of the ICC Court, Mr Alain Plantey) that the kind of “soft” revision proposed by the ICC Bureau was no longer sufficient for the purpose. It was then resolved that a **working party** be set up under the chairmanship of Me Yves Derains, which was mandated until the October 1995 ICC Commission Meeting (i) to examine the question of whether certain matters proposed by the ICC Bureau should be treated as a matter of urgency (such that the ICC Arbitration Rules should be revised in this respect already by early 1996), and (ii) to submit a proposal for a fundamental revision of the ICC Arbitration Rules, such revision to be accomplished within a time frame of no more than 12–18 months; see the report by Blessing, Bull ASA 1995, 108–117.

During 1995 and 1996, work on the revision progressed. The working party, in its report of 29 September 1995, had identified **four major objectives for the revision** of the ICC Rules: (i) to reduce delays in the runway of arbitration, (ii) to reduce unpredictability, (iii) to rationalize costs, and (iv) to improve certain defective rules. At the same time, the working party identified the characteristics of ICC arbitration which deserved to be maintained: the universality of the Rules, the structure of the ICC Court of Arbitration and its assistance by national committees, the control by the institution over time-limits and financial aspects, the flexibility of the ICC procedure, the terms of reference (as one of the most characteristic elements of ICC arbitration) and the scrutiny of the award by the Court (as another particularly characteristic element of ICC arbitration).

The task of the working party was twofold: On the one side, the internal procedures within the ICC required a careful streamlining so as to progress from “ICC bureaucracy” to **“lean case management”** (to use Michael Schneider’s apt expression), the expectation being a significant progress in the sense of a more efficient and time-effective handling of the cases by the ICC Secretariat and by the Court. On the other side, the ICC Rules needed to be restructured, improved and completed by a number of new provisions.

The revised ICC Rules were **approved** at the occasion of the ICC World Congress in Shanghai on 8 April 1997. They **entered into force as of 1 January 1998**. The ICC has devoted two of its recent publications to the new Rules: the ICC Special Supplement published in October 1997 and the ICC Bulletin Vol. 8 No. 2 published in December 1997. The importance of ICC arbitration in Switzerland justifies devoting a special Sub-Section to that revision and its salient changes, in comparison with other major arbitration rules.

- 47 Apart from the ICC Arbitration Rules, the so-called **ICC pre-arbitral referee procedure** is available since 1 January 1990 for parties which – even prior to the constitution of an arbitral tribunal under the ICC Rules – seek a rapid determination of requests for provisional measures (see the ICC Publication No. 482 and the account given thereon in ICC Bulletin 1990 No. 1, 18 ss.). However, these separate Pre-arbitral Referee Rules – although very intelligently crafted – have never been used in the past. The reason for this might be that parties may find it difficult enough, when negotiating a contract, to discuss the topic of dispute resolution and to reach agreement on basics (such as on the use of a particular institution and the place of arbitration) so that they may find it inopportune or perhaps even counter-productive to also discuss in advance rules providing for quick interim relief. Obviously, once a dispute has arisen, the other party would tend not to agree to submit itself to the ICC Pre-arbitral Referee Rules.
- 48 With regard to a general overview on **interim measures** in international arbitration, see the ICC Publication No. 519, “*Conservatory and Provisional Measures in International Arbitration*”, 1993.
- 49 The ICC provides very valuable assistance if parties (or an arbitral tribunal) need to obtain a technical or other expertise from a qualified and neutral expert. The Rules of its **Centre for Expertise** have recently been revised (ICC Publication No. 520, the ICC International **Centre for Expertise**) and the new Rules became effective as of 1 January 1993). See also the ICC Bulletin 1/1993, 53 ss.; also most recently Bourque, L’expérience du centre international d’expertise de la CCI et le développement de l’expertise internationale, Rev. arb. 1995, 231–262 and Charrin in ICC Bulletin 2/1995, 33–46.
- 50 On the occasion of the ICC Commission Meeting of 3 December 1996, an innovative scheme was presented to handle **airline passenger liability claims**. The draft Rules had been worked out by a team of IATA representatives together with Professor Karl-Heinz Böckstiegel, Judge Gilbert Guillaume and V.V. Veeder, Q.C. The intention is to establish a customized arbitration system offered to claimants as an efficient way for resolving differences over the amount of damages to be paid by the air carrier in case of accidents. The respondents in the proceedings will typically be the air carriers and possibly the insurers. Although some provisions of the ICC Rules of Arbitration have been incorporated in the draft, such characteristic features of the ICC Arbitration Rules as the Terms of Reference and the scrutiny of awards have not been included.
- 51 At the same ICC Commission Meeting of 3 December 1996, another scheme was presented with the acronym “DOCDEX”, which stands for **ICC Documentary Credit Dispute Expertise Rules** (the “DOCDEX Rules”, published in ICC Bulletin Vol. 8 No. 2, 1997, 51–59). These Rules provide for a dispute resolution mechanism for questions arising out of the application of the UCP and URR Rules developed by the ICC Banking Commission. The mechanism will be administered by the ICC International Centre for Expertise in co-operation with the ICC Commission on Banking Technique and Practice. The objective of this scheme is to provide an independent, impartial and prompt expert decision on how a dispute should be resolved on the basis of the terms and conditions applicable to documentary credits. It is pro-

vided that a panel of three experts will be appointed which shall decide after consultation with the technical adviser of the Banking Commission. The DOCDEX decision is not intended to qualify as an arbitral award and thus will, unless otherwise agreed, not be binding upon the parties.

A new emerging field in which the ICC has taken the lead is arbitration in the area of **telecommunications** and **electronic commerce**; see hereto the detailed draft Report to the ICC Commission on International Arbitration submitted in October 1998.

e) London Court of International Arbitration (LCIA)

The **London Court of International Arbitration (LCIA)** celebrated its centenary in September 1993. The LCIA goes back to “The London Chamber of Arbitration”, which was founded in 1892 and which changed its name in 1903 to “The London Court of Arbitration” and then, in 1995, to “The London Court of International Arbitration”. A further change of name was a topic for discussion during the centenary celebrations. The word “London” seemed to be too locally orientated in view of its worldwide importance; “International” appeared not to sufficiently express its global focus; “Arbitration” also appeared to be too narrow in view of the marked trend towards ADR, so that (as Jan Paulsson remarked at the centenary celebrations) it would seem that only the word “... of ...” might still be appropriate (of what?). However, today, there is no longer talk of a change of name. The President of the LCIA until the end of 1993 was Sir Michael Kerr, who was then succeeded by Professor Dr. Karl-Heinz Böckstiegel (of Bonn). Since 1 January 1998 the Canadian Yves Fortier CC. Q.C. took over the presidency of the LCIA. The LCIA also has four Vice Presidents and over 20 Court Members (two of whom come from Switzerland). “Users’ Councils” have been set up for Europe/North Africa, North America (including Canada, Mexico and Bermuda) and for the Asiatic/Pacific territories and Africa.

The **LCIA Arbitration Rules** were principally fashioned by Jan Paulsson (Paris) and Professor Martin Hunter (London) and have been in force since 1 January 1985. An international working party accomplished its task to provide for a “soft” revision of the Rules, with a view to improving some minor points in order to make them fit for the year 2000 and beyond, and to harmonize them with the new 1996 English Arbitration Act. The new Rules came into force as of 1 January 1998. How do they compare to the new ICC Rules? See hereto the comparative analysis below.

By contrast to the ICC, the LCIA does not itself supervise the arbitral procedure once it is entrusted to the arbitrators; likewise, no terms of reference are required, and there is no scrutiny of the award by the institution. – As for the statistics: in 1995, about 70 new cases were referred to the LCIA, whereof 4 were conducted on a fast-track basis. 18 of them were multiparty disputes. The places of arbitration were in London, Damascus, Paris, New York and Jersey. As to the nationality of arbitrators appointed: 49 English, 23 Swiss, 4 French, 2 Italian, 2 Dutch, 2 American, 2 Australian, 1 Russian, 1 German, 1 Scottish, 1 Malaysian and 1 Lebanese.

The LCIA organises regular conferences and publishes an excellent quarterly periodical “**Arbitration International**” (cited here as “ArbInt”); its general editor is Jan

Paulsson. A particularly useful tool is the comparative index; see ArbInt 1997, 447–457.

f) Chartered Institute of Arbitrators (CIArb)

- 57 The **Chartered Institute of Arbitrators (CIArb)**, also located in London, goes back to the Institute of 1915 and received its Royal Charter in 1979. The Chartered Institute is a very important association of legal and technical experts operating mainly in the field of building and construction arbitration, shipping, insurance, engineering and commodities trading. The members of the CIArb consist of “Associates” and “Fellows” and total over 7,200. The Chartered Institute runs comprehensive training courses for arbitrators with final examinations and enjoys a special position in this connection. It produces the quarterly periodical “**Arbitration**” and a manual entitled “Register of Arbitrators” containing biographical details of arbitrators. It is distinguishable from the LCIA by the fact that it does not act as an arbitral institution to administer arbitration proceedings; the two organisations, which operated together under one roof until the middle of the 1980s, are not therefore in competition with each other. The CIArb is linked with the LCIA through a Cooperation Agreement signed in Bermuda on 27 June 1996. Most recently, the Chartered Institute has launched an innovative type of cost-effective arbitration: “London Scheme Arbitration”, crafted on the basis of the new English Arbitration Act, particularly for small claims. The procedure is supervised; arbitrators must submit drafts of all decisions and awards to the London Review Panel for comment.

g) China International Economic and Trade Arbitration Commission (CIETAC)

- 58 **CIETAC** (China International Economic and Trade Arbitration Commission) in Beijing, with further arbitration centres (Sub-Commissions) in Shanghai and Shenzhen, is of **prime importance** to many of the leading American and European (including Swiss) enterprises. Thus, all Swiss lawyers and in-house counsel with an international practice need to be familiar with that institution, and will need to know its Rules. In fact, within a few years, CIETAC has – by the number of new cases referred to it – become the *Number One* of all arbitral institutions administering international disputes; for instance, in 1995, a total of 902 new cases were submitted to CIETAC, with a rising trend since then. As almost all of these cases involve, on one side, a Chinese party and, on the other side, a foreign party, CIETAC arbitration cannot be considered as being arbitration on truly neutral ground. For this reason, the ICC has established its presence in China. It offers a welcome alternative to the CIETAC Rules discussed below. Regarding matters to be considered when conducting an ICC arbitration in China, see Chen Min, Some Issues of ICC Arbitration in China, China International Commercial Arbitration Yearbook 1995–1997, 85 ss.
- 59 The **CIETAC Rules** had certainly given rise to some justified international criticism in the past, so that their revision as of 1 June 1994 had been eagerly awaited; meanwhile, two further revisions came into force as of 1 October 1995 and 1998, but

the most criticized points are still in there. For the text of the 1995 Rules, see World Trade and Arbitration Materials 2/1996, 117–142; the latest revision.

Apart from some improvements, reservations are still being expressed e.g. in connection with the insufficient independence of arbitrators; this is due to the **far-reaching jurisdictional power** of the CIETAC Arbitration Commission (whose jurisdictional power – unlike under the Rules of all other leading arbitral institutions – does not come to an end once the arbitral tribunal has been constituted, but continues to have effect). For example, the Arbitration Commission, as an administrative body, has exclusive authority to decide itself on the arbitral tribunal's jurisdiction, which after all is something difficult to reconcile with basic notions in international arbitration. Moreover, the arbitrators have to be appointed from a mandatory list of accredited arbitrators (Article 24).

CIETAC arbitrators lack the authority to rule on interim measures (cf. Article 23); oral hearings are to be fixed in consultation with the CIETAC Arbitration Commission (Article 33); likewise, the place of the hearing is to be determined by the arbitral tribunal in consultation with the Arbitration Commission (Articles 33 and 35); the Secretariat can itself order a record to be kept, whereby a transcript (and any audio tapes) are then only to be made available to the arbitral tribunal (Article 43). If it deems it necessary, the Secretariat of the CIETAC Commission may also require that translations of documents into Chinese (which the parties filed with the tribunal) be provided (Article 75) – for many non-Chinese lawyers a horrifying thought, particularly in complex construction cases with thousands of documents (not to mention here the difficulty in making any kind of reliable translation, and in ascertaining what Chinese speaking arbitrators might understand therefrom). The mode of service is also to be determined by the CIETAC Commission (Article 76) and, finally, Article 81 provides that it is the prerogative of the Arbitration Commission alone to interpret the CIETAC Rules. – All these are matters which caused the author of this Introduction to express concern regarding these issues in numerous personal discussions and in speeches at international conferences, e.g. at the Beijing International Arbitration Conference on 22/23 June 1994 as well as at the IFCAI/HKIAC Conference in Hongkong on 21 November 1995.

The example of **China** (as was previously the case with **Saudi Arabia** and **Russia**) demonstrates the **economic and commercial significance** of the parameters of international arbitration – and hence the importance of also paying due attention to it. An arbitration “set-up” which does not sufficiently enjoy international confidence (or which only enjoys such confidence to a limited degree), whether at the level of the Arbitration Act or at the level of institutional rules and regulations, can have the effect of seriously **hindering foreign investment** in that country, or to make such investments **more expensive**. Clearly, a Western party intending to do business with a Chinese party will assess the commercial risks involved; and in so doing, it will have to weigh the impact of having to arbitrate in China, as opposed to arbitrating on neutral ground; this additional commercial risk will normally cause the non-Chinese party to increase its selling price to the tune of x-percent. Thus, the Chinese party does pay a high price for the fact that arbitration under the CIETAC Rules inspires less confidence in the suitability and neutrality of the process than an arbitration

process taking place in a neutral venue and under for example the ICC Rules, or the LCIA Rules, or on an *ad hoc* basis. Quite the same had happened, and still happens, in Saudi Arabia. However, in contrast to China, Saudi Arabia was always said to be “rich enough to afford an unsuitable arbitration system”; for China, this might be different.

63 It should be noted however that, China is making an impressive effort to learn about the needs and expectations of foreign parties as far as international arbitration is concerned. For instance, in 1995 and 1996 various delegations from all major provinces consisting of professors and high ranking officials were missioned to travel to the leading arbitration centres and institutions in Switzerland and other European countries to familiarize themselves with the notions as they developed in this part of the world.

64 As of 1 July 1997, the 145 years of British Rule in Hongkong came to an end and sovereignty over the territory of Hongkong reverted back to the PRC. Since then, the process of integration and convergence of Hongkong into the PRC has started, allowing, however, Hongkong to maintain its own legal regime in the most important areas of commercial life (according to the guiding principle “one country, two systems”). It is not possible, in the framework of this introduction, to provide a detailed account of the effects of the changes, but all those attending the ICCA Conference in Paris in early May 1998 will well remember the, on balance, very positive account given by Neill Kaplan. His analytical report made it clear that many of the fears voiced in connection with the absorption of Hongkong by China did not materialize, and in a general sense his report depicted an outlook to an even stronger future of Hongkong as a major place of business, and a major centre for hosting international arbitration, in the millennium to come. From this perspective, Hongkong may be seen as a new locomotive for the PRC to gradually open-up towards an internationalization and globalisation in commerce as well as in dispute resolution. A matter of particular concern, in respect of China, is the issue of recognition and enforcement of awards. Before 1 July 1997, an arbitral award rendered in Hongkong was capable of enforcement in China under the terms of the New York Convention. Since 1 July 1997, a Hongkong award has become a domestic award, with less certainty of enforcement within the PRC. However, in this respect, Mr Kaplan has explained that the Chinese legislation is in the process of establishing legal parameters for the recognition and enforcement of awards, comparable to those of the New York Convention. Moreover, proposals aim to achieve a solution, whereby the enforcement of awards is being reviewed by the Chinese Supreme Court. For a critical update see Morgan, *Hongkong Arbitration in Transition: The Arbitration (Amendment) Ordinance 1996*, Mealey’s International Arbitration Report, April 1998, 18–73. On the other hand, US courts have demonstrated a pro-enforcement bias when reviewing the enforceability of a CIETAC award in the USA; see hereto the highly interesting report by Wagoner in *ASA Bulletin* 1998, 289–310.

65 For scholarly writings regarding CIETAC and arbitration in China, reference should be made to some recent materials: Huang, *Several Problems in Need of Resolution in China by Legislation on Foreign Affairs Arbitration*, *JIntArb* 3/1993, 95 ss.; Huang, *Some Remarks About the 1994 Rules of CIETAC and China’s New*

International Arbitration Rules, JIntArb 4/1994, 105 ss.; Huang, The Ethics of Arbitrators in CIETAC Arbitrations, JIntArb 2/1995, 5–16; Lubmann/Wajnowski, International Commercial Dispute Resolution in China: A Practical Assessment, The American Review of International Arbitration 1993, 107–178; Bersani, The Enforcement of Arbitration Awards in China, JIntArb 2/1992, 47 ss.; Guo, The Validity and Performance of Arbitration Agreements in China, JIntArb 1/1994, 47 ss.; Huang, The Stylization and Regularization of the Management and Operation of the Chinese Arbitration Institute, JIntArb 2/1994, 77 ss.; Crawford, China's New Arbitration Law – Business As Usual for CIETAC, in Mealey's International Arbitration Report, October 1994, 16 ss.; Moser, China's New International Arbitration Rules JIntArb 3/1994, 5 ss. Harpole, International Arbitration in the People's Republic of China Under the New Arbitration Act, ICC Bulletin 1/1995, 19 ss.; Sagot, Le règlement CIETAC, Rev.arb. 1995, 427 ss.; Wolff, Neue Schiedsregeln der China International Economic and Trade Arbitration Commission (CIETAC), Betriebsberater (Zeitschrift für Recht und Wirtschaft), Beilage 5 zu Heft 17/1995, 14 ss.; Moser/Yulin, The New Arbitration Rules of the China International Economic and Trade Arbitration Commission, JInt Arb 1/1996, 15 ss.; Min, The Arbitration Act of the People's Republic of China – A Great Leap Forward, JInt Arb 4/1995, 29–50; Yulin, Towards the UNCITRAL Model Law – A Chinese Perspective, JIntArb 1/1994, 87 ss.; Wang, The Unification of the Dispute Resolution System in China – Cultural, Economic and Legal Contributions, JInt arb 2/1996, 5–44; Chen, Some Reflections on International Commercial Arbitration in China, JInt Arb 2/1996, 121–162. Song, A Valid Arbitration Agreement, Or Is It? A Perspective Under Chinese Law, ADRLJ June 1997, 78 ss. Comprehensive new books published in 1996 come from Wang, Resolving Disputes in the PRC, and from Guo, Case Studies of CIETAC: International Trade Disputes. A further very comprehensive volume titled “Arbitration Laws of China” has come out in May 1997, edited by the Legislative Affairs Commission of the Republic of China. Morgan, The Transition of Sovereignty to the People's Republic of China and the Arbitration Regime in Hong-kong, Mealey's International Arbitration Report, Special Suppl. to the May 1997 Issue, 3–32. Huang, On Decision-Making Powers Over Jurisdiction of Arbitrations At CIETAC, Mealey's International Arbitration Report, July 1998, 18–36. A very helpful and comprehensive account came out in summer 1999: Hakansson, Commercial Arbitration Under Chinese Law.

The large number of publications available reflects the importance attributed to China's position for hosting international arbitration.

h) American Arbitration Association (AAA)

The **American Arbitration Association (AAA)**, with its head office in New York and branches in many of the American Federal States, is certainly the largest arbitral institution in the world. It was presided over, until March 1994, by Robert Coulson, who was then succeeded by William Kenneth Slate II. The AAA administers over 90,000 domestic cases a year (between US parties) under its “Commercial Dispute Resolution Procedures”. These procedures are frequently revised; the most current

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version is that as of 1 January 1999, consisting of the “Commercial Mediation Rules”, the “Commercial Arbitration Rules”, the “Expedited Procedures” and the “Optional Procedures For Large, Complex Commercial Disputes”. Separate rules exist for “Construction Industry Dispute Resolution Procedures” (regular track and fast track), for the “Resolution of Employment Disputes” and for “Y2K Disputes” (the text of these procedures is, for instance, published in *World Trade and Arbitration Materials* 3/1999, 181-250). Further, the AAA’s “Patent Arbitration Rules” are widely used.

In the international sphere, the “International Arbitration Rules” of 1 November 1993 had been “softly” revised; the new Rules took effect on 1 April 1997 and brought “thoughtful improvements to the arbitral process” (as Michael Hoellering said). The highlights of the revision include amended/new provisions on applicability (Article 1), time limits (Articles 3 and 6), multiparty arbitration (Article 6), impartiality of arbitrators (Article 7), conduct of the arbitration (Article 16), attorney-client and other privileges (Article 20), currency and interest (Article 28) and punitive damages (Article 28). As of 1 April 1999, “Supplementary Procedures for International Arbitration” were adopted. The case-load of international disputes is increasing fast, from an average of some 150 new cases per year to about 450 new cases reported for the year 1998.

67 The AAA is in close contact and works together with many other arbitral institutions throughout the world and, along with the ICC, the LCIA and the ICSID, forms a prominent landmark on the “map of the arbitration world”. The AAA publishes brochures and other material and provides constant updating in its periodicals, the “Arbitration Times” and its new “**Dispute Resolution Times**” as well as in its quarterly periodical “**Dispute Resolution Journal**”. The trend towards **ADR methods** is most marked; they have attained great predominance in comparison to the traditional arbitration process since they apparently meet a strong demand within the American business world.

68 One of the most recent developments to be reported here is the formation of the **CAMCA**, i.e. of the Commercial Arbitration Center for the Americas, which took place as of 15 March 1996. CAMCA is established at the headquarters of the four leading arbitration institutions of the NAFTA States, i.e. at the AAA in New York, the British Columbia International Commercial Arbitration Centre, the Centre d’arbitrage commercial national et international du Québec and the Cámara Nacional de Comercio de la Ciudad de México. See the comparative references to the CAMCA Rules when discussing below and in more detail the revision of the ICC Rules; the CAMCA Cooperative Agreement has been published in *World Trade and Arbitration Materials* 1996, No. 3, 275 ss. and the Rules in the issue 1996, No. 4, 113–168. The formation of CAMCA came in response to the requirement under the NAFTA Treaty that the parties, to the maximum extent possible, should use arbitration and ADR for the settlement of their commercial disputes (Article 2022 NAFTA Treaty).

i) Vienna International Arbitral Centre

69 The **Vienna International Arbitral Centre** came into operation on 1 January 1975, based on the Austrian Chamber of Commerce Act. Here, too, a leading name has

shaped the institution and lent it a worldwide reputation: that of Dr Dr Werner Melis, President of the International Arbitral Centre, who also became Vice President of the ICCA (see below). Because of its affiliation to a large organisation, the Arbitral Centre has the necessary infrastructure and facilities available to enable it to host arbitrations and large congresses on its own premises. Its present Arbitration Rules date from 1 September 1991 and supersede those of June 1983. They are on purpose succinct and do not as yet contain a number of provisions which one is accustomed to see in most modern sets of arbitration rules. Thus, at a conference held in Vienna on 5 and 6 June 1997, the author of this Introduction suggested a good dozen elements which might be worth-while considering when revising the Austrian Arbitration Act (scattered in various laws and thus not very user-friendly, at least not for the foreign user) and the Rules of the Vienna Centre. Similar to the ICC, the Vienna International Arbitral Centre also monitors the progress of the arbitral proceedings and examines the draft arbitral award which has to be submitted.

The Vienna International Arbitral Centre always played a key role in former East/West arbitrations and, with the recent political changes, Vienna has become the geographic heart of Europe. This, in the author's view, is not only a privilege, but at the same time a tremendous challenge: to meet the expectations of so many parties who place their confidence in the reliability of the arbitral process under the Vienna Rules. A review of all court decisions rendered in Austria in relation to international arbitration was presented by Dr Neuteufel at the Vienna conference of 5 and 6 June 1997. Based on that report, we may say that the Austrian courts have demonstrated a very sound and supportive attitude for international arbitration which, therefore, deserves unrestricted appreciation. – For basic information reference is made to Melis, *Die neue Schieds- und Schlichtungsordnung des Internationalen Schiedsgerichts der Bundeskammer der gewerblichen Wirtschaft*, Vienna, AnwBl 1991, 776 ss.; Heller, *Die Rechtsstellung des Internationalen Schiedsgerichts der Wirtschaftskammer Österreich*, WBl 1994, 105–118; cf. also Melis, *A Guide to Commercial Arbitration in Austria*, ADRLJ 1995, 104 ss.

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j) Stockholm Chamber of Commerce

International arbitration by the **Stockholm Chamber of Commerce**, which was founded in 1917, acquired particular significance as a result of the Cooperation Agreement of 29 December 1976 concluded between the American Arbitration Association (AAA) and the USSR Chamber of Commerce (Moscow), which stipulated arbitration by the Stockholm Chamber of Commerce in the event of disputes between American and Soviet companies. The Agreement between the AAA and the Chamber of Commerce and Industry of the Russian Federation of 1992 also includes this provision again (see the wording of the 1992 Agreement in *IntBus Lawyer* 1994, 25/26). Otherwise, the Stockholm Chamber remained somehow “faceless” in the sense that we have hardly seen – during the past 20 years – a charismatic personality representing the Chamber and marking an international presence. With regard to arbitration in Sweden generally, see “Arbitration in Sweden”, 1984 and “Swedish and International Arbitration”, 1990, both published by the Stockholm Chamber of

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Commerce; the current rules are those in force as of 1 April 1999. Sweden has also enacted a new Arbitration Act, in force as of March of 1999. Hober, Schiedsort Stockholm: Verjährung und anzuwendendes Recht, Jahrbuch für die Praxis der Schiedsgerichtsbarkeit 1988, 80 ss. The *Yearbooks of the Stockholm Chamber of Commerce* are also informative.

k) International Federation of Commercial Arbitration Institutions (IFCAI)

- 72 It must also be mentioned that most of the arbitral institutions in the world have formed themselves into an organisation called the **International Federation of Commercial Arbitration Institutions (IFCAI)**, which was founded in 1985, its objectives being the worldwide promotion of institutional arbitration and conciliation in disputes; it provides new centres of arbitration with advice and support, together with guidance on institutional matters in the widest sense. IFCAI has organized congresses, in particular e.g. Cairo in 1992, Milan in 1993, Hongkong in 1995, Geneva in October 1997 at WIPO and New York in May 1999. IFCAI publishes a regular Newsletter. The IFCAI counts more about 80 arbitral institutions as its members; the Swiss Arbitration Association (ASA) is a member of the General Section. For details on some 150 arbitral institutions, see Davidson/Kos-Rabcewicz-Zubkowski, *Commercial Arbitration Institutions: An International Directory and Guide* 1992; the directory would, however, require updating.

l) International Council for Commercial Arbitration (ICCA)

- 73 The **International Council for Commercial Arbitration (ICCA)** is not in any way an institution administering arbitration cases, and yet it may be described as being a pre-eminent body in the field of international arbitration. Its origin stems from the mid 1950s and owes much to the efforts made at the time by Pieter Sanders (Holland) and Jean Robert (France) to create wider recognition for international arbitration. At that initial stage, the publication of the three-volume manual “*Arbitrage International Commercial/International Commercial Arbitration*” (1956, 1960 and 1965), compiled under the direction of Pieter Sanders, which also commented on the New York Convention and the European Convention, was to some extent the forerunner of the yearbook “**ICCA Yearbook Commercial Arbitration**” (also started under the direction of Pieter Sanders in 1976) and other later ICCA publications. The ICCA’s idea was to set in motion – and provide a forum for – an initially supranational and ultimately *worldwide discussion on the main topics and issues in the field of international arbitration*.
- 74 The first ICCA Congress took place in *Paris* in 1961 (cf. Rev. arb. 1961, 37 ss.) and the second in *Rotterdam* in 1966 (Rev. arb. 1966, 1 ss.). Following an Interim Meeting in *New Delhi* in 1968, it was resolved at the Congress of Venice in 1969 that the idea of international arbitration should be expanded from its European “birth-place” and promoted worldwide, particularly behind the “Iron Curtain”, in Asia and in the **developing nations**. The next ICCA World Congress took place in *Moscow* in

1972, followed by *New Delhi* in 1975 and *Mexico City* in 1978. The ICCA's goal since then has been to leave behind its **European roots** and prove itself as an organisation with a worldwide presence, comprising all different kinds of legal cultures and traditions and promoting an intensive exchange of opinion between them on all matters relating to dispute settlement (including mediation and conciliation, which are of particular importance in countries such as those pertaining to the Arab world and the Far East). See Strohbach, Vom Club de Chambésy zum International Council for Commercial Arbitration, *Liber amicorum Glossner*, 1993, 417 ss.).

After the 1978 Mexico Congress had concentrated, in particular, on the question of the relationship between arbitral tribunals and national courts (juridical assistance/intervention), the 1980 Interim Congress in *Warsaw* was marked by discussion of the multi-party arbitration process. Materials from the ICCA World Congress, held in *Hamburg* in 1982, divided up into four working parties (cooperation among arbitral institutions, commodity and quality arbitrations, new methods of dispute resolution and maritime arbitration), was published in the new series entitled **"ICCA Congress Series No. 1"**.

The ICCA Interim Congress held in *Lausanne* in 1984 was of particular importance to Switzerland as it was there that the then **Draft UNCITRAL Model Law** was discussed (cf. ICCA Congress Series No. 2). Working parties at the ICCA World Congress in *New York* in 1986 concerned themselves with a comparative law analysis under the heading "Comparative Arbitration Practice" and with "Public Policy in Arbitration" (cf. ICCA Congress Series No. 3). The ICCA Interim Congress held in *Tokyo* in 1988 dealt with arbitration in the Far East and with "Arbitration in Combined Transportation" (ICCA Congress Series No. 4). The 1990 ICCA World Congress in *Stockholm* concentrated on the topics of "Preventing Delay and Disruption of Arbitration" and on arbitration in "Construction Cases" (ICCA Congress Series No. 5). The *Bahrain* Interim Congress had to be postponed from the Autumn of 1992 until February 1993 and concentrated on analysing arbitration procedure at the various stages "Pre-arbitral Phase", "Arbitral Phase" and "Post-Arbitral Phase" (ICCA Congress Series No. 6). The ICCA World Congress held in *Vienna* in November 1994 focused on the topic of "Improving Arbitration Proceedings" and dealt with a large number of both procedural and substantive law questions; the papers submitted by the various speakers were published in May 1996 in ICCA Congress Series No. 7. Meanwhile the ICCA Interim Congress took place in *Seoul* on 10–12 October 1996. The last ICCA World Congress was held in *Paris* in May 1998; logically, the 40th anniversary of the New York Convention was memorialized, and this gave rise to a wide discussion of what has and has not been achieved in respect of its goals. Moreover, the Conference looked to the next millennium and discussed proposals to make the enforcement of arbitration agreements and arbitral awards more certain, more predictable and more effective.

It can undoubtedly be said that the ICCA, under the presidency of Me Jean Robert (Paris) 1961–1978, Professor Pieter Sanders (The Hague) 1978–1986, Professor Giorgio Bernini (Bologna) 1986–1994 and Fali Nariman (New Delhi, since November 1994), has achieved its aim, namely to establish an intensive and **world-wide forum for discussion** of matters relating to the international settlement of dis-

putes. The 1993 Congress in Bahrain made it impressively clear (in comparison, for example, to the earlier Congress of the Euro-Arab Chambers of Commerce in Bahrain in October 1987) that, as a result of the intensity of exchange of opinion and the in-depth discussions among the leading practitioners and experts, a noticeable harmonisation has been achieved, with an improved (and still improving) international understanding of quite universally recognized “ground rules” in international arbitration, at the same time coupled with a mutual respect for differing cultures and perceptions.

78 ICCA stands in close connection and collaboration with **UNCITRAL** and the leading arbitral institutions. The **ICCA Yearbook Commercial Arbitration**, available since 1976, was until 1985 edited by Professor Pieter Sanders, and from 1986 onwards by Professor Albert Jan van den Berg; it has become an indispensable compendium of reference for anyone involved in international arbitration. Another indispensable tool is the loose-leaf series **ICCA International Handbook on Commercial Arbitration**, containing the National Reports on international arbitration in individual countries.

79 It should finally be mentioned that still today, ICCA is a mere “club” without any legal personality, consisting of a President, three Vice Presidents, one General Secretary and (currently) 26 members. Until 1981, Switzerland was represented by Professor Pointet and, since 1982, by Professor Pierre Lalive. This is the place to acknowledge with much gratitude that Professor Lalive, with his (internationally acclaimed) outstanding personality, has contributed so much to the development of the technique, spirit and culture of international arbitration, being Switzerland’s “ambassador” in the arena of international discussions. Since 1996, the well-known Dr Robert Briner (the President of the ICC Court of Arbitration, as from 1 January 1997, and *inter alia* past Chairman of the Iran-US Claims Tribunal) was elected as a second Swiss representative. Moreover, in 1998, Professor Gabrielle Kaufmann from Geneva was also elected.

m) Iran-US Claims Tribunal in The Hague (IUSCT)

80 The **Iran-US Claims Tribunal (IUSCT)**, established in The Hague, was set up to resolve the Iran-American hostage crisis at the US Embassy in Teheran, based on the Algiers Agreement of 19.1.1981. It decides claims brought by private individuals from both countries as well as claims between the two countries themselves. If the amount of a claim is less than USD 250,000, the claimant’s country of origin represents it before the tribunal. If the sum claimed is more than this, the claimant itself has *locus standi* to bring the action. Over 4,000 cases have been submitted to the tribunal, the vast majority of which has already been decided. It is significant that the IUSCT applies the UNCITRAL Arbitration Rules (see below), and meanwhile has developed its own jurisprudence thereunder.

81 IUSCT Awards have regularly been published in the ***Iranian Assets Litigation Reporter***. See further ***Mealey’s Litigation Reports: Iranian Claims***, (1983–1991), which are now no longer published. The Grotius Press has published the Iran-United States Claims Tribunal Reports in over 30 volumes. Certain individually selected

decisions are published in International Legal Materials, in the Arbitration Journal, in the International Arbitration Report and in Arbitration Materials or, now, in World Trade and Arbitration Materials, as well as in the ICCA Yearbooks Commercial Arbitration. The commentary by van Hof on the UNCITRAL Arbitration Rules, as applied by the Iran-US Claims Tribunal, is of great interest: Van Hof, Commentary on the UNCITRAL Arbitration Rules – The Application by the Iran-US Claims Tribunal (1991). See further Wühler, Zur Bedeutung des Iran-United States Claims Tribunal für die Rechtsfortbildung, in: Böckstiegel (ed.), Rechtsfortbildung durch internationale Schiedsgerichtsbarkeit, 1989, 93–124; Böckstiegel, Zur Bedeutung des Iran-United States Claims Tribunal für die Entwicklung des international Rechts, in: Liber amicorum Rechtswissenschaftliche Fakultät Köln, 1988, 605–631; Mapp, The Iran-United Claims Tribunal, The First 10 Years 1981–1991, 1993.

n) The Gulf War Claims UN Compensation Commission in Geneva (UNCC)

The **UN Compensation Commission (UNCC)** was set up in Geneva on the basis of UN Security Council Resolution 687 of April 1991; it consists of a Governing Council, a Secretariat (with one Executive Secretary) and Commissioners, who have to decide and/or evaluate claims made against the State of Iraq. The Iraqi government's principal liability for the war damage caused is based on (and had been determined by) a decision of the **UN Security Council**, so that, in most of the cases, the procedure will not focus on the liability issue, but only on the determination of causation, coupled with an administrative (rather than arbitral) taxation procedure in respect of the *quantum*. Over two million claims have been received for a sum exceeding USD 200 billion (Summer 1996). The claims are determined in the framework of awards issued by the UNCC which must be approved by the Governing Council. These awards cannot, however, be considered as being "arbitral awards" in the traditional sense, because the procedure does not satisfy the requirements of the right to be heard in a way as required for arbitral proceedings; consequently, enforcement under the 1958 New York Convention will not be available for those UNCC awards. Likewise, the UNCC procedure cannot be compared to the arbitration procedure in the Iran-US Claims Tribunal in The Hague, which is a procedure between equal parties.

Already by the fall of 1996, practically all **Category A** claims (i.e. over 922,000 claims relating to the departure from Iraq) had been resolved and approved by the Governing council, with approximately USD 3.2 billion awarded. The **Category B** claims (relating to serious personal injury or death) had, by the fall 1996, all been processed and paid; there were about 4,000 such claims, and in total USD 13.5 mio were awarded. By the end of 1996 about half of the total of 426,000 **Category C** claims (relating to personal losses of up to USD 100,000), valued over USD 1 billion, had been processed, and about USD 800 mio had been awarded. These figures do not include the further 800,000 claims filed by the Egyptian workers which ask for the restitution by Iraqi banks of their deposits (valued approximately USD 500 mio). On 1 July 1998, the Governing Council approved the payment of US\$ 739,730,850 in

respect of the sixth instalment of, in total, 64,425 **Category C** claims for individual damage suffered below US\$ 100,000, filed by 74 countries and three international organisations. It is expected that the remaining approximately 74,000 **Category C** claims will be reported and presented in early 1999; the remaining Category C claims will come under the seventh instalment.

84 Further UNCC panels have been constituted to determine the claims in Categories D, E and F. The **D - claims** relate to individual claims exceeding USD 100,000; their total value is in the region of USD 15 billion. For an interim report on **Category D** claims, see Mealey's International Arbitration Report, October 1998, 17 ss. The **Category E - claims** relate to corporate claims; their total value exceeds USD 80 billion; the E panel is presided over by Dr Werner Melis (Vienna). As a separate sub-category under E, the "Well Blowout Control" – claims submitted by the Kuwait Oil Co. for the costs of extinguishing oil well fires in an amount of USD 950 mio will have to be determined. So far, the first instalment of **Category E2** claims consisting of four claims have been adjudicated, and the UNCC has approved the payment of some US\$ 187 mio. based on the report and recommendations submitted by the Commissioners on 3 July 1998 (see the publication of the detailed 107-page report in Mealey's International Arbitration Report, July 1998, Section F. The **Category F - claims** relate to government claims valued approximately USD 100 billion; the F - panel is presided over by Sir Michael Kerr (London).

85 Obviously, the capacity for the UNCC to effectuate compensation payments depends on the flow of income into the fund established by the UNCC, and this inflow depends on the implementation of the UN Security Council Resolution 986 (the "*oil for food*-Resolution"). So far, the UNCC only had enough funds so as to pay compensation for some of the claims in the various categories. For an updated account regarding the total amount of USD 2,729,058,327.92 paid out until 24 March 1999, see Mealey's International Arbitration Report, April 1999, 21 ss.

86 Even if Iraqi oil production could return to the pre-war output valued about USD 20 billion per year, only 30% thereof would have to be paid into the UNCC fund, i.e. some USD 6 billion. Such amount will not even allow an interest servicing on the total value of all claims, let alone allow for a down-payment of the capital amount. These perspectives render the whole exercise somewhat questionable.

87 Another aspect is the very limited role conceded to Iraq to "comment" on the claims, which does not satisfy the requirements of the **right to be heard**. The latter would seem to be particularly important in relation to the Category D, E and F claims where jurisdiction, liability (in particular proximate causation) and *quantum* (in the sense of "direct damage" as per the UN Resolution No. 687 – what damage is direct, when is it merely indirect?) will be elements to be scrutinized carefully, and where it is hardly conceivable that this can appropriately be done without affording Iraq proper participation as a party, and without conducting a proper evidentiary procedure.

88 Do we have **1919** all over again? This is a question which the author raised at the Geneva Forum in October 1996 and at the Hague Conference on 3–5 June 1997. It would seem to the author that certain mistakes made in the past (for instance those of 1919, which quite inevitably lead into the Second World War) should not be repeated.

Learning from history, it would be most desirable to establish, rather than to pursue the present isolation, a really meaningful and constructive dialogue with the Iraqi people so as to commonly re-build a working relationship and to bring back Iraq into the world-wide community. Indeed, a common dialogue to sort out the past would seem to be one of the essential foundations necessary to foster future peace and stability. Such a dialogue has not so far been established, as can be concluded from the harsh criticisms voiced by several Iraqi representatives. The author, not himself privy to the processes before the UNCC or in any way involved, is however certainly not sufficiently qualified to pass a judgment on the situation, and the above remarks may possibly pertain to the “ideal world” and “the stuff dreams are made of”. However, it is never wrong to strive for a better world, and there should be no excuse for not doing that.

Compare Graefrath, Iraqi Reparations and the Security Council, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 55 (1995), 1–68; Raboin, The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing, in: Lillich (ed.), *The United Nations Compensation Commission*, 1995, 119–154; Crook, The United Nations Compensation Commission: A New Structure to Enforce State Responsibility, *American Journal of International Law*, 1993, 144 ss.; Gowl and-Debbas, Security Council Enforcement Action and Issues of State Responsibility, in: *International and Comparative Law Quarterly*, 1994, 55–98; Wühler, Ansprüche gegen Irak vor der United Nations Compensation Commission, in: *Betriebsberater*, Supplement 5 to Issue 12 1996, 23 ss.; Wühler, Causation and Directness of Loss as Elements of Compensability Before the United Nations Compensation Commission, in: Lillich, *The United Nations Compensation Commission*, 1995, 207 ss.; Wühler, Future of UNCC Hinges on Funding (Mealey’s International Arbitration Report 10/1996, 19 ss.). Compare further the wording of the UN Decisions and the forms published in Mealey’s International Arbitration Report 8/1992; see also Arbitration Materials 1/1992, 169 ss. and Ulmer, The Gulf War Claims Institution, *JIntArb* 1/1993, 85 ss.; Alzamora, Reflections on the UN Compensation Commission, *ArbInt* 1993, 349 ss.; Affaki, The United Nations Compensation Commission – A New Era in Claims Settlements?, *JIntArb* 3/1993, 21 ss.; see also Grossen, Un quasi-arbitrage? A propos de La Commission de compensation des Nations Unies et de sa procédure, *Liber amicorum Lalive*, 1993, 509 ss.

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o) Settlement of Disputes Under GATT/WTO

Since 1952, an independent machinery to resolve disputes has been developed within **GATT**. At the first stage, consultations between states are to take place. At the second stage, Clause XXII(2) of the GATT Agreement provides that any party can refer the dispute to a consultation procedure between the member states as a whole and the other country. Approximately 200 disputes were handled up to the year 1994. In order to conduct proceedings under Clause XXIII(1)(a) it is necessary for there to be a violation of a contractual obligation in a manner which endangers the Agreement (so-called “**violation complaints**”, which make up approximately 90% of the proceed-

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ings, as opposed to “*non-violation complaints*”, which make up for the remaining 10% of the proceedings). At the multilateral level, an investigation into the dispute will be commenced, after which a recommendation or even a decision (in the form of a Ruling) will be pronounced and sanctions may even be applied.

91 The rules therefore provide for a **decision by the contracting parties** themselves and not by an independent judicial or arbitral authority. However, opinions remained divided within GATT as to whether disputes should rather be decided by way of a formal juridical procedure, instead of the kind of settlement through political and diplomatic channels. The **Uruguay Round** (“*The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes*”) led to an extension of the procedure to the service industries and to agreements on intellectual property and other special kinds of agreements.

92 One particularly significant element is the fact that, for the **WTO Arbitration Procedure**, a new permanent arbitration body (“*Dispute Settlement Body*”) (DSB)) and an appeal authority (“*Appellate Body*”) were set up. The WTO Panel must decide within 6 months (and in urgent cases even within 3 months) and must make an appropriate recommendation to the DSB; this is deemed accepted unless unanimously rejected by the DSB within 60 days, or unless one of the parties requires a reconsideration. Thereafter, the parties will have 30 days to accept the decision and to make it known how they intend to remedy the breach of contract. If one party to the contract should not comply with its obligations, the country which has suffered injury can ask for reasonable measures to be taken (“*retaliation*”/“*cross-retaliation*”).

93 Whilst the GATT Panels, which were responsible for investigating disputes and preparing *Rulings* in their reports, did not have any authority to decide cases (in that, significantly, the parties themselves could reject those reports), the **juridical nature of the procedure** has now become strengthened within the WTO. Although it is still true that international trade policies are sovereignty-driven (and that the national assertion of **sovereignty rights** cannot as yet be validly subordinated, as can also be seen with regard to The Hague arbitral institutions which will briefly be discussed below), it is nevertheless impressive that most of the almost 100 GATT *Rulings*, which have already been pronounced in the past were voluntarily complied with by the contracting parties. This record might even become more impressive under the WTO procedure. In February 1996, a first WTO Dispute Resolution Panel ruled against the United States and in favour of Venezuela and Brazil, in connection with certain US regulations requiring foreign gasoline to meet stricter standards than domestic products. In April 1996, that Ruling was confirmed by the Appellate Body of WTO so that the decision, unless overturned by a consensus of the WTO’s Dispute Settlement Body (DSB), will become binding (cf. World Arbitration & Mediation Report Vol. 7 No. 4 (April 1996, 104 ss.)).

94 WTO Panel Reports provide a fascinating insight into a wide and complex area of international trade law, world economics and politics. Among the most recent reports, the author would recommend a reading of the WTO Panel Report on India of 5 September 1997 (dealing with patent protection for pharmaceutical and agricultural chemical products) and the Report by the Appellate Body of 19 December 1997 (WT/DS50/AB/R), both published in World Trade and Arbitration Materials, Vol. 10,

No. 2 March 1998, 35–148. Moreover, a reading of the WTO Panel Report of 31 March 1998 regarding Japan (dealing with measures affecting consumer photographic film and paper), published in World Trade and Arbitration Materials Vol. 10 No. 4 July 1998, is highly informative.

Important **scholarly writings** are: Pescatore/Davey/Lowenfeld, Handbook of GATT Dispute Settlement, 1991 and, more recently by the same authors: WTO/GATT Dispute Settlement (with updates); Pescatore, The GATT Dispute Settlement Mechanism – Its Present Situation and Its Prospects, JIntArb 1/1993, 27 ss.; Petersmann, Experience and Proposals on GATT Dispute Settlement Procedures, in Corbet (Publ.), The Position of the European Community in the New GATT Round, 1987; Petersmann/Jaenicke, Settlement of International Trade Disputes in International and National Economic Law (1991); Petersmann, Trade Policy, Environmental Policy and the GATT – Why Trade Rules and Environmental Rules Should Be Mutually Consistent, in: Aussenwirtschaft 1991, 197–221, Dolzer, Formen der Streitbeilegung im multilateralen Wirtschaftsrecht, Jahrbuch für Schiedsgerichtsbarkeit 1988, 37 ss., 42; Senti, GATT – WTO – Die neue Welthandelsordnung nach der Uruguay Runde (Institut für Wirtschaftsforschung der ETH Zürich, 2nd ed. 1998). A comprehensive review has been produced by Komuro, The WTO Dispute Settlement Mechanism – Coverage and Procedures of the WTO Understanding, in: JIntArb 3/1995, 81–172. See further Kil Imann, The Access of Individuals to International Trade Dispute Settlement, in: JIntArb 3/1996, 143–167. Apart from the above paper-works, the author would strongly recommend a “site-visit” on the WTO’s web-site under “<http://www.wto.org>”; it is one of the best structured and one of the most informative web-sites with very extensive materials, including on-line access to videos.

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p) The Permanent Court of Arbitration in The Hague (“PCA”)

The amicable settlement of disputes between States is the subject of **The Hague Conventions of 29 July 1899 and 18 October 1907**. As a result of the 1899 Hague Convention, the **Permanent Court of Arbitration** was set up at the Hague, in the Peace Palace (offered by Mr. Carnegie), The Hague (“PCA”). It became the first worldwide institution for the resolution of international disputes between states or between states and private individuals (cf. Article 20 of the 1899 Hague Convention and Article 41 of the 1907 Hague Convention). The PCA provides for **mediation, good offices, inquiry/fact-finding commissions, conciliation** and **arbitration** services. However, the PCA does not have any authority to intervene in a dispute in any way on its own initiative; its sole objective is to enable or facilitate the amicable resolution of disputes. A Bureau was set up for this purpose in 1901 (International Bureau of the Permanent Court of Arbitration), headed by a General Secretary (currently P.J.H. Jonkman). The PCA is funded by its 80 member states; each of these states is entitled to nominate four people “*of known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of arbitrator*” for election for a six-year term of office; the current Swiss members are Dr Dietrich Schindler (since 1977), Dr Lucius Caflisch (since 1990), Professor

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Jacques-Michel Grossen (since 1991) and former Federal Supreme Court Judge Robert Patry (since 1991); cf. the illustrative 98th Annual Report of the Permanent Court of Arbitration for the year 1998. The Annual Reports also contain an annex referencing each of the cases, the parties, the date of the arbitration submission, the first and the last session, the date of the award and the arbitrators.

97 The Permanent Court of Arbitration has only, as yet, heard some two dozen disputes: 14 of these before the First World War, 6 between the two World Wars, one in 1940, another in 1956 and one more in 1970; no further cases have been submitted to it since then. Given that well over 1,000 international conflicts have arisen in the last 95 years, the PCA is **regrettably under-used**. One of the weaknesses of the Hague Conventions is the fact that the signatory states are not obliged to refer disputes to the PCA; they only have to produce non-binding declarations of intent (“*when the circumstances allow it*”). Serious efforts are now being made to reactivate it; an initial Congress took place in September 1993 (cf. the publication by the PCA in connection with the Stichting T.M.C. Asser Instituut (The Hague); a Third World Peace Conference is also planned for 1999 (to celebrate the centenary of the First Hague Convention of 1899).

98 In 1962 the Permanent Court of Arbitration promulgated its “Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State”. These have since been replaced by two sets of rules, namely (i) the “**Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State**”, of 1993, which are based (with minor adaptations) on the UNCITRAL Arbitration Rules (see below), and (ii) the “**Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States**”, of 1992.

q) The International Court of Justice in The Hague: From the PCIJ to the ICJ

99 As long ago as at the **Second Hague Conference of 1907**, the American delegation proposed that a permanent court of justice be set up, consisting of salaried judges. Projects were worked out both before and during the First World War. Thereafter, at the Paris Peace Conference, discussions were initiated to work out a plan for the establishment of the **Permanent Court of International Justice (PCIJ)** in accordance with Article 14 of the *Covenant of the League of Nations* of 28 June 1919. Thereafter, the Statute of the PCIJ was approved by the assembly of the League in a Protocol of 16 December 1920, subject to ratification by the 41 member states. Upon receipt of the 22nd ratification, the Statute of the PCIJ came into force on 2 September 1921.

100 Thereupon, the PCIJ took up office in 1922 and, from then until 1939, pronounced 21 judgements (*inter alia* in the famous Wimbledon case) and produced 26 advisory opinions. Meanwhile 50 states had accepted the Statute; however, the United States failed to ratify and the number of participating states started to drop due to withdrawals; moreover, 19 states left the League. After the Second World War, i.e. on 18 April 1946, the PCIJ was dissolved by a resolution adopted by the assembly of the League of Nations. On the same day the **International Court of Justice (ICJ)** was

inaugurated, in accordance with Article 92 of the UN Charter of 24 October 1945, as one of the judicial organs of the United Nations, enjoying an independent status. After election of the judges on 6 February 1946, the constitutive session took place in The Hague on 4 April 1946. The ICJ is also housed in the impressive Peace Palace, in a different wing than the PCA referred to above.

The **UN Charter** provides for an escalating system of “crisis management”. Under Article 33 of the UNO Charter the disputing parties must first endeavour to arrive at a settlement, either by **inquiry and negotiation**, or then through **conciliation** (whereby a neutral UNO Commission submits proposals to the parties for an amicable settlement of the dispute), or by a decision of the International Court of Justice in The Hague (pursuant to Article 36(3) of the Charter). Reality, however, shows that **only very few disputes** have ever been brought before the International Court of Justice. The Court has heard only about 30 cases out of the hundreds (or even thousands) of disputes which have arisen since 1945.

It should also be noted that *many judgments have been ineffective*. Iceland, for example, did not comply with its judgment in the dispute relating to the expansion of the Icelandic fishery zones. The International Court of Justice’s interlocutory injunction in relation to French atomic testing in the Pacific was ignored by France. The USA disputed the jurisdiction of the Court of Justice in relation to the Nicaraguan claims. Moreover, the former Eastern Bloc countries generally denied the International Court of Justice any right of existence at all. It also became clear that the truly significant and “explosive” conflicts were not put before the Court of Justice in any event and the only ones which came before it were disputes between friendly countries. Despite this not very encouraging picture, the International Court of Justice does have a useful and important role to play and new efforts are currently being set in motion to increase its role and activity.

The International Court of Justice is a primary organ of the UNO. All the members of the United Nations are therefore also contracting parties to the **ICJ Statute**. Non-members of the UNO may become contracting parties to the ICJ Statute, as Switzerland did in 1948. In contrast to private arbitrations, the ICJ judges (of whom there are 15 in number, elected for a term of 9 years) are appointed on a full time basis and are therefore permanently available, which in certain circumstances makes it possible for interim measures to be pronounced quickly. Each country can be represented in the ICJ by a maximum of one member.

Only **States** can be parties to proceedings in the ICJ. The ICJ’s jurisdiction can be based either on an *ad hoc* agreement (e.g. the 1986 agreement between El Salvador and Honduras on border disputes between those two countries), or on a claim being brought and the Respondent later consenting to it or entering an appearance. Jurisdiction can also be based on a corresponding clause in bilateral or multi-lateral treaties or contracts which provide that the ICJ should have jurisdiction over disputes. A fourth basis for jurisdiction of the ICJ exists under Article 36(2), in terms of a declaration by a State by which the latter declares to acknowledge the jurisdiction of the ICJ vis-à-vis any other State without any special agreement, subject to reserving **reciprocity** (or subject to an “**optional clause**”, which makes reservations possible). A weakness lies in those reservations, e.g. in the “**Vandenberg reserva-**

tion”, according to which the USA agreed to the jurisdiction of the ICJ under the proviso that “*the United States of America specially agree to jurisdiction*”, which leaves all backstage doors open. There is also the so-called **Connally reservation**, according to which the ICJ will be denied jurisdiction in connection with predominantly internal or domestic matters (“... *with regard to matters which are essentially within the domestic jurisdiction ...*”) (which, again, leaves the backstage doors wide open!).

105 In some cases, parties have not appeared in proceedings before the ICJ, so that the ICJ has itself had to take matters into its own hands in order to clarify, evaluate and decide the facts on which a dispute is based. It must therefore (unfortunately) be said, all in all, that the track record of States submitting disputes to the ICJ for a decision is far from impressive. The procedure is weakened by its **relative non-binding nature** (no obligatory submission/numerous reservations) and by the absence of effective sanctions in the event of non-compliance with a decision (in the event of non-compliance with a decision, the other party can only resort to the Security Council and ask that the Security Council impose appropriate sanctions to enforce the decision). As most recent events have shown, the direct political resolution of disputes at UN Security Council level, along with commercial and military sanctions, has unfortunately been considered by many countries to be more effective.

106 Are the Permanent Court and the International Court of Justice a kind of (supranational) state judicial authority, as is occasionally said, or are they arbitral tribunals? Rubino-Sammarano leans towards the latter view, on the grounds that – as is typical of an arbitral tribunal – the parties have an option as to whether they agree to submit to the court. For scholarly writings, see Escher, *Friedliche Erledigung von Streitigkeiten nach dem System der Vereinten Nationen*, 1985, 142 ss.; Schweitzer/Rudolf, *Friedensvölkerrecht*, 1985, Green, *International Law*, 1987, 269 ss.; Frey, *Die Organisation der Vereinten Nationen (UNO)*, 1990, 81 ss.; Ipsen, *Völkerrecht*, 1990, 955 ss.; Brownlie, *Principles of Public International Law*, 1990; Marjan Green, *International law*, 1987, 269 ss.; Starke, *Introduction to International Law*, 1989, 485 ss.; *Encyclopedia of Public International Law*, 72 ss., 157 ss., 163 ss.; Hersch/Lauterpacht, *The Development of International Law by the International Court*, 1982.

107 In addition to the Permanent Court and the International Court of Justice (both in The Hague) there are other international judicial authorities, such as the **Court of Justice of the European Union** established in Luxembourg (including the Court of First Instance) and the **European Court of Human Rights** in Strasbourg; we cannot portray these here.

r) The Claims Resolution Tribunal for Dormant Accounts in Switzerland

108 This report would not be complete without a brief description about the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT), created in the late spring of 1998 by the Independent Claims Resolution Foundation (Foundation). The CRT is an independent tribunal seated in Zurich and under the supervision of the Independent Committee of Eminent Persons (ICEP), and the Swiss Federal Banking

Commission. The main objective of the CRT is to resolve all claims made by claimants to accounts opened by non-Swiss nationals or residents that are dormant since May 9, 1945 and were published by the Swiss Bankers Association on two separate lists on 23 July and 29 October 1997. The CRT also has the authority to adjust awards for unpaid interest and previously deducted bank fees on the basis of Guidelines to be established by the Board of Trustees of the Foundation.

The CRT operates using a set of dispute resolution rules known as the “Rules of Procedure for the Claims Resolution Process” (Rules), adopted by the Board of Trustees of the Independent Claims Resolution Foundation on 15 October 1997. The Foundation was established in 1997 pursuant to Article 80 et seq. of the Swiss Civil Code and is financed by the Swiss Bankers Association. The Board of Trustees of the Foundation, chaired by Paul A. Volker, is responsible for the administration and progress of the CRT.

Briefly, the CRT has a Chairman, a Vice-Chairman, and a total of 17 very highly qualified individuals appointed to sit as arbitrators. The nationalities of the arbitrators include Swiss, Israeli, American, British, Canadian, Belgian and Cypriot. The names of some of the arbitrators may be found on page 257 of the ASA Bulletin 1998. The Rules of Procedure for the Claims Resolution Process are also reproduced in that same volume on pages 258–274. The main features of the Claims Resolution Process include examination of claims in an unprecedented stage known as “Initial Screening”, and thereafter, either a Fast Track or an Ordinary Procedure.

At the Initial Screening stage, the CRT determines whether or not sufficient information has been submitted by a particular claimant to justify the releasing, to him or her, of the name of the bank and the amount in the dormant account. The latter two procedures are formal arbitration proceedings, where the execution of a Claims Resolution Agreement by the bank holding the account and the claimant asserting a claim to it, is a condition precedent to participation in the arbitration. Following the Initial Screening stage, claims that have obtained disclosure of the name of the bank and the amount in the account may be submitted to a Sole Arbitrator for Fast Track review at the request of the bank or upon mutual agreement of the parties involved. (See: Article 11 of the Rules) Claims that are not approved in the Fast Track are resolved in the Ordinary Procedure before a Sole Arbitrator or a Claims Panel, depending on the amount held in the account. (See: Article 14 of the Rules)

In both arbitration proceedings, in order for a claimant to be successful, he or she must satisfy the “Relaxed Standard of Proof” set forth in Article 22 of the Rules. In short, “[t]he claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or part, to the dormant account.” In assessing the information available before it, the CRT must also “at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has lapsed since the opening of these dormant accounts.” The Claims Resolution Procedure is free of charge for all claimants.

Since publication of the two lists by the Swiss Bankers Association, over 15,000 claims have been registered with the accounting and auditing firm of ATAG Ernst & Young. As of September 1999, more than 9,500 claims have been filed with the CRT and a total of approximately 6,000 awards and decisions have been rendered by it.

The Secretariat of the CRT is located at Löwenstrasse 17, P.O. Box 7589, CH-8023 Zurich, Switzerland.

2. The 1998 ICC Rules in a Comparative Perspective

a) Introduction

114 While the ICC Court of Arbitration has been introduced above, it seems appropriate to devote a separate chapter to a review of the new 1998 ICC Rules (“ICC 98”) which entered into effect as of 1 January 1998; the new Rules will be contrasted to “ICC 75”, i.e. the ICC Rules of 1975, as amended 1988). The review will also allow a comparison with the provisions contained in other major institutional arbitration rules, such as the “AAA IAR” (the International Arbitration Rules of the American Arbitration Association, as amended and effective 1 April 1997), “LCIA 85” (London Court of International Arbitration Rules 1985), “LCIA 98” (the revised LCIA Rules that also became effective as of 1 January 1998), the “WIPO AR” (WIPO Arbitration Rules 1994), the “UNCITRAL AR” (UNCITRAL Arbitration Rules adopted 15 December 1976), the “UNCITRAL ML” (UNCITRAL Model Law on International Commercial Arbitration adopted 21 June 1985) and the “CAMCA AR” (Arbitration Rules of the Commercial Arbitration and Mediation Center for the Americas, of 15 March 1996).

115 Basically, ICC arbitration remains the same; its essential characteristics will not change. Indeed, it came as quite a surprise to those working on the revision: the two most characteristic elements, such as the Terms of Reference and the scrutiny of the Award by the ICC Court, both frequently criticised by those of (mostly) limited experience with ICC arbitration, were never seriously questioned, and there were virtually no proposals to discard them, to the contrary! Thus, the main aspects discussed by Blessing, *The ICC Arbitral Process*, Part III: “The Procedure Before the Arbitral Tribunal” (ICC Bulletin Vol. 3 No. 2, November 1992, 18–45), remain valid.

116 However, progress was to be made in the ICC Court’s endeavour to speed up the procedure, to increase predictability and to rationalize the costs. Moreover, all of the provisions of the Rules required a fresh look and had to undergo a very thorough “conditioning program” and “fitness test” so as to check whether they meet the most modern standards and thus be *fit for the years 2000 and beyond*. “Lean administration” by the ICC and efficient procedure and case management were targets to shoot for. – And the result, we may state this right away, is *impressive*; not because of some radical changes or any “miracle rules” (which do not exist), but because of the many elements which were **softly and prudently revised**, the totality of which will provide a new and strong vitality for the 1998 ICC Rules.

b) Request for Arbitration, Answer, Counterclaim [Articles 4 and 5 ICC 98 ⇔ Articles 3–5 ICC 75]

117 Under the old Article 3 (1) ICC 75 a party had the choice to file a Request for Arbitration either directly or through the National Committee. This choice has been

abolished by Article 4 (1) ICC 98; in future, Requests for Arbitration should *directly* be filed to the ICC Secretariat in Paris. This will not only avoid possible delays, but will moreover remove the uncertainty regarding the determination of the day on which the case has become pending.

What is required for properly filing a **Request** for Arbitration? The 1998 Rules no longer requires “*a statement of the Claimant’s case*” (as did Article 3 (2) (b) ICC 75), but simply requires a “*description of the nature of the circumstances of the dispute giving rise to the claims*”, together with a “*statement of the relief sought including, to the extent possible, an indication of any amounts claimed*” (Article 4 (3) (b) and (c) ICC 98). The new wording aims to be as broad as possible in the sense that it does not require a full and detailed “Statement of Claim”. In fact, already in the past ICC Requests for Arbitration had sometimes been filed by way of a two-page document highlighting the bare essence of the nature of the dispute, and sometimes extensive briefs of one hundred and more pages were filed, together with voluminous documents. Both ways, and any solution between those extremes, may be perfectly suitable under the circumstances, and the new Rules want to make clear that the parties enjoy an unrestricted freedom to adopt the way they prefer, provided only that the minimum amount of information is provided. However, the new Rules are also more precise than the old ones in that they require an indication as to the “*relief sought*” (in the sense of the “*conclusions*” in French).

Article 4 (3) (e) ICC 98 now explicitly requires the *nomination* of claimant’s arbitrator, if such a nomination is required under Articles 8, 9 and 10 ICC 98 (see in particular Article 8 (4)).

Article 4 (3) (f) ICC 98 is equally a useful clarification of existing practice; it suggests that claimant submit, with the Request for Arbitration, its *desiderata* or comments regarding the three basic elements: the place of arbitration, the applicable rules of law and the language of the arbitration. All three elements will, in most cases, be contained in the arbitration clause. Where this is not the case, the claimant party should make its propositions known up-front.

Article 4 (5) ICC 98 makes it clear that the submission of sufficient copies of the Request and pertaining documents and the making of the non-refundable advance payment of USD 2,500.– (according to Appendix III - I (1)) are pre-requisites for the ICC Secretariat to send a copy of the Request to the Respondent.

Article 4 (6) ICC 98 is one of the provisions earlier reflected in the Appendix II of ICC 75 which, with slight modifications, found its way into the new Rules. It deals with the **joinder** of claims which may be directed by the Court at the request of one of the parties. However, after the establishment of the Terms of Reference, a joinder of claims will be subject to the conditions in Article 19 ICC 98.

A remarkable *novelty* to be noted here is the new formula adopted on the mode to provide the **advances to costs**: Unlike under the 1975 Rules, Article 30 (1) ICC 98 now provides that, after the receipt of the Request, the Secretary General may request the Claimant to pay the full amount of a **provisional advance** for covering the costs of the procedure up to the drawing up of the Terms of Reference. This new device has a *twofold advantage*: *first*, the determination of the provisional advance will not cause any delay, because this pertains to the new competence of the Secretary General

(whereas in the past the Court had to rule on the (ordinary) advance as such, which is a more time-consuming process); *second*, the provisional advance will only be requested from the claimant party; thus, claimant has it in its hands to see to it that the start of the procedure shall not suffer any delay (as it frequently did in the past, where more often than not the respondent party was slow to pay its share of the (ordinary) advance, which sometimes caused very significant delays).

124 Article 5 (1) and (3) ICC 98 on the filing of the Answer to the Request and the filing of a counterclaim have also been re-shaped so as to mirror the requirements for filing the Request for Arbitration. The answer must be filed within 30 days from receipt of the Request; if respondent would require the granting of an extension, it will in any event have to comment on those elements which are necessary to properly constitute the Arbitral Tribunal (Article 5 (2) ICC 98).

c) Effect of the Arbitration Agreement [Article 6 ICC 98 ⇔ Article 8 ICC 75]

125 Article 6 (1) ICC 98 now clarifies explicitly the sense of the old Article 8 (1) ICC 75, i.e. that the applicable ICC Rules shall be those in effect on the date of **commencement** of the arbitration proceedings, unless the parties have agreed to submit to the Rules in effect on the date of their arbitration agreement. The parties can therefore opt-in or out. A similar provision can be found in Article 2 WIPO AR.

126 Article 6 (2) ICC 98 on the **prima facie examination** by the ICC Court corresponds to old Article 8 (3) ICC 75, with two clarifications: *first*, it now specifically addresses the situation where Respondent fails to submit its Answer (a situation which had been dealt with in Article 7 ICC 75), and *second*, it more correctly not only refers to the existence or validity of the arbitration agreement, but also to its **scope**. The last sentence in this Article is also new.

127 Article 6 (3) ICC 98 deals with the effect of the **failure or refusal by either party to take part** in the arbitration at any stage thereof. The provision basically corresponds to Article 8 (2) ICC 75, by providing that the arbitration shall proceed notwithstanding the failure or refusal. The Working Party was aware that some other institutional arbitration rules contain more explicit provisions; compare e.g. Article 28 UNCITRAL AR, Article 25 UNCITRAL ML, Article 56 WIPO AR, Article 6 (7) LCIA 85, Article 23 AAA IAR, Article 25 CAMCA AR; compare also the detailed provisions in some national arbitration acts, such as Section 41 of the 1996 English Arbitration Act. However, it was felt that the old short version should be retained.

128 It is thus clear that the arbitral proceedings shall nevertheless proceed, but the sometimes more difficult question of *how to proceed* is left for the determination by the Arbitral Tribunal. Nevertheless, it is a quite clearly established notion in international arbitration – in contrast to provisions which are reflected in a great number of local procedural codes governing ordinary court proceedings before national State courts – that the failure or refusal of the respondent party does not amount to an acceptance of claimant's allegations, and cannot be construed as an admission of the claims. The Tribunal, therefore, will have to determine to what extent evidentiary proceedings need to be conducted in order to establish to the satisfaction of the Arbitral

Tribunal and “by all appropriate means” the facts on which the Claimant party wishes to rely.

The converse situation, i.e. that where the **claimant fails or refuses** to continue to take part in the arbitration, occurs occasionally where the claimant party fails to make an advance determined by the ICC. In such a case, the Tribunal may have to suspend the case and, ultimately, the case may have to be terminated, without prejudice to claimant’s right to re-introduce the claims at a later stage in other proceedings (Article 30 (4) ICC 98; the provision in essence corresponds to Article 15 ICC 75, Appendix II).

Quid, however, where – after the Terms of Reference have been signed – the claimant party fails to substantiate its case, or fails otherwise to participate in the proceedings? This situation is neither covered in any of the major institutional arbitration rules, nor has it received much coverage in scholarly writings.

At least two recent ICC cases had to deal with this situation; in one of them, claimant had substantiated its claims in a written submission, but then failed to participate in evidentiary proceedings, so that most of its allegations remained unproven. As a consequence of the Tribunal’s duty under the Terms of Reference, the Tribunal nevertheless had to adjudicate the case on the basis of the file that was before it, and render a decision in the framework of an arbitral award. In the other case, the claims had not even in any way been substantiated by the claimant party; the Tribunal, therefore, had no possibility to render a decision; consequently, the claims had to be considered withdrawn without prejudice, but the cost consequences had to be determined in an arbitral award.

d) Constituting the Arbitral Tribunal [Articles 7–9 ICC 98 ⇔ Article 2 ICC 75]

The general provisions in Article 7 (1) to (5) ICC 98 apply in all cases; they are of a **mandatory** character. Apart from those provisions, the parties are **free** to determine how their Tribunal should be constituted; this is expressed in the *key-provision* of Article 7 (6) ICC 98. Thus, absent such individual provisions agreed upon by the parties, the provisions of dispositive nature as contained in Articles 8 to 10 ICC 98 shall then apply.

A new provision is Article 8 (2) ICC 98 which – in those cases where the ICC Court determined that the dispute warrants the appointment of three arbitrators – now contains the desired clarification that claimant shall always have to nominate its arbitrator *first*, whereas respondent shall have to make its nomination only thereafter (within 15 days). This new timing is a welcome improvement.

Article 9 (1) ICC 98 brings in a new element to be considered in the framework of the Court’s or the Secretary General’s confirmation of Arbitrators, namely the element of “*the prospective arbitrator’s availability and ability to conduct the arbitration proceedings in accordance with these Rules*”. In this connection, reference may be made to Article 23 (a) WIPO AR which expresses the notion that each arbitrator, by accepting an appointment, is deemed to have undertaken to make available sufficient time to enable the arbitration to be conducted and completed expeditiously.

Such an undertaking is certainly also implied whenever accepting to sit as an ICC Arbitrator.

- 135 The aim to speed up the process for constituting the Arbitral Tribunal has brought with it a *new role* for the Secretariat which now may itself *confirm* arbitrators under Article 9 (2) ICC 98 in all those cases where they have filed an unqualified statement of independence which has not given rise to objections. Thus, the procedure will become much swifter and the delays which inevitably occurred under the 1975 ICC Rules (sometimes 90 days or even more) can be avoided in the future. Nevertheless, the Secretariat may, for instance in case of doubt, submit the confirmation of an arbitrator to the resolution by the Court; this is expressed by the deliberate choice of the word “may”.

e) Multiparty Arbitration [New: Article 10 ICC 98]

- 136 Arbitration Proceedings involving multiple parties as claimants or respondents are a normal phenomenon in international arbitration and there is a wide international consensus that the multiple claimants or the multiple respondents should, where the Arbitral Tribunal is to be composed of three arbitrators, jointly have to agree on one candidate to serve as their arbitrator. This practice was also followed by the ICC, until the famous Dutco case (ICC Case No. 5836/MB in re: *Dutco Construction Co. v. BKMI Industrieanlagen GmbH and Siemens AG*) came before the French *Cour de Cassation*.

- 137 The essential parameters of the case were as follows: In connection with the construction of a cement plant in the Sultanate of Oman, BKMI had entered into a silent Consortium Agreement with Dutco (essentially for the erection of civil works) and Siemens (essentially for providing the communication network). The Consortium Agreement divided the scope of works among the three partners and did not provide for their joint and several liability. Under the date of 17 December 1986 Dutco filed its Request for Arbitration to the ICC against BKMI and Siemens, and nominated a French arbitrator. On 16 March 1987 the ICC requested BKMI and Siemens to jointly nominate their arbitrator. Thereupon, both Respondents nominated a German Professor. This nomination, however, was made with the express reservation that equal treatment of the parties was, in the Respondents’ opinion, violated because the two Respondents were forced to agree on one arbitrator (whereas the claimant party was in a position to freely nominate its arbitrator).

- 138 In its Interim Arbitral Award of 19 May 1988, the Arbitral Tribunal (over which the author of this introduction had the honour to preside), reached the conclusion that “*the right of a party to appoint its arbitrator is a fundamental though not absolute notion in ICC Arbitration*” and that, in particular, a party may waive the possibility to designate its own arbitrator and that, in the instant case, on the basis of the Consortium Agreement, all three parties were “*deemed to have contemplated the possibility of a multi-party arbitration*” such that it must likewise “*have been clear to them that – by limiting the number of arbitrators to three – there will be only one arbitrator for the two defendant parties*”. The Arbitral Tribunal concluded that “*such a waiver, or limited waiver, is valid and it cannot be said that the principle of equal-*

ity had been violated ... by the mere fact that both Defendants had to agree on an arbitrator of mutual confidence” (Award, page 26).

The Award, however, was first challenged before the *Court d’Appel* of Paris which rejected the challenge in its decision of 5 May 1989, essentially on the argument “*que le principe d’égalité des parties dans la constitution du tribunal arbitral n’a pas été méconnu en espèce dès lors que la clause d’arbitrage, telle que convenue entre les parties ayant des intérêts communs, autorisait la liaison entre elles d’un contentieux unique et pouvait placer deux d’entre elles dans l’obligation de choisir un seul arbitre ayant leur confiance mutuelle ...*”.

However, the decision of the *Cour d’Appel* was further challenged and brought before the French *Cour de Cassation* which, surprisingly, annulled the decision of the *Cour d’Appel* on the grounds that, in its view, the principle of equal treatment in the designation of the arbitrators is forming part of public policy and that parties cannot, in advance, waive that principle (“*attendu que le principe de l’égalité des parties dans la désignation des arbitres est d’ordre public; qu’on ne peut y renoncer qu’après la naissance du litige*”).

The decision of the French *Cour de Cassation* certainly marks a retrograde step and brings back the notion and the spirit of French law at earlier times in this century. Thus, the decision of the *Court de Cassation* attracted wide criticism. However, it became a matter of fact to be recognized in respect of arbitrations taking place in France, and the ICC was forced to consider the implications of that decision in great detail.

The solution now reflected in Article 10 ICC 98 consists of three parts: *First*, the multiple parties (whether as claimants or respondents) shall make a joint nomination of an arbitrator to be confirmed by the ICC; this is reflected in Article 10 (1) ICC 98 and corresponds to the (pre-Dutco) general ICC policy followed by the Court under the 1975 Rules.

Second, in the absence of such a joint nomination, the parties may themselves discuss the situation and come up with a proposal for constituting the Arbitral Tribunal.

Third, in the absence of a solution found by the parties themselves for constituting the Arbitral Tribunal, the ICC Court *may* appoint each member of the Arbitral Tribunal. In passing, it should be noted that some ICC National Committees suggested that any such appointment should only be made by the Court upon the suggestion of an ICC National Committee; however, for good reasons this proposal did not find its way into the Rules. Apart from this marginal remark, we need to realize that the *key-word* in the sentence is the word “*may*”. In fact, during the sessions of the Working Party, it was extensively debated whether “*may*” or “*shall*” should be used.

The word “*may*” was deliberately chosen to make it clear that the ICC Court is not required, in all cases, to appoint each member of the Arbitral Tribunal. Instead, it may employ the pre-Dutco practice to require the multiple claimants (or respondents) to make a joint nomination and, in the absence of such a joint nomination, nominate only one arbitrator. In this context, the ICC will have the possibility to appreciate all aspects of the case, and its practice is likely to be different in arbitrations where there are no French elements involved (in particular, where the seat of the Tribunal is not in France) and where, therefore, the Dutco decision will not be determinative. Among

those further elements which may be significant for the ICC Court will be whether or not the multiple parties have *contradictory interests*. Such contradictory interests could, for instance, hardly be assumed if the two respondents are the parent company and one of its subsidiaries. Another factor to take into account is the fact whether the multiple parties are *jointly and severally liable*, or whether the legal parameters are such that each party is only liable individually. – By way of comparison, see Article 8 LCIA 98.

f) Challenge of Arbitrators [Article 11 ICC 98 ⇔ Article 2 (8) ICC 75]

146 Article 11 ICC 98 deals with the challenge of an arbitrator for “*lack of independence or otherwise*”. We may note here that the notion of **impartiality** has not found its way into the ICC Rules. **Independence** is seen as being the more objective requirement, whereas impartiality is rather a state of mind which may escape scrutiny against objective standards. Interestingly, the Swiss Arbitration Act in force as of 1 January 1989 (in Article 180 PIL) has reflected the same solution by only requiring independence of each Arbitrator, whilst the 1996 English Arbitration Act has adopted the opposite view by only requiring impartiality, and not independence, essentially on the rationale that even a dependent arbitrator can or could be impartial (see Section 1 (a) and 24 (1)(a)).

147 The further provisions of Article 11 ICC 98 correspond to Article 2 (8) and (9) ICC 75 except that, in Article 11 (3) ICC 98 a last sentence has been added which provides a *significant improvement* in that the comments received by the Secretariat in respect of a challenge shall now be communicated to the parties and to the arbitrators. This will bring a **transparency** into the process which, so far, was lacking. It remains clear that the ICC Court’s decision on the challenge (or on a replacement) is not as such an “award”, but a decision of an administrative nature; the reasons underlying the Court’s decisions remain confidential and thus shall not be communicated; see Article 7 (4) ICC 98.

g) Replacement of Arbitrators [Article 12 ICC 98 ⇔ Article 2 (10)–(12) ICC 75]

148 The provision in Article 12 (1) ICC 98 is new insofar as it now specifically provides that an arbitrator shall be replaced upon a request of all of the parties; this had not been reflected in Article 2 (10) ICC 75.

149 Article 12 (2) ICC 98 deals with the replacement of an arbitrator on the **Court’s own initiative** (thus not in connection with a challenge); it corresponds to Article 2 (11) first part ICC 75. This tool has, to the author’s knowledge, very rarely been used (one matter is at present pending); nevertheless, it must be seen as an important safeguard for protecting the integrity of the arbitral process.

150 The certainly welcomed **transparency** referred to above will also apply in the case of replacement; the comments received from the arbitrator, the parties and other members of the Tribunal shall be made known to all those involved; Article 12 (3) ICC 98.

A further improvement is Article 12 (4) ICC 98: the ICC Court now has discretion whether or not to follow the original **nominating process for the substitute arbitrator**. During the discussions within the Working Party it was said that in “suspicious circumstances” a party whose arbitrator had to be replaced should not be given the opportunity to nominate a second appointee, but that such nomination should then be made by the Court. Again, this is certainly a wise provision (which is also reflected in Article 33 (b) WIPO AR) and a *powerful tool* for assuring the integrity of the process. 151

In case of a replacement, it shall be for the reconstituted Tribunal to determine to what extent previous proceedings should be repeated; Article 12 (4) ICC 98; see also Article 34 WIPO AR, Article 11 (2) AAA IAR. 152

h) Truncated Tribunal [New: Article 12 (5) ICC 98]

A “truncated tribunal” clause is another one of the kind of clauses (akin to Article 12 (2) ICC 98) which institutional rules should by all means have – for the purpose that, as is hoped, such clause will never have to be used or applied in the decades to come! – With but a few exceptions, the ICC National Committees clearly recognized the need and desirability for having a truncated tribunal clause. The *existing* models which were closely considered by the Working Party were Article 11 AAA IAR and Article 35 WIPO AR and the draft for the new LCIA Rules (Article 12 LCIA 98). All three of them reflect a somehow “courageous” solution, and the ICC Working Party felt that a more restrictive approach should be favoured. 153

Questions of the following nature arose: how much discretion should there be for the remaining arbitrators or the ICC Court? Should one aim at formulating a distinction between “non-suspicious circumstances” (such as death of an arbitrator), where there would be a presumptive right of the party who had nominated him to replace the arbitrator, and others (e.g. manoeuvres of a rather tactical nature)? Should a party in “non-suspicious circumstances” a party be granted the right to make a new appointment of an arbitrator, but not in “suspicious circumstances” where the replacement would have to be made by the ICC? 154

Finally, a *cautious solution* was reached in Article 12 (5) ICC 98: (i) No truncated tribunal can operate prior to the *closing* of the proceedings (in contrast to AAA and WIPO, where the stage of the proceedings shall simply be taken into account); (ii) the competence to determine the issue vests with the **ICC Court**, and not with the remaining arbitrators (in contrast to AAA and WIPO); (iii) the ICC solution thus guarantees an objective approach in such a critical situation; (iv) the “defaulting” arbitrator must have been *removed* by the ICC Court (except in case of death) (in contrast to AAA and WIPO) – again, the ICC will remain on top of the situation; (v) wisely, the provision does not aim to draw a distinction between “unsuspicious circumstances”, and others (such distinction had been discussed in the Working Party upon proposal of one of the National Committees); in case of replacements, the ICC Court has the appropriate discretion based on Article 12 (4) ICC 98; the views of the remaining arbitrators as well as those of the parties shall appropriately be taken into account by the ICC Court. 155

Thus, in the author's view, the ICC has reflected a very wise and moderately "tuned down" *formula*, which is certainly appropriate.

**i) *Transmission of the File to the Arbitral Tribunal* [Article 13 ICC 98
⇔ Article 10 ICC 75]**

156 In the past, many arbitral procedures under the ICC Rules had suffered delays due to the fact that, under the terms of Article 10 in connection with Article 9 ICC 75, the files were only transmitted to the Arbitral Tribunal once the Parties had paid the advances on costs. A respondent party, by not paying its share of the advance as requested by the ICC, was therefore able to cause sometimes quite considerable delays of sometimes more than six to nine months.

157 This *serious impact* has now been removed by Article 13 ICC 98 in connection with Article 30 (1) ICC 98, in that the file will now be transmitted to the Arbitral Tribunal as soon as the same has been constituted, provided that the **provisional advance** (as per Article 30 (1) ICC 98) has been paid. The provisional advance under Article 30 (1) ICC 98 will now be an advance payable *by the claimant party only*, in an amount determined (again a novelty) by the *Secretary General* sufficient to cover the costs of arbitration until the Terms of Reference have been drawn up (see Appendix III, Article 1 (2)). The combined effect of these provisions, therefore, is that it will be in the hands of the claimant party to ascertain that the files are transmitted to the Arbitral Tribunal without delay.

j) *Place of Arbitration* [Article 14 ICC 98 ⇔ Article 12 ICC 75]

158 The 1975 Rules lacked a provision in the sense that hearings and meetings can be conducted at a place other than at the formal seat of the Arbitral Tribunal. This *lacuna* has now been filled by the new provision in Article 14 (2) ICC 98. Two elements need to be mentioned here: *First*, the agreement of the parties takes precedence, as can be seen from the words "... *unless otherwise agreed by the parties*". The new ICC Rules, therefore, give the parties' will a slightly more preponderant weight than that provided for example under Article 13 (2) AAA IAR, Article 7.2 LCIA 85, Article 16.2 draft LCIA 98, Article 39 (b) WIPO AR, Article 16 (2) and UNCITRAL AR. The new ICC Rules, in this regard, however stand in line with Article 20 (2) UNCITRAL ML which also reflects the preponderant weight given to the parties' will. Some commentators had suggested that the Arbitral Tribunal should be able to overrule the agreement made by the parties for instance in the framework of the Terms of Reference (that all hearings shall take place e.g. in Somalia) in cases where it had become impossible to carry out that earlier agreement (e.g. in the event of war, refusal of necessary visas etc.), or where other compelling circumstances would compel the conducting of a meeting or hearing at a different place (e.g. where an indispensable third party witness cannot be heard except for instance in Brasil). The fear was that a party, by insisting on that agreement, could prevent the Tribunal from being able to hold the hearing whenever that would suit its particular interest. However, the Working Party did not see a necessity to draft an overly complicated rule; in any

event, a Tribunal will have to appreciate the *bona fides* of each party, and might disregard a manifest obstruction by either party.

Second, the Arbitral Tribunal should not simply impose a place for conducting a particular hearing or meeting, but will have to act *in consultation with the parties*. This is certainly a very appropriate formula (which in fact was inspired by the provision of Article 29 (b) WIPO AR).

As far as **internal deliberations** among the arbitrators are concerned, the Arbitral Tribunal is **free** to select the location. This provision also took its inspiration from Article 46 (b) WIPO AR.

k) Rules Governing the Proceedings [Article 15 ICC 98 ⇔ Article 11 ICC 75]

Article 15 (1) ICC 98 essentially corresponds to Article 11 ICC 75. The slight changes are of a semantic nature only. The term “municipal procedural law” in the old Rules has been changed to “rules of procedure of a national law”, but again, the spirit is the same. Within the Working Party there were discussions whether the last part of the sentence should be changed to make it more explicit that the Arbitral Tribunal is not expected to make reference to any national procedural law, **and in fact should not do so**. Such a wording would have more clearly indicated to the less experienced Arbitrator that an international arbitration should be conducted under truly international rules and standards, i.e. those standards which parties engaged in international business and trade may expect, and thus should not in any respect be conducted along purely national rules of procedure. However, in the end it was felt, within the Working Party, that this notion, by today, is already sufficiently perceived and recognized on a world-wide scale so that it would not be necessary to make this more explicit.

Therefore, the wording as it is by using the formula “... *whether or not reference is thereby made to the rules of procedure of a national law* ...” in fact makes it clear that an Arbitral Tribunal does not need to apply rules of procedure of a national law, and in fact **should not** apply such rules (unless of course the parties had determined otherwise).

We may recall here that the freeing of the international arbitral procedure from local procedural rules is **one of the most significant milestones and achievements** of international arbitration, and much of the world-wide success of arbitration and its recognition as the most reliable method for settling disputes has to do with this aspect of liberality. Compare hereto Article 5 (2) LCIA 85, Article 38 (a) WIPO AR, Article 15 (1) UNCITRAL AR and Article 19 (2) UNCITRAL ML. Compare hereto also Article 182 (2) PIL and the numerous instances in the present introduction where this aspect of the **specificity of international arbitration** is emphasized.

l) Equal Treatment [New: Article 15 (2) ICC 98]

A new provision is Article 15 (2) ICC 98 which expresses the notion that the Arbitral Tribunal “*shall act fairly and impartially and ensure that each party has a reason-*

able opportunity to present its case”. The 1975 ICC Rules did not contain a reference to this rather axiomatic principle in international arbitration. However, this principle is reflected in most other leading institutional rules such as Article 16 (1) AAA IAR, Article 17 (1) CAMCA AR, Article 38 (b) WIPO AR, Article 15 (1) UNCITRAL AR and Article 18 UNCITRAL ML. Obviously, this axiomatic notion has always been at the heart of any ICC procedure, but this will now be spelt out in black and white. All ICC National Committees expressed themselves in favour of retaining such a provision. The principle is also specifically reflected in the Swiss Arbitration Act: Article 182 (3) PIL.

m) Language of the Arbitration [Article 16 ICC 98 ⇔ Article 15 (3) ICC 75]

- 165 The new ICC Rules again make it clear that, in the first place, the agreement of the parties as to the language to be used in the framework of the arbitration shall be determinative. A further slight shift, as compared to the 1975 ICC Rules, should be noted here: Under the 1975 Rules, the language of the contract was seen as a particularly relevant element so as to determine the language to be used in the framework of the arbitration. This significance of the language in which the contract had been drawn up is slightly (but only slightly) played down under the 1998 ICC Rules. This is expressed in the new wording “... *due regard being given to all relevant circumstances, including the language of the contract*”. By way of comparison, Article 14 AAA IAR, Article 8 (1) LCIA 85, Article 17 (3) LCIA 98 and Article 40 (a) WIPO AR essentially provide that the language of the arbitration shall be that of the contract containing the arbitration clause, but subject to the power of the Arbitral Tribunal to determine otherwise having regard to observations of the parties and the circumstances (thus, those Rules operate on the basis of a presumption which, however, can be rebutted or overruled if the circumstances so suggest).

n) Applicable Rules of Law [Article 17 ICC 98 ⇔ Article 13 (3) ICC 75]

- 166 There is no revolutionary change to be reported here; and yet, the new provision in Article 17 ICC 98 is, in the author’s view, a **landmark**, and therefore merits to be put into a broader perspective (see hereto also Part VIII below). It is of course a very basic notion in international arbitration that, first of all, the **choice of law** made by the parties as far as the applicable law is concerned will be fully respected and recognized by the Arbitral Tribunal. In most cases the choice will be **explicit**; however, sometimes the choice might rather be a **tacit or implied choice**, and as such might have to be recognized by the Arbitral Tribunal (mostly in the sense of an **implied negative choice**, e.g. an implied choice not to subject oneself to any one of the national laws of the parties involved).
- 167 **In the absence of a choice** made by the parties (whether explicit or implied), the determination will have to be made by the Arbitral Tribunal. Here, we need to distinguish two components or steps: first, **the method**, or the criteria to be used so as to

determine the resultant law or rules of law (the conflict-of-laws aspect), and second, **the result** as such, i.e. the applicable substantive law or rules of law (the substantive law aspect).

The first aspect on conflict-of-laws:

168

The **1955 ICC Rules** contained no specific provision on the choice of law and on the Tribunal's power to determine the applicable law where the parties had failed to do so. The old solution prevailing in the 1950s was to apply the conflict-of-laws system at the place of arbitration. This solution was pushed into an early grave in 1961, as a consequence of the **1961 European Convention**, according to which an Arbitral Tribunal should apply the "appropriate conflict **rule**" (but not an entire **system** of private international law). Using a "rule" will leave flexibility; using in contrast the "system" at the place of arbitration risks to bring back all undesired localisms, local perceptions, local court practices and local scholarly writings etc. The difference of approach ("rule" versus "system") may lead to diametrically opposed results. The new formula as per the 1961 European Convention received quite unanimous acclaim around the globe and became reflected in most institutional arbitration rules as well as in many national legislations. Thus, it also became reflected in the **ICC Rules of 1975**.

Apart from the above, the so-called "**closest connection**" test gained ground; it had been adopted in Article 4 of the 1980 Rome Convention, in the USA Second Restatement, in Article 187 (1) of the Swiss Arbitration Act (PIL) and, most recently, in Article 1051 (2) of the new German Arbitration Act 1997/98 (X. Book of the Code of Civil Procedure).

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However, the truly ice-breaking step was taken in France, which became known as the **pioneer** of the *voie directe* approach reflected in Article 1496 NCPC. The **most modern solution** takes its inspiration from the French approach and, therefore, no longer suggests (or imposes) any particular method of conflict-of-laws or requirement of a passage via a conflict rule; instead, this solution on purpose leaves the matter open as if it did not exist. This most modern approach has been reflected in Article 28 (1) AAA IAR, Article 13 (1)(a) LCIA 85, Article 46 Netherlands Arbitration Institute Rules, Article 41 Milan Chamber Rules, Article WIPO AR and Article 30 (1) CAMCA AR.

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The **1998 ICC Rules** now also adopt this most modern and most appropriate solution: they are **on purpose silent as far as the conflict of law rule is concerned**, and thus, the arbitrators enjoy a total freedom to either work through the passage of one (or more) particular conflict rule(s) and apply it (them) to the case, or to apply the closest connection test (or to search for the centre of gravity and the most characteristic performance), or to avoid any of these "tools" and to apply the *voie directe*.

171

The second aspect on the substantive law or rules of law:

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On the "target", i.e. the determination of the "law" or the "rules of law", the question is whether a Tribunal should be required to determine one particular **national law** (such as the substantive laws of France), or whether the Tribunal should have the liberty to apply "rules of law" in a wider sense (which term encompasses a broader notion and will include, as the case may be, not only a national law, but also a-national or supranational rules of law, general principles of law, notions forming part

of the *lex mercatoria* (for those who like that expression), rules of law contained in multinational conventions (whether applicable or not), or reflected in the 1994 UNIDROIT Principles. For the sake of avoiding misunderstandings: an arbitral award based on rules of law should **not** be confused with a decision *ex aequo et bono*, or with a decision simply according to “natural justice” (a term sometimes used in State contracts), or an arbitral function of *amiable composition*; instead, a decision based on “rules of law” is, and remains to be, a decision **based on law**.

173 The **1975 ICC Rules** only referred to the term “**law**”. However, such term had always been interpreted quite **liberally** by ICC arbitrators; already under the 1975 Rules, ICC arbitrators in fact felt free to determine, if so warranted by the situation, to rule that a contract shall not be governed by one particular (national) law, but by certain “rules of law”, for instance by generally accepted principles of law etc.

174 However, the recent discussions have shown that sometimes the term “law” is indeed meant to encompass the narrow sense of one particular national law only; compare for example Article 28 (2) of the UNCITRAL ML (which had been criticised for providing a lesser authority for the Arbitral Tribunal than for the parties themselves); compare also the same distinction which re-appears in Article 1051 (2) of the new German Arbitration Act 1997/98; see also the provision in Section 46 (3) of the 1996 English Arbitration Act (where – according to Lord Justice Saville – the term “law” is clearly understood in its narrow meaning, referring to a particular national law only, see also Shackleton, *The Applicable Law in International Arbitration Under the New English Arbitration Act 1996*, Int.Arb. 1997, 375–389, 385 s.).

175 For the ICC Working Party, it was clearly perceived as a **necessity** and as *an almost imperative demand of the time* to employ the correct and unambiguous terminology for what was meant: namely the wide notion, not confined to one particular national law only. And thus deliberately the term “**rules of law**” was chosen in Article 17 (1) ICC 98.

176 In fact, the term “law” (in its narrow sense as referring to a particular national law) would have been too narrow, and the use of such term (in its narrow sense) in the new ICC Rules *would have amounted to a serious retrograde step*, and moreover would put ICC arbitrators into an uncomfortable straight jacket.

177 In addition, the term “the law” is even misleading, considering that, today, we are faced with more and more impacts and interferences of **mandatory rules of law**, which – beyond the national “law” (as may be determined by the parties or, failing them, by the Tribunal) – might have to be taken into account, due to their extraterritorial effects (e.g. competition laws, import and export restrictions, boycotts, embargoes and the like).

178 Only one National Committee, during the extensive consultation process, expressed some reservations regarding the term “rules of law”. [The drafts established by the Working Party always referred to “the law or rules of law” (in fact identical as in Article 59 (a) WIPO AR); however, in the final stage, the wording was simplified to refer to “rules of law” only.

179 With its provision in Article 15 (1) ICC 98, the 1998 ICC Rules will now reflect not only the most modern but also **the most appropriate solution** (and indeed, in the author’s firm conviction, the **only** appropriate solution). They grant the arbitrators the

full “**conflict-of-law autonomy**”; arbitrators are no longer the “slaves” which have to bow before purely local perceptions which may or may not be appropriate. And they moreover grant the arbitrators the full “**substantive law autonomy**”, in that they may apply rules of law, and are not restricted to apply a national law only. The importance of these two elements is very significant:

First, they are truly *essential for enabling a tribunal to reach a correct decision* which satisfies the “**subjectively reasonable and objectively fair expectations**” of parties engaged in international business. *Second*, they in fact substantially **increase certainty and foreseeability** of the law, in that parties should no longer fear that they might become the victims of unexpected local pitfalls. Thus, the new ICC Rules clearly provide for a **more reflective responsibility** of the Arbitrators. It would carry us far beyond the limits of this introduction to exemplify, on the basis of actual cases and experience, the significance of this element.

In any event, the ICC was very wise to overcome the hesitation which still existed during the 1980s when Article 28 (2) UNCITRAL ML was still being discussed, with its unfortunate and much criticised bifurcation regarding the authority granted to the parties themselves, and the more restricted authority granted to the Arbitrators.

The new Article 15 (1) ICC 98 is **even more important** for those countries whose Arbitration Acts still refer to the term “law” (which may or may not be meant in the restrictive sense as referring to one particular national law only), in particular for **England** and **Germany** (see above). As the provisions in Arbitration Acts regarding the applicable law are normally of a **dispositive character** only, it would stand to reason that *Article 15 (1) ICC 98 will prevail* (as an indirect determination made, or an authority conferred unto the Arbitrators, by the parties as a consequence of the arbitration clause providing for ICC Arbitration). Thus, parties from any part of this world contemplating to provide for arbitration in countries such as Germany and England (in respect of contracts lacking a choice of law clause) will certainly be well advised to seriously consider to choose ICC arbitration (or another institution which has a provision up to the standard of Article 15 (1) ICC 98). As far as **Switzerland** is concerned, Article 187 (1) PIL stands in harmony, because – absent a choice made by the parties themselves – the Arbitral Tribunal has to determine the “rules of law” applicable to the substance of the case (Article 187 (1) PIL; regarding the inaccurate German text, see below).

o) Terms of Reference [Article 18 ICC 98 ⇔ Article 13 (1) ICC 75]

The feature of the Terms of Reference is certainly one of the **main characteristics** of ICC Arbitration. Its origin stems from the old French legislation according to which an arbitration clause contained in a contract was purely a natural (non-enforceable) obligation and, therefore, required a new submission by both parties once a dispute had arisen. For decades, the French legislation has changed on this point and, as all modern legislations do, recognizes the binding force of an arbitration clause. However, the requirement of the Terms of Reference did nevertheless survive. True, in the past, certain criticisms had been voiced – but mostly by those with very little practical experience of ICC Arbitration.

- 184 As a matter of fact, the support of all those who had commented on the drafts for the ICC Rules to retain the Terms of Reference as one of their key-characteristics was almost overwhelming. Only one National Committee suggested that the drawing-up of Terms of Reference should be optional, but all others clearly voiced the view to keep them as a useful requirement.
- 185 The above does not mean that the Terms of Reference, as they are under the 1975 Rules, remained sacrosanct. In the opposite, they were reviewed critically so as to take into account some of the criticism and to remove the hesitations (which sometimes had been expressed by parties) to sign the same. The following changes should also be seen and appreciated against the background of the new Article 19 ICC 98 which facilitates the making of new claims even after the signing of the Terms of Reference.
- 186 The new Article 18 (1)(c) ICC98 now adds that the Terms of Reference should indicate the particular “*relief sought by each party with an indication to the extent possible of the amounts claimed or counterclaimed*”.
- 187 The most significant change, however, is reflected in Article 18 (1) (d) ICC 98 which will now make the listing of the “*issues to be determined*” a **dispensable exercise**, dispensable in all those cases where the Arbitral Tribunal would consider such a listing “*inappropriate*”. The wording here is chosen deliberately. Some persons within the Working Party had preferred to make it optional, but finally a consensus was reached that, nevertheless, the listing of the issues to be determined is something desirable and helpful. Indeed, the experienced arbitrator has almost never encountered a difficulty in formulating the issues to be determined in a way which is totally appropriate to the circumstances, sufficiently precise where precision is desirable, and sufficiently flexible where flexibility had to be retained in view of parameters which may still change during the further course of the arbitral proceedings. Nevertheless, the new formula removes a requirement which, sometimes, had been perceived as being an overly difficult task.
- 188 The **operativeness** of the Terms of Reference has now become dissociated from the requirement (under Article 9 (4) ICC 75) that the deposit as requested by the Court be paid. Thus, in future, the Arbitral Tribunal can immediately after the signing of the Terms of Reference continue with the procedure; this will *avoid delays* which sometimes had been substantial.
- 189 In case of refusal of one of the parties to take part in the drawing-up of the Terms of Reference, or in the case of a refusal to sign the same, Article 18 (3) ICC 98 now provides for a much *simplified procedure for the approval of the Terms of Reference* by the Court. The new Rules no longer require the Court to fix a time-limit for the signature by the defaulting party.
- 190 The time limit for signing the Terms of Reference remains at *two months* from the transmission of the files to the Arbitral Tribunal. Of course, the new Rules do not spell out whether the Terms of Reference should be established at the occasion of a *meeting* with the parties, or whether the Terms of Reference should be settled by exchanging correspondence.
- 191 The author’s preference, when sitting as the Chairman, is to prepare a draft of the Terms of Reference and circulate the same to the parties and to the Co-Arbitrators

with a proposal of at least five dates on which a Terms of Reference Hearing could take place. At such Hearing, the Terms of Reference will then be finalized. The author's experience has been that even in relatively simple cases (where one could have had the feeling that the Terms of Reference could easily be settled by way of correspondence) the personal Meeting between the parties and the Arbitral Tribunal has proved to be highly welcomed (from the perspective of the parties) and in fact has immensely facilitated a good understanding right from the beginning of the major factual and legal parameters of the case, as well as of the basic ground rules which are going to be followed. The Hearing also affords the parties an opportunity to make the personal acquaintance of the arbitrators, and *vice versa*. It is therefore at the occasion of such a Hearing that the arbitration will get a "face" and some "real life blood". The sufficiently experienced Chairman will certainly have a good dozen of fairly important **procedural matters** which warrant a discussion with the parties or their representatives (including for instance the question whether the legal briefs to be submitted by the parties after the Terms of Reference should be accompanied, or not, by written witness statements, or whether such written witness statements should only be prepared after the full exchange of written briefs, and whether the filing of such witness statements should be effectuated by both parties contemporaneously, or with staggered time-limits). In most cases, the result of those discussions regarding the further procedure will be reflected in the last part of the Terms of Reference or, alternatively, in a separate **Order on Agreed Terms**.

On the other hand, in smaller cases and where parties or their representatives would have to travel far to attend such a Hearing, the Tribunal will obviously have to weigh carefully the cost implications against the benefit of such a personal meeting.

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p) Establishing a Procedural Time-Table [New: Article 18 (4) ICC 98]

A further novelty is the provision in Article 18 (4) ICC 98 which now requires the Arbitral Tribunal, after consultation with the parties, to establish in a **separate** document a **provisional time-table** which it intends to follow for the further conduct of the arbitral proceedings. Such a time-table should be established when drawing up the Terms of Reference and should be communicated to the parties and to the Court. Subsequent modifications will also need to be communicated in the same way. This is certainly a useful tool for enhancing the efficiency and speed of ICC Arbitrations. On the other hand of course, it must be realized that, at the early stage of the Terms of Reference, it is quite impossible in most cases to forecast the necessity and the scope of further evidentiary proceedings, for instance the necessity to proceed to the examination of witnesses and experts.

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q) New Claims [Article 19 ICC 98 ⇔ Article 16 ICC 75]

Article 16 of the 1975 ICC Rules has caused certain difficulties and has been the subject matter of criticism for its **rigidity** as far as the making of new claims during the course of the arbitral procedure (after the signing of the Terms of Reference) is concerned. In fact, the old Article 16 had caused some of the hesitations occasionally experienced by parties to sign the Terms of Reference. That rigidity had to be cured

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in a cautious manner. In this regard, the Working Party carefully studied the solutions in Article 44 WIPO AR, Article 20 UNCITRAL AR, Article 23 (2) UNCITRAL ML, Article 4 AAA IAR and Article 4 CAMCA AR. The proposal of the Working Party was supported by the comments of all ICC National Committees who expressed themselves in favour of a relaxation of the stiff rule in Article 16 ICC 75, particularly in situations of new claims resting on newly discovered or revealed facts.

195 Thus, under the new Article 19 ICC 98, new claims will now be admissible under the following parameters and *without* the necessity for the parties and the arbitrators to draw up and sign a *Rider* to the Terms of Reference:

196 The new claims need to be authorized by the Arbitral Tribunal; such authorization will suffice; in other words, the respondent party cannot block the admissibility of new claims, as was the case under the old regime of Article 16 ICC 75.

197 The Tribunal, when considering whether to admit new claims, will have to have regard to the nature of such new claims or counter-claims, the stage of the arbitration and all other relevant circumstances.

198 Certainly, new claims or counterclaims should not come at the last minute when the other party may not have a suitable opportunity to defend itself. Thus, arbitrators will have to pay special attention to satisfying the equality principle which is now reflected specifically in Article 15 (2) ICC 98. As far as the “other relevant circumstances” are concerned, the Tribunal will have to consider particularly the delay which might be caused if, for instance, evidentiary proceedings would have to be reopened.

r) Establishing the Facts of the Case [Article 20 ICC 98 ⇔ Articles 14 and 15 ICC 75]

199 The question was whether the 1998 ICC Rules should provide more specific guidance regarding procedural matters than the 1975 Rules. In particular, the question was whether some further guidance should be given in the Rules, similar for instance to the guidance contained in the WIPO AR, in Articles 19–22 LCIA 98 or in the “1996 UNCITRAL Notes on Organizing Arbitral Proceedings”. The overall attitude regarding this question, however, was a *negative* one, essentially due to the concern that the ICC Rules need to remain entirely flexible and should accommodate, to the largest extent possible, the wishes of the parties and, failing that, the case-tailored directions of the Arbitral tribunal. Thus, the *key aspects* relevant for the procedure of the ICC Rules reflected in Articles 14 and 15 of the old Rules (and extensively discussed in the author’s Report “*The Procedure Before the Arbitral Tribunal*” (ICC Bulletin Vol. 3 No. 2, 1992, 18–45)) remain the same. This is so regarding:

- the famous notion that the Arbitral Tribunal shall have to establish the facts “**by all appropriate means**” (now reflected in Article 20 (1) ICC 98), which notion implies an active (inquisitorial) role of the Tribunal in all relevant aspects of the case (which includes, for instance, the ordering of site visits, or the ordering of demonstrations, the combating of delaying tactics);
- the key notion of the party’s right to request a **hearing** (now reflected in Article 20 (2) ICC 98); see also Article 19 (1) LCIA 98;

- the Arbitral Tribunal's authority to organize a hearing *on its own motion* and to decide on the hearing of witnesses, of experts appointed by the Parties or of any other person (see the amplified provision in Article 20 (3) ICC 98); the shortest expression is that the Tribunal **must** hear the parties, but **may** hear witnesses;
- the Arbitral Tribunal's authority, according to Article 20 (4) ICC 98, to appoint experts; this authority has also slightly been amplified in two directions:

First, the appointment should be made after consultation with the parties. Consultation, however, does not mean that the parties will have to agree to the appointment of experts; the Arbitral Tribunal, therefore, clearly has the authority to appoint experts even in the absence of a request from one of the parties, if the Tribunal has reached the conclusion that this will be necessary for a proper adjudication. *Quid*, however, if both parties have agreed that the Tribunal should not appoint any expert, although the Tribunal perceives a necessity to have certain matters properly established by a neutral expert? This issue gave rise to debate within the Working Party. However, in the author's view, the question is rather moot: In such a situation, the Arbitral Tribunal should make it clear to the parties that it will then understand its mission in the sense that it should assess and determine the issues to the best of its ability on the basis of its own knowledge and the best possible understanding and appreciation of the situation, and render its Award on that basis. In the author's view, an Arbitral Tribunal should certainly be prepared to do that. After all, the conferring of such an authority to the Arbitral Tribunal would appear to be a *minus in maius* in that, for instance, the parties could also go further and authorize – and indeed mandate – the Arbitral Tribunal to act as *amiables compositeurs* or to decide *ex aequo et bono*. As a result, a Tribunal will appoint a neutral expert only where at least one party has requested such appointment, or had agreed to it. Thereafter, such party will have to advance the corresponding costs.

Second, a sentence has been added in Article 20 (4) ICC 98 reflecting the notion that the parties have the right to request a Hearing at the occasion of which the Tribunal appointed expert can be questioned by them (or by their own experts). Compare also Article 26 (2) UNCITRAL ML.

- the Tribunal's authority, according to Article 20 (5) ICC 98, to summon any party to provide additional evidence; compare hereto Article 48 (b) WIPO AR, Article 24 (2) and (3) UNCITRAL AR, Article 19 (3) AAA IAR, Article 13 (1) (f) and (i) LCIA 85; this authority had of course already been affirmed in arbitral practice under the 1975 Rules, but the new Rules have now made this authority explicit;
- Article 20 (6) ICC allows "*documents only-arbitrations*", provided that none of the parties requests a Hearing; however, in the author's view, an Arbitral Tribunal will have to make its intention to render the award without a hearing known to the parties (indeed, the award should not come as a surprise); this would then enable the party or parties to object and to request a hearing.

200 Within the Working Party it was also discussed whether the new ICC Rules should contain a provision on the Tribunal’s power to **freely appreciate the evidence**. Such a provision, reflected in many other institutional rules, carries its own significance against the background of some more restricted rules on the reception of evidence as they are known in certain common law countries; see for instance the provision of Article 48 (a) WIPO AR. However, it was felt that such a provision was not necessary, because the authority of the Arbitral Tribunal to freely appreciate the relevance and significance of the evidence is anyhow obvious.

s) Trade Secrets and Confidentiality [New: Article 20 (7) ICC 98]

201 Article 20 (7) ICC 98 refers to the Arbitral Tribunal’s authority to take measures for protecting trade secrets and confidential information. In this connection, the Working Party had carefully considered the more elaborate provisions on **trade secrets** as contained in the WIPO Arbitration Rules, in particular its Article 52 (which authorizes the Tribunal, in exceptional circumstances, to make use of a so-called “confidentiality adviser” according to Article 52 (d) WIPO AR), and the detailed rules on **confidentiality** contained in Articles 73–76 WIPO AR.

202 Reactions from the ICC National Committees regarding the reflection of an elaborate rule on the protection of trade secrets and confidentiality were *mixed*: Some were in favour and proposed that provisions along those of WIPO should be inserted into the ICC Rules, others felt that the solutions should be left to practice and that the Arbitral Tribunal in any event has the authority to take the appropriate measures for safeguarding confidentiality, including the power to decide what evidence it may accept as proof; still others went so far to even raise the question why, at all, arbitration should be confidential. Thus, the issue is highly controversial and difficult (compare hereto the article by Paulsson/Rawding: “The Trouble with Confidentiality”, in ICC Bulletin 1/1994, 48–59).

203 The Working Party also considered the solution in Article 34 AAA IAR, which imposes a confidentiality obligation on the arbitrators and the institution, but not on the parties. In the final discussions, the preference was expressed to simply reflect a somehow “*programmatic article*” recalling the authority of the Arbitral Tribunal to take appropriate measures for protecting trade secrets and confidential information, without however spelling out more detailed provisions thereon, and without determining more precisely to what extent e.g. the memorials and documents filed during the procedure, and statements of witnesses and experts and the decisions taken by the Arbitral Tribunal ought to remain confidential. By comparison, see the newly crafted provisions in Article 30 LCIA 98, which goes far beyond that solution.

t) Hearings [Article 21 ICC 98 ⇔ Article 15 ICC 75]

204 The new Article 21, by and large, corresponds to the old Article 15. The changes are rather of a semantic nature. Article 21 (1) ICC 98 provides that the Arbitral Tribunal “*shall summon the parties to appear before it on the day and at the place fixed by it*”. However, we may add here as a footnote that it would be quite extraordinary if an arbitral tribunal simply summoned the parties to appear at a hearing without first

inquiring as to the availability of the parties, their representatives and the witnesses (if witnesses are to be heard) at the dates which the Tribunal proposes to them. This is not only required by minimal standards of politeness, but also by the standards of each party's right to be heard (which could be impaired if, for instance, an Arbitral Tribunal summoned the parties to appear at a hearing which its counsel, due to other commitments, is unable to attend).

Article 21 (2) ICC 98 reflects the notion that, in the case of a failure to appear without valid excuse, the Tribunal shall have the power to proceed with the hearing. The rather artificial presumption which was contained in Article 15 (2) ICC 75 that "*such proceedings shall be deemed to have been conducted in the presence of all parties*" has now been eliminated in the new text. Reference should also be made to Article 6 (3) ICC 98, which is the general provision regarding a party's refusal or failure to participate in the proceedings. Compare hereto also Article 28 UNCITRAL AR, Article 25 UNCITRAL ML, Article 56 WIPO AR, Article 6 (7) LCIA 85, Article 23 AAA IAR, Article 25 CAMCA AR; compare also for instance the provisions in Section 41 of the 1996 English Arbitration Act.

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u) Closing of the Proceedings [New: Article 22 ICC 98]

The new Article 22 (1) ICC 98 reflects a good practice which has already been widely used in ICC Arbitrations, particularly those handled by French arbitrators which are used to the notion of *clôture des débats*. The new Rules now transform this practice into a duty of the Arbitral Tribunal. Other institutional rules contain similar provisions; see e.g. Article 57 WIPO AR, Article 24 AAA IAR, Article 26 CAMCA AR, Article 29 UNCITRAL AR.

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According to Article 22 (2) ICC 98, the Arbitral Tribunal will then have to indicate to the ICC Secretariat the approximate date by which the draft Award will be submitted to the Court for approval pursuant to Article 27 ICC 98. Obviously, this is sometimes a difficult issue. The author's personal experience has shown that sometimes, after extensive and carefully structured deliberations, the Chairman submits a draft Award to his co-arbitrators within one month or two and that, thereafter, a lengthy procedure might be triggered during which numerous efforts need to be made regarding the fine tuning of the Award, with the aim to reach a unanimous decision, or at least a majority decision. In extreme situations, this difficult exercise has sometimes absorbed many months during which deliberations took place, mostly by exchanging faxes. While these difficulties cannot be avoided once a draft Award is on the table, it will nevertheless be helpful, for an efficient accomplishment of the task, that the Tribunal disciplines itself by indicating the date on which it intends to submit the draft Award to the ICC Court.

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v) Conservatory and Interim Measures [Article 23 ICC 98 ⇔ Article 8 (5) ICC 75]

The 1975 ICC Rules only contained an indirect reference to the arbitrators' authority to rule on conservatory or interim measures by providing that, before transmission of the file to the arbitrator (and in exceptional circumstances even thereafter) the parties

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shall be at liberty to apply to any competent judicial authority for seeking interim or conservatory measures. Thus, the 1975 Rules did not specifically spell out the Arbitral Tribunal's authority to itself rule on conservatory and interim measures.

209 There was no doubt, within the Working Party, that the ICC Rules, in this regard, had to be brought up to a **modern standard**. The most significant elements of the new provision in Article 23 ICC 98 are the following:

- Article 23 (1) ICC 98 is of a **permissive** nature; the parties are free to agree otherwise.
- The new Article provides for a **broad power** (comparable to Article 46 WIPO AR, Article 26 UNCITRAL AR, Articles 21 (1) AAA IAR and Article 23 CAMCA AR. The existing Article 13 (h) LCIA is slightly more restrictive; the provision will be changed to reflect the notion that the Tribunal can order any interim relief which the Tribunal would have power to grant in an award (Article 22 (1) (j) LCIA 98.
- The Arbitral Tribunal may impose a **security** on the requesting party.

210 There was discussion within the Working Party whether the **ICC pre-arbitral referee procedure** should be incorporated, or at least referenced, in the new Rules. However, it was decided not to do so, in view of the complexity of issues that are connected thereto (which can be seen from the 40 paragraphs packaged into seven articles of the Rules on the Pre-Arbitral Referee Procedure); an incorporation could, as it was feared, become a disincentive to choose the ICC Rules.

211 There were discussions whether an explicit reference to the possibility to request a **security for costs** should be made, so as to avoid the impact of the well-known *Coppee-Lavalin v. Ken-Ren* case. Some ICC National Committees were against, some voted for it; some of them expressed the view that a party should have the possibility to request a security for costs in exceptional circumstances only (like in Article 46 (b) WIPO AR). Some suggested a wording in the sense that parties “*are deemed to have agreed that any application for security for costs be made solely to the arbitrators*”, so as to avoid the Ken-Ren situation in the future.

212 However, in the end, a preference was expressed not to make any specific reference to a security for costs. Nevertheless, the wording of Article 23 would seem to be **broad enough** to allow the making of an application by a party for, and the issuing of a decision by the Tribunal on security for costs.

213 Should the Tribunal moreover have the authority to order any party to provide **security for all or part of the amount in dispute**, possibly on the basis of a counter-indemnity for any costs or losses? The provision contained in Article 46 (b) WIPO AR and the draft Article 25 (1) LCIA 98 were known to the members of the Working Party, but there were, in the author's recollection, no specific proposals to reflect those matters explicitly. All will thus remain in the hands of the Arbitral Tribunal.

214 The new ICC Rules follows the examples already reflected in Article 26.2 (2) UNCITRAL AR, Article 46 (c) WIPO AR, Article 21 (2) AAA IAR and Article 23 (2) CAMCA AR that interim measures may take the form of an **order or of a reasoned award** (as considered appropriate by the Arbitral Tribunal).

215 There were discussions whether there should be a provision regarding the consequences of non-observance, by the aggrieved party, of the measure ordered or

awarded by the Tribunal; for instance, it was proposed that such defaulting party's claims or counterclaims should no longer be considered by the Tribunal. However, such a sanction did not find its way into the new Rules. In this regard it was *inter alia* argued that "*arbitrators should retain a wide range of consequences to visit on the defaulting party, to be decided by the arbitrators on a case-by-case basis, in the light of the particular facts and applicable law*".

The authority of the Arbitral Tribunal is **not exclusive**. A party remains free to seize (instead of the Tribunal) a competent State court. This is reflected in Article 23 (2) ICC 98 which, essentially, corresponds to Article 8 (5) ICC 75, except that the more restrictive notion under the 1975 Rules "*in exceptional circumstances*" has been replaced by "*in appropriate circumstances*" in the 1998 Rules.

In this context, a further legal aspect deserves to be mentioned specifically which is the following: The authority granted to the Arbitral Tribunal to decide on conservatory and interim measures is one thing. Yet, another thing is to ascertain that the applicable *lex arbitri* (i.e. the Arbitration Act prevailing at the place of arbitration) also allows an Arbitral Tribunal to rule on interim measures. Of course, in Switzerland, such authority is conceded to the arbitrators, see Article 183 (1) PIL. However, in some other parts of Europe like Austria, Italy, Greece and some Scandinavian countries, the authority to rule on interim relief falls into the reserved prerogatives of State courts. Such reserved prerogatives of State courts can not normally be derogated by agreement of the parties (for instance by agreeing to submit disputes to the ICC Rules); however, this will need to be checked carefully under the relevant Arbitration Act, in order to determine whether or not the provision is of a mandatory character.

w) *Time-Limit for Rendering the Award* [Article 24 ICC 98 ⇔ Article 18 ICC 75]

The slightly changed Article 24 (1) ICC 98 now triggers the running of the six months' time-limit for rendering the final Award from the date of the last signature on the Terms of Reference or, in the case of Article 18 (3) ICC 98, from the date of notification to the Tribunal by the ICC Secretariat that the Terms of Reference had been approved by the ICC Court. Of course, the well-known six months' time-limit had been a matter of discussion, and the opinion was voiced that the ICC should not miss the opportunity to reflect a more realistic time-limit within its rules. For instance, the solution in Article 63 (a) WIPO AR was discussed, but in the end it was felt that a counter-productive signal would be given, were the new Rules to indicate a time-limit of, say, 9 or 12 months (which would certainly have brought the Rule closer to reality). Of course, the time-limit as it is (six months) can be extended upon request by the Arbitral Tribunal, or upon the ICC Court's own initiative.

x) *Making of the Award* [Article 25 ICC 97 ⇔ Article 19 and 22 ICC 75]

The new Rules, in Article 25 (1) ICC 98, of course retain another one of the characteristic features of ICC Arbitration, i.e. the provision that, in the absence of a majority

decision, the Chairman of the Arbitral Tribunal shall decide alone. See also Article 16 (3) LCIA 85 and Article 26 (3) LCIA 98 which adopt the same solution.

220 The new Article 25 (2) ICC 98 now explicitly requires that awards shall state the reasons upon which they are based.

221 In case of a **settlement** reached between the parties, Article 26 ICC 98 now provides that the settlement shall be recorded in the form of an award only if so requested by the parties, and if the Arbitral Tribunal agrees to do so. This, of course, has already been the practice under Article 17 ICC 75, but the text required this clarification.

222 The provision on the **scrutiny** of the Award by the Court (Article 27 ICC 98) remained unchanged as to its substance. However, the trivial question remains: **what is an award?** The term is **not defined** in institutional rules, nor is it in the New York Convention of 1958. For instance, a decision on the applicable law: is this an award? Or a decision that the claims are or are not time-barred? Are they subject to scrutiny, or not? It is obvious that, occasionally, uncertainties will remain which will necessitate a communication between the Tribunal and the ICC counsel in charge of the file.

223 **Articles 28 (1) to (3) ICC 98** regarding the notification of the Award correspond to Article 23 ICC 75. The further provisions in Articles 28 (4) and (5) ICC 98 correspond to Article 25 ICC 75. Article 28 (6) ICC 98 reflects the **binding nature** of the Award and its enforceability. It corresponds to Article 24 ICC 75, except that the word “final” has been replaced by the more accurate description in the sense that the Award “*shall be binding on the parties*”. Its “finality” (in the legal sense) is determined by the Arbitration Act prevailing at the place of arbitration.

y) Correction and Interpretation of the Award [New: Article 29 ICC 98]

224 Most institutional arbitration rules have explicit provisions empowering the Arbitral Tribunal to correct its Award, either on its own motion or upon application of one of the parties, or to interpret its Award; the ICC Rules of 1975 did not. However, already in practice under the 1975 Rules the ICC, Arbitral Tribunals were allowed to correct an award, or to provide an interpretation where necessary. The ICC required the observance of a **time-limit of 30 days** after receipt of the Award, reasoning that it might be abusive for a party to wait for a long period of time (for instance until some challenge procedures or enforcement procedures had been started) and then come up with a request for correction or interpretation.

225 When discussing the draft for a new provision in the ICC Rules 1998, the “landscape” was divided, particularly as far as the reactions of the ICC National Committees was concerned. Some were against any new provision on this matter; some agreed to reflect a rule on correction only, but were hesitant or even opposed to including a provision on interpretation. Essentially, certain fears were expressed that there could be a potential danger that the losing party might be tempted to resort to **abusive requests** by, for instance, filing a lengthy Brief to the Arbitral Tribunal asking for further interpretation on a point on which it had lost and on which it might try to challenge the Award before a national Court. Another National Committee expressed the view that any time-limit for submitting a request for correction or interpretation should not be strict and that, if any application is made more than 30 days

after notification, it should be accompanied “by adequate justification for the delay, and will be accepted only if the Court determines in its sole discretion that it is appropriate to do so”.

The Working Party analyzed all of these reactions and, of course, studied the provisions in other institutional rules such as Article 66 (a) and (b) WIPO AR, Article 30 AAA IAR, Article 17 LCIA 85, Article 27 LCIA 98, Articles 35 and 36 UNCITRAL AR, Article 33 UNCITRAL ML, Article 32 CAMCA AR and, by way of further comparison, Section 57 of the 1996 English Arbitration Act. In the final discussions, the Working Party retained the time-limit of 30 days for corrections or for requests for an interpretation of the Award. The applications must be made to the ICC Secretariat in a sufficient number of copies (as per Article 3(1) ICC 98). The Arbitral Tribunal shall grant the other party a possibility to submit comments and shall, thereafter, decide, by submitting its draft decision to the Court within 30 days after expiration of the time-limit for the receipt of comments from the other party (or within such other period as the ICC Court may decide).

In addition to providing for the correction and interpretation of the Award, the question was raised whether a party should have a right to file a request for making an **additional award**. Compare hereto the provisions in Article 37 UNCITRAL AR, Article 33 (3) UNCITRAL Model Law, Article 17 (3) LCIA 85, Article 27 (3) LCIA 98, Article 66 (c) WIPO AR. Obviously, this is a more delicate situation, and most ICC National Committees had expressed the view that, in fact, there should be no provision for allowing a request for an additional Award. After all, as it was said, ICC Awards are scrutinized by the Court and thus, not only in theory but also in practice, there should never occur a situation where a particular claim or issue remained undecided by the Tribunal. The Work Group basically shared this view. This explains the reason why the ICC Rules 1998 do **not**, in contrast to others, provide for additional awards.

z) Advance to Cover the Costs of the Arbitration [Article 31 ICC 98 and Appendix III ⇔ Article 9 ICC 75 and Appendix III]

Article 30 (1) ICC 98 contains a new and certainly practical solution according to which the **Secretary General** (in a new function) may himself, upon receipt of the Request for Arbitration, determine the amount payable by the claimant party only as a **provisional advance** intended to cover the costs of arbitration until the Terms of Reference have been drawn up.

Thereafter, “as soon as practicable”, the **ICC Court** (no longer the Secretary General) shall fix the **global advance**, subject to readjustments (Article 30 (2) ICC 98). When is it, in this sense, “practicable” to determine the global advance? The endeavour of the ICC Court will be to make this determination, as far as possible, after receipt of the respondent party’s answer; thereafter, upon receipt of the Terms of Reference, the ICC will verify whether a substantial change in the parameters has occurred; if so, a readjustment will be made.

In case of claims and counterclaims, **separate** advances may be fixed for the claims (payable by the claimant party) and the counterclaims (payable by the respondent party).

- 231 Article 30 (4) ICC 98 takes its origin from Article 15 of Appendix II to the 1975 Rules and deals with the consequences of non-payment: first, temporary suspension, thereafter the claims or counterclaims shall be considered **withdrawn without prejudice** to their reintroduction at a later date in another proceeding.
- 232 Likewise, Article 30 (5) ICC 98 regarding **set-offs** corresponds literally to Article 16 of Appendix II under the 1975 Rules. It was certainly appropriate to reflect this provision in the body of the new Rules itself because, in the past, it had sometimes been argued that the pleading of a set-off, as an emanation of substantive law, extinguishes *pro tanto* the main claim and, therefore, cannot be made dependent on the payment of a separate deposit, or an increase of the deposit. Occasionally, therefore, parties pleading set-off had maintained that the Arbitral Tribunal was, as a matter of substantive law, obliged to deal with the set-off irrespective of the fact whether such additional task was covered by an appropriate advance. In future, such an argument will be untenable. By submitting to ICC Arbitration it will now be clear that the pleading of a set-off requiring the Tribunal to consider additional matters may trigger an increase of the advance, or a separate advance, and each party submitting to ICC Arbitration will of course be deemed to have specifically agreed to this. The solution as now reflected is certainly highly appropriate.

aa) The Costs of the Arbitration [Article 31 ICC 98 ↔ Article 20 ICC 75]

- 233 Article 31 (1) ICC 98 largely corresponds to Article 20 (2) ICC 75 except that, regarding party costs, the term “*normal legal costs incurred by the parties*” has been replaced by “*the reasonable legal and **other costs** incurred by the parties for the arbitration*”. It is thus recognized that “other costs” (other than legal costs) may constitute allowable expenses which, according to the Tribunal’s decision, may have to be reimbursed by the less successful or losing party.
- 234 Article 31 (2) ICC 98 corresponds to Article 20 (3) ICC 75, but contains a quite **significant** second sentence according to which “*decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal **at any time** during the proceedings*”. Again, this is a significant improvement and does away with a sometimes harshly criticised practice under the old Rules, namely the practice that the determination of **party costs and their allocation** was always deferred to the final award. Thus, where the Tribunal had made an interim award (e.g. on jurisdiction) or partial award, the ICC used always to take the position that the Tribunal should not entertain and determine, within such interim or partial award, the “winning” party’s **claim for reimbursement of its own costs** incurred as a consequence of the procedure conducted so far (for instance for outside counsel, party experts, inhouse counsel and staff, costs and disbursement of witnesses and party representatives and the like).
- 235 Under the new Rules, the Tribunal will now be free to immediately determine the amount of reimbursable party costs in the framework of such an interim or partial award. Given the fact that such costs may sometimes be very substantial, the criticism was certainly appropriate and the Working Party had to propose a more flexible solution. At the ICC Conference of 4 June 1997 the opinion was stressed by the partici-

pants that ICC Arbitral Tribunals should, in future, also **make use** of the new power conferred to them under the last sentence of Article 31 (2) ICC 98.

Article 31 (3) ICC 98 on the fixing and allocation of costs among the parties corresponds to Article 20 (1) ICC 75. 236

bb) Modified Time-Limits [Article 32 ICC 98 ⇔ Article 18 ICC 75]

Basically, Article 32 ICC 98 is a new Article providing that the parties may agree to shorten the various time-limits set out in the Rules. However, such an agreement shall only become effective once approved by the Arbitral Tribunal. The ICC Court, however, may extend the time-limits whenever necessary. 237

This provision in fact deals with the discussion on the much debated phenomenon of “**fast track arbitration**”, an expression *à la mode* to denote some ICC Cases which had been conducted on a particularly expeditious time-schedule. The Working Party had intensive debates on the question whether particular provisions should be drafted for such an expedited procedure, for instance in a manner comparable to the WIPO Expedited Arbitration Rules. Some ICC National Committees strongly suggested that a set of special Rules be established, whereas most others were hesitant. The Working Party finally decided that there should not be a separate set of rules but simply a short article (in the sense of Article 32 (1) ICC 98), but with the safeguards reflected in Article 32 (2) ICC 98. Compare also with Article 9 LCIA 98. 238

In the author’s view, this solution is fully satisfactory because, in any event, a fast track arbitration can only work if both parties have agreed and committed to a shortened time-schedule and to the succinctness of the procedure. Moreover, such a procedure can only work if the arbitrators are also in agreement to operate on that basis (which, as practice has shown, would require them to defer most of their other commitments during the time-period of the fast track arbitration). 239

cc) Waiver [New: Article 33 ICC 98]

So far, the ICC Rules had no explicit waiver rule comparable, for instance, to Article 58 WIPO AR, Article 20 (1) LCIA 85, Article 25 AAA IAR, Article 27 CAMCA AR, Article 30 UNCITRAL AR, Article 4 UNCITRAL ML and Article 32 (1) LCIA 98 (compare also the extensive wording in Section 73 of the 1996 English Arbitration Act). 240

Although one may say that the notion “*speak up or shut up*” stems from the *bona fides* principle (which as such should anyhow govern the conduct in arbitration) it was well warranted to reflect a new provision indicating clearly that a party which does not promptly object if it believes that the procedure was incorrect will be deemed to have waived its right of objection. 241

The waiver carries its **particular significance** in the framework of any subsequent proceedings before State courts if a party aims to challenge an award. Frequently, in the framework of such challenge procedures, a party will aim to show that the procedure before the Arbitral Tribunal was defective. However, such argu- 242

ments should have little merit where the complaining party already had a possibility to voice its objections in the framework of the arbitral proceedings. In arbitral practice, it is quite customary for the Arbitral Tribunal to specifically ask the parties, for instance at the end of Hearings, whether there were any observations or objections in respect of the procedure conducted so far, thus clearly inviting the parties to make such matters known to the Tribunal immediately, and to record this appropriately.

243 The ICC National Committees were, with but one exception, in favour of inserting a new waiver rule, and the Working Party was unanimously in favour of it. The new ICC provision is certainly a welcome improvement which will enhance certainty and *bona fides* in the arbitral process.

dd) Exclusion of Liability [New: Article 34 ICC 98]

244 Similarly, until their revision, the ICC Rules had lacked a provision protecting the ICC Court and the Arbitrators from liability. Compare hereto Article 77 WIPO AR, Article 35 AAA IAR, Article 19 LCIA 85, Article 37 CAMCA AR and Article 31 LCIA 98; compare also Sections 29 and 74 of the 1996 English Arbitration Act.

245 The new ICC provision is admittedly **very broad**, because it purports to exclude liability “*for any act or omission in connection with the arbitration*”, whereas other institutional rules are phrased more cautiously, realizing that conscious and deliberate wrong-doing certainly cannot be unremedied.

246 The Working Party’s view was that where a liability claim is filed, it will anyhow be for the National Court to determine to what extent it was permissible to exclude liability, having regard to the law or laws which govern the relationship between the party and the ICC Court or the arbitrators.

247 Again, the addition of this provision constitutes a welcome improvement and enhances the integrity of the arbitration process.

ee) General Rule [Article 35 ICC 98 ⇔ Article 26 ICC 75]

248 But for semantic adaptations, the rule is the same as the old Article 26 ICC 75. It did not give rise to any particular discussions within the Working Party. The relevance and the meaning of the second part of the sentence “... *shall make every effort to make sure that the Award is enforceable at law*” has been discussed elsewhere. A similar provision is contained in Article 20 (2) LCIA 85 and Article 32 (2) LCIA 98. The author would simply add as a footnote that the criterion of enforceability should not outweigh or override the Arbitral Tribunal’s task to render a correct and legally sound decision.

ff) Concluding Remarks

249 The new Rules do not come as an earth quake. They are rather evolutionary than revolutionary. ICC procedures very largely remain in the hands and under the control of the parties. Expediency and efficiency of the process are now certainly enhanced in

an altogether impressive way, while those characteristical elements which made ICC arbitrations an impressive success-story have been preserved.

The “product” now on the table is certainly carefully considered and well balanced. It incorporates the experience and the wisdom acquired in the handling of some 6,000 cases during the last three decades, and at the same time leaves the room open for much flexibility and for all of the dynamics of the decades to come. Mathieu de Boisséson, in his comments submitted to the Conference of 4 June 1997, spoke (*à la Marcel Proust*) of a “*recherche de l’équilibre*” and of a “*recherche de la sobriété, mais sans moralisme*” – words that were indeed touching on the center of what had inspired the Working Party, and all those inside and outside the ICC who had devoted their time to comment on the numerous drafts that had circulated around the globe prior to the adoption of the final version of the 1998 Rules. A most sincere word of appreciation is owed to Me Yves Derains, for the most impressive work he did as the chairman of the Working Party, to Stephen Bond as the vice-chairman of the Working Party, Eric A. Schwartz as the former Secretary General and to the ICC’s General Counsel Dominique Hascher. The Working Party operated under the control of the chairman of the ICC Commission on International Arbitration, Me Paul A. Gélinas, who had set the parameters for this massive work.

With the 1998 ICC Rules, the WIPO Rules of 1994, the new LCIA Rules 1998 and the 1997 AAA IAR, (to name only these four among the modern institutional Rules) very fine “tools” are now available for the benefit of all parties engaged in the arena of international business and trade. The challenge and commitment and indeed the *nobile officium* during all of the years to come will be to use them whether as arbitrators or as lawyers, in a very professional manner.

3. The Major Conventions

a) *The New York Convention of 1958*

Clearly, the impressive upturn of international arbitration and the success of arbitral institutions such as the ICC and others is closely linked to the significance of the **New York Convention of 1958** on the Recognition and Enforcement of Foreign Arbitral Awards (NYC 1958); it placed the **Geneva Protocol on Arbitration Clauses** of 24 September 1924 and the **Geneva Convention on the Execution of Foreign Arbitral Awards** of 26 June 1927 on a new basis. The NYC 1958 had been ratified by 116 countries as of 31 December 1996 (cf. the list in the relevant ICCA Yearbook Commercial Arbitration; cf. also 12 JIntArb 1/1995, 113). Among the most recent signatory states are Venezuela (in February 1995), Lithuania (in March 1995), Bolivia (in April 1995), Vietnam (in September 1995), Kazakhstan (in November 1995), Mauritius (in June 1996), Brunei Darussalam (in July 1996) and, Paraguay (in October 1997), Kyrgyzstan (in December 1997), El Salvador (February 1998) and Nepal (March 1998).

On the other hand, a number of sophisticated and developed states has not as yet ratified the New York Convention (such as e.g. Lebanon, the United Arab Emirates);

in those latter cases, it will be important to check the availability of particular Bilateral – or Multilateral Treaties before agreeing on a specific place of arbitration (regarding Multilateral Treaties see also further below). For instance, two networks to be mentioned here are the 1983 Convention on Judicial Cooperation Between States of the Arab League, the so-called “**Riyadh Convention**” of 1983 signed by Iraq, Jordan, Libya, Syria, Tunisia and Yemen and the Convention of the Arab League on Enforcement of Arbitral Awards, the so-called “**Amman Convention**” of 1987, in force since 1993, signed by Iraq, Jordan, Libya, Palestine, Sudan, Tunisia and Yemen.

254 All legal practitioners (and judges of national courts) need to be intimately familiar with the New York Convention and keep up to date on recent developments. The internationally renowned bestseller, the standard work by van den Berg, The New York Arbitration Convention of 1958, is essential reading here; it is expected that Professor van den Berg will have completed his work on the second edition by early 2000. Moreover, the Swiss Arbitration Association devoted its Conference of 2 February 1996 to the topic of the New York Convention; the association’s reports are published in the volume “ASA Special Series No. 9 – The New York Convention of 1958” (August 1996, about 300 pages) and provide a very useful overview on the current situation and court practice in the major jurisdictional areas of the world. On the NYC, see also the commentary below on Article 194 PIL.

255 Reference should also be made to the extensive **case law** on the NYC contained in the **ICCA Yearbook Commercial Arbitration**. Updated reports are regularly submitted at the numerous international arbitration congresses as well as at the traditional New York Convention workshops of the SBL Committee D at the IBA Congresses (which workshops have been headed for many years by Albert Jan van den Berg, Jan Paulsson and Gerold Herrmann).

256 The essential merits of the NYC are (i) the recognition of arbitration agreements (as per Article II NYC) and (ii) the setting of the yardsticks and criteria for the recognition and enforcement of international arbitral awards (as per Articles IV and V). It is according to these principles and criteria that national legislators have successfully been guided in international arbitration matters ever since 1958. The **UNCITRAL Model Law** (see below) also reflects these criteria, as does Article 190(2) PIL (in an intentionally concise form).

257 However, it remains still unsatisfactory that, at the very final and indeed decisive stage of the entire arbitral process, i.e. at the stage of **enforcement proceedings** relating to a foreign arbitral award, the national exequatur judge should, according to Article V (2) NYC, examine questions of **objective arbitrability** of the dispute and of compatibility of the foreign arbitral award with **public policy** according to the yardsticks of **his own national law** (and not according to those of some internationally recognized standards and criteria). Indeed, today, when the **specificity of international arbitration** has become widely recognized around the globe in the sense that the international arbitral process *has become significantly distanced from the impact of local provisions*, those local perceptions still return again at that ultimate and crucial stage of the process (i.e. at the time of enforcement in domestic courts against the award-debtor). This is a situation which is truly unsatisfactory, and it is therefore with good reason that discussions have been set in motion to also take

enforcement proceedings out of the domestic sphere; cf. Blessing, Bull ASA 1993, 351, referring to the papers published since the summer of 1995 by Holtzmann and Schwebel in: The Internationalisation of International Arbitration (LCIA, 1995); see also the above Bibliography.

b) The 1961 European Convention

A great deal of importance is also attached, with regard to the development of international arbitration, to the **European Convention on International Commercial Arbitration of 21 April 1961** (sometimes also called “Geneva Convention of 1961”) drawn up under the *aegis* of the UN Economic Commission for Europe and ratified by 22 countries (but not by Switzerland). For a list of signatory states and case law, reference should be made to the appropriate heading in the most current ICCA Yearbook Commercial Arbitration.

The **significance** of this Convention mainly centres around **four topics**: First, the Convention was intended to promote and facilitate East/West trade (which was then experiencing growing pains), through **improved recognition** of commercial arbitration. The permanent Arbitration Courts attached to the Chambers of Commerce of the CMEA countries were put on an equal footing with other arbitral institutions and *ad hoc* arbitration. Second, the European Convention improved matters to a certain extent by **further restricting the grounds** for setting aside an award and by implementing the provisions of the New York Convention (cf. Article XI). Third, the Convention had to solve, in Article IV, the problem of establishing an arbitral tribunal where the parties from East and West could not agree on the appointment of the arbitrators; thus, the Convention contains detailed provisions for ensuring that an **arbitral tribunal can be set up**, to the extent necessary with the assistance of a Special Committee and the assistance of the local chambers of commerce (whose roles became more significant, whereas the role of national courts was cut down significantly).

Fourth, the Convention contains, in Article VII, a landmark provision (revolutionary at the time) on the **determination of the governing law**, whereby (in the absence of a choice of law by the parties) the arbitrators were *already at that time* granted the **autonomy to determine the appropriate rule of conflicts of laws** to be chosen so as to determine the proper law governing the contract, by virtue of the following famous wording: “... *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*”. Thanks to this provision, the previously prevailing opinion of leading scholars and the attitude frequently taken in arbitral practice, according to which (in the absence of a choice of law made by the parties themselves) an arbitral tribunal had to apply the private international law of the seat (i.e. the conflict of laws system as applicable in the country in which the arbitral tribunal had its seat), was definitively – after only a relatively short life – pushed into an early grave. However, that old doctrine, no longer compatible with the fundamental notions and requirements of modern international arbitration, still survives today as a kind of “fossil”, e.g. in the International Arbitration Rules of the **Zürich**

Chamber of Commerce of 1989, in those of the Arbitration Court of the Hungarian Chamber of Commerce of 1993 as well as in the Arbitration Act of Yemen of 1992.

261 Article VII must, today, be seen and appreciated as one of the **most significant milestones** in the development of modern international arbitration, because it paved the way towards **freeing international arbitral tribunals from the ties of local laws**. A more detailed analysis of its significance for the later legislations in Europe and the principal institutional arbitration rules (ICC, LCIA, AAA, WIPO, Vienna, NAI, DIS (Deutsche Institution für Schiedsgerichtsbarkeit e.V.) etc. and the UNCITRAL Arbitration Rules) can be found in Blessing, Regulations in Arbitration Rules on Choice of Law, in ICCA Congress Series No. 7, 391–446, in particular 418 ss., and in the report by the same author entitled Choice of Substantive Law in International Arbitration, JIntArb 2/1997, 39–65.

c) *The ICSID Convention 1965*

262 The **World Bank Convention** on the Settlement of Investment Disputes between States and Nationals of other States of 28 March 1965, known as the **ICSID Convention** or the **Washington Convention**, must be mentioned. The Convention provides for arbitration when disputes arise between a state on the one hand and a national of another state. By the end of August 1998 the Convention had been signed by 144 States, but only 129 had ratified it (see Mealey's International Arbitration Report, August 1998, 15; see also the listing as annually published in the ICCA Yearbook). ICSID decisions are regularly published in the ICCA Yearbooks. The most recent ratifications in 1995 came from Nicaragua, Venezuela, Mozambique, Bolivia, Oman, Uzbekistan, St. Kitts & Nevis, and the Bahamas; the most recent signatories are Kyrgyz, Bahrain, Guatemala and Panama. We may note that, when the Washington Convention was promulgated, the Latin American countries collectively abstained from adhering to it, as a drawback of the **Calvo Doctrine**; however, they recently started to ratify the Convention.

263 The ICSID Centre offers a possibility for states interested to receive foreign investments to provide for the jurisdiction of the Centre in their investment promotion legislations, and indeed a great number of the approximately 5000 inter-state BITs (Bilateral Investment Agreements, see their publication in the ICSID's multi-volume collection of Investment Treaties) include an undertaking to arbitrate claims of the investor. See generally Sornarajah, the International Law on Foreign Investment, 1994. This will create jurisdiction for the Centre even in the absence of an arbitration clause or arbitration agreement concluded between the individual parties; Jan Paulsson thus speaks of "arbitration without privity" (see his article in ICSID Review Vol. 10, 1995, 232 ss., in particular at 240). – Hardly any other international convention has been the subject of so much written material. This wealth of literature must, however, be contrasted with the mere 40 or so cases sponsored over the last 30 years. See also the reports currently appearing in the *ICSID Review – Foreign Investment Law Journal* and *News from ICSID*. Reports on the cases are published in four volumes of the ICSID Reports edited by Rayfuse and Lauterpacht. However, the case load increased in 1997 when ICSID registered 10 new cases. The

increase is essentially due to the fact that parties making claims under BITs (Bilateral Investment Treaties) seem to prefer the use of the ICSID arbitration system, instead of electing the use of the UNCITRAL Arbitration Rules.

One particular provision deserves to be referred to specifically: Article 42(1) of the ICSID Convention, which relates to the governing **substantive law** in the absence of a choice of law by the parties; see hereto Blessing, *Regulations in Arbitration Rules on Choice of Law*, in ICCA Congress Series No. 7, 419 ss.; Nathan, *Submissions to the International Center for Settlement of Investment Disputes in Breach of the Convention*, 12 JIntArb 1/1995, 27–52; Delaume, *L'affaire du Plateau des Pyramides et le CIRDI – Considérations sur le droit applicable*, Rev. arb. 1994, 39–68; cf. also further publications on the Washington Convention by Delaume, as per bibliography (above N 6).

In 1978, the Administrative Counsel of ICSID authorized the administration, at the request of parties concerned, of certain proceedings between States and nationals of other States which otherwise would fall outside the scope of the ICSID Convention, for instance where one party is a non-Contracting State, or a national of a non-Contracting State. The scope and terms regarding the administration of those proceedings are set out in the “**ICSID (Additional Facility) Arbitration Rules**” which, in essence, are based on the ICSID Rules, but reflecting some provisions derived from the UNCITRAL Arbitration Rules and the ICC Rules. While under Article 53 of the ICSID Convention a **judicial review** of an arbitral award is excluded, awards rendered under the ICSID (A.F.) Rules will not be insulated from judicial review under national law. Instead, the recognition and enforcement of awards made under the ICSID (A.F.) Rules will be governed by the law of the forum, including applicable international conventions such as the New York Convention of 1958.

Under both the ICSID Rules and the ICSID (A.F.) Rules, the majority of the arbitrators sitting on a tribunal are required to be nationals of third countries (Article 39 ICSID Rules, Article 7 (1) ICSID (A.F.) Rules).

e) The Moscow Convention of 1972

The Moscow Convention of 26 May 1972 provided for a referral to arbitration of all disputes which arise between economic organizations of the former CMEA countries. The arbitration rules were unified in 1974 under the “Uniform Arbitration Rules of the Arbitration Courts attached to the Chambers of Foreign Trade of the CMEA Countries”; see ICCA Yearbook 1976, 147–156. They were slightly amended in 1987. Arbitration was thus the **compulsory** dispute resolution mechanism within the COMECON, and the system became widely harmonized throughout the member states. Awards were final and binding and enforceable in the same manner as court judgments; grounds for refusal of enforcement were strictly limited.

Most CMEA countries only had one arbitration court, except e.g. the former Soviet Union which had the Foreign Trade Arbitration Commission (F.T.A.C.) and the Maritime Arbitration Commission (M.A.C.). For a detailed comparison of these rules with those of the major Western arbitration institutions, see Blessing, *The*

Major Western and Soviet Arbitration Rules, JIntArb 3/1989, 7–76. The legal nature of these permanent arbitration courts had been the subject matter of debate. Were they comparable, in terms of independence, to Western arbitral tribunals set up e.g. under the ICC Rules, or were they closer to state courts? Could the arbitrators be regarded as sufficiently independent and impartial, given the fact that in most cases the arbitrators had to be chosen from among the persons listed on the arbitrators' lists of the particular arbitration court, which lists in most cases only contained the names of nationals of that country? Was it justified that awards rendered by these arbitrators qualified for recognition and enforcement under the New York Convention of 1958 (which by the way provides in its Article I (2) that the term "arbitral award" shall include awards made by a permanent arbitral body to which the parties had submitted their dispute, an insertion that had been made at the request of Eastern European countries; see also Article I (2) lit. b of the European Convention of 1961).

269 Another question that typically arose in those arbitrations was the question whether the foreign trade organization (which had to be used by the local entities that intended to engage in foreign business and trade) could be or had to be identified with the state under which it had been constituted. A first famous case in point arose in the dispute between Sojuzneftexport and Israel, when the former invoked in its favour the export prohibition affecting exports to Israel during the war between Israel and Egypt. The question essentially was whether Sojuzneftexport could be regarded as being sufficiently independent from the Soviet Union; the award of 3 July 1958 (53 A.J.I.L. 787 (1959)) came to the conclusion that Sojuzneftexport enjoyed sufficient independence so that it could be distinguished from the state.

270 Since the dissolution of the Soviet Union and the creation of 14 independent states, many of them have reformed their arbitration laws on the basis of the UNCITRAL Model Law, which laws provide for more freedom of the parties. For instance, parties may now freely select their arbitrators (except in Romania). In general, the view expressed is that the Moscow Convention has ceased to exist.

f) The Inter-American Convention on International Commercial Arbitration 1975

271 The **Inter-American Convention on International Commercial Arbitration** of 30 January 1975 ("**Panama Convention**"), which has since been ratified by 16 countries, is of a regional importance. The New York Convention served as a model and was largely followed. The Panama Convention marks a very significant improvement regarding the recognition of an arbitration clause or arbitration agreement, by doing away with the requirement, in some of the Latin American states, according to which an arbitration clause was nothing more than a kind of natural obligation which had to be corroborated by a fresh submission agreement once a dispute had actually arisen. According to its Article 3, parties were free to determine the arbitral procedure; absent such agreement, the procedure would be conducted under the Rules of the Inter-American Commercial Arbitration Commission (the "IACAC Rules"). Those Rules were first established in 1934 and changed significantly, effective 1 January

1978, when – with but a few exceptions – the UNCITRAL Arbitration Rules were incorporated.

The most recent ratifications of the Panama Convention came from Argentina on 5 January 1995 and from Brazil on 27 November 1995. The Convention has been signed, but not yet ratified, by Bolivia, the Dominican Republic and Nicaragua. For further details see Norberg, General Introduction to Inter-American Commercial Arbitration, and the wording of the Convention, in: ICCA Yearbook Commercial Arbitration 1978, 1, 15 and 231; for the up-dated Rules of Procedure see ICCA Yearbook 1983, 77 ss.; cf. also van den Berg, The New York Convention 1958 and the Panama Convention of 1975, ArbInt 1989, 214 ss. and Sanders, Chapter 12 on Arbitration contained in Volume XVI of the International Encyclopedia of Comparative Law (1996), Notes 73–75. 272

g) The Riyadh Convention of 1983

The Convention on Judicial Cooperation Between States of the Arab League, the so-called **“Riyadh Convention” of 6 April 1983** was signed by all 21 member states of the Arab League, but was ratified only by 12 member states: Iraq, Jordan, Libya, Mauritania, Morocco, Palestine, Somalia, Sudan, Syria, Tunisia and the Yemen Arab Republic (it should be remarked that Saudi Arabia has not yet ratified the Riyadh Convention). For these countries, the Riyadh Convention replaced the **Convention of the Arab League** on the Enforcement of Judgments and Arbitral Awards of 1952. 273

By virtue of a further Convention, the so-called **“Amman Convention” of 14 April 1987** (in force since 1993, after ratification by Iraq, Jordan, Libya, Palestine, Sudan, Tunisia and Yemen) an Arbitration Center with jurisdiction in commercial disputes was created in Rabat. 274

In this connection, reference should also be made to the **Euro - Arab Arbitration Rules** of 1983 which had been specifically designed to provide a suitable format for arbitration proceedings between European parties (mostly suppliers) and Arabic partners. The objective had been to ascertain a strict parity between Arabic and Non-Arabic interests, on the understanding that other existing arbitral institutions, such as the ICC, were seen as institutions rooted in the “Western world”. Excellent congresses have been organized to promote the Euro - Arab arbitration system, for instance in Bahrain, Tunisia and Amman. However, despite the excellent idea and the impressive promotion by Sheikh Salah al Hejailan and Fathi Kemicha, the Euro - Arab arbitration system, has not as of yet come to fruition. 275

4. The Major Influence of Institutional Arbitration Rules on the Development of National Laws

Over the last few decades, parties to disputes, as well as arbitral institutions, (such as the ICC etc.) have carefully chosen as countries in which to conduct their arbitration proceedings those states/towns in which arbitration-friendly framework conditions 276

prevail. In other words, being the choosers, they have favoured host countries whose framework conditions (in particular as regards their arbitration acts) harmonize well with the institutional arbitration rules (thus respecting their provisions as being the rules chosen pursuant to the agreement of the parties). One can go so far as to affirm that national legal systems have effectively been compelled to harmonize their international arbitration laws along lines which are in harmony with the rules of the major international arbitral institutions (e.g. those of the ICC). Experience over the past two decades has shown that a country whose arbitration legislation differs from, or runs against the arbitration rules of major institutions will only in exceptional cases become the host country in which an international arbitration is to be conducted.

277 Because of their major importance worldwide the **ICC Arbitration Rules** (and their line of thinking) have acquired a particularly **significant precedent-setting role**, and have influenced national legislation on international arbitration – including that of Switzerland. In addition, there are two other sets of rules which have widely influenced legislative work on the **modernisation** of national arbitration legislation: first, the *UNCITRAL Arbitration Rules* and second, the *UNCITRAL Model Law*.

5. The UNCITRAL Arbitration Rules

278 The **UNCITRAL Arbitration Rules** (“UNCITRAL AR”) were shaped in the mid-1970s out of the need to create an instrument for the settlement of disputes arising in international trade in the form of internationally accepted rules for **ad hoc arbitration**. After many years of study by leading experts (among them the “father” of the UNCITRAL AR, Professor Dr Pieter Sanders) in both government and private sectors of Western industrialised countries, of socialist countries and developing countries, the UNCITRAL AR were approved by the General Assembly of the United Nations in December 1976 and recommended for use in international trade (Böckstiegel, *Erfahrungen als Schiedsrichter mit der UNCITRAL Schiedsordnung*, in: *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit*, 1990, 15/16 ss.; Sanders, *Commentary on the UNCITRAL Arbitration Rules in ICCA Yearbook Commercial Arbitration* 1977, 172–223; Rauh, *Die Schieds- und Schlichtungsordnungen der UNCITRAL*, Schriftenreihe Internationales Wirtschaftsrecht Vol. 7, Cologne 1983).

279 The UNCITRAL AR provide a real and attractive option for **ad hoc arbitration**: first, as an option or alternative to institutional arbitration under the *aegis* of an arbitral institution (such as that of the International Chamber of Commerce (Paris), the Zürich Chamber of Commerce, the London Court of International Arbitration, the Vienna Arbitral Centre etc.) and, second, as an alternative to “pure” *ad hoc* arbitration (i.e. arbitration which is solely governed by the national arbitration act – for instance, in Switzerland, by Chapter Twelve of the Private International Law).

280 Moreover, the UNCITRAL AR have been designed to serve as a **model** for arbitral institutions as their single or optional rules. For such purpose, UNCITRAL promulgated its “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules”, published in *UNCITRAL Yearbook* 1982, Part III, 420 ss., which describe the ways and

options to be considered. And indeed, the acceptance of the Rules for the latter purpose has been very favourable. They were adopted as the governing rules e.g. by the IACAC, the Regional Centres in Kuala Lumpur and Cairo, the Hongkong Centre, the Spanish Court of Arbitration and by the Australian Centres in Melbourne and in Sydney. Other institutions offer administered arbitration under the UNCITRAL AR as an alternative for using their own “home-made” rules; this is the case for the AAA, the LCIA, the BC Centre in Vancouver, the Canadian Centre, the Channel Islands Centre, the Gdynia Maritime Arbitration Centre, the Bulgarian and the Polish Chambers of Commerce, the Indian Council of Arbitration, the Italian Arbitration Association, the Stockholm Chamber of Commerce and the Vienna Centre. There exists a third group of institutions which are prepared to act as appointing authority under the UNCITRAL AR, such as the ICC, the Association of Swiss Chambers of Commerce, the Japan Commercial Arbitration Association, the Netherlands Institute, the Zürich Chamber of Commerce, the Oslo Chamber and the German Institution of Arbitration.

The UNCITRAL AR (for the most part) superseded the former **Arbitration Rules of the United Nations Economic Commission for Europe** (UN - ECE Rules) of 20 January 1966, which had previously often been used in contracts, particularly those with countries in Eastern Europe. Beyond doubt, the UNCITRAL AR are enjoying a **world-wide acceptability** and have proven to be effective. The significant Article 15 (1), for instance, reflects the important notion of excluding any impact of, or interference by, local non-mandatory provisions of law and enshrine the famous and important formula authorizing an arbitral tribunal to conduct the arbitration in such manner as it “*considers appropriate*”. Moreover, the UNCITRAL AR provide for a self-contained system of rules avoiding any reference to local courts. As regards the arbitration clause, the only requirement is that it must be “in writing”, without requiring a signature or an exchange (in contrast to the New York Convention, but in harmony with the Swiss solution as per Article 178 (1) PIL). The UNCITRAL AR also contain a self-contained system for constituting the arbitral tribunal and for determining the place of arbitration (where the parties failed to make such determinations). Where requested by a party, the arbitral tribunal is obliged to hold hearings for the presentation of evidence or for oral argument; this is certainly a justified provision also reflected in institutional rules such as those of the ICC. In connection with the determination of the applicable law, the UNCITRAL AR use the term “law”; however, at the time when they were drafted, a wide interpretation to the term “law” was given, in the sense that it would comprise the notion of “rules of law” (which includes transnational rules of law, generally accepted principles, public international law, trade usages or *lex mercatoria*). Regarding the arbitral decision, a majority will be required (with no power given to the presiding arbitrator to decide alone where no majority can be reached).

The UNCITRAL Rules acquired particular importance after 1981 because they were chosen as the arbitration rules applicable to the **Iran-US Claims Tribunal** (IUSCT), based on the **1981 Algiers Agreement** between the USA and Iran. In the past 13 years, therefore, thousands of arbitration cases have been decided on the basis of the UNCITRAL Rules, and a substantial arbitration practice in the Iran-US Claims

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Tribunal has been developed in relation to the individual provisions of the UNCITRAL Rules. The IUSCT practice has been comprehensively reported: see in particular Van Hof, Commentary on the UNCITRAL Arbitration Rules (the Application by the Iran-US Claims Tribunal), The Hague 1991; see also Aksen, The Iran-US Claims Tribunal and the UNCITRAL Arbitration Rules – An Early Comment, in: The Art of Arbitration, Liber amicorum Pieter Sanders, 1982, 1–26.

283 The UNCITRAL Rules were also the starting point so to speak for the very extensive work done for creating the **UNCITRAL Model Law** (see below). Their close links can be seen from a comparison of numerous provisions. On this point, and for a comparative synopsis of the provisions of the Arbitration Rules of the ICC, the London Court of International Arbitration, the International Arbitration Rules of the American Arbitration Association, those of the Arbitration Court of the (former) USSR Chamber of Commerce, with the provisions of the UNCITRAL Rules and those of the UNCITRAL Model Law, see Blessing, The Major Western and Soviet Arbitration Rules, JInt/Arb 3/1989, 7–76; see also A.T. von Mehren, Die UNCITRAL Schiedsordnung in rechtsvergleichender Sicht, Jahrbuch für die Praxis der Schiedsgerichtsbarkeit 1990, 86–96).

284 Shortly after adopting the UNCITRAL Arbitration Rules, the United Nations, on 4 December 1980, also approved the **UNCITRAL Conciliation Rules** (see ICCA Yearbook Commercial Arbitration 1981, 165–169, with a commentary by Herrmann, Commentary on the UNCITRAL Conciliation Rules, 170–190).

6. The UNCITRAL Model Law

285 UNCITRAL's initial endeavours to harmonise and unify the international commercial law and arbitration law date back, to the UN Resolution 2205/21 of 17 December 1966. However, the foundations for the work on a Model Law for International Arbitration were not laid down until after the UNCITRAL Arbitration Rules had been adopted (which had occurred by the UN Resolution 31/98 of 15 December 1976); the start-off for working out a model law was given at a consultative meeting in Paris in 1978 (between representatives of the UNCITRAL Secretariat, the Asian-African Legal Consultative Committee (AALCC), the ICCA (International Council for Commercial Arbitration) and the ICC). This proposed **UNCITRAL Model Law** was to be based on the provisions of the NYC of 1958 (UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958) and the provisions of the aforementioned UNCITRAL Arbitration Rules.

286 The **ICCA Conference in Lausanne** in May 1984 focused on the draft of the UNCITRAL Model Law produced that same year. The reports and materials submitted there provides vital insight into the main issues under discussion at that stage of the work (cf. ICCA Congress Series No. 2: UNCITRAL's Project for a Model Law on International Commercial Arbitration, published by Pieter Sanders, 1984).

287 The *point de départ* for working out the Model Law was the fact that the so-called **fair and reasonable expectations of the parties** (who had concluded an arbitration agreement) were often (too often) frustrated by the interference of local laws prevail-

ing at the place of arbitration. For example, local laws may frustrate the arbitral process and the parties' legitimate expectations in situations of the following nature:

- where the local arbitration law does not sufficiently recognise the **binding nature of an arbitration clause** (for instance, where local laws, as was the case in Venezuela and some other Latin American states, treat an agreement to arbitrate merely as a natural obligation without any binding force, such that parties had to agree on a new submission to arbitrate once an actual dispute had arisen),
- where local laws do not sufficiently respect the parties' autonomy in relation to the selection and appointment of arbitrators, or if party autonomy in this regard is restricted,
- where local laws do not grant the arbitral tribunal the so called *kompetenz-kompetenz* (i.e. the authority of the arbitral tribunal to determine its own jurisdiction),
- where local laws do not fully recognize the parties' authority to freely determine the procedural rules to be applied in the framework of their arbitration,
- where local laws do not – in the absence of a determination by the parties themselves – fully recognize the arbitrators' authority to determine the procedural rules as they deem appropriate, for instance by requiring that the arbitral process be governed by any kind of local rules of procedure,
- where local laws do not fully respect the parties' own choice as to the substantive law to be applied by the arbitral tribunal, or
- where local laws do not recognize the arbitrators' freedom to select the appropriate conflict of law rule so as to determine the applicable law or rules of law (for instance by requiring that the arbitrators should apply the local conflict of law system at the place of arbitration).

The need for a **globalisation and harmonisation** of international arbitration was recognized worldwide, and the ambition to craft a model law was supported by numerous international organisations as well as both public and private institutions. On purpose, the goal was not to draft an international convention, which then would have to be ratified by the states; rather, the goal was a more modest one, i.e. to simply work out a model for a piece of legislation to be adapted by the national legislators, thus allowing states more flexibility to incorporate it in their own national legislation. This approach was certainly wise, as demonstrated by the impressive acceptance which the Model Law has had to date.

The UNCITRAL Model Law was adopted by the General Assembly of the United Nations by Resolution 40/72 of 11 December 1985. Like the New York Convention, the Model Law is **compulsory reading** for every practitioner in international arbitration. As to its bibliography: In 1989, a **comprehensive review** of the individual provisions of the UNCITRAL Model Law and of the *travaux préparatoires* was presented by Holtzmann/Neuhaus, A Guide to the UNCITRAL Model Law on

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International Commercial Arbitration: Legislative History and Commentary (1989). Other important works include titles such as Broches, Commentary on the UNCITRAL Model Law on International Commercial Arbitration, 1990; Calavros, Das UNCITRAL Modell-Gesetz über die Internationale Schiedsgerichtsbarkeit, 1988; Herrmann, The UNCITRAL Model Law – Its Background, Salient Features and Purposes, ArbInt 1985, 6 ss.; Husslein-Stich, Das UNCITRAL Modell-Gesetz über die Internationale Handelsschiedsgerichtsbarkeit, IWR Vol. 8, 1990; Sanders, Unity and Diversity in the Adoption of the Model Law, ArbInt 1995, 1–38. – What are the ICC Arbitration Rules like in comparison to the UNCITRAL Model Law? We refer here to Schwartz, The ICC Arbitration Rules and the UNCITRAL Model Law, ArbInt 1993, 231 ss.

290 It has since been shown that the Model Law is indeed based on an impressive **international consensus**. It has in fact become the yardstick for modern legislation on international arbitration. The Model Law provides an almost complete legislative solution. It reflects (and respects) the **fundamental principle of party autonomy**, thereby marking a stark contrast to certain barriers erected under many national arbitration laws, which attempt (or still attempted at that time) to confine arbitration proceedings within too narrow a limit, or which impose (or imposed) mandatory procedural provisions. In addition, the Model Law also contains provisions which aim to provide **legal certainty**, e.g. those on the procedure for appointing and challenging arbitrators (Articles 11–15), those on the arbitrators' *kompetenz-kompetenz* (Article 16), those relating to *lis pendens* (Article 21), those relating to amendments of claims (Article 23(2)), or those regarding the conduct of an oral hearing (Article 24(1)).

7. Level of Acceptance of the UNCITRAL Model Law

291 After a relatively slow start, an impressive number of states and jurisdiction areas have by now adopted or incorporated the UNCITRAL Model Law in or within their national laws (either by adopting the Model Law in its entirety, or by adopting it subject to minor modifications or additions). Some useful notes on the various characteristics of its adoption are contained in the report by Sanders, Unity and Diversity in the Adoption of the Model Law, ArbInt 1995, 1–38.

292 One of the first countries to adopt the Model Law was **Canada**, at the Federal level, by the Commercial Arbitration Act of 17 June 1986, thereafter followed by all Canadian Provinces; **Cyprus** followed by its International Commercial Arbitration Law of 1987, **Australia** by the 1989 International Arbitration Amendment Act, **Bulgaria** by the Law on International Commercial Arbitration of 29 July 1988 (with subsequent amendment on 7 July 1992 and 2 November 1993), **Mexico** by the Commercial Code (Articles 1415–1437) of 22 July 1993, **Scotland** by the Law Reform (Scotland) Act 1990, Section 66, Schedule 7, the **Russian Federation** by the Law on International Commercial Arbitration of 7 July 1993, **Peru** by the Ley General de Arbitraje No. 25935 (Articles 81 to 109) of 7 November 1992, **Nigeria** by the 1988 Arbitration and Conciliation Decree, Part III, Sections 43–47, **Tunisia** by the Code de l'arbitrage of 26 April 1993 (although arbitration proceedings involving a

Tunisian state-controlled entity were excluded, a situation which causes uncertainty), **Bermuda** by the International Conciliation and Arbitration Act of 29 June 1993, **Hongkong** by the 1989 Arbitration (Amendment) Ordinance and the 1990 Commencement Notice, **Bahrain** by Decree No. 9/1994 of 16 August 1994, **Ukraine** by the Ukrainian Law on International Commercial Arbitration of 24 February 1994 (in force since 20 April 1994).

These have recently been followed by **Hungary** (Act No. LXXI of 1994, in force since 13 November 1994) and **Zimbabwe** (Act on Arbitration of 7 May 1996). **Egypt** also adopted the UNCITRAL Model Law, although with a few modifications, in its Act No. 27/1994 of 18 April 1994 (in force since 22 May 1994); one much criticised modification is Egypt's additional grounds for setting aside arbitral awards. The Egyptian Law was almost literally copied by the new legislation of the Sultanate of **Oman** (Arbitration act of 27 July 1997; see hereto El-Ahdab, La nouvelle loi sur l'arbitrage du Sultanat d'Oman, Rev.arb. 1997, 527 ss. **Kenya** also adopted the Model Law (the Arbitration Act received Presidential Assent on 10 August 1995 and entered into force in January 1996). **Singapore** followed the same example, by its "International Arbitration Act Adopting the UNCITRAL Model Law" of 31 Octobre 1994, in force since 27 January 1995 (see hereto Boo/Lim, Overview of the International Arbitration Act and Subsidiary Legislation in Singapore, JInt Arb 4/1995,75 ss. In so doing, Singapore cured the negative press it had attracted in the famous Turner-case, where prestigious foreign counsel were not allowed to plead the case before the arbitral tribunal. Certainly, that case had a devastating effect on Singapore's reputation. Today, however, we are pleased to see that Singapore – having meanwhile earned a unique reputation as one of the two best developed logistical centers of the world, next to Los Angeles – is very well positioned as an arbitration center in the region.

India's new Arbitration and Conciliation Act 1995 (replacing the outdated 1940 Act) is also based on the UNCITRAL Model Law (see World Trade and Arbitration Materials 1/1996, 87–116 and Mealey, International Arbitration Report, February 1996, 16). On 16 January 1996, the Arbitration and Conciliation Ordinance was promulgated by the Indian President, and on 2 August 1996 parliamentary approval was given. A major achievement of the 1996 Ordinance was to reverse the effect of an earlier (very much criticized) decision of the Indian Supreme Court which held that an arbitration award rendered outside of India under an arbitration agreement contained in a contract governed by Indian law would not be considered a "foreign award", regardless of who the parties were and where the award had been rendered. The effect of that decision was that such an award would not qualify for enforcement in India under the terms of the New York Convention (to which India is a party) rather, the Indian Supreme Court (in that criticized decision) held that such an award would be considered a domestic award governed by the Indian Arbitration Act of 1940 (as it was still in force at that time in 1993) and, consequently, would be subject to a review on the merits; see hereto the extract on the case *National Thermal Power Corp. v. Singer Corp.* in Yearbook Commercial Arbitration 1993, 403. The effect of the 1996 Ordinance is to eliminate Section 9 (b) of the Foreign Awards Act. Moreover, the 1996 Ordinance created a new category of "international commercial arbitration".

Within its ambit, the parties are free to designate the law applicable to the substance of the dispute. Recently, complications arose due to India's deviation from the UNCITRAL Model Law as far as the number of arbitrators is concerned: the Indian Act prohibits an even number of arbitrators. Unfortunately, India has not done away with the reciprocity reservation under the New York Convention. Therefore, recognition and enforcement of awards may only be warranted if the country of origin of the award is on India's approved list of signatory nations.

295 Furthermore, some states of the USA also adopted the UNCITRAL Model Law several years ago, including **California** in 1988 with its "Act to Add Title 9.3 to Part 3 of the Code of Civil Procedure", **Connecticut** by its "Act Concerning the UNCITRAL Model Law on International Commercial Arbitration" of 1989, **Oregon** by its "International Commercial Arbitration and Conciliation Act" in 1991 and **Texas** by its "Act Relating to the Arbitration or Conciliation of International Commercial Disputes" of 1989; **Florida**, **Georgia** and **Hawaii** have also basically followed the Model Law. The adoption of the Model Law, and in general the interplay in the USA between state law and federal law, is a difficult subject, and some "bizarre" episodes have been reported. A good insight on one particular aspect has been provided by Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of "Waiver"*, in: *The American Review of International Arbitration* 1995, 223–286.

296 Numerous other countries are in the process of modernizing their laws on international arbitration. They all are confronted with the UNCITRAL Model Law, and the standards set by it. It is to be expected, for example, that other **Central and Eastern European States** and further **CIS Republics** such as Croatia, Kyrgysistan and Mongolia will in the very near future follow the Model Law (for a concise overview on the situation in Central and Eastern Europe see Salpius, *Recent Developments in Arbitration in Central and Eastern Europe*, ADRLJ 1996, 175 ss.), **Croatia**, **Kyrgysistan** and **Mongolia**. Moreover, legislations in developing countries of **Africa** (after Kenya and Zimbabwe) are likely to join in, such as **Mozambique** and **South Africa**. **Korea**, the **Philippines** and **Thailand** are expected to be next in the row, and possibly further up-rising industrial countries of **East Asia** and in the **Pacific Rim**.

297 As far as the new legislations in **England** and **Germany** is concerned, the UNCITRAL Model Law has always been on the drawing board of the specialists working on the drafting; however, both countries have clearly gone their own ways.

8. Recent Reforms of Arbitration Acts in Europe

a) In General

298 So far, we have discussed the modernisation of numerous different national arbitration laws on the basis of the UNCITRAL Model Law. Very generally speaking, it can be said that **clear moves towards modernisation and reform** have been made in the international arbitration law field since the beginning of the 1980s. A first breakthrough had become evident with the passing of the amended **English Arbitration**

Act of 4 April 1979 and the new **French arbitration law** as per Decree No. 81–500 of 12 May 1981. These were followed in **Austria** by the Federal Law of 2 February 1983 (although a modern and integrated Arbitration Act is still not as yet in place in Austria), in **Switzerland** by Chapter Twelve of the Federal Act Governing Private International Law of 18 December 1987 discussed here, in the **Netherlands** by the new Arbitration Act of 2 July 1986, in **Portugal** by Act No. 31, 786 of 29 August 1986 and in **Spain** by Ley 36 of 5 December 1988.

Belgium amended its Uniform Law of 1972 under the date of 27 March 1985, limiting, in a rather drastic and frequently criticized step, any possibility to set aside arbitral awards only to those procedures where a party with connections to Belgium is involved (see Article 1717 (4) of the Belgian Judicial Code). However, a new Belgian law has been adopted on 2 April 1998 which, *inter alia*, removes the automatic suppression of the possibility to set aside an award. The new solution, therefore, is now quite identical to the solution prevailing in Switzerland.

Partial reforms have also been implemented in various other countries, including **Norway** by its Act of 23 May 1980, **Luxembourg** by the Grand Ducal Décret of 8 December 1981, **Italy** by its Act No. 25 of 5 January 1994 (Articles 806–840 of the Codice di Procedura Civile), which came into force in April 1994, **Finland** by the Act which came into force on 1 December 1992, **Bulgaria** by the Bulgarian Arbitration Act (Act No. 60 of 5 August 1988 and the subsequent amendments in 1992 and 1993) and **Romania** by the Act of July 1993. The **Czech Republic**, with its old (CSSR) Arbitration Act No. 98 of 1963 (quite rightly criticised in many respects by investors and foreign trading partners), had a great deal of ground to make up; the Czech Republic passed a new *Arbitration Act* on 1 November 1994, modelled on the UNCITRAL Model Law, but regulating at the same time domestic and international arbitration.

All those working on the modernisation of national arbitration laws are – since the mid-1980s – faced with the provisions of the UNCITRAL Model Law. Generally, they serve as a guidance, and national legislators are called upon to decide whether the Model Law is to be adopted or whether their own solution is to be preferred.

b) England's 1996 Arbitration Act

The question of the adoption of the UNCITRAL Model Law had been the subject of particularly in-depth debate in **England**, where the new Arbitration Act 1996 was approved by Parliament in June 1996 (reproduced in *World Trade and Arbitration Materials* 1996, No. 4, 47–112). The so-called “Mustill Report” produced in June 1989 advocated relying as closely as possible on the UNCITRAL Model Law, although with certain variations, along with the proposal of a uniform solution for both national and international arbitral tribunals. The Draft Arbitration Bill was introduced by the DAC (*Departmental Advisory Committee*) in February 1994 and experts from all over the world were invited to put forward their comments. This Draft Bill was not very favourably received (at least on the Continent); its distinctive Anglo-Saxon characteristics in both substantive and formal respects attracted criticism. The

DAC Bill was already quite removed from the UNCITRAL Model Law (although the UNCITRAL Model Law, and each one of its provisions, always were – as had been explained by V.V. Veeder – on the working tables when drafting the English Bill). As *a result of the manifold criticism*, the DAC was therefore instructed to once again go “back to the drawing board” and to submit an improved Bill. In autumn 1994, Lord Justice Saville took over the chairmanship of the Mustill Committee from Johan Steyn. He provided a good insight into the “pre-natal stages” of the new law: Saville, *The Arbitration Act 1996 and Its Effects on International Arbitration in England*, in: “Arbitration” Vol. 63 No. 2 (May 1997), 104 ss.

303 This new Bill, which promised to contain considerable improvements, was eagerly awaited and was presented in the summer of 1995. Since then, the Bill came through various further “mills”, including that of Lord Justice Saville who reworked the entire text. A lot of input also came from the working party under the leadership of the well-known Arthur Marriott who had voiced substantiated criticism on the Bill (see e.g. Marriott, *The New Arbitration Bill*, in “Arbitration” (Journal of the Chartered Institute of Arbitrators), Vol. 62/No. 2, 1996, 97 ss.).

304 The Bill, having now become the 1996 Arbitration Act, provides for **one and the same regime for both domestic and international arbitration**. Such a solution also existed in Switzerland under the Intercantonal Arbitration Convention, the so-called “Concordat”, and had proved, in Switzerland, to be as **impracticable** as trying to make a square out of a circle (because such legislation will inevitably have to take into account a number of particularities of purely domestic nature which may not deserve recognition in the framework of international arbitration). Compromises, therefore, had to be made in England as well. The 1996 Act has meanwhile entered into force as of 31 January 1997, and it remains to be seen whether it will satisfy today’s expectations. We may say that the former *1979 Arbitration Act* did not fulfil those expectations in various respects, and this is the main reason why England had not, up to now, been able to enjoy the importance it deserves as an international place of arbitration, despite its indeed very impressive potential in terms of eminent legal practitioners and outstanding arbitrators.

305 One thing seems clear and deserves particular appreciation: Great care was applied to the *very careful structuring* of the numerous Sections. Some of these sections come over with impressive clarity; others seem to be slightly over-burdened and will require very careful reading. Some preliminary concern has been voiced e.g. in respect of the state courts’ powers to intervene according to Section 12, regarding the possibility for the parties (unless otherwise agreed) to refer a point of law to determination by a state court according to Section 45, regarding the default provision under Section 41 (4) as well as the default provision under Section 17 (1), and in respect of the relatively wide scope of challenge or appeal for “serious irregularity” under Section 68 (e), (f) and (i), coupled with the possibility to file an appeal on a point of law (which would seem to succeed if the decision on the point of law is “obviously wrong”, see Section 69 (3) (c)(i), whereas in other modern legislations, including that of Switzerland, the threshold to be met will be higher in that an incompatibility of the *result of the award* as such with *public policy* will be required for a successful challenge).

Finally, a much regretted section is Section 46 (3) on the determination, by the arbitral tribunal, of the **applicable law** in those cases where the parties have not made (or have not been able to make) such determination themselves. Section 46 (3), deliberately (as Lord Justice Saville explained in May 1996), requires the arbitrators to determine “the law”, and does not instead allow them to determine the applicable **“rules of law”**. Those who know and have practically experienced the *crucial importance* and the **guarantee function** which must be attributed to the arbitrators’ authority to determine the appropriate “rules of law” (and not only one particular law, being a national law), therefore, have already concluded that England will not be a suitable place to host international arbitrations wherever the parties have not themselves made a determination of the applicable law, because the parties might not benefit from a *protection* which is likely to become even more important in the future. Recent arbitration cases have shown with impressive clarity that the arbitrators’ authority to determine “rules of law” is a most essential prerequisite to allow justice and predictability to reign and to allow the arbitral tribunal to reach a correct and just decision. However, this is not the place to develop this aspect further. – These are but a few preliminary observations made at a time prior to the availability of a commentary on the new Act. A first annotated guide was published in 1996: Merkin, Arbitration Act 1996. Articles on the new Act by Veeder, Mustill and Reymond appeared in *Revue de l’arbitrage* 1/1997, since then many others were published; see the Bibliography for details.

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c) Germany

The question of a *tel quel* adoption of the Model Law (as this had been advocated for example by Klaus Lionnet) or the shaping of an independent German solution has been the subject of intense debate in **Germany** as well. For a discussion regarding the debate in Germany, see Sanders, The Introduction of UNCITRAL’s Model Law on International Arbitration into German Legislation, *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit* 1990, 121–130. The report submitted in February 1994 by the Committee for the Reorganisation of Arbitration Law (with a discussion paper on the amendment of the Tenth Book of the German Code of Civil Procedure (Zivilprozessordnung)) did, in itself, present a rather independent German solution, although it was said to have been closely modelled on the UNCITRAL Model Law (see the report by the Committee on the Reorganisation of Arbitration Law, chaired by Rolland, of February 1994).

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Like in England, the Committee suggested a **uniform set of rules for both national and international arbitration proceedings** (see the illustrative paper produced with regard to this solution by Sanders, *Unity and Diversity in the Adoption of the Model Law*, *ArbInt* 1995, 4/5). Sceptics fear that only a **compromise solution** can be expected, with insufficient attention being paid to the **specificity of international arbitration**; a **“proceduralisation”** of international arbitration procedure is feared (because of too close reliance upon, or the analogous application of, provisions of the German Code of Civil Procedure and the very extensive comments thereon contained in comprehensive standard works). What has already been said with regard

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to England also applies to Germany: it is partly as a result of former criticism of various provisions of the Tenth Book of the German Code of Civil Procedure that it had not, in the past, been possible for Germany (with its particularly impressive reservoir of eminent lawyers and experienced legal practitioners, professors and experts) to position itself in the place it deserves as a host country for international arbitral tribunals. It would be most desirable, in the interests of the international business community, for this situation to be changed by a particularly favourable 1997 German Arbitration Act, and a circumspect application of its provisions. No doubt, our German friends will make a substantial contribution to achieve this goal. The new Act has meanwhile entered into force as of 1 January 1998. Many scholarly writings have been published during 1997 and 1998; for a short summary see Gino's Lörcher: *La nouvelle loi allemande sur l'arbitrage*, ASA Bulletin 1998, 275 ss. A more detailed analysis is provided in the book by Lörcher/Lörcher.

309 A particularly noteworthy provision is § 1025 (3) which fills a gap in the UNCITRAL Model Law in that it offers court assistance in aid of arbitration even in those cases where the place of arbitration had not been determined, provided however that a party has its place of business or residence in Germany. Other interesting provisions include § 1025 (2) and 1050 which provide for court assistance even for foreign-based arbitrations or not-yet-seated arbitrations. Many other provisions would deserve to be mentioned here. However, we may leave the subject at this point, hoping that Germany will in the years to come earn a high prestige as a country hosting international arbitrations. Indispensable reading is the special volume devoted to the German Arbitration Act: Arb.Int. 1/1998.

9. Review on Other Modernisations of National Legislations

a) In Australia, the Middle East and Africa

310 A **breakthrough atmosphere** for the UNCITRAL Model Law has extended beyond Europe – albeit with a slight timelag. The **Australian Federal States** were on the forefront to pass uniform Arbitration Acts modelled on the UNCITRAL Model Law.

311 **Lebanon** brought in a modern arbitration law by its Decree No. 90/83 of 16 September 1983 (adopting the French Decree No. 81–500); however, Lebanon has not ratified the New York Convention; for details, see Chafic Nehme's contribution in the LCIA Newsletter Vol. 1 No. 1 (1996), 6 and the extensive report by El-Ahdab in JIntArb 3/1996, 39–118. The **United Arab Emirates** passed their Act of 8 March 1992 (which, however, does not reflect a number of important notions and provisions of the UNCITRAL Model Law). The most recent step has been taken by **Iran** whose parliament (the Majlis) adopted the International Commercial Arbitration Act on 17 September 1997 (Iranian Official Gazette No. 15335 of 20 October 1997, 1–4); for a report thereon see Seifi, *The New International Commercial Arbitration Act of Iran, Towards Harmony With the UNCITRAL Model Law*, JInt.Arbit 2/1998, 5–36.

312 **Djibouti** had given itself a new Arbitration Act in 1984 (which had also by and large followed the French model). **Nigeria** had promulgated a new Arbitration Act by Decree No. 11 of 14 March 1988, many provisions of which were inspired by the

UNCITRAL Model Law. In other parts of **Africa** arbitration is progressing slowly; see the comprehensive overview by Assouzu, *Arbitration in Africa: Agenda For Reform*; ADRLJ 1997, 373–396.

b) In Japan, Taiwan, Korea and Thailand

Legislative amendments in **Japan** have not yet been forthcoming (Part VIII of the Code of Civil Procedure of Japan of 1980 is still based on the German Code of Civil Procedure of 1877); arbitration in Japan, still today, plays an insignificant role, in contrast to **mediation**; for instance, it has been reported to the World Intellectual Property Organisation (WIPO) that, out of some 140,000 disputes arising per year, only a handful go to arbitration; compare also Munakata, *Recent Developments on International Arbitration in Japan*, in “Commercial Arbitration” published by the Commercial Arbitration Association of the ROC, Taiwan, No. 35/1994, 31 ss.). The most recent book on the topic comes from W.S. Davis jr., *Dispute Resolution in Japan*, October 1996. 313

The same applies to **Taiwan**, whose Commercial Arbitration Act of 20 January 1961 is very outdated, despite revisions on 11 June 1982 and 26 December 1986. The work on changes is nevertheless in progress in Taiwan, with the internationally-oriented younger generation being strongly in favour of adopting the UNCITRAL Model Law. It is still uncertain at the present date whether the more conservative circles will be prepared to adopt this path. 314

Korea’s Arbitration Act dates back to 1966 (Law No. 1767 of 16 March 1966, as amended by Law No. 2537 of 17 February 1973). For an overview, see Lee, *Dispute Resolution in the Republic of Korea: A General Overview*, in: *World Arbitration & Mediation Report*, January 1996, 16 ss. Various perceptions of the Arbitration Act would require modernisation; the same must be said in respect of the Arbitration Rules of the Korean Arbitration Board of 16 November 1989; Swiss and foreign investors, therefore, have shown reluctance to agree to arbitration in Seoul, unless they had the possibility to increase their prices payable by the Korean party. One of the problem areas is the requirement that arbitrators have to be chosen from the list of arbitrators maintained by the KCAB (Korean Commercial Arbitration Board) and that, unless otherwise specifically agreed by the parties, each arbitrator must reside in Korea (Article 19 (2) KCAB Rules). Moreover, each party may request translation or interpretation into the Korean language according to Article 31; the award (to be rendered within 30 days after closing the hearings) will have to be written in Korean, exceptionally in Korean and English (with the Korean version prevailing in case of discrepancy). – Thus, there seems to be quite some similarity with the situation in Mainland China (see the following sub-title). However, the ICCA Conference of October 1996 in Seoul (extremely well organized by the KCAB) triggered certain reforms and improvements. For instance, a new arbitrators’ list with numerous non-Korean professionals has been established in view of the ICCA Conference. Moreover, KCAB has devoted much effort to perfect the administration of the cases referred to it. Workload is increasing significantly; see the KCAB Guide to Arbitration Practice in Korea, published in 1998 which also contains the latest ver- 315

sion of the KCAB Commercial Arbitration Rules (as amended 1989, 1993 and 1996) and the Korean Arbitration Laws.

316 **Thailand** passed its Arbitration Act of 13 August 1987.

c) In the People's Republic of China

317 The **People's Republic of China**, already today one of the most important investment countries and, in all probability, the future **world centre and number one economic power**, is also finding it hard to effectively modernise its arbitration law. The old Chinese Arbitration Act was (quite justifiably) criticised by international experts and led to China paying a high price for it; this is because, on the one hand, particularly in major investment contracts with the Chinese State and State organisations, it was and still is almost impossible for the parties under the CIETAC Rules to agree on anything but on the arbitration procedure and, on the other hand, European/American partners in trade and industry could quite understandably only protect themselves from the higher risk connected with arbitration under the CIETAC Rules by raising up the price for their goods and investments.

318 The new **Chinese Arbitration Act** was therefore eagerly expected at the end of June 1994; the author of this Introduction and several eminent international experts made an urgent appeal to the authorities in the People's Republic of China for the new Act to first of all be circulated on the international scene in its draft form and for it not to be passed until international comments had been received – a path successfully adopted in 1994 and 1995 by England, Germany and Sweden when those countries were in the process of re-shaping their arbitration acts. Unfortunately, however, this was not done: the new Chinese Arbitration Act was promulgated in August 1994 without taking into account international comments and came into force as of 1 September 1995. It is somehow disappointing in many respects and unfortunately will not make it easy for China to obtain its desired investments from foreign partners (who tend to seek a reliable arbitration regime as an important safety-device which ought to be in place when entering into a investment contract with a foreign party). However, it would seem that the Chinese government has realised as it continues to pay a high price for the present situation. It has set up various delegations since Spring 1995, with instructions to approach the leading international arbitration centres (including Switzerland) to discuss central arbitration questions locally. These discussions and consultations led to an intensive exchange of opinions.

For the numerous scholarly writings on arbitration parameters in China and under the CIETAC Rules, see the above discussion regarding the CIETAC Rules and the Bibliography.

d) In Latin America

319 A breakthrough atmosphere has even been felt in some countries in **South America** which abandoned the Calvo-Doctrine. It should be remembered that, for example in **Venezuela** and **Brazil**, an arbitration clause contained in a contract signed by both sides was considered, according to overwhelming academic opinion and court prece-

dents in these countries, to be a merely (unenforceable) natural obligation (a notion that had been borrowed from the old French law as it applied in France until the 1920s and which had significantly influenced the Latin American legislations). The result of this was that it had not been possible to conclude a legally binding arbitration agreement (in the sense of an arbitration clause or a submission agreement) until a dispute arose.

In **Venezuela**, for instance, such arbitration clause had to be reconfirmed once the dispute had arisen, such confirmation requires the approval of the national courts. The resultant factual and legal uncertainty is quite obvious and was responsible for much hesitation on the part of many foreign contracting parties considering whether or not to conclude a contract. As of today, the fact is that Venezuela still does not have a national law regulating commercial arbitration. Rather, there are separate regulations on arbitration in specialized sectors, such as maritime, consumer and agricultural matters. Arbitration therein is seen as a merely ancillary feature of the legal system, governed by regulatory concepts that date to the turn of the last century. Against this background, progress is urgently needed and, to this end, a bill has now been prepared in Venezuela to modernize its system of domestic and international commercial arbitration. The proposed legislation is said to be modelled upon the 1985 UNCITRAL Model Law; see World Arbitration and Mediation Report, March 1998, 78–81. No doubt, the Panama Convention is starting to mark its influence on this development.

Even earlier, **Brazil** (one of the last South American countries to do so) had started to put its arbitration law on a modern footing (Senate Bill No. 78/92), which led to the enactment of the New Brazilian Arbitration Act on 23 September 1996. Brazil has not yet ratified the NYC, but its provisions are mirrored in the Act itself; see the comprehensive report by Barral/Cardoso: Arbitration in Brazil: The 1996 Act, Mealey's International Arbitration Report, August 1998, 16–31, as well as the report by Emrich, The Evolving Nature of Arbitration in Brazil, Mealey's International Arbitration Report, September 1998, 20–42. **Venezuela**, however, had acceded to the NYC on 8 February 1995, followed by **Bolivia** on 28 April 1995.

Other **Latin American countries** had, in the past, shown a hesitant attitude towards arbitration, a fact which certainly has to do with the 19th century's **Calvo Doctrine** which must be understood as a reaction to foreign intervention in Latin American countries. The doctrine required that, when disputes arise out of investment contracts or technology transfer contracts, such disputes should be referred to the national courts in the particular Latin American country and should be governed by that country's national laws. The so-called **Calvo-clause** found its way e.g. into the Constitution of Mexico and Peru as well as into the regional **Andean Foreign Investment Code** entered into by Venezuela, Bolivia, Peru and Ecuador in 1977; according to that Code, jurisdiction of arbitral tribunals and the application of foreign law for investment contracts and technology transfer contracts was excluded. Thus, under the Calvo doctrine, arbitration was **not** a recognized method for settling those international disputes. However, today, the influence of the Calvo Doctrine is weakening. This can be seen, for instance, by the recent ratifications coming from Latin American countries of the **ICSID Convention** and the reforms that are taking place in respect of the national arbitration acts (see e.g. **Colombia's** Acts of 7 Octobre 1989

and 21 March 1991). For a basic review and numerous cross references, see Grigera-Naón, Arbitration in Latin America: Overcoming Traditional Hostility, *ArbInt* 1989, 137 ss. – The ICC, in May 1997, published a Special Supplement to its Bulletin on International Commercial Arbitration in Latin America ICC Publication No. 580). It provides an excellent overview on the actual status. Moreover, the enforcement of arbitral awards in Latin American countries has been the topic at the occasion of the Vancouver IBA Conference in September 1998; a publication of the extensive reports is under preparation.

e) New Arbitration Centres Outside Europe

- 323 A large number of new **international arbitration and dispute resolution centres outside Europe** have recently come into being. Mention should be made of those established in Lagos, Cyprus, Cairo, Tunis, Amman, Bahrain, Abu Dhabi, Dubai, Oman, Djibouti, Mauritius, New Delhi, Kuala Lumpur, Singapore, Beijing, Hongkong, Seoul, Taipei, Tokyo, Melbourne and Sydney, Quebec and Vancouver and Bermuda. Their number and importance is increasing, although only a few will succeed in earning worldwide importance. In contrast, international arbitration in the USA is still comparatively insignificant, as compared to *domestic arbitration* in the USA handled by the AAA (American Arbitration Association), with some 60,000 cases a year.

f) A Growth Industry?

- 324 It is sometimes said that international arbitration has become a “**growth industry**” which is becoming increasingly commercialised. However, in Switzerland, things are not viewed that way. The upturn in arbitrations is but a necessary consequence of the heavy increase in world trade. The WTO Report for 1996 estimates the value of exported goods with almost 5,000 billion US Dollars for 1995 (contrasted to only 575 billion in 1973), whilst foreign direct investments were estimated at 315 billion US dollars (compared to 25 billion in 1973). The trade in services for 1996 was estimated at 1,200 billion US Dollars. The upturn of international arbitration thus only mirrors this impressive development. The increase in the case load in Switzerland is an expression of the requirement of the parties that disputes should not be determined by national courts, but by arbitrators whom they trust, sitting on neutral territory. In addition, there is also an unmistakably strong growing need for a more efficient settlement of disputes by way of so-called **ADR methods** (which depend, however, on the willingness of both parties to cooperate and do not result in an enforceable decision); cf. the last Sub-Section of this Introduction.

10. A New Era: Arbitration Based on Treaties (BITs, EDAs, NAFTA, Energy Charter)

a) *Economic Development Agreements (“EDAs”) and other Bilateral Investment Treaties (“BITs”)*

Could there be *arbitration without an arbitration clause*? The obvious answer would be to say NO, because arbitration, in its traditional connotation, is a **consensual process** and as such, will be premised on the existence of an arbitration clause or arbitration agreement linking the parties. However, it would be quite wrong to conclude that an arbitration clause or arbitration agreement will always be required for establishing the jurisdiction of an arbitral tribunal: 325

First, there is a number of situations where a non-signatory party “X” may become bound under an arbitration agreement concluded between the parties “A” and “B”. This may occur for instance in the case of legal succession, or as a consequence of an agency, or on the basis of the so-called “**Group of Companies Doctrine**” etc. (see hereto ASA Special Series No. 8 “The Arbitration Agreement – Its Multifold Critical Aspects”, with reports by Blessing, Derains, Jarvin, Jarosson, Sandrock and Staufer). This is one of the most important and indeed burning issues in international arbitration, and has triggered extensive debate. 326

Second, two parties may have provided for arbitration in the framework of one contract, but not for other or subsequent contracts. In this connection, the so-called “**Single/Uniform Business Transaction Theory**” has developed criteria for determining whether or not an arbitration clause contained in only one of the various contracts would be sufficient to also provide for arbitral jurisdiction in respect of the other contracts (see hereto the detailed discussion in the ICC Award No. 7375 of 5 June 1996 in re *M.O.D. of Iran v. Westinghouse*, 32/33 and 64–74, published in Mealey’s International Arbitration Report, December 1996; see also the ICSID Case No. Arb/82/1 in re *SOABI v. Republic of Senegal*, ICCA Yearbook 1992, 42–72, in particular 51 ss. 327

Third – and this leads over to the topic under the present heading – arbitral jurisdiction may be established on the basis of a **bilateral or multilateral treaty** between States. We have already discussed above the procedures under GATT and WTO. However, a relatively novel development is emerging where private investors will also be able to step into the arena of arbitration against a State, without the investor’s home country espousing the case. One of the first cases of that nature was the *SPP v. Republic of Egypt* Case (known as the “Pyramids” Case) where an aggrieved investor successfully initiated an ICSID arbitration on the basis of a unilateral promise contained in the 1988 Egyptian Investment Law. In vain, the Government of Egypt contended that the text of that law was insufficient to create compulsory jurisdiction of an arbitral tribunal; see the excerpts of the jurisdictional award rendered on 14 April 1988 published in ICCA Yearbook 1991, 28. 328

Similar situations have occurred under a number of **Economic Development Agreements (“EDAs”)** and other **Bilateral Investment Treaties (“BITs”)** which have largely replaced the former concession agreements. According to Paulsson 329

(Arbitration Without Privity, ICSID Review, 1995, 232, 236 ss.) there might exist as many as 5000 BITs. Whatever the number, one may easily imagine the vast potential of disputes which, according to the particular terms of the relevant BIT, might come under arbitral jurisdiction. For an interesting insight into issues that arose under the U.S.-Turkish Bilateral Investment Treaty see Kreindler, “Issues in Drafting and Performance of Arbitration Agreements in the Context of Bilateral Investment Treaties and Energy Projects: The Example of Turkey”, in Mealey’s International Arbitration Report, May 1997, 25 ss.

330 In general, BITs aim to address the needs of investors who, in most cases, will be expected to employ large capital investments with significant commercial risks which, normally, will only be recovered over a long period of time sometimes extending to decades. Thus, **political risks** are a significant factor and may undermine the economics on which an investment contract may be premised. Other illustrations of the particular risks involved have to do with the insecurity of title to real estate in many of the host countries, lack of negotiating authority and uncertainty of contractual powers, unclear, unstable or contradictory legislation, difficult regulatory framework for imports, exports and the movement and repatriation of capital, unpredictable exercise of sovereign powers which might be used for abrogating legal and contractual rights granted to an investor.

331 All of these aspects strongly **speak for, and indeed require, an internationalization** of perceptions, including a delocalization of the rules of law governing the investment (such that, in most cases, either public international law or **general principles of law** will be referred to as being applicable), and require an independent dispute resolution mechanism. Leading concepts were discussed in famous cases such as in *Saudi Arabia v. Aramco* (27 I.L.R. 117/1963; Award of 23 August 1958), *Sapphire v. NIOC* (35 I.L.R. 136 (1967; Award of 15 March 1963), *TOPCO/CALASIATIC v. Libya* (53 I.L.R. 389/1979; Award of 19 January 1977), *BP v. Libya* (53 I.L.R. 297/1979; Award of 1 August 1974), *LIAMCO v. Libya* (62 I.L.R. 141/1982; Award of 12 April 1977), *AGIP v. The Congo* (21 I.L.M. 726/1982; Award of 30 November 1979), *Revere Copper v. OPIC* (56 I.L.R. 258/1980; Award of 24 August 1978), *Elf v. NIOC* (Yearbook Commercial Arbitration 1986, 97; Award of 14 January 1982), *Kuwait v. Aminoil* (21 I.L.M. 976/1982; Award of 30 November 1979), *S.P.P. v. Egypt* (22 I.L.M. 752/1983; Award of 11 March 1983), *Deutsche Schachtbau v. R’As Al Kaimah and Shell* (1990 App.Cas. 295/1987, 2 All E.R. 769 and Yearbook Commercial Arbitration 1988, 522 and 1989, 737), *Wintershall v. Qatar* (28 I.L.M. 795/1989; Partial Award of 5 February 1988), *AMOCO v. EGPC* (ICC Case No. 5331 Award of 18 January 1988, not published), *MOD Iran v. Westinghouse* (ICC Case No. 7375, Preliminary Award of 5 June 1996, fully published in Mealey’s International Arbitration Report, December 1996). Compare further Lillich, *The Law Governing Disputes Under Economic Development Agreements: Reexamining the Concept of “Internationalization”*.

332 As far as the dispute resolution clauses in EDAs and BITs are concerned, many of them are modelled on a two-tier system: First, there is an obligation to settle disputes through diplomatic channels or other channels of negotiation. If such efforts fail, the settlement of disputes shall, **even without any specific arbitration clause**, be sub-

ject to arbitral jurisdiction. The required consent to arbitration will be premised on the fact that the contracting State, having signed the Bilateral Treaty, had offered to arbitrate disputes – quite in the sense of an *erga omnes* offer – and, therefore, will be deemed to have agreed in advance that the foreign investor will be in a position to accept that offer, by addressing a corresponding notice of arbitration under the UNCITRAL Arbitration Rules, or by filing a request for arbitration with an institution (where the BIT provides for an institution to administer the arbitration, such as ICSID). Thus, *arbitral jurisdiction is no longer premised on the privity of contracts*, i.e. on a reciprocity of negotiated consent. Under this new concept reciprocity is given up and replaced by a **compulsory jurisdiction** against the host State. In a metaphorical comparison, Professor Prosser spoke of “*the fall of the citadel*”.

b) The Lomé Conventions

A further contribution to the development of arbitration without privity came through the **Lomé Conventions III and IV** regulating the relationship between the European Community and the African, Caribbean and the Pacific (“ACP”) Group of States, including 71 countries all of which were former European colonies. They traditionally enjoy a privileged trade access to the EU market. Nevertheless, at the present time it is felt that the EU-ACP partnership should be revitalised by emphasizing the respect of human rights and the rule of law, and by a new approach combatting poverty through directing aid-programs in support of private enterprises. New trade agreements are planned to be shaped implementing the spirit of an economic partnership. Common rules for investor protection, the protection of intellectual property rights, technical certification, competition and public procurement are being discussed and remain on the agenda for 1998. – As far as dispute resolution is concerned, Article 238 (1) of Lomé III provides that any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services shall be settled by arbitration in accordance with procedural rules adopted by the Council of Ministers. Under Article 238 (3) of Lomé III, disputes are to be resolved under the Rules of the ICC, thus providing for a compulsory arbitration.

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c) The North American Free Trade Agreement (“NAFTA”)

The **North American Free Trade Agreement (“NAFTA”)** finalized in 1993 (reprinted in 32 ILM 289, 605) contains dispute settlement mechanisms in three different Chapters, the most significant one being Chapter Eleven. The NAFTA Treaty encourages the parties, to the maximum extent possible, to use arbitration and alternative dispute resolution for settling commercial disputes (see its Article 2022). In response to such a mandate, the Commercial Arbitration and Mediation Center for the Americas (“CAMCA”) had been formed. NAFTA Chapter Eleven, similar to a very large number of BITs, also embodies a pre-commitment to arbitration in connection with investor-State disputes. See Eklund, A Primer on the Arbitration of NAFTA Chapter Eleven Investor-State Disputes, J.Int.Arb 4/1994, 135–171; Horlick/Marti,

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NAFTA Chapter 11B, J.Int.Arb 1/1997 43–54. Trakman, *Dispute Settlement Under the NAFTA: Manual and Source Book*, Transnational Publishers, Inc., 1997.

335 Chapter Eleven itself is divided into three Sections. Section A deals with the scope and general obligations of the parties in connection with national treatment and most – favoured – nation treatment (Articles 1102 and 1103), standards of treatment (Articles 1104 and 1105), performance requirements and senior management (Articles 1106 and 1107), transfer of capital, profits etc., expropriation and compensation, information requirements and environmental matters (Articles 1109–1114). Chapter Eleven Section C then defines a number of significant terms, and its **Section B** contains the provisions regarding the dispute settlement procedures. The (non-mandatory) Article 1118 requires the parties to first attempt to settle the dispute through consultation or negotiation prior to starting arbitration. Otherwise, it affords the private investor (who believes that a party or State has violated any of the obligations under Chapter Eleven Section A) the right to resort to binding international arbitration, whereby the investor may elect to submit the claim to arbitration either under the ICSID Rules, or under the ICSID (Additional Facility) Rules, or to initiate *ad hoc* arbitration under the UNCITRAL Arbitration Rules. Issues shall be determined by the Tribunal in accordance with the provisions of NAFTA and applicable rules of international law.

336 An interesting element is that the Arbitral Tribunal, when requested to do so by a party, shall request the **interpretation** of NAFTA by the NAFTA Free Trade Commission, whereupon the NAFTA Commission is to submit its interpretation in writing to the Tribunal within 60 days. Failing a response, the Tribunal shall itself decide the issue. If the Commission does provide its interpretation, then its conclusion will be binding on the Tribunal (see Article 11131 (2) NAFTA). **Enforcement** of the arbitral award may be sought under the ICSID Convention, or the New York Convention of 1958, or the Inter-American Convention.

d) The 1994 Energy Charter Treaty

337 The **1994 Energy Charter Treaty** (which followed the non-binding 1991 “European Energy Charter”), signed by more than fifty countries (countries of the European Union, most OECD countries, the CIS Republics), may be described as the most ambitious project for setting up an international investment regime in the sense of a multilateral version of a BIT. Its Article 26 provides for investor arbitration against the host State. The Treaty distinguishes two phases of investment: (i) the pre-investment phase in the sense of access of investors to the host State - this phase is subject to some soft-law obligations imposing a duty of best efforts at the level of non-discrimination and non-discriminatory treatment, and (ii) the post-investment phase (i.e. the phase after an investor has committed capital and other resources to a particular project) in which the protection intensity afforded by the Treaty will increase significantly.

338 Article 27 of the Energy Chartered Treaty deals with inter-state arbitration. However, several important matters are excluded from jurisdiction, such as disputes relating to Article 6 (environmental matters which must be submitted to the Charter Conference), competition matters (Article 19, for which only a consultation proce-

ture and diplomatic discussions will be available) and trade-related matters according to Articles 5 and 29 where the Treaty intends to avoid a duplication of the dispute settling procedures available under GATT/WTO.

One of the most significant tools for the private investor will be Article 26 of the Treaty. It does away with the old model reflected in various OECD Conventions according to which the investor was forced to first convince the home State to espouse the case of its own national in order to obtain access to the dispute resolution procedure (in the past, such home states had shown noticeable reluctance to get involved in commercial disputes of their nationals). Instead, the investor now has a standing on his/its own. The investor will be free to choose one of the following four options: Arbitration under the ICSID Convention, arbitration under the ICSID (Additional Facility) Rules, *ad hoc* arbitration under the UNCITRAL Arbitration Rules, or Stockholm Chamber of Commerce Arbitration.

The scope for which an arbitration case can be brought is somehow limited to breaches of obligations under Part III of the Treaty (non-discrimination, international minimum standard obligations on a “fair and equitable” basis and under the notion of the “most constant protection”, compensation for losses or nationalisation, capital and foreign exchange transfers and employment of key personnel. The most important aspect is the non-discrimination principle targeting protectionist tendencies, a notion which was given a very wide meaning. The applicable law for determining the dispute will be the Treaty itself and “*applicable rules and principles of international law*”; see also Article 10 (1) which affirms the applicability of the “*international law minimum standard*”.

It is a significant aspect that the Treaty **does not refer to any national law**. Rather, if any national law is to be applied, it will be subject to scrutiny to determine whether such national law would stand in harmony with the Treaty Obligations (and if not, the Treaty will prevail).

According to Article 26 (8) the arbitral award will be final and binding upon the parties. **Enforcement** can be sought under the New York Convention of 1958. Moreover, if a contracting State refused enforcement, such non-compliance with the arbitral award would amount to a breach of the Treaty “justiciable” under the provisions for inter-state arbitration under Article 27 of the Treaty.

Looking at Article 26, one may nevertheless question the wisdom of the treaty-makers who provided for **compulsory arbitration**, depriving the parties of their freedom to negotiate something different, or to draft an arbitration clause according to their own individual needs and preferences. A critical look on this Treaty comes from Wälde, Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation, Arb.Int 1996, 429–466, in particular 444 ss. See further Turner, Investment Protection Through Arbitration: The Dispute Resolution Provisions of the Energy Charter Treaty, Int.A.L.R. Vol. I No. 5, August 1998, 166 ss.

IV. Globalisation and Harmonisation

1. International Harmonisation in General

344 The end of the Second World War heralded a new epoch of **international integration** to a unknown degree thus far. The creation of new communities of States and alliances, the foundation of the United Nations, the EEC then EU, EFTA, the OECD, COMECON and the Council of Europe must all be borne in mind. A large number of international conventions contrived to bring about **harmonisation of laws and far-reaching legal unification** within communities of States, achieve uniform law, lay down uniform technical standards (e.g. DIN) and unify a substantial amount of the instrumentation used in trade and commercial practice. The standardisation of the law on cheques and bills of exchange had already taken place prior to the Second World War. The standardisation of the law on contracts through multinational conventions may be recalled here, e.g. the **UN Vienna Sales Convention** of 11 April 1980 and the **Rome Convention** of 19 June 1980. A considerable harmonisation of laws also took place in the field of banking law and finance law, in securities dealings, take-overs and mergers, in anti-trust and competition law, in intellectual property law, in book-keeping and accounting, in international trade by the use of standardised practices, such as e.g. INCOTERMS, the ECE terms of delivery and standard practices with regard to documentary credits and bank guarantees, by the FIDIC Conditions in the field of international construction. The press contains daily reports of the process of approximation of laws within the European Union (EU), which continues to forge ahead.

345 Special reference may be made to the **UNIDROIT Principles** (as published by the International Institute for the Unification of Private Law, presented in May 1994). We may recall here that these principles, which had been prepared by a working group established in 1981 and composed of leading experts and academics of all major legal systems, constitute in essence a restatement of those “*principes directeurs*” that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in international arbitral practice. Recent ICC awards make specific reference to them, e.g. the awards in ICC Case No. 7110 rendered in July 1995 and in ICC Case No. 7375 rendered on 5 June 1996, 122 s.

346 On the other hand, the UNIDROIT Principles, as now laid down, have not as yet, in all of their details, stood the test of detailed scrutiny in all their aspects. In this context see the critical comments made by Raeschke-Kessler, *The UNIDROIT Principles for International Commercial Contracts: A New lex mercatoria?* in: ICC/Dossier of the Institute of International Business Law and Practice, 1995, 167 ss. who raises formal concerns that there are certain rules which differ from the principles and rules as reflected in the United Nations Convention on Contracts for the International Sale of Goods of 1980 (Vienna Sales Convention, “CISG”) and, possibly, also from the “Principles of European Contract Law” prepared by the

“Commission on European Contract Law” chaired by Professor Ole Lando (Denmark). The latter expressed the opinion that the United Nations Sales Convention “*already provides a rather complete set of rules on a lex mercatoria*” (at p. 174, with reference to the view expressed by Drobnig in *The American Journal of Comparative Law* 1992, 635 ss.). Despite this critical view, the red book published by UNIDROIT and containing the principles and a commentary thereto is essential reading for all those involved in international arbitration; see also the further publications by Bonell (Chairman of the Working Group), *An International Restatement of Contract Law* (1994); Berger, *Die UNIDROIT-Prinzipien für Internationale Handelsverträge*, in: *Zeitschrift für Vergleichende Rechtswissenschaft*, Vol. 94 - August 1995, 217 ss.; Lando, *Assessing the Role of UNIDROIT Principles in the Harmonization of Arbitration Law*, in *3 Tulane Journal of International and Comparative Law* 1994, 129; Gaymer, *UNIDROIT Principles of International Commercial Contracts*, in *International Company and Commercial Law Review*, March 1995, 83 ss.; Van Houtte, *The UNIDROIT Principles of International Commercial Contracts*, in: *Arbitration International* Vol. 11/4, 1995, 373–390 and Kessdjian, *Un exercice de rénovation des sources du droit des contrats au commerce international: Les Principes proposés par l’UNIDROIT*, in *Revue critique de droit international privé* 84 (4), Oct–Dec. 1995, 641–670; Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?*, in *Uniform Law Review* Vol. I 1996-1, 26 ss. (with a bibliography of 40 books/reports on the UNIDROIT Principles at pp. 210–213); Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions and National Laws*, in *3 Tulane Journal of International and Comparative Law* (1994/95), 45 ss.; Hartkamp in the same *Journal* at 65 ss.; see also the reports by Ferari in *69 Tulane Law Review* (1994/95), 1225 ss.; Garro, in the same *Journal* at 1149ss., Aranguren at 1239 ss. and Veytia at 1191 ss. A recent article comes again from Berger, *The lex mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts*, *Law and Policy in International Business*, Vol. 28 No. 4, 1997, 943–990.

The unification and harmonisation of laws are in progress, not only in the field of substantive law, but also in the field of **procedural law at the level of the national courts**. Mention must therefore be made, with regard to the law on civil procedure, of the four **International Conventions** which came into force in Switzerland on 1 January 1995, namely -

- The **Hague Convention** on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 (AS 1994, 2809);
- The **Hague Convention** on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 (AS 1994, 2824);
- The **Hague Convention** on International Access to Justice of 1980 (AS 1994, 2835); and
- The **European Agreement** on the Transmission of Applications for Legal Aid of 1977 (AS 1994, 2851).

- 348 The following conventions had already previously entered into force:
- The **Hague Convention** on Civil Procedure of 1954 (SR 0.274.12) and
 - The **Lugano Convention** on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988 (SR 0.274.12).
 - The **European Convention on State Immunity**, adopted by the Council of Europe in 1972, ratified by Austria, Belgium, Luxembourg, The Netherlands, Switzerland and the United Kingdom (entry into force in 1976); regarding state immunity, a particularly important topic in the domain of international arbitration, see Sanders, Chapter 12 “Arbitration”, in: International Encyclopedia of Comparative Law (1996), N. 128–135 and the numerous further references cited herein; see also Blessing/Burckhardt, Sovereign Immunity – A Pitfall in State Arbitration?
- 349 The following conventions should also be mentioned on the EU level:
- The **Brussels Convention** on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, and
 - The **San Sebastián Convention** of 26 May 1989, supplementing the Brussels Judgments Convention.
- 350 **Developments in international arbitration** are particularly impressive, thanks mainly to the work of the ICC and UNCITRAL, accelerated by the New York Convention of 1958, the European Convention of 1961 and, to a great extent, to the world-wide discussions for shaping the UNCITRAL Model Law. Intense discussions of all areas of international arbitration at countless **international conferences**, symposiums and colloquiums over the last decade have focused on all aspects, on contrasting traditions, on the differences between the various origins and on the varying types of legal cultures. Although this variety and diversity of opinion and views expressed certainly prevails in some respects (not just between the various different legal cultures, or because of tension between North and South, East and West, but even within the same legal community), an impressive degree of **harmonisation** has nevertheless already quite unmistakably taken place. For instance, while for a long time much emphasis had been placed on highlighting the differences between **common law procedures** and **civil law procedures** (cf. e.g. Staughton, Common Law and Civil Law Procedure: Which is the More Inquisitorial? A Common Lawyer’s Response, and Reymond, A Civil Lawyer’s Response, both in ArbInt 1989, 351 ss. and 357 ss.), it would seem that such a distinction is *no longer material* and in any event should not be over-valued.
- 351 Both **Anglo-Saxon and American procedural practice** in arbitration matters has therefore borrowed essential elements from the Continental European tradition and abandoned some features based on national procedural law (cf. Marriott, Evidence in International Arbitration, ArbInt 1989, 280 ss., and Craig/Park/Paulsson, International Chamber of Commerce Arbitration, 376–386). Thus, a quite **comparable procedural practice** in international arbitration has emerged for setting out factual and legal arguments in written submissions. The manner in which proceedings

are conducted to take evidence has also been very much harmonised in an attempt not to incorporate the disadvantages of local procedural law into arbitration proceedings. Practical experience in countless arbitration cases involving both *common law* and *civil law* parties has shown that the various different systems and concepts are not incompatible and, on the contrary, can indeed be successfully combined.

Arabic Law, for instance, is based on legal concepts sometimes barely compatible with those of Western industrialised countries. However, the considerable influence exerted in the past by French law – and in some countries by English law – coupled with an intensive dialogue beyond any frontiers at numerous conferences as well as the intensified economic cooperation have all led to a much improved mutual understanding. **Central and Eastern Europe** anyhow maintain close ties to the Continental European principles because of their common roots in Germanic and Roman law.

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2. Harmonisation of International Arbitration

Can we therefore expect to see a global **unification of international arbitration**? The answer to this at the present time (and probably for the near future) must certainly be “No”. We may recall here, in passing, the earlier attempts made by the **European Convention Providing a Uniform Law on Arbitration** (Strasbourg 20 January 1966; UN Register of Texts Vol. II. 1973, 65–75) which turned out to be a failure, because too many states made reservations and showed reluctance to give up particularities of their own national laws; that Convention (ratified by Belgium only) certainly came ahead of its time. And today? Unification is not a topic, is “out”; meanwhile the Model Law has set the pace as the “in” – solution, since it leaves states the freedom to amend its articles. And yet, it would nevertheless be appropriate to observe that the constantly developing **globalisation of markets** in international commerce, the evolving intensification of traffic and trade and the networking in production facilities around the globe, have triggered a **growing harmonisation of fundamental legal concepts**. Although individual legal systems (despite efforts of deregulation) are becoming steadily more complex and new and ever more complex regulations are being brought in, it is nevertheless noticeable that a **far-reaching consensus** of opinion on basic principles of international trade (in the widest sense) has crystallised.

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This international consensus has – albeit with certain slight variations – become evident in numerous specific legal fields. In the accounting field, for instance, the **IAS (International Accounting Standards)** have been created to denote an internationalised standard, and it could be said that there is a similar kind of “IAS” applicable also in the field of international arbitration, namely as **International Arbitration Standards**. Professor Pierre Lalive was therefore quite right when saying that “*un droit international ou transnational de l’arbitrage*” (an international or “transnational” arbitration law) had emerged (Lalive, *Avantages et inconvénients de l’arbitrage ad hoc* in: *Liber amicorum Bellet*, 1991, 302). At the instigation of the author of this Introduction, last year’s conference of the *International Federation of*

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Commercial Arbitral Institutions (IFCAI), which was held in Hongkong in November 1995, focused on the topic of “*Globalization and Harmonization of the Basic Notions in International Arbitration*” (see the IFCAI’s Conference volume bearing this title, published by the Hong Kong International Arbitration Centre, 1996). The **ICCA Conference in Seoul in October 1996** also concentrated on this topic (see ICCA Congress Series No. 8).

355 The concept of resolving disputes before arbitral tribunals, with its very different origins, has undergone an impressive degree of globalisation and associated **harmonisation** since the intensive discussions on the UNCITRAL Model Law. Even if a world map on arbitration does still show a differing basis and degree of acceptance (compare, for example, the high number of domestic arbitration cases which are handled in the USA under the aegis of the AAA (over 60,000), to the extremely low number of arbitration cases in Japan, where legal disputes are by tradition almost exclusively resolved by simple conciliation or mediation; or compare the reservations shown in South American countries influenced by the **Calvo Doctrine**), recognition of arbitration is now progressing strongly and in all fields of the law, even in those which for decades had been reserved to the prerogatives of state courts.

356 Thus, there is a growing acceptance and recognition of arbitration in critical areas such as those involving insolvency, securities trading, competition and antitrust laws and matters involving all kinds of intellectual property (the latter still with numerous different facets, essentially depending on whether or not the particular IP concerned depends on a public registration). Likewise, arbitration is gaining importance in **international financing contracts and syndicated loans, in bond issue agreements, in international sports, in sponsoring and merchandising, in entertainment, in genetic engineering** as well as in new **fields of telecommunication and concessions**, and in the areas of the **space industry**.

3. Reasons for the Upturn in International Arbitration

357 To what is this progress due? What particular justification is there for the **acceptance** of international arbitration? Many answers have been given to these questions. On the one hand, the answer probably lies in the **scepticism** of international parties vis-à-vis the national state courts which are perceived (and suspected) to be too deeply rooted in purely domestic laws and notions. Thus, there exists a hesitation and fear for parties doing international business of becoming the victims of the machinery of the national courts’ system and its mills, a system irredeemably fettered by **local procedures and their pitfalls** and in the end seen by them as a judicial institution serving the national interests involved.

358 On the other hand, international parties are expressing confidence that arbitrators (who have made a name for themselves with their integrity and experience in assessing international commercial matters) are more likely to reach a carefully weighed and balanced decision – a decision which will respond to their fair and reasonable expectations. It can therefore be said that the trust shown in arbitration is based on the fact that arbitrators are not just influenced or guided by local or national precepts, but

will have much wider perspectives for the benefit of the parties. The success of international arbitration is therefore an expression of scepticism about national courts and of aversion to the heavily criticised “**proceduralisation**” of national proceedings. The implication, conversely, is that it is the duty of international arbitration and of each arbitrator to adequately respond to those justified expectations of business parties; we will go into this subject in more depth in the following paragraphs.

The harmonisation of international arbitration was one of the topics of the **ICCA Congress in Tokyo** in 1988, which concentrated (*inter alia*) on the topic of “*Overcoming Regional Differences: Arbitral Practice, Comparative Law and the Approximation of Laws*” (cf. the papers in ICCA Congress Series No. 4, 281 ss.). Harmonisation is indeed desirable. To corporations and the business community it is even more so: it is essential! In the end, it is not the aim or the ambition that within 10 years, an arbitration procedure in Tokyo will be exactly the same as in Buenos Aires or Zürich; but it will be the aim to achieve a similarly high level of trust so that a legal dispute (if it is unavoidable) will be decided in all these places in accordance with principles which are shared by a mutual or even global international consensus of opinion (the fundamental aspects of which serving as the yardsticks for the behaviour of all international business parties). Western industrialised countries (where international arbitration became strongly established earlier than elsewhere) had been reproached (for instance by Professor Sornarajah) that they aimed to impose their own understanding of arbitration on the rest of the world, ignoring the fact that other legal cultures have also developed machinery for settling disputes just as worthy of respect. However, we do not see it that way, and many Swiss arbitrators have in the past impressed parties from distant countries and cultures by their openness and understanding for different views and cultures. After all, this is the challenge and *nobile officium* of the arbitrator of international stature.

Harmonisation is only possible with a **dialogue** and on the basis of a mutual understanding. This dialogue has been impressively set in motion. Understanding, however, requires not only mutual concern, consideration and respect, but also a willingness to question one’s own positions and possibly cast aside the boundaries of too narrow individual values and legal perceptions. At the same time, therefore, harmonisation means **to distance oneself from local or national thinking patterns** and with this remark, as we shall see, we have just touched upon the **main point** which indeed characterises the new Swiss arbitration law. Indeed, Chapter Twelve (quite unlike the “Concordat”) now enables arbitrators to conduct arbitral proceedings which fully meet the **fair and reasonable expectations of the parties**, instead of forcing the parties (as well as the arbitrators) into a kind of “straitjacket”, as was previously the case under the “Concordat” (which to some extent had imposed a conduct of arbitral proceedings *à la Suisse*, by its numerous references and analogies to purely domestic procedures).

4. Sporadic Criticism and Scepticism

It would be wrong to just stress here the positive trend, in the form of a swing from local understanding of arbitration towards a supraregional and supracultural concept

of arbitration, without also pointing out, however, that heavy **criticism** has also sometimes been voiced and that it has occasionally been vehemently asserted that arbitration is in any event just an instrument used by Western industrialised powers to “suppress and exploit developing countries” and to further “cement their dominant position”. The various articles by the above mentioned Professor Sornarajah (e.g. Sornarajah, *The Climate of International Arbitration*, *JIntArb* 2/1991, 47–86; see the remarks on this by Blessing, *Globalization (and Harmonization?) of Arbitration*, *JIntArb* 1/1992, 79 ss.) are testimonies of these extreme views. A similar scepticism, or even aversion, had also been expressed by South American countries influenced by the **Calvo Doctrine** and the effort made by the *Inter-American Arbitration Commission* is now gradually beginning to lead to better recognition of arbitration within its member states, although it will certainly still be some considerable time before a real breakthrough will be achieved. Eminent scholars and arbitrators such as e.g. Argentina’s Horacio Grigera Naón, formerly a supporter of the Calvo doctrine regarding state contracts and now Secretary General elect of the ICC (succeeding Eric Schwartz as of October 1996), are today in the forefront to promote arbitration.

5. The “Specificity of International Arbitration”

362 The so-called “**specificity of international arbitration**” (a term frequently used in this Introduction) has for many years been a kind of “**magic formula**” – like all magic formulas without precise contours and slightly mysterious at the same time. It simply means nothing more than an awareness that international arbitration is an “**animale**” *sui generis*, to be clearly distinguished from the characteristics and criteria of mere national or domestic arbitration. In fact, the recognition of the notion and understanding that **international arbitration should clearly distance itself from local procedures and perceptions** is one of the most predominant and at the same time justified concerns; a concern which is just as significant from the point of view of Western industrialised nations as from the point of view of upcoming and developing industrial nations. However, specificity in this sense does not just relate to formal matters; an international arbitral tribunal is clearly also distinguishable from state justice in its substantive-law approach to a given dispute.

363 First, it must quite rightly be emphasised that an arbitral tribunal is not bound by other (national or arbitral) decisions or precedents. It is only responsible to the parties concerned and has to do optimum justice between them. Thus, frequently, arbitral awards will make (sometimes numerous) references to other cases under a covering note that such references are of course always of academic interest, but that nevertheless the particular tribunal will (and indeed must) make its own independent determination on the basis of the facts and merits of the particular case and that no other case will sufficiently compare to the one at hand, neither in its individual elements, nor in an overall perspective (see e.g. ICC Award No. 7375 of 5 June 1996, 64).

364 Second, it is easy to see and understand that the particular (disputed) **contract** between the parties in question is of utmost significance to an international arbitral tribunal (“**le contrat fait loi entre les parties**”). In the event of differences of opinion,

the arbitral tribunal will mostly be concerned with applying and, to the extent necessary, **interpreting** the contract correctly. Reference to provisions of the underlying law applicable and to scholarly writings thereon will only relatively infrequently be made (or, in any event, less frequently than in State court proceedings); frequently, such references are made simply for the purpose of further corroborating the tribunal's assessment derived from an interpretation of the spirit of the relevant contract. This is a solution for which there are good grounds. For example, where the law chosen by the contracting parties is not or only scarcely known to them. Moreover, the hesitation in not immediately referring to the provisions and readily-available solutions provided for by the underlying law applicable to the contract appears to be particularly justified where the parties themselves did not make their own choice as to the applicable law and where, therefore, it will be for the arbitral tribunal to determine the substantive **governing law** or the **applicable rules of law** by means of an **objective approach** (by applying, for instance, the **closest connection rule**), or (in certain special cases) by means of the **subjective approach**.

Third, it is quite clear from studying many international arbitration awards that **an overwhelming number** of them are based on a few **fundamental principles** which are being applied to the subject matter of the particular dispute in question (cf. Blessing, *Das neue internationale Schiedsgerichtsrecht der Schweiz – Ein Fortschritt oder ein Rückschritt?*, Schriftenreihe DIS, Vol. I/II, 68 f., in which 10 main principles based on *bona fides* and *pacta sunt servanda* are listed; see also Mayer, *Le principe de bonne foi devant les arbitres du commerce international*, Liber amicorum Lalive, 1993, 543 ss.). The **UNIDROIT Principles** established in 1994, for instance, reflect principles derived from and discussed in countless international arbitral awards. On specificity in general, see Lalive, *Problèmes spécifiques de l'arbitrage international*, 341 ss.; Fouchard, *Introduction: Spécificité de l'arbitrage international*, Rev. arb. 1981, 449 ss.; Lalive/Gaillard, *Le nouveau droit de l'arbitrage international en Suisse*, Clunet 1989, 905 ss.; cf. also Lalive/Poudret/Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 258 s.

The **acknowledgement of its specificity** does not mean, on the other hand, that international arbitration has to be or should be **de-localised**. On the contrary, the intensive discussion which took place at the beginning of the 80s on **de-localised arbitral awards** clearly demonstrates the need for a basis and rooting within a national legal system (e.g. Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, International and Comparative Law Quarterly 1981, 358 ss.).

On the other hand, a rooting in a national *lex arbitri* does not at all demand the application of local procedural provisions. To the contrary: local procedural standards should not play a role in international arbitration (and where such role of local standards cannot be avoided, then such role must be a remote one only).

Furthermore, a rooting in a national *lex arbitri* does **not at all demand the application of the local conflict of laws system or rules**; we will discuss this in more detail in Part VIII below.

And finally, a rooting in a national *lex arbitri* does **not** demand a determination by the arbitrator that, in the absence of a choice of law by the parties themselves, he

will be obliged to determine a particular “law” (in the sense of one particular national law) applicable. Instead, the arbitrator will satisfy his duty if he determines the issues submitted to him on the basis of the “rules of law” considered by him to be applicable in the particular context, as was quite rightly emphasised by Lalive/Poudret/Reymond in: *Le droit de l’arbitrage interne et international en Suisse*, ad Article 187 N 9. Again, see hereto the Part VIII below, in particular Sub-Chapter 4. See also A. Bucher, *Zur Lokalisierung internationaler Schiedsgerichte*, *Liber amicorum Keller*, 570, and Blessing, *Das neue internationale Schiedsgerichtsrecht der Schweiz – Ein Fortschritt oder ein Rückschritt?*, *Schriftenreihe DIS Vol. 1/II*, 67/78 and *id.*, *The New International Arbitration Law in Switzerland*, *JIntArb* 2/1988, 60 ss.; more recently, Gaillard (Publ.) *Transnational Rules in International Commercial Arbitration*, ICC Publ. No. 480/4, 1994, and Blessing, *Regulations in Arbitration Rules on Choice of Law*, ICCA Congress Series No. 7, 391–446, in particular at 418 s., 429 and 444. Further references in Part VIII.

370 What does this basis or rooting in the *lex arbitri* then consist of? Does it mean anything more than that (i) the arbitrator ought to follow the public policy principles applicable in the country where the arbitration is held, that (ii) the national court of the situs will have jurisdiction in aid of arbitration and that (iii) those courts will be competent to deal with challenges against the award? Or does the said basis and rooting go beyond those three elementary aspects? Should one follow the complex analysis made by a certain (very well known) Professor Otto Sandrock who, in pursuing the particular question of the arbitral tribunal’s roots and foundations in the national law at the situs, asked the question whether an arbitral tribunal should somehow be bound by a kind of “primary” conflict of laws system (“*Ur-Kollisionsrecht*”, as he called it) as prevailing in the country in which the arbitral tribunal sits? Sandrock (although himself a declared “non-mercatorian”) also answered this question in the negative in the following words: “*All in all, therefore, the following must be concluded: International arbitral tribunals are not bound by any particular rules of private international law or conflicts of laws, (sc. not even by those) which form part of that “primary” private international law. On the contrary, a “primary” norm of that “primary” private international law does grant arbitral tribunals the authority to determine themselves (and according to their own best assessment) the connecting factors that are relevant in respect of a particular contract. However, the question which then arises is how such discretion is to be employed.*” (Sandrock, *Die Fortbildung des materiellen Rechts durch die internationale Schiedsgerichtsbarkeit*, *Schriftenreihe DIS*, Vol. 8, 1989, 21 ss., 68).

371 This quotation from an article by such an eminent analyst demonstrates how quickly discussion of fundamental aspects departs from the practical level and evolves (at apparently immeasurable length) into a highly interesting **academic or even philosophical discussion** à la Heidegger. During the discussions which followed Otto Sandrock’s paper, Detlev von Breitenstein stated something similar in respect of French law, although in less philosophical words: “*The arbitrator does not therefore choose a legal system in its entirety, but is authorised to assemble from various different legal systems those legal provisions or rules of law (‘règles de droit’) which seem to him to be most appropriate for his award. In other words, he is choos-*

ing his menu ‘à la carte’ instead of eating the ‘set menu’. This leads in practical terms to the well-known ‘*petitio principii*’, according to which the arbitrator compiles and declares as ‘*lex mercatoria*’ those legal notions and principles which he needs in order to justify the outcome of the arbitration proceedings ...” (von Breitenstein, contribution to the discussion published in *Schriftenreihe DIS*, Vol. 8, 129).

The wide field of discussion on this merely **partial aspect of specificity** will just be outlined here and will not be considered in depth. It may be noted here that the above academic discussion on specificity and the manner (and extent) of a rooting in the national law of the situs has hardly ever been of any real practical significance to the “users” of the arbitration system. Most international arbitration proceedings are conducted in Switzerland without such a “rooting” or “basis” being or becoming at all relevant, and without as such being noticed or perceived by those “users” (i.e. the parties involved in a particular arbitration) – and yet, those arbitrations are nevertheless clearly Swiss proceedings. Typically, the arbitration procedure will be regulated between the parties and the arbitrators by agreement **and without reference to local provisions**. The substantive assessment of the arbitrators then follows, based on the contract and (if necessary) an interpretation of that contract. Thus, it will frequently not even be necessary to seek assistance by looking into the statutory provisions of the underlying law applicable to the contract.

The **recognition of the specificity of international arbitration** is and will remain to be *one of the most significant milestones on the road map of international arbitration*; a milestone which demands to be respected and to be sanctioned by an appropriate legislation and by incorporating and reflecting its “message” in both arbitral practice and national court practice. **As we shall see below, the Swiss “Arbitration Act” entirely reflects this hypothesis and respects and reflects those notions associated with the “specificity of international arbitration”.**

However, before taking this further, we ought to pause for a moment and reflect on one very basic question: “*What are then, actually, those certain requirements to be satisfied by a modern place of arbitration?*” – We will discuss this in the next Chapter.

V. Requirements and Expectations Regarding A Modern Place of Arbitration

374 What makes a place of arbitration acceptable? By what factors or criteria is a place of arbitration to be assessed? In other words: what really are the so-called ***fair and legitimate expectations*** of the parties in relation to the suitability of a place of arbitration and the arbitration proceedings there? And in general: what makes a place earn the recognition as being a so-called “***arbitration-friendly place of arbitration***”, and what are its criteria? With regard to these questions see the elements listed in Blessing, Drafting an Arbitration Clause, in ASA Special Series No. 8 (1994), 39–43 and 46–48.

There is no easy answer to these questions, and all the possible answers are based on partially subjective evaluation criteria. A summarised answer will be attempted here.

1. The Expectations of the Parties

375 It can be said that parties who might possibly have to become involved in arbitration proceedings will typically have the following expectations:

a) An “Arbitration-Friendly” Environment

376 Generally speaking, the parties will expect it to be possible for “their” arbitration proceedings to be conducted in an **arbitration-friendly environment**; this means:

- Suitability **geographically**: Good flights and traffic communications; good hotel and conference facilities; a good infrastructure generally; the availability of secretarial services, possibly audio visual equipment, professional *verbatim reporters* and video-conferencing facilities.
- Suitability **culturally**: Most parties give preference to a place of arbitration of tested tradition. Neutrality is often mentioned in this connection as an element important for its acceptability to the parties. Even more important, however, would seem to be **cultural neutrality**, in the sense of impartiality with regard to the origin of the parties and their different traditions and cultures.
- Suitability **legally**: Parties quite rightly expect a modern “*Arbitration Act*” to be in place, i.e. a statutory provisions on (international) arbitration acceptable to them, assuring them that arbitration proceedings can be conducted on a modern basis. **What does this actually mean?**

b) An Acceptable Legal Environment

The expectations of the parties with regard to an arbitration-friendly legal environment at “their” place of arbitration – to be achieved and assured by the local *lex arbitri*, i.e. the *Arbitration Act* applicable at the place of arbitration – can be listed as follows:

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- First of all, the parties expect the arbitration law applicable at the seat of the arbitral tribunal to contain those statutory provisions which are necessary in order to ensure that an arbitral tribunal **can validly be constituted** and can be “kept alive” until an arbitral award is handed down, and thereby that there is a **reliable local court system** in existence to provide support (to the extent necessary) in the appointment, challenging or replacement of arbitrators.
- The parties also expect a national judiciary to provide other **judicial support** (if necessary), e.g. in relation to the taking of evidence or in the pronouncement of, or assistance in, interim measures.
- On the other hand, the parties expect the form of the *lex arbitri* to reflect and comply with the **“specificity of international arbitration”** in the aforementioned sense.
- The parties expect, in particular, to be spared entanglement in **domestic legal provisions**. International criticism is therefore (quite rightly) addressed at arbitration acts which make reference to other local laws, such as typically a local Code of Civil Procedure. Just as an example, criticism has been voiced of the Taiwanese Arbitration Act, which refers to provisions contained in the Taiwanese Code of Civil Procedure and to rules governing the national organisation of the judiciary. The problem with that is that such laws are scarcely accessible to foreign “users” of arbitration in Taipei/Taiwan; neither are any English translations and commentaries available on those provisions. But why then go to Taiwan? We will discuss below that the Swiss Concordat (i.e. the regime prevailing in Switzerland prior to 1 January 1989) also had too much local content and, for exactly the same reason, attracted criticism; that was one of the important reasons to change the law!
- Parties expect that terms used in the “*Arbitration Act*” (in Switzerland: in Chapter Twelve PIL) will be construed, interpreted and applied on the basis of **international criteria**; it should (and must) therefore be expected that legal practitioners and arbitrators in an international place of arbitration will take into account and consider international literature and standards, and not purely domestic literature, standards and perceptions (however good they may be).
- Generally speaking, it will be expected that the Arbitration Act (*lex arbitri*) will grant the parties and the arbitral tribunal full **“procedural autonomy”**, without imposing any local restrictions, constraints of time limits or other interference into the procedural autonomy. Thus, the parties, and failing them the arbitrators, will be the masters shaping the procedural rules according to their particular needs, without having to apply any rules pertaining to any local Code of Civil Procedure.

- In the same context, where parties had chosen an **institutional arbitration procedure**, they will expect the *lex arbitri* to **respect** the provisions of those arbitration rules, and not to render them illusory as a result of purely local mandatory provisions to the contrary (e.g. by imposing mandatory provisions relating to the appointment of the arbitral tribunal, or in connection with interim measures of protection, or the shaping of the arbitral procedure and in particular the evidentiary proceedings, or in the appraisal of evidence and the delivering of the award).
- In the absence of a choice of the substantive law applicable, the parties are entitled to expect an arbitral tribunal to be given extensive “**conflict of law autonomy**” in the sense that the arbitral tribunal is not in any way obliged to apply the rules or provisions pertaining to the **local private international law** (conflict of laws rules). In contrast, a state court will of course have to apply the local conflict of laws system; but the latter deserves no authoritative significance for an international arbitral tribunal.
- In the absence of a choice of law made by the parties themselves, they will expect that the arbitral tribunal will have the benefit of a “**substantive law autonomy**” in the sense of an authority granted by the *lex arbitri* to determine either “the law” applicable to the contract in question (in the sense of one particular national law) or, instead, the “**rules of law**” (to mean rules which may or may not pertain to a national law), or pertain to the so-called **general principles of law**, including **transnational legal principles and *lex mercatoria***, rules of “**natural justice**”, principles and rules of law derived from international conventions (whether or not directly applicable in the particular case), including e.g. the **UNIDROIT Principles**.
- Parties normally expect the presiding arbitrator to be authorised to **decide alone** in the absence of a majority, such that he should not therefore run the risk of finding himself in the **predicament** of having to endorse the extreme opinions of either one or the other of his coarbitrators (a matter which is of particular importance when it comes to the determination of the *quantum*).
- Parties will expect the national judiciary to recognise and respect the **finality of the arbitral award**. The parties’ confidence that the dispute has been finally determined by the arbitral award should not be frustrated by the fact that there are too many **ways of setting aside or otherwise challenging the award**. On the other hand, however, the parties will also expect that some safety-net will be available to rescue them if the arbitral proceedings should really turn out to have gone wildly astray.
- Where proceedings are set in motion to set an arbitration award aside, parties will expect a prompt and at the same time cautious judicial review. As a further element, parties do not want to have to fight through two or even more **court instances** before the highest national court determines the challenge against the award.

c) The Parties' Own Legal Counsel

Parties often attach very particular importance to their ability and right to be represented in arbitration proceedings by their **own counsel** (their lawyers e.g. from New York or Damascus), with whom they have become accustomed to work over the years. For this reason alone, parties expect arbitration proceedings to be conducted according to “**international standards**” and not according to the sometimes strange particularities of any kind of municipal or domestic law, with which they cannot be familiar. The risk of being confronted with localisms would in fact compel them to instruct a local lawyer. 378

d) Cost Effectiveness and Confidentiality

The parties also expect **cost-effective procedures**, an efficient case. Proper management will, however, essentially depend on the abilities and experience of the particular arbitral tribunal and its presiding arbitrator. 379

Parties usually expect that the arbitral procedure will take place **in confidentiality**. However, if looked at closely, perceptions may vary a great deal. In the latter regard, reference ought to be made to the article by Paulsson/Rawding on “The Trouble With Confidentiality” (see the Bibliography). See also the provisions which are contained in arbitration rules of leading arbitral institutions which, however, are far from being complete, with the exception of the WIPO Arbitration Rules, Articles 73–76. For instance, Article 35 of the International Arbitration Rules of the AAA only imposes a duty to maintain confidentiality on the arbitral institution and the arbitrators, but not on the parties themselves. The new 1998 ICC Rules, as discussed above, are silent on this point (after extensive discussions which took place within the working party in respect of various proposals to deal with the issue, none of which however found unanimous approval). 380

e) Enforceability

Finally, the parties expect that the arbitral tribunal will see to it that its arbitral award will be **enforceable** and thus will not suffer from a defect which might frustrate its benefits for the winning party. 381

As far as the parameters in the country of enforcement are concerned, they will expect that the New York Convention will be applicable in that country, preferably without reservations, and that the local enforcement courts will be familiar with the aims and the “philosophy” of the New York Convention and will not be misguided by local protectionism. 382

2. The Lawyers' Expectations

The **lawyers' expectations** are substantially the same as those of the parties. It is particularly important to foreign lawyers that: 383

- the local *lex arbitri* meet modern criteria and be “free” of unexpected pitfalls;
- they can be certain that the arbitration proceedings will be conducted according to an “**international standard**” and not according to unknown **local procedural provisions or standards**;
- the *lex arbitri* provide for sufficient autonomy for the parties (or the arbitrators in their stead) to be able to organise the **procedure** themselves, i.e. autonomously and without the interference of local requirements of a mandatory nature;
- the arbitral tribunal have jurisdiction to decide on **interim measures of protection**;
- the *lex arbitri* contain provisions appropriate to counter unfounded or abusive objections to arbitrability, the validity of arbitration clauses and the jurisdiction of the arbitral tribunal;
- the **three fundamental autonomies** (as above referred to) be granted; i.e. **the procedural law autonomy, the conflict of law autonomy** and the **substantive law autonomy**;
- the grounds for recourse to set aside an arbitral award be restricted to the extent sanctioned by the 1958 New York Convention.

384 This list reflects the expectations of a “**typical**” lawyer but does not take into account any special interests which he or she may have or wish to defend in a specific case. Obviously, the interests of a counsel acting for a respondent whose principal concern lies in using delaying tactics will be to put up as many obstacles as possible, for instance by seeking interference by national courts wherever possible. The legislator, however, must be guided by the **fair and reasonable expectations of bona fide on the part of counsel and parties**.

3. The Arbitrators’ Expectations

385 The principal **expectations of the arbitrators** are generally that:

- a modern *lex arbitri* applies at the place of arbitration;
- the arbitration procedure is not determined or restricted by **local procedural provisions** (cf. the aforementioned **procedural law autonomy**);
- the proceedings can be conducted according to the *provisions agreed upon by the parties themselves* (or those pursuant to the Rules of the particular arbitral institution);
- they have jurisdiction to themselves decide questions of arbitrability and arbitral jurisdiction (so-called “**Kompetenz-Kompetenz**”);
- they have jurisdiction to rule on **interim measures of protection**;

- where the parties have not made any choice of law: that they themselves are free to determine the substantive law or rules of law governing the contract, without being forced to apply the local conflict of laws system (cf. “**conflict of law autonomy**” and “**substantive law autonomy**”);
- they are authorised to decide *ex aequo et bono* (or as *amiables compositeurs*), provided of course that they have been so authorized, or instructed to do so, by the parties;
- the *lex arbitri* contains an appropriate provision on the **decision-making of the arbitral tribunal** (with the presiding arbitrator’s authority to decide alone absent a majority);
- the national courts will strictly limit their **judicial control** when an arbitral award has to be reconsidered in formal or substantive respects;
- and, finally, that arbitrators remain free from and protected against **liability-claims** unless they have clearly misconducted themselves.

4. International Expectations Regarding Switzerland as a Place for Hosting International Arbitration

What international expectations are, therefore, addressed to Switzerland as a place for hosting international arbitration? 386

They are mainly those which have been stated above. Chapter Twelve, which will be commented upon in detail below, provides a **favourable framework and climate** for this purpose. It can do no more than to provide all the necessary tools and parameters. Any of the further expectations nurtured by the parties (“users”) can only be fulfilled by those persons who will have to deal with a particular case in one capacity or another, whether as lawyers, arbitrators or state court judges. 387

In the following, the legislative developments in Switzerland will first of all be set out (Part VI), before turning to some of the predominant features of Chapter Twelve (Part VII). 388

VI. Legislative Developments in Switzerland

1. From Cantonal Law to the “Concordat”

389 In Switzerland, the matter of regulating the **procedural law** (unlike substantive-law legislation) falls, in accordance with the demarcation of legislative powers on federal and cantonal level, within the **regulatory domain of the cantonal legislator**. The law of civil procedure is therefore cantonal law, and, until recently, the cantonal codes of civil procedure included a section on arbitration. It should be noted here that, despite the variety of cantonal codes of civil procedure, they all unmistakably have their historical roots in old Germanic procedural doctrine which is, in turn, based on the Roman and Canonical tradition. For a long time, the legal status of arbitration was the subject of dispute amongst legal scholars because its classification as either a **private law or procedural law matter** caused difficulty. The long and fruitless **battle between the theories**, which contributes nothing to the understanding of arbitration, will not be considered any further here (similarly see Lalive/Poudret/Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Introduction au Chapitre 12, 260). It must just basically be mentioned that, in Switzerland (in contrast to Germany), the procedural law view prevailed.

390 When, in the course of the 1960s, it became more and more obvious that the differing rules on arbitration contained in the 26 different Cantonal Codes of Civil Procedure produced an unsatisfactorily complex “legal landscape”, it was considered impossible (due to the above mentioned cantonal legislative competence) to achieve uniformity by way of a Federal Law. Thus, unification could only be achieved by means of proposing to the Cantons a so-called **Concordat** (i.e. an Intercantonal Arbitration Convention), leaving it to the Cantons to elect to adhere to it. According to Article 102(7) of the Swiss Federal Constitution, the Concordat had to be ratified by the Federal Council; that ratification took place on 27 August 1969.

391 The **first cantons** to subsequently adhere to the Concordat in their internal cantonal legislation were Schwyz, Vaud, Unterwalden, Neuchâtel, Fribourg, Solothurn, Basel-City and Geneva (all in 1970/71), followed by Berne, Obwalden, Basel-Country, St. Gall, Ticino, Valais, the Grisons and Schaffhausen between 1972 and 1976. The **Canton of Zürich's** accession to the Concordat was for a long time the subject of dispute (or even a battle), particularly because the prevailing view was that the arbitration law contained in the former provisions of the Zürich Code of Civil Procedure (§§ 238–257) were very good and, in some instances, even better than those found in the Concordat. The Canton of Zürich did not therefore accede to the Concordat until 1 July 1985. Now, all the Cantons have acceded to the Concordat, the last one being the Canton of Lucerne (under § 3 of the Lucerne Code of Civil Procedure of 27 June 1994, which came into force on 1 January 1995).

392 It can therefore be said that the Concordat now constitutes Switzerland's **uniform domestic arbitration law**. It continues to apply in its entirety to **national (domestic) arbitration** between two (or more) Swiss parties, i.e. in those cases which do not fall

under the scope of Article 176(1) PIL. There is a great deal of **literature** in existence with regard to the Concordat. It suffices here to refer to three standard works: Jolidon, *Commentaire du Concordat suisse sur l'arbitrage*, 1984; Rüede/Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht*, 1993 (which comments on both the Concordat and the Chapter Twelve PIL); Lalive/Poudret/Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 1989, the first part of which contains a commentary on the Concordat contributed by Jean-François Poudret.

2. The Successes – and Deficiencies – of the Concordat

a) Successes

Generally speaking, the Concordat undoubtedly denoted a considerable progress as compared to provisions on arbitration which were contained in the individual Cantonal Codes of Civil Procedure. That the **legal unification** within Switzerland aimed at and achieved by the Concordat constituted an urgent necessity – particularly from the perspective of the foreign “users” – cannot be doubted. Although based on the level of “wisdom” available in the 1960s, the Concordat did at its time constitute a modern legislative basis for arbitration in Switzerland during two decades. 393

Although it must be conceded that, from where we stand today, the Concordat is clearly outmoded and has now been largely **superseded**, it must be stressed, in its “honour”, that it did contribute a great deal to Switzerland’s importance as a place of arbitration and that it earned the respect and justified confidence of foreign parties/users. 394

b) Criticism and Shortcomings

During the course of the 1970s and 1980s, however, the Concordat also encountered **criticism**. It no longer appeared to satisfy the rising new perceptions of the “specificity of international arbitration”. An increasing amount of criticism had to do with the fact that the Concordat contains **numerous mandatory provisions** (approximately two thirds of the 46 articles in the Concordat), that the Concordat therefore imposes **an uncomfortable “straitjacket”** on both parties and arbitrators to conduct international arbitrations *à la Suisse*, instead of primarily respecting the **primacy of autonomy** of the parties and the arbitrators (cf. Bull ASA 1986, 122–128). 395

The **most serious defect** of the Concordat, however, consisted of the fact that it aimed to regulate two fundamentally different situations at the same time and with but one *uniform set of rules*, namely on the one hand national/domestic arbitration and, on the other, international arbitration with its distinctive requirements. This combination could not bring about any happy outcome – but at best a **compromise solution**, with concessions being made on both counts and, in the end, proving unsatisfactory for both purposes. Although in the beginning this solution seemed viable and satisfactory, the intensive arbitral practice more and more revealed its weakness and its inappropriateness for truly modern requirements. Compare hereto the remarks made 396

above in respect of Germany and England who both have elected to again try to make a square out of a circle (possibly and hopefully with success).

397 Criticism regarding the Concordat was voiced in particular in respect of:

- 398 (i) its inconsistency with Article II of the 1958 New York Convention, in stipulating a **requirement of a written form** for the arbitration agreement (as per Article 6 (1) of the Concordat in conjunction with Articles 13–15 of the Swiss Code of Obligations), according to which the signature was a necessary element for the validity and for the binding nature of the document (so that a telex or fax did not meet that particular requirement of the written form under Article 13(1) of the Swiss Code of Obligations); this is now solved by Article 178 (1) PIL;
- 399 (ii) the provision in Article 5 of the Concordat with regard to **objective arbitrability**, which proved a problem in practice and meant, *inter alia*, that it was first of all necessary for the arbitral tribunal to determine the substantive law applicable in order to establish whether the claim in question “fell within the free disposal of the parties”; moreover, Article 5 Concordat requires a determination by the tribunal in the sense of a negative clearance whether or not, according to some mandatory provisions of law, the right or claim falls within the exclusive jurisdiction of a state court. Needless to say that those determinations sometimes made complex up-front proceedings inevitable so as to determine the issue of arbitrability under Article 5; this is now suitably solved by Article 177 (1) PIL;
- 400 (iii) the absence of a rule on the increasingly important instances in arbitration where **one of the parties is a state or state-controlled organisation**, i.e. with regard to the restriction on the plea as to subjective or objective arbitrability; Article 177 (2) PIL now contains a **landmark provision** to cover this;
- 401 (iv) the particularly heavily criticised **subsidiary reference to locally applicable procedural law**, i.e. the Swiss Federal Code of Civil Procedure, in Article 24(2) of the Concordat; any such reference is now carefully avoided, see Article 182 PIL;
- 402 (v) the absence of arbitral jurisdiction to **order interim measures of protection** (cf. the provision in Article 26 of the Concordat); again this is now rescued by Article 183 PIL;
- 403 (vi) the unfortunate provision for **set-off** in Article 29 of the Concordat, as a result of which the conduct of arbitration proceedings could be “torpedoed” by raising a set-off plea; this provision also gave rise to misunderstandings (even amongst top-ranking international arbitrators); a typical example of this was the Second Interim Award of 2 December 1988, ICC Case No. 5124, in re *Iran v. CEA*, rendered under the presidency of Professor Pieter Sanders; see also ATF 116 Ia 154 and Bull ASA 1990, 286–304); those proceedings still governed by the Concordat (in which a set-off claim of approximately USD 400 million, acquired as a result of an assignment, was put forward to counter and paralyse the principal claim in a total sum of approximately USD 2 billion)

quite clearly demonstrated the “unfortunate nature” of this Article 29 Concordat; the new Chapter Twelve deliberately does not contain a provision to that effect;

- (vii) the unsatisfactory provision of Article 31(3) of the Concordat, which confined itself to stating that the arbitral tribunal must decide according to the **“rules of the governing law”**, which implied (as construed at the time) that the arbitral tribunal should apply a **national conflict system** in the absence of a choice of law, e.g. the Swiss private international law (as the law applicable at the seat of the arbitral tribunal) so as to determine the governing law; at the same time, views were divided whether, in search of the governing law to be determined, the arbitral tribunal had to choose one particular national law, leaving it somehow unclear whether the arbitrators will have the freedom and authority to reject the applicability of one particular national law and instead reach the conclusion that the particular contractual relationship be governed by a-national or transnational rules of law, general principles of law or *lex mercatoria*. Again, this is now clearly solved, see Article 187 (1) PIL;

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- (viii) the over restrictive provisions of Article 33 of the Concordat on the contents of the **arbitral award**, which both restrict party autonomy and conflict with Article 19 of the ICC Arbitration Rules and those other leading arbitral institutions which provide for a casting decision of the presiding arbitrator in the absence of a majority of votes; this is now solved by the provisions in Article 189 PIL which grants party autonomy and provides for the presiding arbitrator’s authority to decide alone, absent a majority;

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- (ix) the too extensive **grounds for annulment of the arbitral award, in particular on the ground of alleged “arbitrariness”** according to Article 36(f) of the Concordat, which encouraged frivolous and abusive challenges against arbitral awards; this is now clearly done away by the much more restrictive grounds in Article 190 (2) PIL, in particular Article 190 (2)(e);

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- (x) the **two tier levels for annulment proceedings**, according to which a complaint for annulment of an arbitral award had first to be brought in the Cantonal High Court at the seat of the arbitral tribunal, with a possibility of a further public law appeal against that cantonal decision directed to the Swiss Federal Supreme Court; this, likewise, has now been cured by providing the “one shot” solution of Article 191 PIL.

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c) The Concordat Remains Suitable for Domestic Arbitration Only

Numerous provisions in the Concordat, whilst still appearing quite proper and appropriate for purely **domestic arbitration**, thus proved **no longer acceptable** to international arbitration. Today’s review, made after almost 8 years of experience with the new Arbitration Act (i.e. Chapter Twelve), just confirms the qualification of the Concordat as an **outmoded set of rules**. Thus, today, the Concordat is more or less dead as far as international arbitration is concerned; however, a few more remarks are necessary.

409 First, as indicated above, the Concordat survives in so far as **purely national arbitration** is concerned. This domestic arbitration does exist but, in the overall perspective, is rather insignificant as compared to international arbitration. Thus, in Switzerland, we have an opposite situation as compared to that in the United States where domestic arbitration accounts for 99 percent of the total case load.

410 Second, since the Concordat now applies in all Swiss cantons, a few of its provisions will continue to apply in those cases or situations where one party or the arbitral tribunal, within the context of an international arbitration governed by Chapter Twelve PIL, makes an application to the local court for **assistance for arbitration proceedings**, such as in relation to the appointment, removal, replacement or challenge of an arbitrator, or in connection with the taking or reception of evidence. However, such applications are extremely rare in arbitral practice (for example, see the Geneva Award published in Bull ASA 1990, 283).

411 It should finally be mentioned that there is an **option clause** contained in Chapter Twelve (Article 176(2) PIL) which makes it possible for parties to a *per se* international arbitration (and therefore *eo ipso* governed by Chapter Twelve), to exclude Chapter Twelve by an express opting-out agreement and choose the Concordat instead; see the detailed commentaries *ad* Article 176 (2) PIL. However, hardly any use at all has ever been made of this right to opt out; this option might possibly have been taken up in a few singular cases which were still pending on as of 1 January 1989, so as to avoid having to take into account a new *lex arbitri* in an already pending proceeding. For today and the future, it does not look likely that any use will be made of this option and it will therefore **not bring about an active “survival” of the Concordat** as a *lex arbitri* in the domain of international arbitration.

d) No Continued Subsidiary Application of the Concordat

412 Since the Concordat, therefore, has practically no further significance in international arbitration, it is justified to speak of the **“old” Concordat** (but being aware that the Concordat remains alive as per the two foregoing paragraphs). This should also make it clear to non-Swiss readers (not fully familiar with Swiss law) that there are **no parallel sets of laws** to be considered and that, in essence, only Chapter Twelve will control international arbitral proceedings.

413 Some misapprehensions in respect of the foregoing had arisen amongst our German colleagues, mainly as a result of – *with the greatest respect* – earlier views having been expressed by our much esteemed colleague Professor Eugen Bucher (in: Die Regeln betreffend Schiedsgerichtsbarkeit im neuen IPRG und deren verfassungsmässiger Hintergrund, report submitted to the Swiss Lawyers’ Conference in 1988, particularly 283–287), who at that time still expressed the view that cantonal law (and therefore the Concordat) also continued to apply in international arbitrations (at p. 283), that Chapter Twelve did not have exclusive application, but merely “supplementary/corrective” application, that the intention that cantonal law should continue to apply had been expressed indirectly (at p. 284) and that it was not the aim of Chapter Twelve to independently and comprehensively regulate the field of international arbitration (at p. 285). These views were also later adopted or shared by his uni-

versity colleague, Professor Walter (in: Die internationale Schiedsgerichtsbarkeit in der Schweiz – Offene Fragen zu Kapitel 12 des IPRG, ZBJV 1990, 161 ss., 165 and 174), and were then repeated in Walter/Bosch/Brönnimann, Internationale Schiedsgerichtsbarkeit in der Schweiz, 29 and 75 s.).

However, this is not so (*sit venia verbi*) (see hereto correctly Lalive/Poudret/Reymond, Le droit de l'arbitrage interne et international en Suisse, Introduction to Chapter 12, 278 s.: “*Le Concordat n’a donc plus aucune application dans le domaine de l’arbitrage international ...*”). Chapter Twelve does, in fact, govern international arbitration **comprehensively and exclusively, without the Concordat being of any further subsidiary application**. Where Chapter Twelve is silent, it is not possible to simply refer back to the Concordat in an attempt to fill *lacunae*. Cantonal law cannot claim a subsidiary or supplementary application; it has been suppressed by Federal law. A different interpretation would not only be to misconstrue the clear **main objective** of the work carried out by the parliamentary Sub-Committee, but also to misinterpret the wording of Article 176(1) PIL. See also the correct statement by Addor, Internationale Schiedsgerichtsbarkeit: Bundesrecht oder Konkordatsrecht?, 67: “*Any further direct, subsidiary application of the Concordat – except under Article 176(2) of the Private International Law Act – is precluded, whether or not the Swiss Private International Law Act contains any loopholes.*”

For instance, one of the **problematical provisions** of the Concordat was that dealing with **set-off** (Article 29 of the Concordat). Indeed, the problem with that provision had been one of the reasons for affirming the necessity to reform Swiss international arbitration law. Chapter Twelve quite intentionally no longer contains any provision on set-off (which means that an arbitral tribunal has to come to its own decision on the admissibility, jurisdiction and procedural consequences in the case of a set-off plea to which no arbitration agreement, or a different arbitration agreement, applies). If, therefore, as a result of the absence of an express provision in Chapter Twelve, reference could simply be made to Article 29 of the Concordat as a legal regime of subsidiary application, this would be tantamount to disregarding a **major reason** for reforming the international arbitration law and would thereby frustrate its objectives. It is regrettable that this point has not been considered with sufficient clarity in the blue Commentary on the Swiss Private International Law Act by Vischer, on Article 182 N.13, and that the comments contained there could give rise to a misconception. Neither is it possible to follow the view expressed in this respect by Walter/Bosch/Brönnimann, 75 s. Correct comments are, however, made by Poudret, in: Quelles sont les innovations réelles apportées par la LDIP à l’arbitrage international en Suisse, 160 s., with reference to the *Iran v. CEA* arbitration proceedings mentioned above, which formed the basis of ATF 116 Ia 154 (see comments in Bull ASA 1990, 286–304).

Misconceptions about this **independent basic concept** of Chapter Twelve are also due to the fact that the 1978 **Draft Bill**, the 1979 **Final Report** and also the 1982 **Message of the Federal Council** were, in fact, *still inspired by a substantially different approach* as it prevailed at that moment in time. It was not until a new wording was submitted in Spring of 1986 by a small group of experts, that a **fundamentally new direction and orientation** found its way into the Draft Bill.

417 One of the fundamental pillars of that **new orientation in 1986**, therefore, is of a purely conceptual nature and cannot be directly traced in its wording. It would therefore seem all the more important to give this aspect particular emphasis: i.e. the conscious new conception of Chapter Twelve as an **Arbitration Act**, as a separate piece of legislation, although embedded within the Private International Law Act. Thus, conceptually, Chapter Twelve must be understood as a **stand-alone piece of legislation**, being independent from Chapters 1–11 of the the PIL Act.

418 It was only in adopting this new fundamental understanding that Switzerland took the decisive step to honour and recognize the demands of the above mentioned **“specificity of international arbitration”**; that notion in fact requires, in particular, that an *Arbitration Act* should not be “tainted” by purely local flavour and that the “stage” of the “theatre” (for conducting international arbitration) should be set in accordance with the fair and reasonable expectations of international parties. This requires the removal from that “theatre-stage” of *all those requisites of local folklore*, unless such folklore can at the same time claim to be “grown up” and pertain to the truly international theatre. P. Karrer very correctly refers, in his commentary *ad* Article 187 PIL, to the “*stand-alone*” character of Chapter Twelve.

419 The **origin of Chapter Twelve** and its more than ten years of preparation work will be briefly outlined below.

3. The Origin of Chapter Twelve

420 The “Message” (*Botschaft*) of the Swiss Federal Council on the Private International Law Act for the proposed Chapter Twelve on arbitration explained that international arbitration urgently required a **regulation at a Federal level** (and no longer on a purely cantonal level), and that international arbitration was assuming an ever growing importance for the settlement of disputes among parties engaged in international business and trade, whereas a reference to the ordinary courts had become more or less the exception. Switzerland, as it was said, therefore had a particular interest and indeed **vocation** in maintaining its world-wide reputation as a prime country for hosting international arbitration. It was also said that Switzerland, in the past, had been chosen as a preferred location for international arbitration because of a perceived actual need for having a traditionally neutral country with, at the same time, a well organised legal system and eminent legal experts. The Intercantonal Concordat of 27 March 1969 (SR 279) did not, as it was said, meet essential requirements of international arbitration because it did not contain appropriate provisions for certain matters vital to international arbitration, such as e.g. relating to the question of the law applicable to the validity of the arbitration agreement (cf. in particular the Message, 25 s.).

421 But then came the blow! In a parliamentary debate on the Draft Bill, the **Senate** (*Ständerat*) voted on 13 March 1985, by a majority of only 18 to 17 votes, that the entire Chapter on international arbitration should be **deleted** from the Bill. The main argument for the Senate’s negative attitude had to do with doubts as to the **constitutionality** of allowing a Federal Law to rule on arbitration which, at that time, was still perceived as being, essentially at least, a procedural matter which, as such, was

reserved to the legislative competence of the cantons. Thus, the concern was voiced that the sovereignty of the cantons in procedural law matters would be challenged. Moreover, as a second argument, it was said that there was **no need** for a Federal Law, since the Concordat was, as it was (wrongly) said, still quite **sufficient and satisfactory** for the purpose. As a third argument, it was said that the proposed provisions within the Draft Bill were anyhow **incomplete** and of doubted “wisdom”; for instance, the possibility provided by one of those provisions (namely the provision allowing the possibility for parties to make a so-called **exclusion agreement**) was considered to amount to a breach of Swiss traditions (cf. AmtlBull StR 1985, 173–179).

The third argument prompts a comment to be made here: The provisions on arbitration as per the Draft Bill, as it was at that time, had in fact only consisted of twelve relatively short articles (at that time Articles 169–180) and were confined to regulating essentials (compare hereto the Concordat with its 45 articles, many of them being of a mandatory nature). This limitation, however, had to be understood against the background according to which, **at that time**, it was still assumed that any matters not covered in those 12 articles would be covered by the **subsidiarily applicable cantonal law** (i.e. the Concordat) which, at that time, was meant to remain applicable in international arbitration.; it was not therefore necessary to provide a complete set of rules within Chapter Twelve (to note: at that time, it was still Chapter Eleven).

However, this very conceptual notion was changed as a consequence of the consultations with the **expert group** which started in February of 1986. But how did this change come about?

The Senate’s negative decision of 13 March 1985 caused quite a serious shock in the Swiss arbitration circles (cf. Bull ASA 1985, 60; Burckhardt, SJZ 1985, 297 ss.). It subsequently led, within the Committee of the other parliamentary chamber, i.e. the **House of Representatives** (“Nationalrat”), which also had to deliberate the Bill, to a motion made by some of the parliamentarians that comments should be invited from a number of knowledgeable **arbitration experts and practitioners**. This proposal was accepted and led to the somewhat unusual procedure of **hearings** being conducted by that Committee with five experts (the **so-called Sub-Committee**, consisting of Professor Pierre Lalive, Professor Claude Reymond, Professor Anton Heini, Professor Hans-Ulrich Walder and the author).

An essential focus to be reviewed with those experts was the issue whether or not to keep the Chapter on international arbitration within the Draft Bill on the Swiss Private International Law (AmtlBull NR 1986, 1364 s.). A second key issue was, whether the provisions, as they were then on the table, were (in the opinion of the five experts) at all suitable and satisfactory to reform the Swiss Arbitration Law.

Following these parliamentary hearings, three members of that Sub-Committee (Professors Pierre Lalive and Claude Reymond, together with the author) took it upon themselves to re-examine and critically evaluate the Federal Government’s Bill and to submit proposals to the House of Representatives Committee on an improved wording of the (formerly Eleventh, now) Twelfth Chapter.

Without going into detail, it must be said that the three members of the **Sub-Committee** faced an extremely difficult and delicate task because, in actual fact, the

Federal Government's Bill was not satisfactory in some of its most essential aspects. The task thus was to **softly redesign** the Chapter, but in such a way as to ensure that it still fitted into the structure already in existence. Otherwise – i.e. if a completely new and extended text were submitted – the experts had to fear that Parliament would consider the Chapter on International Arbitration not sufficiently ripe for further deliberations, with the effect that, most probably, it would decide to strike out the entire Chapter from the Act (as this had already been voted by the other parliamentary chamber). The idea, thus, was **to avoid** such a result by all means, since the deletion of Chapter Twelve would with certainty have meant to set back the urgently needed new piece of legislation on international arbitration for many years.

428 When drawing up the new wording it was therefore constantly necessary to take **political considerations** into account. *Everything else had to be disregarded, no matter how desirable it was.*

429 The **new wording** drawn up by the three members of the Sub-Committee was submitted to the House of Representatives Committee in the Spring of 1986 and then became the subject of intense parliamentary debate and improvement in committee in both Chambers, until the deliberations came to an end in October 1987.

4. The Principal Issues of the Parliamentary Debate

430 The following were, in particular, the principal issues of the parliamentary debate:

- 431 a) The **procedure for the appointment, removal, replacement or challenge of an arbitrator and the role of the national courts** in these proceedings: The Federal Government's Bill did not contain any provisions on these matters because it was assumed that cantonal law would continue to apply (hence the Concordat). The **Concordat solution** and court practice developed under the Concordat were, however, very **unsatisfactory** in institutional arbitration, since administrative decisions taken by arbitral institutions on the appointment, removal, replacement or challenge of an arbitrator could again be challenged before, and re-examined by, the ordinary courts at the seat of the arbitral tribunal (even though the parties must be taken to have agreed, by submitting themselves to the rules of a particular arbitral institution such as the ICC, that those very matters be decided (in an administrative procedure) by the institution (ICC) itself and not by the national courts at the seat of the arbitral tribunal). – It was therefore necessary to put the Bill on a new footing, by first of all pronouncing the principle of the **respect for, and the primacy of, the autonomy of the parties to regulate those matters themselves** (i.e. by submitting themselves to the rules of an arbitral institution, or by stipulating provisions of their own).
- 432 b) The law applicable to the **arbitral procedure**: The Federal Government's original Bill contained (in its former Article 173(2)) the following provision: "*The law of the canton in which the arbitral tribunal has its seat is also to be applied mutatis mutandis in a subsidiary capacity*". – The parliamentary Sub-Committee voiced **strong objections against this subsidiary application of local procedural law**, on the argument that it was no longer compatible with modern con-

ceptions of international arbitration to refer to a (or indeed any) municipal, local or cantonal law.

Therefore, a new wording was proposed and discussed according to which the arbitral tribunal was to be given a full **“procedural-law autonomy”** to determine itself the procedure **“wherever and to the extent necessary”**. However, this later wording did not go through until the very last minute, i.e. until the House of Representatives’ session on 21 September 1987 and the Senate’s subsequent session on 1 October 1987. Thus, one of the most fundamental aspects of international arbitration saw its break-through only in the last sessions, and without that break-through the new Swiss Arbitration Act would not deserve to be characterised as a modern statute. We thus need to realise that this was clearly a **fundamentally new concept** if compared to the Federal Government’s Bill.

- c) **Ordering interim precautionary or conservatory measures** in arbitration proceedings and the **co-operation of the national courts** in enforcing such measures: There was argument as to whether the wording used should be *“the parties may authorise the arbitral tribunal to order precautionary measures; if no such authorisation is given, the parties may apply to the appropriate national courts”* (so that without the parties’ authorisation the tribunal would not have that authority) or whether instead preference should be given to the solution whereby, if the parties have not agreed on anything, the arbitral tribunal will have the power to order interim or conservatory measures on an application made by one of the parties. The disadvantage of the first alternative, which was finally **rejected** at the consultation stage, would have been that the consent of both parties would have been required in order for interim or precautionary measures to be ordered, and this would very clearly have been a **retrograde step** not living up to modern requirements.
- d) The question whether a preliminary award by an arbitral tribunal on its jurisdiction has to be challenged by way of an **immediate recourse**, or whether such recourse might still be possible after notification of the final award.
- e) The provision concerning the **law governing** the dispute: Although it was not disputed, in this connection, that an arbitral tribunal principally has to apply the law chosen by the parties, the rule governing the dispute **absent an explicit choice of law made by the parties** led to protracted discussions. The **alternatives** considered were (i) either to include no rule at all, or (ii) to provide for the applicability of the law with the so-called “closest connection”, or (iii) to state that the arbitral tribunal should decide the matter on the basis of the law applicable as per the provisions under the PIL Act (i.e. the Swiss Private International Law Act as a whole).

When considering the present wording of Article 187(1), it is easy to see that (following lengthy debates) a decision was made on the wording along the lines of the second alternative. This result is **particularly remarkable** for the following reason: during extremely heated debate the parliamentary committees had to discuss the codification of the Swiss rules on conflict of laws (as per the present Chapters 1–11). Parliament was undoubtedly convinced (with quite some justifi-

cation) that the codification of Chapters 1–11 created a remarkably modern, trend-setting system of private international law. *Was it not therefore natural to “attempt” to provide that an arbitral tribunal with its seat in Switzerland should also be guided by this advanced and sophisticated Act of Parliament (i.e. Chapters 1–11) when deciding on the substantive law to be applied in the absence of a choice of law?* Was it not, to put it differently, an almost impertinent demand of some professionals to expect Parliament to virtually **discard** its own achievements when enacting the PIL Act, by providing for an independent conflict rule within Chapter 12 giving an arbitral tribunal **the freedom and autonomy to in fact completely disregard the solutions adopted in Chapters 1–11** of the Swiss Private International Law Act, so that they may determine the law or rules of law applicable to a dispute on the basis of autonomous criteria as determined by the arbitral tribunal?

438 The questions raised here make it clear that Parliament finally acknowledged and recognised the **specificity of international arbitration** (in an impressive manner, because in the end it conceded to the arbitrators a **conflict of law autonomy** as now reflected in Article 187 (1)).

439 f) The question **whether and on what grounds arbitral awards can be re-examined by national courts**: The discussion focused, *inter alia*, on whether the (then) Article 177(2) in the Federal Government’s Bill was still adequate in providing that an award on the merits of a case could “be challenged in the Swiss courts at the seat of the arbitral tribunal on the grounds that it constituted a manifest denial of justice, or on grounds of arbitrariness”.

440 However, this solution was criticised on the argument that the Concordat, exactly on this point, had attracted international criticism for its “unfortunate” **notion of “arbitrariness”** as a ground for challenging an arbitral award. Indeed, the term “arbitrariness” in the sense of the Concordat had often been misunderstood abroad. For this reason, it was imperative to find a better solution.

441 Another suggestion then came up which provided that an award could be challenged if “it was not based on sustainable grounds”, but this was probably just another way for describing “arbitrariness”.

442 A fundamentally new direction was therefore discussed in the aim to further limit challenges against arbitral awards to the bare minimum: the proposal was that the remedy of a setting aside of an award on its merits should only be available if the award was found **incompatible with public policy (“ordre public”)**. Indeed, this new approach – which is in harmony with the similar criterion as per Article V (2) of the New York Convention and Article 34 (2)(b)(ii) of the UNCITRAL Model Law – reflects the prevailing view around the globe. And thus, the ultimate adoption by the Swiss Parliament of this latter solution was an extremely welcome and satisfying result.

443 g) A further and extremely difficult question to resolve was the issue of determining **what courts should have jurisdiction to decide recourses to set aside an award**. It was clearly recognised by Parliament that a **dual level of “appeal”** (first of all, applying for an annulment to the cantonal high court at the seat of the arbi-

tral tribunal, with a further possibility of a constitutional “appeal” to the Swiss Federal Supreme Court) no longer seemed appropriate. Initially it was considered “politically impossible” (for reasons of the deeply rooted federalism in all matters of civil procedure) to **remove the cantonal jurisdiction** and instead to provide for a **direct** and **exclusive** jurisdiction of the Swiss Federal Supreme Court. However, at the end, the “miracle” became law (and existing laws were changed) to provide for the exclusive authority of the Swiss Federal Supreme Court. This, beyond doubt, constitutes **another milestone in the Swiss legislative landscape**.

- h) The question whether the **exclusion of any right of appeal** against an arbitral award is permissible and, if so, in what circumstances. 444

The new draft of the Twelfth (then the Eleventh) Chapter, which resulted from the work carried out by the House of Representatives Committee and the Sub-Committee, was discussed by the House of Representatives in plenary session and subsequently passed unanimously (AmtlBull NR 1987, 1894). Following the procedure for ironing out differences, the Senate also finally agreed to the present version of Chapter Twelve, after lengthy debate and with various minor modifications (AmtlBull StR 1987, 178 ss., 506 ss.), in a **final vote on 18 December 1987** by 32 votes to 8 (AmtlBull StR 1987, 685). 445

It should also be mentioned that, during the final parliamentary debates, the **French** wording was the text principally used by the parliamentarians. It was then simply left to the *Redaktionskommission* (drafting committee) to prepare the **German translation**, which however was not finalised until a few days before the final vote. This fact explains why a few minor errors sneaked into the German text prepared in the last transcript. For instance, the term “*règles de droit*”, so important to the parliamentary debate, was incorrectly and inartfully translated in the German version of Article 187(1) by “*Recht*” (law), and in the Italian translation by “*diritto*”, instead of (more correctly) by the word “*Rechtsregeln*” (rules of law). In respect of the crucial significance of this term, see also Blessing, Regulations in Arbitration Rules on Choice of Law (ICCA Congress Series No. 7, 391–446 and, Blessing, Choice of Substantive Law in International Arbitration, JInt Arb 2/1997, 39–66; see also La live/Poudret/Reymond, Le droit de l’arbitrage interne et international en Suisse, ad Article 187 N.9 s. of Swiss Private International Law Act; also previously Blessing, The New International Arbitration Law in Switzerland, 60 s.; id. in Schriftenreihe DIS 1/II, 67 s.; similarly A. Bucher, Zur Lokalisierung internationaler Schiedsgerichte, Liber amicorum Keller, 1989, 570. Cf. also the ice-breaking wording of Article 1496 of the French Nouveau Code de Procédure Civile, incorporated in Article 28 (1) of the UNCITRAL Model Law and in Article 1054 of the Dutch law on civil procedure. The term “**rules of law**” was correctly used in the English translation. 446

We may briefly note here in passing that another (but less serious) purely translation related inconsistency appears in Article 181; in the German version of the provision on *lis pendens* the words “*with prayers for relief*” are introduced without being reflected in the French wording (and neither were they therefore incorporated in the Italian or English translations). 447

- 448 Does Chapter Twelve **merely constitute a “piecemeal approach”**? Is it the work of a **“legislative minimalism”**, as E. Bucher at first considered in his aforementioned paper to the Swiss Lawyers Conference in 1988. **The answer to these questions and other similar ones must be an emphatic NO.** The fact that the new wording achieved in the Spring of 1986 could not exceed its previous scope has had, in the end, an extremely positive effect, namely: **deliberate concentration** on absolute essentials, brevity; conciseness; discarding any ambition to regulate everything (avoiding thus the danger of restricting acclaimed arbitral freedom and autonomy). Hence, the Swiss solution has resisted to the temptation to yield towards enacting a detailed and complex set of rules (such as those contained in the *Dutch Arbitration Act* of 1 December 1986 or, most recently, in the 1996 English Arbitration Act), and instead has achieved a result comparable to the even shorter provisions of the French international arbitration law under the Decree of 1981.
- 449 What was the **main idea** behind Chapter Twelve and what are its effects? More about this below. Let us first of all address a different question.

5. Why No Adoption of the UNCITRAL Model Law?

- 450 The large amount of work done on the draft of the **UNCITRAL Model Law** was done at the same time as the new Swiss international arbitration law was being drawn up. A question which is occasionally asked is: why did Switzerland draw up its new international arbitration law *more or less* in isolation, instead of waiting for the UNCITRAL Model Law to be brought in and then incorporating it in its entirety – or at least to a significant extent? *Did Switzerland take the wrong direction, more or less ignoring the signs and the demand of the times?* These questions must be answered in the negative, particularly for the following reasons:
- 451 **From a historical point of view**, it must first of all be remembered that the work on the present Chapter Twelve was already going full speed ahead when the first initial steps were being taken towards the draft of the UNCITRAL Model Law. Switzerland’s work on Chapter Twelve was tied in with the entire codification of Swiss private international law. Postponing the work on international arbitration would have affected and delayed the entire codification process for years. Probably, a proposal to adopt the UNCITRAL Model Law would have triggered a never ending new debate and, as a result, would also have meant excluding the present Chapter Twelve from the PIL Act. We would have had the constitutional debate on the authority of the federal legislator to regulate arbitration (ousting the competence of the Cantons in matters of civil procedure) all over again and the urgently required reform of Switzerland’s international arbitration law would have been delayed by another five or more years.
- 452 From a political point of view, it would also certainly have been impossible to have the Swiss legislation on international arbitration determined and adapted according to the provisions of the UNCITRAL Model Law. Even at the time of the ICCA Congress in Lausanne, in May 1984, the most important provisions of the UNCI-

TRAL Model Law were still under discussion (in some cases with different variants). By the time the definitive text became available and had been adopted by the United Nations, in 1985, it would no longer have been possible, for political reasons, to put the draft provisions of Chapter Twelve then in existence on a completely different and much wider footing. The redirection of certain fundamental provisions of Chapter Twelve, which took place in the Spring of 1986, was **the utmost** that could be done within the concept already laid down. Concentration on the most important elements was the goal. Any other “non-vital” or just “nice-to-have” provisions had to be discarded. However, we may now already maintain that the brevity of Chapter Twelve (confined to 19 articles) is not a shortcoming, in fact, but quite the reverse: **it is its virtue!**

In terms of content it must be said that the adoption of the provisions of the UNCITRAL Model Law would not have been of crucial importance for enabling Switzerland to foster a modern arbitration act. The UNCITRAL Model Law as a whole is undoubtedly excellent and *certain isolated criticisms* of various provisions (for instance the deplorably restrictive reference to “the law” in Article 28 (2)) do not downgrade that characterisation. It provides modern detailed legal guidance, particularly useful wherever international arbitration cannot look back upon decades of deeply rooted tradition. It may, however, simply be mentioned in passing that the work done on certain individual provisions of the UNCITRAL Model Law revealed an almost incalculable number of opposing views and arguments and that the wording finally adopted constitutes a **compromise solution**, quite in the sense of the lowest common denominator. It is thus not surprising that certain states that considered the Model Law in detail (with a view to shape a new Arbitration Act on its basis) went into lengthy processes to adapt and improve on some of its provisions; the examples of the very extensive legislative processes in Bermuda, Germany and England come to mind. Nevertheless, today’s notable success and worldwide acceptance of the UNCITRAL Model Law speaks for itself.

Switzerland managed to arrive at an extremely **poignant and liberal solution** which, basically, stands in harmony with the provisions of the UNCITRAL Model Law, however confining itself to those rules which are of prime importance. The fact that there are *no truly fundamental differences* between Chapter Twelve and the UNCITRAL Model Law can be seen from the report by Walder, Das UNCITRAL Modell-Gesetz und die Bestimmungen über die Internationale Schiedsgerichtsbarkeit im schweizerischen IPR-Gesetz, Recht in Ost und West, Institute of Comparative Law, Waseda University (Publ.) 1988, 727 ss.

It should be remarked, however, that Switzerland’s independent choice has two substantial **disadvantages** which are now increasingly coming to light:

- (i) Chapter Twelve of the Swiss Private International Law Act, along with its provisions, was conceived (at least by those three experts who submitted a new draft for the Bill to the House of Representatives’ Committee in the Spring of 1986) as a separate and **stand-alone solution** (in the current sense of an “Arbitration Act”). Thus, it was meant to reflect a new philosophy and approach which should not be burdened with old and outdated ideas. However, what happened in actual

fact? Have the Swiss commentators been able to realize that change of philosophy? – The answer is: no, **unfortunately**. Because many of the countless comments and articles made and published in the meantime have principally sought to understand and interpret individual provisions of Chapter Twelve from former *partially superseded legal perceptions*. Cf. on this Blessing, *The Arbitration Agreement – Its Multifold Critical Aspects*, in ASA Special Series No. 8, 8. The modern design of Chapter Twelve therefore runs the risk of losing its **self-sufficiency** through a back-stage door.

457 A foreign party therefore (now again) seems to run the risk of being confronted with *localisms* – even though there should strictly be no place for such localisms in such an important Act, and even though a foreign “user” of Switzerland’s arbitration system is certainly entitled to expect of such a modern place of arbitration that it will be guided by **international standards**, taking international perceptions into account and not just domestic ones (no matter how well-founded or justifiable these might be in our own view and appreciation).

458 Thus, if Switzerland had adopted the UNCITRAL Model Law, it would have been clear from the very start that it would be inappropriate to construe the provisions of the Model Law according to existing domestic principles; it would, in fact, have been clear that reference should be made for this purpose to the great wealth of relevant **international literature** which is available – and to which Swiss authors, in particular, have made a very valuable contribution.

459 (ii) Switzerland’s decision to do it “its way” has also had an adverse effect on the **significance** of our very **substantial expertise** and **experience** in international arbitration: Swiss authors are making a very significant contribution to the discussion of vital international topics, such as e.g. objective arbitrability, the scope of application of an arbitration agreement, the arbitral procedure, interim measures, the governing law, principles governing the recourse to set awards aside – but *many of these contributions remain hidebound by being labelled “of local significance only”*, in that these contributions just relate to “our” Twelfth Chapter (and not to the corresponding provisions of the UNCITRAL Model Law, which would trigger off echoes on the international level).

460 In our opinion, therefore, our only hope is that Swiss authors and commentators will concern themselves more with international literature in the future than they have done in the past. In our opinion it would not only be wrong, but also short-sighted and presumptuous, to ignore foreign literature. Three examples will make this clear:

461 a) Wherever there are arbitration proceedings, questions relating to **multi-party arbitration** arise; the problem is the same. Swiss literature on this topic is very scarce, and not very detailed; on the other hand, however, there is a vast amount of foreign literature available on multi-party arbitration; to disregard all this would be quite inexplicable.

462 b) The same applies to the scope of an **arbitration agreement**, particularly with regard to parties who have not signed it at all themselves; the **group of companies doctrine** and the **single business transaction doctrine** have been the subject of a

great deal of subtle discussion internationally, although hardly at all in Switzerland (cf. the contributions by Sandrock, Jarvin, Jarrosson, Derains and Blessing in: ASA Special Series No. 8 (December 1994)). It would be unwarranted to disregard the international debate (and to simply take into account our own “home-made wisdom” whenever such issues need to be examined and evaluated.

- c) The international discussion on the issue of the governing law or the **governing rules of law** (which comes within the area of Article 187(1)) is particularly intricate; Swiss literature only plays a very small part in this debate. Here again, anybody dealing with this question in arbitration proceedings conducted in Switzerland can justifiably expect not only the points of view expressed in Swiss commentaries to be taken into account, but also those contained in **international literature**. Cf. in this respect Blessing, Regulations in Arbitration Rules on Choice of Law, in: ICCA Congress Series No. 7, 391 ss. as well as Blessing, Choice of Substantive Law in International Arbitration, JInt Arb 2/1997, 39–65. 463

This subject also includes the issue as to the relevance and applicability of **mandatory rules of law of a third country (“Eingriffsnormen”)** e.g. regarding the question whether an arbitral tribunal sitting in Switzerland must take into account or apply European or American anti-trust laws; this is also an outstanding example of an instance in which prudent consideration is impossible without reference to the wealth of foreign scholarly writings. See hereto Part IX. below. 464

VII. The Predominant Features of Chapter Twelve

1. General Characteristics

465 Chapter Twelve **governs international arbitration only** and does not deal with purely domestic arbitration, which continues to be subject to cantonal law (i.e. the Concordat). This deliberate distinction has shown advantageous results, both in terms of providing a dogmatically satisfying solution as well as in terms of the outcome, whereas a uniform law purporting to govern both domestic and international arbitration would necessarily have constituted a **compromise solution** (Cf above in relation to England and Germany). The distinctive regulation of international arbitration has enabled the **specificity of international arbitration** to gain full legislative respect and has at the same time paved the way for the Swiss Federal Supreme Court (when seized with challenges against arbitral awards) to develop a jurisprudence which is freed from purely local perception.

466 **Certain fundamental questions of arbitration law** implicitly arose during the parliamentary deliberations, in particular:

- How much freedom do arbitrators want, how much do they need?
- How much freedom do parties want, how much do they need?
- How much protection do arbitrators want, how much do they need?
- How much protection do parties want, how much do they need?
- What amount of freedom and autonomy should, or must, a modern arbitration venue therefore provide?
- What amount of freedom and autonomy can a state be prepared to concede to the parties?

467 Cf. Blessing, The New International Arbitration Law in Switzerland, JIntArb 2/1988, 13. On the principle of the need for arbitral tribunal autonomy, see also the contribution made by Sonnauer, Die Kontrolle der Schiedsgerichte durch die staatlichen Gerichte, IWR Vol. 10, 1992, 5 ss., who also analyses the spectrum which ranges between essential autonomy, on the one hand, and reasonable state control, on the other and arrives at this conclusion: *“If you want an Arbitration Act which takes a positive attitude towards arbitration and has a beneficial effect on it, you have to allow arbitral tribunal autonomy to the widest possible extent whilst on the other hand reducing state control to absolute essentials. In everyday parlance this means therefore: “As much arbitral tribunal autonomy as possible but only as much state control as absolutely necessary”* (at p. 7). Also see his detailed analysis at pp. 9–17.

468 The Swiss Parliament has earned a great deal of credit for having had the wisdom to achieve a **liberal solution** (thereby rejecting the more conventional views expressed, for example, during the Senate’s deliberations in 1985), at a time when this

had not yet become an established trend and did not yet correspond to the generally perceived views on the essentially proper nature of this solution.

Unlike the Concordat, therefore, the **general characteristic** of Chapter Twelve is its much greater **liberality**. Chapter Twelve takes full and complete account of the parties' desire to be able to regulate **"their" arbitration procedure** themselves autonomously. This **autonomy** of the parties is given pre-eminence (whereas the former Concordat, in effect, lent itself to conducting international arbitration proceedings quite akin to litigations in state courts). Chapter Twelve, in particular, grants the so-called **"procedural law autonomy"**, the authority for ordering interim measures, a so-called **"conflict of laws autonomy"** as well as a **"substantive law autonomy"**. Certain restrictive provisions in the Concordat have been omitted, e.g. those relating to arbitrability and set-offs.

All in all, Chapter Twelve can be termed the Swiss **Arbitration Act**, thereby emphasising that it is a self-contained piece of legislation. As such, it is to be understood and interpreted as an instrument which **stands alone** – quite in accordance with international requirements and the expectation that a modern *lex arbitri* should be devoid of "local colour".

Without wishing to anticipate the detailed commentaries as contained in this publication, **a few outstanding features** deserve special mention within the framework of this introduction.

2. The Outstanding and Distinctive Characteristics in More Detail

The principal design features and innovations contained in Chapter Twelve can be summarised as follows:

a) *Re Scope (Article 176):*

When is an arbitration an **international arbitration** under Chapter Twelve? It was quite deliberate that purely formal criteria only should be looked at, namely (i) that a party has its registered offices/is domiciled outside Switzerland and (ii) an agreement pursuant to which the arbitral tribunal should have its seat in Switzerland. The elegant Swiss solution stands in contrast to Article 1492 of the French NCPC (Nouveau Code de Procédure Civile), which provides that an arbitration is "international" where international trading interests are concerned (which can give rise to complex questions of determination), and also stands in contrast to the more complex definition of internationality contained in Article 1(3) of the UNCITRAL Model Law.

b) *Re Arbitrability (Article 177):*

Sub-Paragraph 1: It is of significance here that the term **"objective arbitrability"** is very widely expressed by a **distinctive substantive conflict of laws rule**. All

“claims of economic interest” are therefore arbitrable, irrespective of the fact that substantive law governing the contractual relationship might provide for a more restrictive definition of the objective arbitrability. We may recall here that under Article 5 of the (old) **Concordat** the only claims which were arbitrable were those of which the parties were free to dispose of, a solution still encountered in numerous civil law countries; this latter solution involved (and, where it applies, still involves) the difficulty for an arbitral tribunal to first determine the governing law for the legal relationship (which sometimes is a rather time consuming and difficult exercise) in order to then be able to establish whether, according to such *lex causae*, the claim being made was a “freely disposable” claim.

475 Take, for example, the revocation of an oil-drilling concession, or the expropriation of a power plant or oil and gas facility: all claims of such a nature do clearly involve economic or financial interests and thus are (pursuant to Article 177 (1) PIL) objectively arbitrable for any arbitral tribunal having its seat in Switzerland, notwithstanding the fact that those claims might well be considered non-arbitrable under the *lex causae* in question.

476 Moreover, it was also vital, when drafting Article 177, to omit the reservation contained in Article 5 of the (old) Concordat favouring the jurisdiction of a national court where this derives from a mandatory statutory provision. Thus, Article 177(1) now governs objective arbitrability notwithstanding any mandatory provisions of Swiss domestic or foreign law to the contrary; the only barrier is Swiss *ordre public*. Cf. with regard to the latter IPRG – Briner ad Article 177 N 13 and IPRG – Ber ti/ Schnyder ad Article 190 N 71–77. An important and illustrative precedent in this context is ATF 118 II 353 in re *Fincantieri-Cantieri Navali Italiani SpA v. Oto Melara* of 23 June 1992, where the Swiss Federal Supreme Court, for good reasons, held that matters of arbitrability are to be determined and adjudicated irrespective of the validity of the contractual obligation according to the *lex causae*. Regarding the significance of that decision in the context of arbitration in matters of **intellectual property**, see Blessing, Arbitrability of Intellectual Property Disputes, in ArbInt 1996, 191 ss., 205 s.

477 Likewise, matters involving EU or US **competition or antitrust laws** are arbitrable in Switzerland, including e.g. matters regarding the alleged nullity of a contract or of a contractual provision, the alleged illegality of a restraint of trade and the right to invoke an individual or block exemption under Article 85 (3) EC Treaty. However, an arbitral tribunal will only decide on private law remedies and thus cannot impose fines and other sanctions for which exclusive competence vests with the EU Commission (according to the EU Regulation No. 17, Article 3). Thus, arbitration proceedings and proceedings before the Commission often run parallel to each other, and the sanctions in each of the proceedings are complementary. Case law has settled that neither an arbitral tribunal nor the parties will have standing to ask the **European Court of Justice** to render a **preliminary ruling** in the sense of Article 177 EU Treaty (see the Northsea Decision CJEC 102/81, LR 1982, 1095; see also the Danfoss Decision CJEC 109/88, LR 1989, 3199 and the Commune d’Almelo decision CJEC 393/290, LR 1994, 1477). Below, we will devote a separate Chapter to the numerous complex competition law issues that come before arbitral tribunals; see Part IX., 7 (b).

The question had arisen whether an arbitral tribunal sitting in Switzerland should also affirm arbitrability where a party not only seeks simple damages, but demands an award for **treble damages** based on an alleged *per se* violation of US antitrust laws. The writer's opinion is clearly in the affirmative, for a number of reasons which need not be elaborated here. In this sense, an arbitral tribunal opined in the framework of Case No. 202/1992 (under the International Arbitration Rules of the Zürich Chamber of Commerce) in the widely known case *Adolph Hottinger v. George Fischer Foundry Systems (USA)*, in July 1995, that it will (over and above the applicable Swiss law as the law chosen in the relevant contract) fully take into consideration (or even directly apply) US antitrust law, including punitive elements such as the trebling of damages. See hereto the Chapter dealing with competition law issues.

We may note in passing that, on the domestic level, the new **Swiss Cartel Law** of 6 October 1995 contains, in principle, no restriction as to the arbitrability of competition law disputes; however, its Article 15 (1) requires courts (and arguably also arbitral tribunals, in the view of Tercier in JdT 1996 I 11) to submit the issue to the *Wettbewerbskommission* for consultation (which, as we understand the law at this stage, does not remove the tribunal's authority to ultimately decide on the merits). Only in those cases where a party invokes that an **inadmissible restraint** of trade as such should be lawful on the strength of overriding public interests, the issue will have to be decided by the Swiss Federal Council (*Bundesrat*) (Article 15 (2) Cartel Law); in such latter (exceptional) situation, arbitrability will have to be denied.

Paragraph 2: One significant **milestone** in Chapter Twelve is the **restriction on the objections available to states and state-controlled organisations**, which are barred from disputing subjective or objective arbitrability by relying upon their own national law. This provision reflects those fundamental ideas which are embodied in a whole series of important arbitral awards; cf. the sample list of such awards in Blessing, *The New International Arbitration Law in Switzerland*, JIntArb 2/1988, 27 s. The provision also reflects the resolution passed by the *Institut de Droit international* of 4/14 September 1989 (Bull ASA 1990, 203) and is appropriately considered Swiss *ordre public* (cf. Poudret, *Quelles sont les innovations réelles apportées par la LDIP à l'arbitrage international en Suisse?*, 157). See further the detailed study contained in Sanders' report in the *International Encyclopedia of Comparative Law*, Vol. XVI on Civil Procedure, Chapter 12 on Arbitration, 1996, 12–125 to 12–136. – Regarding the different issues of interference with a contract by so-called “Acts of State”, see the special Part IX, 8.

c) *Re the Arbitration Agreement (Article 178):*

(i) Article 178 (1) PIL: Requirement As To Form

In paragraph 1: A new **independent substantive conflict rule** is also enacted here; this became necessary as a result of strong international criticism of former Article 6 of the Concordat, to which Article 13 of the Swiss Code of Obligations (and its requirement of a signature) was relevant (which led to problems with telexes, faxes, telegrams and arbitration clauses in documents remitted but not signed). The *guiding*

principle underlying the new rule and independent idea in Article 178, paragraphs 1 and 2, is threefold:

First, in recognition and realisation of the specificity of international arbitration, a reference to other “domestic” legislation was to be avoided (such as an implied reference to the writing requirement as contained in Article 13 of the Swiss Code of Obligations).

Second, a renvoi to foreign law was also to be avoided (absent a substantive conflict rule, the question as to the formal validity of an arbitration clause might be governed by foreign i.e. non-Swiss law); the requirement as to form is that a writing in any form will suffice, whether or not signed.

Third, an exchange of documents is deliberately not a requirement under the terms of Article 178 (1) PIL; it is therefore, in the writer’s opinion – and having regard to the particular circumstances – possible to construe an implied consent, for instance through performance of the contract in which the arbitration clause was embedded.

(ii) No “Exchange” Required

Thus, Article 178 (1) is **more liberal than the “last minute provision” of Article II (2) of the New York Convention of 1958**. Article II (2) contains the **unfortunate term “exchange”** of documents, a requirement which has given rise to a vast amount of case law and has also strongly been criticised on the grounds that (i) it no longer meets present day needs, (ii) lends itself to an overly literal interpretation in the sense of requiring a mutual exchange, and (iii) as such would justify a revision of the NYC in years to come. See hereto in particular Blessing, *The Arbitration Agreement – Its Multifold Critical Aspects*, in ASA Special Series No. 8, 9–13 (excerpts from which were published in Bull ASA 1994, 38–45) and the criticism expressed therein on an arbitration award.

Why should business men be allowed to conclude large transactions orally, and be required to comply with rigid requirements for agreeing to arbitration? Should a buyer’s unilateral purchase order, voluntarily “implemented” by the seller (i.e. without exchanging a counter-signed purchase order, but having tacitely and conclusively accepted the terms of the purchase order by performing under the contract) be valid in respect of all of its terms – except one, i.e. **the arbitration clause** contained therein? After all, today, arbitration is not only an alternative to ordinary court proceedings, but has almost become “the only game in town” (as Yves Fortier put it once). Compare hereto § 1031 (2) of the new German Arbitration Act and the extremely liberal requirements for a writing under the 1996 English Arbitration Act. See also Wenger, *Schiedsvereinbarung und schiedsgerichtliche Zuständigkeit*, in: “*Schiedsgerichtsbarkeit*”, 1997, 223–247. Compare further the similar views expressed by Kaplan, “Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?”, *ArbInt.* 1996, 44–45, and Herrmann, *The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts*, ICCA Congress Series No. 6 on the Bahrain Conference, 45/46. Herrmann emphasised his views further at the IBA

Conference in Melbourne and, most recently, at the Freshfields Lecture in London (October 1998); his latter report will shortly be published in Arbitration International.

It is therefore this author's clear opinion that a party's **plea invoking a lack of an exchange** (or other defect under the "writing-requirement") might, under particular circumstances, have to be considered **inadmissible – in view of the overriding bona fides** requirement. In particular, a party must be **estopped** from invoking such a plea where it had inspired the other party's confidence that the contractual terms (including the arbitration clause) had been agreed to, and where such inspired confidence deserves an overriding protection. Requirements of good faith, in that sense, pertain to norms of a transnational public policy which cannot be sacrificed. It is also a fundamental principle of Swiss law, as reflected in Article 2 of the Civil Code. If that famous article is worth its existence, it will have to be recalled particularly in the framework of Article 178 PIL. **"A party cannot blow hot and cold at the same time"**, is a *dictum* grounding in English equity; it seems justified to recall this in the present context.

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(iii) Article 178 (2): Substantive Validity, Scope and Reach

Paragraph 2 of Article 178 constitutes a kind of **ubiquity formula** with regard to **the substantive validity of an arbitration agreement, its scope and its reach**. The provision makes the previously heavily disputed question as to the **law applicable** to the validity of the arbitration agreement. We may recall here in passing that the issue of the law governing an arbitration agreement has, in international arbitration practice, received half a dozen different answers (cf. Blessing, *The New International Arbitration Law in Switzerland*, 31–33). The new formula, in contrast to the Concordat, now clearly reflects the ***in favorem validitatis*** principle. The parties are nevertheless still quite at liberty to make their own choice of law as regards the validity of arbitration clauses; cf. Blessing, *The Arbitration Agreement – Its Multifold Critical Aspects*, 14, with reference to the report by Poudret, *Le droit applicable à la convention d'arbitrage*, in ASA Special Series No. 8, 23 ss.

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The substantive law questions relating to an arbitration agreement include, for example:

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- issues relating to the **valid conclusion of the arbitration agreement**,
- issues regarding any mistake, error, invalidity or impossibility of the arbitration agreement,
- issues relating to the interpretation of the arbitration agreement, particularly with regard to its **scope** (e.g. in connection with those complex questions which arise with groups and companies within multinational groups (so-called **group of companies doctrine**), where only one company in the group had signed an arbitration agreement, as well as in the case of contracts which have to be considered as being closely linked by reason of an ***unité économique*** (which, in certain circumstances, leads to an arbitration clause which even though contained in just one contract between the parties will also be considered as having been validly con-

cluded in relation to other (parallel or later) contracts, sometimes referred to as the *single/uniform business transaction doctrine*). Cf.: Blessing, “The Arbitration Agreement – Its Multifold Critical Aspects”, ASA Special Series No. 8 and extensive literature referred to therein. Questions of arbitrability are, however, governed by Article 177 PIL.

490 The latter situations justify some further brief remarks, distinguishing various situations:

(iv) Extension of the Arbitration Clause to Non-Signatories

491 **Extension from a Parent Company to a Subsidiary:** Take for example a contract with an arbitration clause which was concluded between the parent company A and X. The question is whether X can sue not only A, but also its subsidiaries or sub-subsidiaries. Moreover, could X only sue a subsidiary? Or, in a reversed scenario, could the subsidiary directly avail itself of the arbitration clause concluded by its parent company and sue X? The essential issues will be: By what powers can the parent A implicitly oblige one of its subsidiaries, such as B and C? And, on what legal grounds could X as claimant succeed to sue not only the parent company A but also one or more of its subsidiaries B and C? These issues were the subject matter of arbitral awards in, for instance, the following ICC Cases: 1434 (1975), 2375 (1975), 3879 (1984), 4402 (1983), 4504 (1985), 5103 (1988), 5891 (1988), 5920 (1989), 6000 (1988), 6519 (1991), 6972 (1989), 7102 (1994), 7626 (1995), 8553 (1997). Obviously, there is no short or simple answer to these critical and most complex questions (and, as one might add, any short answer will probably be wrong). One of the many aspects to examine in such scenarios is the question whether the contract in question was a so-called “*Konzernvertrag*”, i.e. a contract meant to involve the whole concern or group of companies, or enure to the benefit of (also) other companies within the group (“*Konzern*”), rather than involving only just one particular entity.

492 **Extension From a Subsidiary to the Parent Company:** Here, the contract in question was entered into by a certain subsidiary B and the party X. The questions which arise are: Can X not only sue the subsidiary B (which might have no assets), but at the same time direct its claim against the parent company A? Or, can X successfully sue the parent company A, although the arbitration clause is only with the subsidiary B? The basic issue is: What rights and obligations arise for the parent company A if one of its subsidiaries such as B concludes a contract with an arbitration clause? The situation is discussed in, for instance, the following ICC Cases: 4131 (1982), 5730 (1988), 5721 (1990), 8553 (1997). See also the award of an Arbitral Tribunal in Zürich (under the Rules of the Zürich Chamber of Commerce, ZCC 188/1991) where the Tribunal had to determine whether a contract (containing an arbitration clause) signed by a provincial organisation of an Asiatic state had to be imputed and attributed to the supervising national organisation of that Asiatic state. The Arbitrators, by unanimous decision rendered on 11 February 1993, affirmed jurisdiction on the basis of the very specific prevailing circumstances. The Swiss Federal Supreme Court upheld the decision on 1 September 1993, protecting the

extension of the scope and reach of the arbitration clause to a non-signatory party. Or, in order to draw the attention to another situation (again) taken from “real life”, can X sue the subsidiary B before an arbitral tribunal alleging non-performance under the contract and, at the same time and in parallel proceedings, also sue its parent company A before the competent state court, invoking e.g. misrepresentation (for instance regarding the ability of its subsidiary B to properly perform the contract) and claiming quite the same kind of damages (although under a different “label”)? Or should the arbitral tribunal, in such scenario, also exercise jurisdiction over the claim directed against the parent company A, for instance under the rationale that it would appear to be inadmissible to frustrate the confidence placed by the parties in the arbitration clause by allowing one party to circumvent that agreement to arbitrate through a state court action against the parent company (with which, obviously, no formal arbitration agreement had been concluded)?

“Marionette” Companies and Strawmen: Here, a somehow typical scenario has been that, although there were no official contractual dealings between the State A and the State X, they nevertheless conducted business via intermediary structures (which could be seen as marionette companies) incorporated off-shore, such as the Panama company C and the Liberia company Y. The typical question which arose in this context was whether the Panama company C can sue not only the Liberia company Y (which arguably has no substance of its own), but also the controlling State X. Of course, there were/are various variants to this structure. One may also make analogies to situations where a state simply dissolves the state-controlled entity which had entered into a particular contract. The question which will arise in this scenario is whether, by so doing, the state itself (by interference) must be deemed to have become a party to the contract and the arbitral proceedings. This scenario was discussed in the much criticised Bangladesh Case of the Swiss Federal Supreme Court (ATF 102 Ia 574) where the Swiss Federal Supreme Court failed to reach the correct decision. However, in ICC Case No. 7245 the Arbitral Tribunal held that by dissolving a particular co-operative, the State itself (more precisely, the State’s public law organisation which caused the dissolution) had to be deemed to have become a party to the arbitral proceedings (Interim Award of 28 January 1994). Quite similar is the situation in strawmen cases. An individual A, said to be fairly rich, uses the strawman Mr C, or the fronting entity C Corp., to enter into a Contract with X. Can X sue not only C (who may have no assets), but also A, and under what circumstances?

Joint-Venture Situations: Here, the typical situation is that a contract (containing an arbitration clause) is concluded between the joint venture D and X. The questions which arise are whether X can directly sue the joint-venture partners or members A, B and C. Other questions include whether A could escape from liability by invoking that it had left the joint venture before the disputed agreement had been entered into? Could B invoke that the joint-venture D had been established in the form of a separate legal structure and that, therefore, B was not directly/personally liable, moreover because it had not itself signed any arbitration clause? Or, could A and B (two of the consortium members) initiate arbitral proceedings on their own behalf as well as on behalf of others although only the joint-venture company D had signed the arbitration clause?

495 **General Contractor/Sub-Contractor Relationship:** Here, the typical question is whether the owner/employer X can not only sue the general contractor A, but also one or more of the sub-contractors B, C and D.

(v) Under What Criteria Should Such Situations Be Adjudicated?

496 How should situations of this nature be dealt with, examined and adjudicated? **What law or rules of law govern these issues? What are the main criteria?** See hereto more extensively: Blessing, Extension of the Arbitration Clause to Non-Signatories, ASA Special Series No. 8, December 1994, 151 ss. and the articles by Professor Otto Sandrock, Sigvard Jarvin, Professor Charles Jarrosson, Emmanuel Stauffer, Yves Derains, all in the same volume. Basically, there are **solutions grounding in national law**, and there are **solutions favouring an a-national or transnational law approach**.

497 The most essential yardstick, however, is the **test of the fair and reasonable expectations of the parties**. In this latter context, the contract itself will have to be the essential source of guidance and, where the contract is silent (which it arguably will be), the reasonable **contract-interpretation** will be. Another aspect is, of course, the **behaviour of the parties**, in particular the behaviour of a parent company which has not signed the arbitration clause contained in a contract between one of its subsidiary and party, but nevertheless behaved in a manner to (possibly) inspire the understanding of the contracting party X that the parent company was (or wished) also to be involved in the contract and in its implementation.

498 **Active participation** of a non-signatory party and its own economic interests may be elements to be looked at closely so as to determine whether such active participation and interests must be construed in a manner to justify, in particular or exceptional circumstances, a conclusion that such parent should become bound under (or might avail itself of the benefits of) the arbitration clause.

499 Moreover, arbitral tribunals are like to consider very closely the structure and organisation within a group of companies. The fact that such group (or certain companies thereof) may be qualified as a **Konzernvertrag**, or form a so-called **unité économique**, will be significant elements when adjudicating the issue of the *locus standi* of a parent company, or of a subsidiary, which had not itself signed an arbitration clause.

500 A significant element will be the **direct interest** or benefit of the non-signatory party (e.g. of a parent company) in the conclusion of a particular contract made by its subsidiary.

501 Moreover, the **instrument theory** ("**Instrumentaltheorie**") is sometimes used in arbitration cases, in a manner akin to the **clearly outspoken notion used by the European Commission in competition law matters**, and fully backed up by the **European Court of Justice (ECJ)**. Under this theory, the ECJ has fined Non-EU based parent companies for anti-competitive practices of their EU-based (legally independent) subsidiaries, by **entirely disregarding the separate legal structures**, and by simply arguing that the subsidiary acted **under the control** of its parent company, or arguing that the parent used a subsidiary **as an instrument** to lend itself to

anticompetitive behaviour. In the famous Commercial Solvents case, the ECJ even attributed the **omission** of its 50% controlled Italian subsidiary to its American parent company, arguing that the parent should have intervened and should have exercised all its influence to see to it that its 50% controlled Italian subsidiary continues to effectuate supplies to an undesired local Italian competitor! See hereto Part IX below dealing with Competition law issues in international arbitration.

This writer does not believe that an arbitrator can make his life as easy as the European Commission does! In fact, it is quite clear to a reliable arbitrator that the numerous elements individual to each case will have **to be weighed very carefully**, respecting as a starting point **the basic principle of the privity of contract** and the clear notion that legal entities are distinct from each other. Therefore, such fundamental principles cannot easily be removed by an arbitral tribunal, **unless very specific circumstances demand such a removal**. The legal doctrines used to analyse these situations are sometimes sailing under the “label” **apparent or ostensible authority, apparent or ostensible representation**, rules of **estoppel** in common law, rules of **acquiescence**, rules of the so-called **mandat apparent** (in France), or **Duldungsvollmacht/Anscheinsvollmacht** (in Germany), the **alter ego doctrine**, **general principles of law or transnational law and notions pertaining to lex mercatoria**, notions regarding the **piercing of a corporate veil**.

The heart of the matter and the decisive determination to be made is therefore, **a determination to be made under the bona fides principle**. This principle will require in the first instance for all parties to act in good faith and will not protect positions or defences which stand in contradiction to the exigencies of this principle or which frustrate an established confidence (which confidence would be deserving of an overriding legal (or arbitral) protection. For most of the determination to be made thus, the essential source of the arbitral “wisdom” is an evaluation of the parties’ objectively fair and subjectively reasonable expectations; the purely legal or academic issues are of a secondary importance.

As a footnote: This author does **not at all share the views** of his highly esteemed colleague and friend, Professor Poudret, who – in a much debated and criticised view – had occasionally maintained that Article 178 (1) PIL would limit the authority of an arbitrator to extend the arbitration clause to non-signatories (e.g. other companies within a group). The author holds this opinion for the following reasons:

- Professor Poudret seems to analyse such situations purely under Sub-paragraph 1, and based thereon obviously will reach the conclusion that, e.g., a parent company had not signed an arbitration clause, such that the writing-requirement will not be satisfied.
- However, such a view is, in the opinion consistently expressed and applied by this author since the 1980s, **clearly wrong**.
- In fact, the problem/issue is not an issue under Sub-paragraph 1, but under Sub-paragraph 2 of Article 178 PIL. It is a problem as to the scope of an existing (validly signed or even exchanged arbitration agreement) **ratione personae**.
- Indeed, the prevailing view in Switzerland rather is that, once an arbitration clause exists, its scope and reach have to be determined according to Article 178 (2) PIL.

The issue will be one of the **consensus**. Very clearly, the **most essential yardsticks** cannot be found in legal theories, but only in a very careful analysis of the particular situation, the common intentions of the parties, the interpretation (if need be) of their contract, the fair and legitimate expectations of the parties, the entirety of the business pattern and the usages which underlie the transaction.

- Therefore, it will first of all be a matter of proper contract construction and interpretation whether the contract (containing an arbitration clause) was meant to also include a non-signatory party.
- The ICC Case 7375 has shown that the examination of the real intentions of the parties when entering into a contract can take years of highly complex proceedings, with extensive briefs and many days of oral examinations, and *hélas* the “lives” of the arbitrators would have been infinitely easier, had they seen a merit in adopting Professor Poudret’s purely formal approach (and the author of this introduction would not have had to devote 100 pages of the Preliminary Award on Jurisdiction to this issue; the 136 pages of the Award were fully reproduced in Mealey’s International Arbitration Report, December 1996; see also below).

(vi) Group of Contracts; The So-called “Single/Uniform Business Transaction Doctrine”

505 Quite the same principles apply in respect of this distinct (but somehow comparable) situation where two parties have concluded several contracts and only one of them contains an arbitration clause. The question does arise whether the arbitration clause contained in only one of them is “good enough” to also cover the other contracts.

506 A leading case is ***Société Ouest-Africaine des Bétons Industriels (“SOABI”) v. Republic of Senegal*** (ICSID Case No. ARB/82/1, cited in ICCA Yearbook XVII-1992, 42–72, in particular 51 ss.), where the conclusion was that the arbitration clause contained in one contract had to be extended to the quite different contract between the same parties, but pertaining to one and the same project, thus forming a certain ***unité économique***.

507 Further, in ***G.I.E. Acadi v. Société Thomson-Answare*** (Revue de l’Arbitrage 1988, 573 ss.), it was decided in a first decision that the arbitration clause contained only in one contract was also to be extended to the separate contracts; thereafter, this interpretation was reversed in a second decision, due to the very specific facts at hand.

508 Also in the famous “Pyramids Case” (Award of 16 February 1983 in ICC Case No. 3493 in re ***SPP v. Egypt and EGOTH***, excerpts published in Jarvin/Derains, Collection of ICC Arbitral Awards 1974–1985, 124 ss.), the underlying Agreement between the Parties was reflected in the form of separate agreements. However, the Arbitral Tribunal chaired by Professor Giorgio Bernini concluded that the transaction “as a whole is to be viewed as **a unified contractual scheme aimed at the completion of the two projects envisaged as its object**”.

509 In **ICC Case No. 7929** (Award rendered on 8 February 1995 under the chairmanship of Alan Redfern), the Tribunal had to determine whether the arbitration clause contained in a Partnership Agreement, concluded in March 1986, would also be and

remain valid, and extend to, a certain Co-operation Agreement made in June 1987 between the same parties, whereby, pursuant to the Co-operation Agreement, the earlier Partnership Agreement was to be terminated as of 1 July 1987. The Co-operation Agreement did not itself contain an arbitration clause, and the Tribunal sitting in Zürich had to decide whether the Arbitrators had jurisdiction over any claims or counter-claims arising from the Co-operation Agreement “*either as part of a unified contractual scheme with the Partnership Agreement, or on its own*”. One party pleaded that the two Agreements (i.e. the Partnership Agreement and the subsequent Co-operation Agreement) were not “stand alone” contracts, but indeed closely inter-related. The Tribunal, in its Interim Award on Jurisdiction, reached the conclusion that the Agreements were not standing alone, but had been concluded “*as part of a business relationship which began in 1985 and which inter alia expressed the wish to settle any disputes by arbitration*”. The Tribunal concluded that one would rather have to look at the situation as a “unified contractual scheme”.

In **ICC Case No. 5651** in re *KCA Drilling v. Sonatrach* (Jurisdictional Award of 16 September 1988) the Tribunal chaired by Professor Börner had to consider whether a certain “*Avenant No. 5*” to the initial Drilling Contract was also covered by the scope and reach of the initial Drilling Contract. The Tribunal concluded that the *Avenant No. 5* was **merely accessory**, such that it affirmed the question. On challenge of the Award, the Swiss Federal Supreme Court upheld the Arbitral Tribunal’s decision (ATF 116 I a 56).

In **ICC Case No. 7375** (fully published in Mealey’s International Arbitration Report, December 1996), the Arbitral Tribunal (chaired by the author) had to consider the situation whether the arbitration clause contained in only one contract entered into in 1971 was also “good enough” to apply to 8 subsequent contracts made between 1973 and 1978. On the basis of a very careful analysis and evidentiary procedure, the Arbitral Tribunal had to come to the conclusion that those contracts were not merely accessory, but standing alone; hence, arbitral jurisdiction regarding contracts 2–9 had to be denied.

In some other cases (such as ***Société Confex (Romania) v. Etablissement Dahan (France)***, ICCA Yearbook XII (1987), 484 ss., and ***James Allen (Ireland) Ltd. v. Marea Prod. B.V. (Netherlands)***, ICCA Yearbook X-1985, 485 ss.) the Arbitral Tribunals held that the arbitration clause contained in one of the agreements could not be extended to another agreement not containing an arbitration clause.

This brief review has shown that purely “scholarly wisdom” would not be sufficient, but that the essential yardsticks are set by, and to be derived from, the contract itself and all surrounding circumstances. These circumstances, for instance, have to establish whether a parallel or subsequent contract (not containing an arbitration clause) was closely (or less closely) related to another contract, containing such an arbitration clause, whether one or more of the contracts would have to be qualified as being merely accessory contracts, or whether the various contracts do constitute an *unité économique*, forming a single, unified or uniform business transaction.

Where the accessory nature, or the *unité économique* in the above sense, has to be affirmed, arbitral tribunals are likely to determine that the arbitration clause contained in only one of the contracts would also control those other contracts.

515 For making this kind of determination, the relevant contracts will have to be interpreted **against the background of the entire “landscape”** within which these contracts are situated, and having regard to any usages which the parties might have established. **The ultimate decision will have to come from an answer to the question whether it was within (or as the case may be outside) the objectively fair and subjectively reasonable expectations of both parties to conclude that the arbitration clause contained in one contract can (or cannot) be seen as an “umbrella” for other/separate contracts between them.**

(vii) Claims in Tort

516 Sometimes it is questionable whether quasi-contractual claims are also covered by the arbitration clause. This seems to be less obvious in common law jurisdictions than in civil law jurisdictions.

517 For instance, the question may arise whether, in a construction contract, the physical injury suffered by a foreman could also be the subject matter of an arbitration between the contractor and the employer. In general, civil law countries tend to affirm such arbitral jurisdiction on the argument that, once parties have agreed to arbitration, their agreement must be understood in a broad sense, arguably covering all issues which may arise under a particular relationship (a view specifically confirmed by the Swiss Supreme Court).

518 In so doing, the **legitimate expectations of the parties** again play a decisive role, quite in the sense of the hypothesis stated at the beginning of this paper.

(viii) The Trouble with Set-Offs

519 Set-offs are particularly difficult. The defendant party, disputing the claims under contract A might invoke, as a set-off, claims originating from a contract B relating to the same transaction, or might invoke claims under a contract C relating to a different transaction between the same parties, or might even invoke claims which it “bought” from an assignor who had a contract with the claimant.

520 In which ones of these cases should arbitral jurisdiction be affirmed? Again, there is no simple answer. With but a few exceptions, institutional arbitration rules are silent. The silence must be understood in the sense that, of course, this topic was not ignored by those working on the institutional arbitration rules, but was rather believed to be too difficult for promulgation into a particular rule. However, specific rules can be found in the institutional arbitration rules of certain chambers of commerce, including those of Zürich (Article 27), Basel (Article 29), Berne (Article 9), Ticino (Article 12), Swiss-German Chamber of Commerce (Article 16) and Bern. These need not be commented here further. Article 19 (3) of the UNCITRAL Arbitration Rules inspires an understanding in the sense that a set-off may only be invoked in respect of a claim arising out of the same contractual relationship.

521 By way of an example, the arbitral award in **ICC Case No. 5971** may have to be mentioned. In that case (in which this author sat as the chairman), the contracts for a particular food processing plant was split up in three different contracts with three dif-

ferent arbitration clauses: a joint-venture contract, a sales contract and a know-how contract. The claimant party initiated arbitration on the basis of the joint-venture contract only, but the defendant party pleaded set-off claims originating also from the two other contracts. *Quid*, should the Arbitral Tribunal disregard those set-off claims?

Apart from a detailed reasoning discussing legal parameters and a number of scholarly writings, the ultimate decision of the arbitral tribunal was inspired by the conviction that the Tribunal could not confine itself to adjudicating the claims arising under one contract only, while closing its eyes in respect of certain justified set-off claims (although those originated from different contracts with different arbitration clauses). The Tribunal considered that all three contracts formed “*un ensemble économique*” and thus also adjudicated also the set-off claims (thus avoiding the unfortunate decision which had been rendered in the famous Iran case (ICC 5124, Interim Award of 2 December 1988). This case, as far as its reasoning on the set-offs is concerned, is reported in the ASA Bulletin 1995, 728–741. Among the more recent studies the following may be cited: Reiner, *Aufrechnung trotz (Fehlens einer) Schiedsabrede nach österreichischem Recht, liber amicorum K. Hempel*, Vienna 1997, 108 ss. and Berger, *Die Aufrechnung im Internationalen Schiedsverfahren*, RIW 1998, No. 8, 426 ss. The two most recent contributions come from Gross, *Das rechtliche Schicksal von Verrechnungsansprüchen im Schiedsverfahren*, and from Baumann, *Aspekte der Verrechnung in der Schiedsgerichtsbarkeit*; both books were published in summer 1999 in the series of the University of Zürich and the Europe Institute of Zürich, Volumes 2 and 5).

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(ix) Regarding Article 178 (3) PIL: Separability

Paragraph 3 reflects – albeit in an excessively apodictic form – the requisite **independence** of the arbitration clause from the main contract in which it may be embedded or to which it may refer (so-called “*autonomy*”, “*separability*” or “*severability*” of the arbitration clause).

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d) Re the Constitution of the Arbitral Tribunal (Articles 179/180):

Paragraph 1: This apparently banal provision is of major practical significance in institutional arbitration in fact, it provides that the **primacy of party autonomy** will be respected, particularly where the parties have assigned the competence to **appoint, remove, replace or challenge** an arbitrator to an arbitral institution (such as the ICC). The arbitral institution’s ruling can therefore no longer be challenged as such (the only remaining possibility being a separate challenge to the arbitral tribunal’s jurisdictional award based on Article 186 PIL, or recourse to set aside the final award based on Article 190(2)(a) or (b) PIL). This constitutes an extremely welcome improvement as compared to the judicial practice which prevailed under the Concordat (cf. Blessing, *The New International Arbitration Law in Switzerland*, 36/37 and references contained therein; see hereto further the decision of the Swiss Federal Supreme Court in re *Hitachi v. SMS Schloemann Siemag AG* of 30 June 1994, commented in Bull. ASA 1997, 99–107.

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- 525 The primacy of party autonomy is also reflected in Article 180(1) and (3) in questions concerning the **qualifications** of and **challenge** to an arbitrator. In respect of Article 180 (3), the Swiss Federal Supreme Court for the first time clarified, in its decision of 13 August 1996, that the decision of the Cantonal court at the seat of the arbitral tribunal in respect of a challenge cannot be further attacked by way of a public law appeal to the Swiss Federal Supreme Court; see the discussion in Bull.ASA 1997, 108–112.
- 526 Article 179(2) PIL was introduced to restore the confidence of foreign parties in nominating a Swiss court judge (e.g. the President of the Swiss Federal Supreme Court) as their **appointing authority**. Therefore, an obligation has now been included in Article 179(3) PIL for such a judge to proceed with the appointment, unless a *prima facie* examination shows that no arbitration agreement exists between the parties.
- 527 The requirement of **independence and impartiality** was a matter of debate within Parliament. To require both not only of the presiding arbitrator, but also of the party nominated arbitrators, reflects a deeply rooted legal tradition in Switzerland. On the other hand, regarding party nominated arbitrators, there was also respect for the fact differing views as to their required degree of impartiality may prevail elsewhere, and that those differing views should not be discriminated by the Swiss legislation. In Parliament, the concern was also voiced that one party might try to “torpedo” arbitration proceedings on the grounds that an arbitrator appointed by one party allegedly lacked impartiality according to the same strict standards as are necessarily applied to the presiding arbitrator.
- 528 It was for this reason that – quite in harmony with e.g. the ICC Arbitration Rules 1988 and 1998 – *only the more objective requirement of independence* was laid down by statute in Article 180 (1) PIL. However, there is no need to stress that it may be regarded as the *nobile officium* of each arbitrator (including those appointed by the parties) to prove themselves not only independent but also impartial in every respect. – As an interesting footnote, it may be added here that our English friends have, in the framework of the 1996 English Arbitration Act, adopted exactly the opposite solution, by retaining only the impartiality – requirement, on the argument that independence is not an important element (since even a truly dependent arbitrator might prove to be impartial).

e) Re the Arbitral Procedure (Article 182):

- 529 It is an almost axiomatic principle in international arbitration that the parties are free to determine the arbitral procedure, provided that the minimum standards of “due process”, as expressed in Article 182 (3), are observed. What is **significant**, however, is that, to the extent the parties have not regulated the procedure themselves, the arbitral tribunal will enjoy so-called “**procedural law autonomy**”. Thus, the arbitral tribunal is no longer in any way expected under the PIL – *in contrast to the Concordat* – to apply or take account of any local procedural rules. Indeed, as we may add, it should not do so in an international arbitration, not even in a subsidiary capacity or *per analogiam* (as this still had been suggested under the regime of Article 24(2)

Concordat). Compare hereto Article 1494 (2) of the French Nouveau Code de Procédure Civil. The respect for **procedural law autonomy** (as another reflection of the “*specificity of international arbitration*”) has become one of the very basic principles (emphasised worldwide) and one which has gained wide, although not yet unanimous international recognition and acceptance.

It was quite deliberate that Chapter Twelve does not and should not contain any particular provisions of its own regulating the **arbitral procedure**. This is not an omission, nor a shortcoming, but rather a reflection of the deliberate liberality of the Swiss Arbitration Act which wants to be open to all kinds of procedures shaped according to the needs of the case. It is thus the duty of the arbitral tribunal to establish “to the extent necessary” the **ground rules** (typically in consultation with the parties) at a very early procedural stage, so that there will be sufficient clarity for the parties. See hereto Blessing, The New International Arbitration Law in Switzerland, JIntArb 2/1988, 42–49 as well as the Commentary ad Article 182 in the present publication.

Article 182 (3) PIL reflects – as probably the only truly mandatory rule within Chapter Twelve – the minimum requirement to be observed irrespective of the procedure followed by the tribunal: the requirement of **equal treatment** of the parties and their **right to be heard**, an idea moreover sanctioned by Article 190 (2)(d) PIL.

f) Re Interim and Conservatory Measures (Article 183):

As another step forward (as compared to the Concordat), the (not to be considered exclusive) jurisdiction of the arbitral tribunal to pronounce **interim or conservatory measures** has been enacted. Indeed, it is one of the important requirements of a modern *Arbitration Act* to grant an arbitral tribunal such jurisdiction. The provision stands in *harmony with the major institutional arbitration rules*, which also provide that an arbitral tribunal shall have jurisdiction to pronounce interim measures (see e.g. those of the ICC, LCIA, AAA, WIPO, NAI, the Zürich and Geneva Chambers of Commerce, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law etc.). For a detailed comparison, see Blessing, The Conduct of Arbitral Proceedings Under the Rules of Arbitration Institutions, WIPO Publication No. 741, 41–72. As explained therein, the nature of the provisional measures which may be imposed by an arbitral tribunal largely depends on an appreciation of substantive law issues.

Article 183 is silent as to the form in which to direct interim measures. Normally, interim measures are issued in the form of an order of the arbitral tribunal; however, the tribunal might also consider to issue its measures in the form of a **reasoned award** (which may qualify for recognition and enforcement under the New York Convention), as specifically also provided for in Article 26 (2) UNCITRAL Arbitration Rules, Article 22 (2) AAA Rules, Article 46 (c) WIPO Arbitration Rules and Article 23 (1) of the 1998 ICC Arbitration Rules.

Regarding more detailed comments on interim relief, see Part X. 1 below.

g) *Re Support From the State Judiciary (Article 185):*

- 535 Chapter Twelve expressly provides, both with regard to the appointment of arbitrators and in connection with arbitration procedure, that the State judiciary can be asked to provide assistance, wherever necessary. Cf. Article 179 (2) and (3), Article 180 (3), Article 183 (2) and (3), Article 184 (2) and Article 185. This means a **positive helping assistance**, and merely not interfering involvement of state courts. However, in practice, it is very rare that use has been made of these provisions thus for.

h) *Re Award on Jurisdiction (Article 186):*

- 536 **Paragraph 1:** The Article reflects the so-called “**Kompetenz-Kompetenz**” (competence of the arbitral tribunal to rule on its own competence or jurisdiction). Jurisdictional issues arise under numerous headings. This is best exemplified by listing a number of **typical examples of jurisdictional issues** which had to be decided in recent cases:

- Has the correct party been sued?
- Does the claimant have *locus standi* to pursue the particular claim?
- Does a successor of rights have *locus standi*?
- Does the assignee of a particular claim have *locus standi* to sue in arbitration (*quid* under civil law, under common law; *quid* where unilateral assignments were contractually excluded)?
- Has an arbitration clause been validly signed on behalf of a party?
- *Quid ius* where particular signing formalities were not complied with?
- Is the subject matter covered by the scope and reach of the arbitration clause?
- Does the particular arbitral tribunal have jurisdiction to deal with a set-off plea which originates from a different contract which does (or does not) contain an arbitration clause, or contains a different arbitration clause?
- Are claims for tort or quasi-contractual claims also covered by the arbitration clause?
- Can, or must, the scope and reach of an arbitration clause be extended to other entities of a group of companies, i.e. to its parent company, or to a sister company, or to a subsidiary (application of the so-called **group of companies-doctrine**)?
- Does the arbitration clause contained in only one contract extend to other contracts which are somehow related or connected; if so, how close must that inter-relatedness be (application of the so-called **single/uniform business transaction theory or group of contracts-doctrine**)?
- Does the arbitration clause signed by a state-controlled company or organization also bind the state itself to arbitral jurisdiction?

- Is a contract signed by one government official (but without a council of ministers' approval) valid and binding and thus create arbitral jurisdiction?
- Does a party have capacity to sue or to be sued?
- Is the subject matter arbitrable in Switzerland, although it may not be arbitrable (i) according to the *lex causae*, or (ii) according to some mandatory rules of law reserving the matter to the jurisdiction of state courts or government authorities, or e.g. to an antitrust regulatory body, or a patent office?
- Are “acts of state”, such as expropriation arbitrable?
- Does an arbitral tribunal have jurisdiction to proceed even though the supreme power of a state (whose substantive laws are applicable to the merits) has prohibited the arbitrators to go forward with the arbitration?
- Can third parties be compelled to take part in an arbitration?
- Can third parties intervene on their own motion?
- Has the arbitral tribunal been validly constituted ?
- Can the arbitration be conducted as a multiparty arbitration? Has the arbitral tribunal properly been constituted in respect of the multiple claimants or respondents?
- Can a subcontractor be involved in a consolidated arbitration with the employer and the general contractor due to an arbitration clause incorporated by reference?

See hereto specifically Blessing, The ICC Arbitral Process – The Procedure Before the Arbitral Tribunal, ICC Bulletin 2/1992, 27. It is quite apparent from the typical situations listed above that many of them will raise extremely difficult legal issues, many of them being directly linked to the determinations on the merits. 537

Paragraph 3: Where the jurisdictional aspects can be sufficiently isolated and where pleas as to a lack of *locus standi* or jurisdiction do not appear to be of a mere dilatory nature, arbitrators will normally prefer to adjudicate jurisdictional issues first and before dealing with the merits. This is reflected in Paragraph 3 by the words “as a rule”, a wording that had been inspired by Article 21 (4) UNCITRAL Arbitration Rules (using the words “in general”); it leaves all the requisite flexibility for arbitrators to decide otherwise. 538

i) Re Determination of the Governing Rules of Law (Article 187 (1)):

In its first part, Article 187 (1), reflects the basic notion that the parties are free to determine the applicable law or rules of law themselves. Regarding the significance of this notion, see Blessing, Choice of Substantive Law in International Arbitration, JIntArb 2/1997, 39–66 and Blessing, Regulations in Arbitration Rules on Choice of Law, ICCA Congress Series No. 7, 391–444. 539

Despite an explicit choice which the parties may have made in their contract in favour of the applicability of a particular **national law** (or in favour of **a-national** 540

rules of law), an arbitral tribunal will, in the practice of international arbitration, more often than not be confronted with the following kind of questions/issues:

- Is the choice of law made by the parties to be respected **even though** they may have chosen a particular law in order to avoid some mandatory rules of their own domestic law?
- May the arbitral tribunal be satisfied with applying the particular substantive law chosen by the parties (i.e. the Swiss law), or should it go beyond that and moreover directly apply **mandatory rules of law** (so-called “*Eingriffsnormen*”) pertaining to another legal order, such as competition laws, environment protection laws, currency and exchange control regulations, import-export restrictions, embargoes, boycotts, blockages?
- Or should the tribunal only take those foreign mandatory rules into account (which goes less far than applying them directly)?
- Is there any room for the application of Article 19 PIL, at least *per analogiam* – even though Chapter Twelve is to be considered to *stand alone* such that an arbitral tribunal is not supposed (let alone obliged) to apply the criteria in Chapters 1–11 of the Swiss Private International Law Act?
- How should a distinction be drawn between mandatory rules which deserve to be respected, and those which do not seem to deserve such respect? And how to decide where various contradictory mandatory rules (for instance emanating from different states or jurisdictions) claim to be applicable? Do for instance competition rules rank in priority over rules whose sole purpose is to protect a state’s financial, economical or fiscal interests (such as foreign exchange laws, customs and tax laws)? Should politically motivated regulations (such as trade embargoes) be respected or disregarded? What about the US RICO Act, the US Helms Burton (Libertad) Act?
- What role is played by the so-called “*application-worthiness test*” or the “*legitimacy test*” of a provision which requires extraterritorial or universal application? How is, in this context, the “*rule of reason*” to be applied?

541 These are questions with which an international arbitrator will be confronted in numerous cases. See the discussion of these issues in Part IX below.

542 Absent a choice (whether **explicit** or **implied**) made by the parties, and absent a choice of the parties in favour of some institutional rules which deal with the issue (such as e.g. the ICC Rule), Article 187 (1) provides for an **independent conflict of laws rule** which says that the arbitrator shall have to determine the law or rules of law (regarding the significance of this distinction see below) applicable to the dispute by making the so-called “**closest connection test**”. In other words, the provisions on private international law as contained in Chapters 1–11 PIL are not as such applicable, neither directly, nor *per analogiam*.

543 It is important to note that the PIL gives an arbitral tribunal the “**conflict of law autonomy**”, in recognition of the **specificity of international arbitration**. The author of this Introduction considers the recognition of the conflict of law autonomy

to be *one of the six major milestones in the development of modern international arbitration*. For a further discussion of the five other milestones, see Blessing, Regulation in Arbitration Rules on Choice of Law, ICCA Congress Series No. 7, 391 ss., and Blessing, Choice of Substantive Law in International Arbitration, JIntArb 2/1997, 39–66.

The closest connection rule may be considered a universally acceptable “guiding principle”; the rule provides that, on the one hand, the arbitral tribunal cannot entirely freely or arbitrarily determine the governing substantive rules of law, but has to apply and use a rather objective “tool” in the sense of determining the closest material connection. On the other hand, however, the tribunal is not supposed (let alone obliged) to apply a specific **conflict of laws system** (e.g. the one at the seat of the arbitral tribunal, as particularly advocated in the 1950s).

Thus, the Swiss Arbitration Act, by adopting the closest connection rule, does not go quite so far as to allow the so-called *voie directe* in the sense of Article 1496 (1) of the French Nouveau Code de procédure civile; but this can be stated without regret, because the closest connection test leaves a sufficiently broad freedom to the arbitral tribunal. The significance of Article 187 in its broader perspectives and the mechanisms for determining the applicable law or rules of law via four different approaches will be explained in their contexts in Part VIII.

The closest connection test should guide the tribunal to the applicable **law**, or more precisely to the applicable **rules of law** (*règles de droit* as per the authentic French statutory wording of Article 187(1) which is accurate in this respect, in contrast to the German and Italian texts which use the inaccurate term “*Recht*” “*diritto*”, instead of using the more correct term “*Rechtsregeln*”). The term “**rules of law**” makes it clear that the arbitral tribunal is not bound to determine the applicability of one specific national law, but has the freedom to base its award on “**rules of law**” (including a-national or transnational rules of law, *general principles of law*, principles of public international law, *lex mercatoria*, commercial practices, provisions from international Conventions or, more recently, the 1994 **UNIDROIT Principles**). We have termed this above “**the substantive-law autonomy**”, and we may appreciate this as another center-piece for every modern Arbitration Act, which may be looked at as a guarantee ensuring that an arbitral tribunal may arrive at a conclusion which stands in line with the objectively fair and subjectively reasonable expectations of international parties.

All in all, it is clear that the issue covered by Article 187 will only give rise to any serious discussion in very few arbitration proceedings; in the vast majority of cases (possibly 90% or more? – there is and will not be any statistics on this point) it will be a question of **applying the contract** underlying the dispute (“*le contrat fait loi entre les parties*”) and, if necessary, **interpreting** it. Indeed, international arbitrators have frequently shown a good deal of **hesitation** in referring (in a supplementary or suppletory capacity) to the provisions of the applicable (national) law (which in many cases may not even be familiar to the parties). It is thus more likely, and indeed good practice, that an arbitral tribunal will endeavour to resolve issues (on which there is no directly applicable contractual provision) by **interpreting** the contract within the framework of its spirit.

548 A certain **reluctance** to impose the ready-made solution of an underlying code or law is, in any event, justified in the international context. This can be exemplified by referring to the following (rather typical and certainly frequent) situation: a particular international contract provides for certain specified and limited remedies in case of non-performance; the underlying legal system, however, would grant other or more remedies (or would limit some of the contractually agreed remedies). *Quid?* Should the contract prevail, or the provisions of the underlying applicable law? And *quid* if the contractual provision stands in violation to a **mandatory** provision of the applicable law? – Certainly, each of those cases will have to be determined on their own merits, but the general tendency would clearly suggest that the contract should rank in priority over and above the provisions of the applicable law; and this might even have to be so where a contractual provision stands in violation of a mandatory provision of the underlying national law. Thus, if a contract contains specific remedies (clearly negotiated among the parties), it would seem wrong for an arbitral tribunal to lightly “come in” and determine that other or further remedies will be available, or that certain contractually foreseen remedies would not be available on the basis of the underlying applicable law; a tribunal ruling in such a way would disregard negotiated terms of contract and would, in an unjustified manner, impose purely local perceptions of the underlying law over and above the intentions of the parties.

549 Thus, arbitral tribunals have, for instance, expressed the view that:

- an agent – in respect of an **agency** agreement made between two non-Swiss parties, but subjected to Swiss law, where the agent had contractually waived a compensation for the clientele upon termination of the agency – cannot thereafter claim compensation under Article 418 (u) of the Swiss Code of Obligations, although that Article is mandatory; this example shows that the contract is, and must be, the prime source for the arbitrators’ decision; purely local perceptions reflected in an underlying legal system, even where imposed mandatorily, cannot prevail in the international context, for a good number of different and independent reasons; there are a number of reasons, unless they would truly form part of public policy (which will very rarely be the case);
- in the context of an **acquisition** agreement between two major international groups subjected to Swiss law, where carefully negotiated representations and warranties were agreed upon (including certain remedies in case of breach which could be invoked during 24 months after the closing), there will be no room for applying, over and beyond the contractual parameters, the statutory remedies in connection with an alleged material error, misrepresentation or willful deception; likewise, the seller could not invoke the more stringent duties of a buyer under the terms of the Swiss Code of Obligations, because those requirements were not as such reflected in the acquisition agreement; thus, again, the arbitrators, for good reasons, refrained from interfering into the “balance” negotiated by the parties when shaping the terms for the deal; indeed, the parties were no novices in international business and were not to be taught by an arbitral tribunal how to agree and what to agree upon – and the arbitrators respected that in their decision; in contrast, a State court would most certainly have found that the particular contract

was silent on those matters, such that the provisions of the Swiss Code (in particular, Articles 24 (1) and 28 of the Swiss Code of obligations) were to be applied. The result of course, would have been radically different.

Other examples of a similar nature could be cited in the framework of large construction cases where this topic is of a particularly vital significance. In most cases the arbitral tribunal will have a rather simple legal justification for not allowing statutory provisions to come in and distort the contractual *equilibrium*: it will conclude that the choice of law clause agreed between the parties was meant to say that the governing (say: Swiss) law should be applied only insofar as the parties had not provided (explicitly or implicitly) for a contractual solution ("*Teilverweisung*"). Thus, for instance in the above example where the agent had contractually waived a compensation upon termination of the agency, no room was left for applying Swiss law and its mandatory Article 418 (u) CO. Indeed, such a reasoning is the more justified since the parties would have been entirely free to determine that the agency should be governed by some other national law (not Swiss law), which did not contain a contradicting and undesired mandatory protection for agents.

There is a virtually endless flood of both Swiss and international literature on the vast topic covered by Article 187 (to which P. Karrer has also extensively contributed with his Commentary on Article 187). Since the parties themselves will in most cases have made a choice of law, and since moreover an arbitral tribunal will have a tendency, where there is no choice of law, to close any loopholes which might exist by interpreting the relevant contract, the question arises whether this flood of literature might not be *in inverse proportion to the relevance of the provision in Article 187(1)*. – In the author's view, the answer is: NO. The issue governed by Article 187 is a **very fundamental one**:

- the **recognition of the freedom of choice-of-law** is a fundamental right within a free market-orientated legal system;
- the **recognition of the conflict of law autonomy** of an arbitral tribunal is an expression of (as well as a yardstick for) open-mindedness and respect with regard to the objectively fair and subjectively reasonable expectations of international parties;
- the **recognition** that an arbitral tribunal also has the **substantive law autonomy**, in that (like the parties themselves) it can declare "**rules of law**" applicable (in contrast to the narrow term "law"), is another very significant criterion and indeed milestone of achievement; various international arbitral awards handed down over the last few decades were only correctly decided because the arbitral tribunal had been able to make a responsible use of such autonomy reflected and freedom; we are proud, in Switzerland, to have this autonomy in Article 187 (1) PIL, and at the same time regret the somehow timid and nationalistic approach which is still reflected in Article 28 (2) of the UNCITRAL Model Law and which continues to be reflected in the new Arbitration Acts of Germany and England.

In these few remarks, we may merely convey the idea that, behind the seemingly trivial wording of Article 187 (and the just as trivial wording of the corresponding

provisions in the Arbitration acts of other countries and the provisions in countless arbitration rules), lies a whole complicated multi-layered network within which numerous **central aspects of the legal system** and of **economic policy interests** are closely linked (some visibly, some invisibly). This becomes apparent to those familiar with countries where the above discussed autonomies are not granted, or are granted on paper only, and where local perceptions are imposed.

553 One of the most difficult subject matters, emerging in a substantial percentage of international arbitration cases, is the impact of (mostly foreign) **mandatory rules of law**. We will discuss this aspect in the framework of Part VIII below.

k) Re the Making of the Arbitral Award (Article 189):

554 Chapter Twelve distinguishes three kinds of arbitral awards, namely the jurisdictional award under Article 186, the partial award under Article 188, and the final award; they are all governed by Article 189. What is new – in contrast to the Concordat – is the **primacy of party autonomy**, according to which it is within the power of the parties to agree on how the arbitral award is to be handed down. The parties can, therefore, waive the giving of reasons in advance. Moreover, because of the recognized primacy of party autonomy, a so-called **truncated tribunal clause** (within the meaning of Article 11 of the International Arbitration Rules of the AAA, or within the meaning of the analogous provision in Article 35 of the **WIPO** Arbitration Rules and, most recently, Article 12 (5) of the **1998 ICC Rules**) will have to be regarded as a valid agreement of the parties – an aspect to which a certain degree of significance is attributed today, especially as a provision of this kind has efficient preventive effect and, on the practical side, will in future avoid the disaster in the well-known *Pim v. Deutsche Babcock* case.

555 The new **authority to decide alone** given in Article 189 (2) to the presiding arbitrator of an arbitral tribunal where there is no majority is particularly welcome. It stands in harmony with Article 19 of the 1975 **ICC Rules**, Article 25 (1) of the 1998 **ICC Rules**, Article 16 (2) **LCIA Rules** and Article 61 **WIPO Arbitration Rules**. Thus, the presiding arbitrator's authority to decide alone under those institutional rules no longer conflicts with the *lex arbitri* (as was the case under the Concordat).

l) Re the Finality of an Award and Grounds for Setting Aside (Article 190):

556 The fact that the **grounds for setting aside an award** have now been substantially restricted constitutes **marked progress** over the Concordat. **Procedural defects** can, basically, only be remedied if principles pertaining to *natural justice* have been violated. Thus, the grounds for challenging an award are set out in the restrictive list as per Article 190(2)(a)–(d).

557 The ground of “*arbitrariness*” (“*Willkür*”) available under the regime of the Concordat, so frequently misunderstood and criticised by foreign commentators, no longer suffices to overturn an award. Hence, **on the merits**, an arbitral award can only be set aside if it is to be considered **incompatible with public policy** (see

Article 190(2)(e)). In this context, it should be noted that the actual **outcome** of the award as such must be contrary to *ordre public*, and a merely wrong, defective or deficient reasoning would not suffice to vacate an award. The *ordre public* in question is the so-called “*Swiss ordre public in international matters*”, which has a narrower meaning than Swiss domestic public policy.

It should also be noted that recourse to set aside an award **does not** *per se* have any **suspensive effect**. Thus, the arbitral award is enforceable, unless an application by one of the parties to the Swiss Federal Supreme Court to suspend the award has been granted. The Supreme Court’s practice, in this regard, is for good reasons very restrictive.

According to Swiss Federal Supreme Court practice, an **application for revision** will be admissible *praeter legem* if a criminal offence had an impact on the arbitral tribunal’s award (ATF 118 II 199 ss.; Bull. ASA 1992, 356). See hereto La live/Poudret/Reymond, Article 190 N 5; IPRG Commentary Heini ad Art. 190 N 55–58 and Commentary Berti/Schnyder ad Art. 190 N 93–96; see also the most recent decision reported in Bull. ASA 1997, 116–118, where an application for revision had been filed with the arbitral tribunal which correctly denied its jurisdiction to consider the matter.

The **correction and interpretation** of arbitral awards is also to be deemed admissible *praeter legem*. Such an application was admitted in June 1994 by an arbitral tribunal sitting in Geneva (in the matter of L. Co Ltd et al. vs B. Co Ltd et al., not reported) on the basis of established doctrine. See in accord Berti/Schnyder ad Article 190 N 97. Compare also the provisions in Article 66 **WIPO** Arbitration Rules, Article 66, Article 29 of the 1998 ICC Rules, Articles 35/36 UNCITRAL Rules, Article 33 UNCITRAL Model Law, Article 17 LCIA Rules, Article 31 AAA Rules.

A distinction is quite correctly drawn between (i) a correction which may be made on the basis of an *ex parte* request or can be made by an arbitral tribunal *proprio motu* without the other side having to be heard, and (ii) a request for rendering an **additional award**, where the other side will in most cases have to be heard. The time limits for such applications under most institutional Rules are 30 days from the date of notification of the arbitral award. The short time limit is (i) an emanation of the concern to satisfy legal certainty (“*Rechtssicherheit*”) and (ii) a reflection of the requirement to act in good faith (which means in this context that a party who believes that an award is defective, must say so immediately, and not sometime thereafter).

m) Re the Swiss Federal Supreme Court as the Sole Instance (Article 191):

A major point of criticism under the Concordat regime was the possibility of a two-stage setting aside procedure, first before the Cantonal court at the seat of the arbitral tribunal, and second, by way of a public law appeal against the Cantonal decision, before the Swiss Federal Supreme Court. This criticism was well-accepted in Switzerland. Article 191 (1) of the PIL provides for a “**one shot appeal**” by way of a public law appeal only (within 30 days of the notification of the arbitral award) directed to the Swiss Federal Supreme Court. For the sake of “completeness”, we

should mention that, however, there exists the option under Article 191 (2) to opt for the jurisdiction of the Cantonal court at the seat of the arbitral tribunal; this is an option, which, just like the one in Article 176 (2), has no practical importance whatsoever. The fact that the *Swiss Arbitration Act* has succeeded to provide for the exclusive jurisdiction of the Supreme Court has, outside Switzerland, been remarked with envy. Indeed, in most countries, a recourse to set aside an arbitration award has to be brought in at a high court level, with a further possibility of appeal or recourse to the supreme court. The Swiss solution meets the parties' prime need for an expedient and cost-effective final determination within the country of origin of an award; it also guarantees that the most experienced judges will sit "in judgment" over an international arbitral award.

563 The filing of an action for setting aside an award does **not per se** have a **suspensive effect**. However, such suspensive effect may, upon a motivated application, be granted by the Supreme Court. For good reasons, the Supreme Court is extremely reluctant to grant it. Where a partial award has been attacked, the arbitral proceedings may, subject to the determination by the arbitral tribunal, continue notwithstanding the fact that a public law appeal is pending.

564 The Supreme Court, when seized with an action for setting aside, may dismiss undoubtedly unjustified actions for annulment of the award in **summary proceedings**. Otherwise, the Court will normally determine the action after having received the response of the opposing party; it will thereafter either dismiss the appeal, or allow it and **remit** the case to the arbitral tribunal for supplementing the arbitral proceedings, or for taking a new decision, having regard to the observations of the Supreme Court. In other words, the Supreme Court will not normally supplant the decision taken by the arbitral tribunal by its own decision on the merits.

n) Re the Possibility to Make an Exclusion Agreement (Article 192):

565 Another new feature is that foreign parties can now in advance wholly or partially exclude any setting aside proceedings against an arbitral award, by way making a so-called **exclusion agreement** (e.g. within the arbitration clause, or in any subsequent document). However, this exclusion must be explicitly stated; a merely implied exclusion (e.g. by way of a provision contained in institutional arbitration rules, such as those of the ICC and WIPO) will not suffice in Switzerland (in contrast to court practice in England). An exclusion agreement will nevertheless not exclude the possibility of judicial review by the enforcement judge, who will have to apply Articles IV and V of the New York Convention.

o) Re Enforcement of Foreign Arbitral Awards (Article 194):

566 Article 194 enhances the enforcement in Switzerland of **foreign arbitral awards**. Irrespective of the country of origin of an award, the test under the New York Convention will be applied. In a declaration dated 23 April 1993 Switzerland therefore withdrew its **First Reservation** in respect of the New York Convention (AS 1993, 2434; see also Bull ASA 1993, 506 and Arbitration Materials 2/1993, 155).

3. Evaluation of the Swiss Solution – Does it Mark a Progress?

All in all, therefore, it can be said that Chapter Twelve represents **significant progress** over the Concordat. 567

In **institutional arbitration** (mostly under the ICC Arbitration Rules but also under the Rules of the WIPO, LCIA, AAA etc.), Chapter Twelve constitutes an extremely **arbitration-friendly and liberal *lex arbitri***; a *lex arbitri* which – and this is always a vital concern when evaluating a convenient *forum* – entirely respects the institutional arbitration rules chosen by the parties and remains in harmony with them. Thus, apart from the equal treatment requirement in Article 182(3), Chapter Twelve does not contain any legal provisions which could be construed as **mandatory**, restricting the freedom given to the parties (or, in a subsidiary capacity, the arbitral tribunal) with regard to the arbitral procedure. For the relationship between the *lex arbitri* and institutional arbitration rules cf. Blessing, The ICC Arbitral Process: The Procedure before the Arbitral Tribunal, Part III, ICC Bulletin 3/1992, 18 ss., 25 ss.; see also the analytical report by Sandrock, How Much Freedom Should an International Arbitrator Enjoy? – The Desire for Freedom from Law v. The Promotion of International Arbitration, in: The American Review of International Arbitration 1992, 30 ss., 39–43; see further Craig, International Arbitration and National Restraints in ICC Arbitration, ArbInt 1985, 49 ss.

In ***ad hoc*** arbitration proceedings, Chapter Twelve can be said to replace institutional arbitration rules. It constitutes a modern, appropriate and well-balanced instrument offering an assurance of efficient arbitration proceedings. 568

It can therefore be said that, with its Twelfth Chapter, Switzerland has achieved an international arbitration law which meets present day standards of **liberality**, without neglecting the requirement of **legal certainty**. In its most essential features Chapter Twelve concurs with the philosophy of the UNCITRAL Model Law without adopting its detailed rules. Thus, those familiar with the Swiss solution will not regret too much the fact that Switzerland did not implement its legislation on the basis of an adoption of the UNCITRAL Model Law. 569

4. What Effect Does Chapter Twelve Have on Legal Practice?

The liberality of Chapter Twelve **does not just offer freedom**, but also sets **higher standards** of competence and ability on the part of lawyers and arbitrators. As a result of Chapter Twelve, and in comparison with the former regime under the Concordat, international arbitration proceedings in Switzerland have become: 570

More liberal: greater significance is attached to party autonomy, while there is and will be less interference and control by the state judiciary in arbitration proceedings. 571

More international: Foreign parties to arbitration proceedings will no longer have to fear that their international case will come under the unexpected verdict of Swiss domestic procedural law. 572

More autonomous: Parties, lawyers and arbitrators are no longer expected to deal with local procedural rules (or those of the Federal Act of Civil Procedure), and like- 573

wise they need no longer bother themselves studying the quite extensive commentaries and court decisions referring to those. We may recall that under the regime of the Concordat, non-Swiss parties and lawyers often perceived a need, for the sake of abundant caution, to investigate thoroughly into local procedures, thereby encountering the additional inconvenience that practically none of those materials, commentaries and court cases were available in the main language used in Switzerland for international arbitral proceedings, namely English. Today, it is only in those very few cases in which national courts are asked to provide assistance (e.g. to appoint or replace an arbitrator in *ad hoc* arbitration proceedings, or in the event of a national court being asked to provide assistance in the framework of evidentiary proceedings) that the local court will apply its own local procedural rules. Apart from those very exceptional circumstances, an arbitration procedure in Switzerland can be conducted autonomously.

574 **Easier for foreign lawyers:** The latter's expectation that the arbitration procedure in Switzerland can be conducted on the basis of an international spirit is justified and will be honoured by experienced arbitrators. There should no longer be a need to instruct Swiss counsel for pleading an international case before the arbitral tribunal.

575 **At the same time more exacting for lawyers:** If procedural issues arise, it will no longer be possible or sufficient to refer to the solution provided by a paragraph in a local code of civil procedure, or to seek an answer suggested in a local court practice. Instead, procedural issues will have to be decided in the light of international arbitration practice and possible answers will have to be examined against a two-fold test:

- **Objectively:** Is the answer backed up by a sufficient recognition in the domain of international arbitration? Does it accord with *communis opinio*?
- **Subjectively:** Does the suggested answer deserve recognition and application as far as the particular parties involved are concerned, having regard to their objectively fair and subjectively reasonable/legitimate expectations?

576 **Also more exacting for arbitrators:** They too can no longer simply refer back to ready-made and pre-fabricated answers as contained in local legislation. Instead, they will have to **develop** their answers by deduction having regard to international standards, and to scrutinize them as to their authoritative nature in the case at hand, thereby essentially ascertaining that the application of the legal rule in question meets the **objectively fair and subjectively reasonable/legitimate expectations of the parties** in an international arbitration. This, certainly, is a more demanding task. See hereto Blessing, *Das neue internationale Schiedsgerichtsrecht der Schweiz – Ein Fortschritt oder ein Rückschritt?*, 24 s.; Blessing, *The New International Arbitration Law in Switzerland*, JIntArb 2/1988, 16/17.

5. Legal Certainty and Foreseeability

577 The fear is occasionally expressed, when debating Chapter Twelve, that new Swiss international arbitration law might offer less **legal certainty and foreseeability** com-

pared to the old Concordat. However, this is not so, and in fact it is quite the reverse. It is only by referring to internationally acknowledged customs and practices that parties can be sure of being safeguarded against unpleasant surprises and local customs with which they cannot be conversant and which they cannot or should not have to expect. Chapter Twelve fulfils the requirement and expectation of **specificity** in international arbitration. It allows the arbitrator to conduct proceedings in a flexible manner, in line with the specific requirements of a particular case and allows a decision to be arrived at which is not just governed by a local criterion, but also by the criterion of an **international claim to validity**. The freedom and autonomy embodied in Chapter Twelve is **not just *carte blanche* for procedural arbitrariness or for an arbitrary decision**, but does in actual fact comprise the most essential **legal protection** for the contracting parties. It acts as a **guarantee**, comparable with an **insurance policy**.

The greater the freedom, the greater the responsibility: this maxim squarely applies to Chapter Twelve. 578

The detachment of international arbitration from **local provisions** does not therefore create legal uncertainty, but actually promotes **legal certainty** instead. It ultimately ensures that a businessman can rely on fundamental legal principles with which he is conversant, irrespective of whether the process is brought before an arbitral tribunal in Switzerland or Bahrain. Chapter Twelve achieves a certain degree of **“symmetry of expectation”** which was not guaranteed under the Concordat. 579

The following example should make this clear: If a German industrial company has to face arbitration proceedings in Lagos, Tashkent or Bombay, it will voice its expectation that these arbitral proceedings should not be impaired by the **local code of civil procedure** or other provisions of a purely local character (e.g. those in Tashkent), on the rationale that the German company cannot be at all conversant with those local provisions, with their corresponding caselaw or with commentaries thereon (contained in local textbooks, for which there might not even be an English translation available). If such local provisions had to be observed in international proceedings, the German industrial company would understandably be very disconcerted (no matter how good the local law in Tashkent might be). It would certainly not consider the direct or subsidiary application of the Tashkenti code of civil procedure likely to further “legal certainty and foreseeability of the law” and would most likely complain about the necessity, if those local rules were applied, of instructing a local lawyer to plead its case (not to mention the additional fear of whether it could adequately explain itself to the lawyer). The German company would in such circumstances understandably argue that the arbitration proceedings should be conducted according to international standards, and that anything else would be unreasonable and incompatible with its legitimate expectations and with the international nature of the disputed contract etc. 580

This example may seem convincing, and yet in the converse case, i.e. where arbitration proceedings were to be conducted in Switzerland and not in Tashkent, we might be tempted to consider that it would not at all be unjust or unfair to foreign parties involved in arbitration proceedings in Switzerland to have their arbitration subjected to the local Swiss procedural rules. However, the fact that we in Switzerland 581

are naturally well familiar with our own provisions and might even proudly feel that they deserve to be applied to the foreign parties in an international arbitration, does not at all justify our advocating their legitimacy in international arbitration. We ourselves must be prepared to concede precisely what we expect of foreigners (as per the above hypothetical example of Tashkent). This is what is meant by the aforementioned “symmetry of expectation”, which the author argues is vital to respect.

582 Chapter Twelve, in its liberal spirit, is also of a truly **exemplary nature** for foreign legislations. For good reasons, it has been regarded as a model for shaping new arbitration acts, although in most cases some tribute will have to be paid to also satisfy certain local perceptions. The model-character would seem to be all the more important, the stronger the upturn in international arbitration and the stronger the trend that important arbitral proceedings will no longer be conducted just at the traditional places for arbitration such as Paris, London, Geneva or Zürich. Indeed, more and more pressure is being put on Western companies concluding contracts with firms in the Middle East, the Far East, Eastern Europe, Africa or South America (and particularly with state-controlled organisations) to agree on a place of arbitration such as Bahrain, Dubai, Cairo, Damascus, Kuala Lumpur, Singapore, Hongkong, Beijing, Taipei, Seoul, Tokyo, Moscow, Kiev, Panama etc.

583 It should also be recalled that – e.g. in the construction industry – an increasing amount of pressure is being put on construction firms, general contractors and suppliers to subject the relevant contracts to the **local law** at the place where the construction is to take place. A supplier will be strong enough to avoid such impact only in those rare cases where the supplier operates in an almost monopolistic market, and thus will not have to fear to lose the contract to one of its competitors. In this connection the reference to “rules of law” and to “general principles of law” would seem to be of paramount importance having a **function akin to that of a guarantee**. This brings us back to now take a broader look to a somehow academic subject which, however, can be of a crucial relevance for the outcome of the arbitral decision; see Part VIII.

VIII. Determination of the Substantive Rules of Law

1. Choice of Law by the Parties

There is a general consensus that, in all international contracts, the choice of law is one of the most important contractual elements to be agreed upon between the parties. Such a choice will dispense with the need for the parties to argue an overly complex issue which otherwise inevitably would have to be dealt with, should a dispute arise. The multifold aspects discussed in this part will further emphasize the importance for the parties to make their own choice of law. 584

a) *The Free Choice – In Theory and In Real Life*

Today, the parties' **freedom** to themselves choose the law applicable to their contractual relationship is one of the most essential cornerstones in international law, recognized in practically all national legal systems. Even those countries which, in the past, exercised close control over contractual relationships of their own nationals are today proudly announcing to the world's business community that their own national legal system fully recognizes the free choice of the parties as far as the applicable law is concerned. For instance, in the past, question-marks as to the recognition of a free choice of law had been made in respect of the People's Republic of China, South Korea and Taiwan, but those representing these countries at international conferences very clearly stressed that their own national laws will fully recognize the freedom of the parties to themselves determine the applicable law in the framework of international contracts. 585

We need to be aware that the parties' choice of law will have certain limits. These limits, basically, are twofold: *First*, a choice *in fraudem legis* will not be recognized. A party who, on purpose, makes a choice of law so as to circumvent the applicability of an undesired law, will not deserve protection. Some countries may require a reasonable or legitimate interest for making a particular choice of law (such as the United States as per the 2nd Restatement of Conflict of Laws); this aspect is, however, not of significant interest and does not need to be further elaborated here. *Second*, frequently, today, even where the parties have chosen a particular national law, there will be foreign laws that tend to claim **extraterritorial application**; we will come back to this aspect further below. 586

However, on the other hand, we need to be aware that, in some countries, **certain types of contracts** (such as contracts for investments in infrastructure projects, joint-ventures, building- and construction contracts) can only be made by respecting the sometimes complex regulatory framework which may exist in the particular country where the investment is to be made. For instance, in respect of the People's Republic of China, the situation is such that, for most of these contracts, Chinese law will have to govern the contractual relationship, and thus it would be somehow naive for a for- 587

eign party to speculate that it will succeed in avoiding the impact of Chinese law simply by providing that German law or Swiss law should be applicable.

588 In recent years, the host countries for those large investment or infrastructure projects have shown a very clear **trend to impose their own national law** such that, in the framework of requests for tenders, the employer (or government) will insist on the application of its own national law (be it Indian, Chinese or Mongolian). A bidding contractor who, instead, would wish to propose either (i) the applicability of its own national law (such as its American, German, French or English law) or (ii) the applicability of a neutral law not connected to any party (such as, for example, Swiss law) would have no chance to succeed in the tender. Western industries, suppliers and contractors, therefore, have good reasons to acquaint themselves with the legal parameters prevailing in those countries.

589 Another clearly noticeable trend moreover is that those countries will not only impose their own national laws, but also **their own dispute resolution mechanism**. For example, in 1995, a major Swiss company and a South Korean company were bidding for a large infrastructure project in Taiwan. Upon information and belief, the offers were more or less identical and, as far as experience and superiority of technology was concerned, the Swiss company was believed to have the best chances. However, the Swiss company voiced a reservation regarding the applicable Taiwanese law and, moreover, proposed that arbitration should rather take place on neutral ground, e.g. in Hongkong or in Singapore. The South Korean competitor, however, accepted the Taiwanese law and the venue for arbitrating any kind of disputes in Taipei under the Taiwanese Arbitration Act of 1961/1986 (which, unfortunately, does not respond to modern needs and perceptions and urgently requires modernization). In the end, the Korean contractor got the contract. This is just one of many recent examples and, in the author's conviction, these situations are likely to become rather typical in the decades to come. The fact that, for instance, the China International Economic and Trade Arbitration Commission (CIETAC) is seized with more than one thousand new international arbitration cases submitted to it per year speaks for itself.

b) Quid, Where the Parties Cannot Reach Agreement on the Applicable Law?

590 Sometimes, it may be overly difficult for the parties to agree on a particular national law. What should they do in such a situation? Should they remain silent? Or should they at least come to an agreement that their contractual relationship be governed by **general principles of law, or *lex mercatoria*, or similar de-nationalized rules of law?**

591 Discussions on this question have shown that we are discussing here an **almost religious question**: Some will say that referring to general principles of law will amount to a kind of “roulette”, and will open the doors for totally **unpredictable vicissitudes and to arbitrariness**. Others will, on the contrary, praise the parties and will congratulate them for having had the **wisdom** to enter into a truly international contract, and for paving the way to the kind of fairness, independence and neutrality

of assessment that one may – and must – expect if a contractual relationship is scrutinized against the demands and requirements of general principles of law.

Thus, for the first group of scholars, the reference to general principles of law is the biggest sin and the biggest mistake. For the others, it is close to the ideal world, almost a “ticket into paradise”, but in any event an **insurance policy against unpredictable pitfalls** which may exist in unknown national laws. 592

Which one of these two extreme views is the correct view? Which one is the more reasonable attitude? This author has his own very clear answer, as further discusses in this chapter (compare hereto earlier writings of this author such as *The New International Arbitration Law in Switzerland – A Significant Step Towards Liberalism*, 5 JIntArb. 2/1988, 9–88, in particular at 54 ss.; *Regulations in Arbitration Rules on Choice of Law*, ICCA Congress Series No. 7, 1996, 391–446, and *Einführung in die Internationale Schiedsgerichtsbarkeit*, publication of the Europe Institute Zürich, February 1997, 1–186 and 361–401, in particular 101 ss.). 593

A preliminary reflection, nevertheless, should be made here: there is hardly a field of law where more scholarly writings have been published on the subject, most of them written by excellent scholars and professors who, however, may indeed have had very limited practical experience to deal with those situations in actual life. The present issue, however, is a burning issue for practitioners – for those who, in actual practice, had the opportunity to experience the value and the benefit which results for both arbitrating parties in those cases where the prevailing answers are being derived from principles that deserve to be characterized as being “universally recognized” (rather than to take guidance from a certain paragraph “x” of a particular national law which might prove to be entirely suitable for that particular country’s national purposes, but be totally unsuitable in the international context). 594

c) General Principles of Law as a Corrective or Supplementary Order

There is another instance where general principles of law may come in. Namely in those situations where the parties basically agree that a certain national law should apply, but also agree that, in addition to such national law, general principles of law should be applied. In legal practice, this dual formula has been used in numerous contracts. Unless the hierarchy of these two reference systems has been clearly defined, it has often been a matter of interpretation to determine whether, in essence, the contract should be governed by the national law, unless such national law would stand in contradiction to general principles of law, such that the general principles of law will have a kind of “**corrective effect**”, or whether the general principles may only come in in so far as the national law is silent (such that the general principles will be of a supplementary character). 595

Again, in this latter context we have heard **criticisms** from numerous scholars taking the view that such a dual reference would only complicate matters, would provide uncertainty and thus should rather be avoided, giving preference to the solution whereby one clear national legal system prevails. However, those scholars have either never had a single arbitration to adjudicate where these issues were at the heart of the dispute, or else they have not learned to realize that local or national perceptions and 596

laws are often short-sighted, engineered under a purely local focus and do not deserve to be of an authoritative nature in a large international context.

597 In a very general sense it is of prime importance to realize the following: In the past decade, despite many trends towards de-regulation, we have seen a tremendous amount of new legislations being created in all fields of law and in a density of regulation which is unprecedented. And we certainly may expect this to continue as a natural process and as a response to regulate and balance numerous needs, criteria and different national policies. Enterprises stepping onto the international market place will, of course, be expected to honour the laws of the “market place”, but on the other hand, when it comes to the adjudication of a dispute, it is also necessary for an arbitral tribunal to seek a resolution and decision which is in harmony with fundamental notions and with those generally recognized principles of law in which both parties have confidence in when entering into the contract. This reflection suggests that an arbitral tribunal would not fulfil its important mission properly if it only satisfied itself to correctly apply a given paragraph of a particular national law, unless it also satisfied itself that that particular paragraph indeed deserves its application under the relevant circumstances, and having regard to the parties and **their objectively fair and subjectively reasonable expectations**. At the same time, the arbitral tribunal will have to have regard to notions pertaining to the **transnational public policy** and to the rules and requirements of **comity**. For the latter aspect see von Hoffmann, *Internationally Mandatory Rules of Law Before Arbitral Tribunals, Acts of State and Arbitration*, 1997, 3 ss., 22–27.

598 Thus, if the international arbitrator would like to be more than simply a slave and a kind of mechanic who blindly takes the local tools to fix a problem, he will have to do more careful thinking and reflection. And it is exactly here where we may see the tremendous importance of international arbitration and, probably, its superiority to any other adjudicatory process provided by national courts or authorities. Indeed, the international arbitrator is today challenged and called upon to reflect more carefully on his decision than any State court judge. For that purpose, modern arbitration acts concede a very vast degree of freedom to the arbitrator. **Such a freedom, however, brings with it, as a corollary, an increased amount of responsibility**, i.e. the responsibility to provide a very carefully reasoned decision which lives up to those (already mentioned) fair and reasonable expectations of the parties.

599 Let us now focus on a **different scenario**: the scenario where the parties have failed to determine the applicable law.

In such a situation, three different steps/issues must be clearly distinguished:

- **The subjective approach:** Is there a **hypothetical will** or intention of the parties that needs to be respected? Hereinafter Sub-Section 2.
- **The objective approach:** If the above question is to be answered in the negative, the objective approach will have to be adopted by the arbitral tribunal, where three steps/levels will have to be distinguished:

- (i) First, the level of the applicable conflict-of-laws rule; hereinafter Sub-Section 3;

- (ii) Second, the level of the substantive law or rules of law (as designated by means of the criteria of the applicable conflict rule); see Sub-Section 4;
- (iii) Third, we need to discuss the potential impact of mandatory rules of law claiming an extraterritorial application; see Sub-Section 5.

2. The Subjective Approach: Researching the Hypothetical Will of the Parties

The question here is: **have the parties, despite their silence, made an implied positive or negative choice of law?** At this juncture, we are coming to a second kind of an almost “religious” question. The question is this: Where parties have not made an explicit choice of law in their contract, is it necessary, appropriate or totally unnecessary for an arbitral tribunal to ask itself (as well as possibly the parties) why no such choice or determination of the applicable law had been made?

In England, for instance, such a question would not be asked, and many other common law jurisdictions might take the same view. Thus, the English arbitrator is likely to simply notice the absence of an explicit choice of law made by the parties and he would then proceed to determine himself the applicable law (in the sense of the “objective approach” described hereinafter).

The above, however, is not the attitude on the European Continent. It is true that **ordinary State Courts**, even on the Continent, tend to have some hesitation in reflecting on what the parties might have agreed, and sometimes show an inclination toward immediately imposing their own legal analysis on the parties, namely by resorting to the objective approach as described hereinafter. This is also true as far as the Swiss Federal Supreme Court is concerned which, decades ago, abandoned the approach of the hypothetical intention. This may be fine, for State courts, but according to the author, is not so for arbitral tribunals! **Indeed, the attitude of State courts is not a relevant or authoritative factor in international arbitration;** arbitral tribunals must as closely as possible remain within the framework of the parties’ contractual intentions, whether positively expressed, expressed impliedly, or tacitly, or through constructive behaviour. Thus, in the view of the author, the international arbitrator has **a distinctive and noble duty** to refrain from imposing extraneous concepts onto the parties, but instead should, as far as possible, honour their common intentions. Therefore, an arbitral tribunal should trigger the objective approach with caution only – and probably with more caution and reluctance than a State court would apply under the same circumstances. This is yet another of the multifold facets of the so-called “*specificity of international arbitration*”.

Thus, the absence of an explicit choice of law in an international contract is always **something quite striking**. As a presiding arbitrator, the author would naturally be interested to know why this was and to find out what was behind the absence of an explicit choice of law.

a) The Silence Might Be Particularly Significant

604 In actual fact, there might be **a number of reasons** why no determination of the applicable law has been made, for instance:

- Was that determination simply **forgotten** by the parties or
- Had the parties thought of making a choice as to the applicable law but, in the end, thought that such a determination would **not be necessary**? In such latter case, the arbitrators would certainly be interested to know **why** the parties thought such determination superfluous, or
- Did the parties discuss a choice of law, but **fail** to come to an agreement? In such a situation, the arbitrators would certainly wish to know what had been discussed and for what reason the parties were in the end unable to agree, or
- Have the parties **intentionally avoided** to discuss the matter of the applicable law, for instance because they knew that it would be difficult to reach an agreement, and/or because of a fear that raising this issue might result in walking away with no contract at all?

605 The reader will easily realize that it can be highly important, revealing and relevant to investigate the absence of a choice of law clause (and the writer of this article has learned a lot by tracing back the history of a contract over various stages of negotiations so as to get a full understanding of what the parties, in the end, had agreed in their final contract). Thus, at least in the last two cases described above, the arbitral tribunal will have to ask itself whether the parties (who had not made an explicit choice of law) at least manifested a **so-called hypothetical will or intention** in one direction or another.

606 In this sense, the arbitral tribunal might come to the point of asking itself the following question:

“If **these** particular parties **had to agree** on a choice of law, what law (or rules of law) would they have chosen?”

In at least some cases, the arbitral tribunal will be able to come to a fairly obvious conclusion.

607 However, in probably the majority of these cases the arbitral tribunal might only come to a kind of **negative conclusion**, namely a conclusion that both parties clearly wanted to avoid a particular national law. The most typical of these situations is for an arbitral tribunal to conclude that the claimant quite certainly or quite obviously did not want to subject itself to the national law of the other party, i.e. that of its respondent; and that the respondent party quite obviously did not want to subject itself to the national law of the claimant party. This is the situation which we may call an **“implied negative choice”**. See hereto Blessing, Regulation in Arbitration Rules on Choice of Law, in particular 396 ss.

b) An Illustrative Case

The most typical situation where it might be justified to think of an implied negative choice is the situation where, at least on one side, a contract is made by a **State party or a party controlled by the State**. Such was, for instance, the situation which had to be examined in the framework of ICC Case No. 7375. The case concerned one of a series of contracts (in total nine) made in the 1970s by a State entity of an Islamic State ("Party A"), as purchaser (claimant in the arbitral proceedings), and a U.S. supplier ("Party B") (respondent in the arbitral proceedings). The contracts provided for the supply by the U.S. manufacturer (Party B) of certain equipment to Party A; the supplies included certain air defence equipment and parts. None of the contracts contained a choice-of-law clause. While it was not possible for that Tribunal to clearly ascertain the "history" of the contract negotiations, the representatives of both arbitrating parties clearly confirmed, in the framework of evidentiary proceedings, that neither party would have agreed to subject itself to the other party's national law. Moreover, Party A stressed the fact that agreeing to a foreign national law would have been considered incompatible with its perception of sovereignty. How did the arbitrators deal with this issue? The Tribunal first analysed the performances of the parties and, in the sense of an *excursus* on the objective approach (as will be discussed hereinafter) clearly came to the conclusion that the characteristic performance had to be rendered by Party B, i.e. the U.S. manufacturer, since *inter alia* the equipment not only had to be manufactured in the particular State of the United States, but also had to be inspected there by the purchaser, with delivery terms in the United States and virtually no obligations to be fulfilled, under the relevant contract, on the territory of Party A. Thus, the objective approach clearly guided the Tribunal to determine that Party B's State law was to be the *lex causae* (Award pp. 101–125). However, the arbitrators did not stop there, but reflected further: they realized that the determination of the applicable law (on the basis of the *lege artis* objective approach) had **one very significant flaw**, namely that it clearly **disregarded** the fact that neither party had consented to subject itself to the national law of the other party and that, quite probably, Party A's government would not have entered into the contracts if that had meant subjecting itself to the U.S. laws.

Therefore, the Arbitral Tribunal reached the conclusion that it indeed must take this situation into account, recognizing that both parties – by a kind of "shouting silence" – had made an **implied negative choice of law** in the sense that, under no circumstance, should the contracts be governed by the national law of either one of the parties. Thus, the Tribunal had to look for another legal order to govern the contract(s). Should the Tribunal have chosen perhaps a neutral national law, i.e. a national law not connected to one of the parties, such as Swiss law? This would have seemed to be extremely arbitrary. Why Swiss law and not French law, or the law of Argentina? Any such choice of a third (neutral) legal order would have been particularly critical, because one of the most difficult issues in that arbitration was the issue of the statute of limitations. Thus, if the Arbitral Tribunal had elected to choose the national law of State X as a neutral law which might have contained a short (or a long) statute of limitations, it would, by that choice, impair the position of either one of the parties.

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610 As a second alternative, the Tribunal reflected whether it should follow Mauro Rubino-Sammartano's **tronc commun-doctrine**, such that the contract(s) would be deemed governed by those parts of both parties' national laws which are common. However, in an evaluation of this method, the Tribunal reached the conclusion that such method would not promise to be satisfactory.

611 The Tribunal thus came to the point of analysing the third alternative, i.e. to consider a **de-nationalized solution**. It discussed a number of important arbitral awards where de-nationalized rules of law had been applied. In particular, the Arbitral Tribunal referred to ICC Case No. 5953 in re *Primary Coal Inc. v. Compania Valenciana*, Award of 1 September 1988, published in *Revue de l'Arbitrage* 1990, 701 ss. That case was commented by Lagarde as well as by Goldman, in *Clunet* 1990, 433–442; compare also Berger, *Lex mercatoria* in der internationalen Wirtschaftsschiedsgerichtsbarkeit – Der Fall “Compania Valenciana”, 13 *Praxis des Internationalen Privat- und Verfahrensrechts*, 1993, 281 ss. Further reference was made to ICC Case No. 3131 decided on 26 October 1979 in re *Pabalk Ticaret v. Norsolor* and the corresponding judgment of the Austrian Supreme Court dismissing an appeal on 18 November 1982, cited in *ICCA Yearbook* 1984, 159 ss. Earlier cases in point are *Sapphire v. NIOC* (35 Int. L. Rep. 1967, 136 ss.) and *Topco v. Calasiatic* (17 I.L.M. 1978, 17), as well as the awards in ICC Cases No. 1512, 1641, 1859, 3267, 3493, 3572, 4840, 5065, 6379 and 7110. The Tribunal, quite in line with the spirit discussed in the reviewed decisions, reached the conclusion that the contract in dispute also has to be de-nationalized and be deemed subject to general principles of law. In its further reasoning, the Arbitral Tribunal explained that the term “general principles of law” would include notions that sometimes are said to form part of a *lex mercatoria*. It also discussed the 1994 UNIDROIT Principles which claim to express a general and world-wide consensus. Nevertheless, the Tribunal made the cautionary remark that it would have regard to the UNIDROIT Principles as far as they could claim to reflect a wide international consensus. Thus, the Award on Preliminary Issues, on page 139, **held** the following as far as the applicable law is concerned:

612 “The Arbitral Tribunal determines that – apart from having due regard to the contractual terms and taking into account relevant trade usages – Contract No. 1 shall be governed by, and interpreted according to, general principles of law applicable to international contractual obligations having earned a wide international consensus, including notions said to form part of the *lex mercatoria* as well as the UNIDROIT Principles, as far as they can be considered to reflect generally accepted notions and principles.”

613 The consequence flowing from this Preliminary Award is that the Tribunal will have the task of determining the statute of limitations as well as all subsequent contractual issues solely on the basis of those general principles of law, *lex mercatoria* and the 1994 UNIDROIT Principles. At this point, the reader may immediately raise the following questions: How is it possible that the statute of limitations can be determined on the basis of general principles of law only? How is it possible to determine individual contractual claims simply by reference to general principles of law, *lex mercatoria* and the 1994 UNIDROIT Principles? These questions are certainly justified, and indeed these are the typical kind of questions of “**positivists**”, i.e. of those who believe that the law must regulate every situation in detail, and unless a detailed

legal answer written down in some paragraphs of a national law can be found, the outcome will be uncertain and unpredictable, and the award will be built on a vague or speculative legal basis. The author of this article is not a “positivist” in this sense, but is convinced, on the basis of extensive practical experience, **that the generally accepted principles are sufficiently detailed so as to allow a carefully reflected adjudication of each individual issue**, including the issue as to the determination of the statute of limitations.

One thing is obvious in this context: it is certainly much more difficult for a tribunal to apply general principles of law than to simply apply one particular national law. If a tribunal can adjudicate a case according to a national law, it will have a relatively easy task to find out the pertinent provision of law, to study the commentaries relevant thereto and to then make a decision having regard to the contractual terms and, to the extent necessary, the solution offered by a particular paragraph in a national law. However, if an arbitral tribunal has to reach its decision by having regard to general principles of law, then it will have to think much more carefully. *Inter alia*, it will probably have to compare a variety of answers provided in different national legal systems, and will have to reflect in those, with the utmost care, when forming its decision (which, as such, must live up to a higher standard of authority).

A **novice** in the field of international arbitration might sometimes be tempted to say that, where an arbitral tribunal applies general principles of law or *lex mercatoria*, it will have a kind of *carte blanche* to do whatever it thinks fit and, in essence, will have an easy “ride”. This is, of course, entirely wrong. In fact the exact opposite is true!

For the sake of avoiding a possible misunderstanding, it should be emphasized that a decision based on general principles of law or *lex mercatoria* will clearly remain to be a decision made under the “**rule of law**”; it should **not** be confused with a decision *ex aequo et bono*, or by an *amiable composition*, for which practically all national laws and arbitration rules of leading arbitral institutions will require an explicit consent of the parties so as to empower the tribunal to act accordingly.

So far, we have discussed the case where the situation is such as to allow the arbitral tribunal to discover a hypothetical intention of the parties. However, this may not always succeed – so what then? This is our next topic, focusing on the “objective approach” and its two distinctive facets (hereinafter Sub-Sections 3 and 4).

3. The Objective Approach: The First Aspect Relating to the Applicable Conflict Rule

a) Introduction

We now need to consider the situation where (i) the parties have failed to make a choice of law and (ii) where the absence of a choice does not, as such, justify a conclusion that the parties had made a hypothetical choice – either in the sense of an implied positive or an implied negative choice, as discussed in Part B above.

619 In such a situation, the arbitral tribunal will have to determine the substantive law rules **via the means and tools of private international law**. Here, a first series of question arises:

- Should the arbitral tribunal **elect** to apply a particular **conflict-of-laws system**, such as the system prevailing at the place of arbitration? Or should it even be **bound** or at least “expected” to apply such a private international law system?
- Or, conversely, and instead of applying a system of conflict of laws, should the Arbitral Tribunal be free to pick one particular **conflict of law rule** deemed appropriate, i.e. an individual rule, as opposed to applying an entire system?
- Or should it even be free to **look over** the passage via a conflict rule altogether and to adopt the so-called *voie directe*?

620 These questions may sound academic and may seem to be of interest for professors only, but as a practitioner the author can say that they are not: they are questions of **crucial practical significance** because, depending on their answer, they may sometimes directly determine the outcome of a case. And because this is so, these questions need to be examined and handled very carefully. It is, however, not the purpose of this article to provide a full scholarly discussion on this topic and we may limit ourselves to highlight the essence as well as some of the difficulties of which each arbitrator must be aware.

b) What Are the Legal Parameters to Be Checked?

621 What are the legal parameters which an arbitral tribunal will need to check when being confronted with the task of determining the applicable law? The answer to this question will depend on whether the arbitration is an *ad hoc* arbitration or an institutional arbitration.

(i) In ad hoc Arbitration

622 In *ad hoc* arbitration, the relevant source of information to be looked at by the arbitral tribunal is the arbitration act applicable at the seat of the tribunal, i.e. at the place of arbitration. Arbitration acts will normally contain a provision regarding the applicable law. Typically, such provision will first reflect the notion that, where the parties have chosen the law, the tribunal will decide the dispute on the basis of such choice. In addition, the provision will typically continue to deal with the situation where the parties have not made a choice, and the provision will, in most cases, consist of two elements: *First*, a reference that the arbitral tribunal will apply the conflict of law rule deemed appropriate; and *second*, a reference that the tribunal shall thereupon determine the applicable law (or the applicable rules of law).

623 Many arbitration acts will contain further provisions making reference to trade usages and to the authority of an arbitral tribunal to determine a dispute *ex aequo et*

bono, provided that the parties had specifically conferred such authority on the Tribunal.

(ii) In Institutional Arbitration

Here, the first source of information for the arbitral tribunal is to look at the corresponding provision contained in the arbitration rules of that particular institution. These provisions, by and large, will be of a structure similar to those contained in national arbitration acts. The question then arises as to the hierarchy between the institutional arbitration rules and the arbitration act prevailing at the seat of the Arbitral Tribunal. This **hierarchy** is rather simple, as will be demonstrated below. 624

In the first instance, an arbitral tribunal has to respect the mandatory provisions of the arbitration act prevailing at the place of arbitration. Those mandatory provisions take precedence over the provisions contained in the institutional arbitration rules chosen by the parties. Some institutional arbitration rules make an explicit reference to this effect, see for example Article 3(a) of the WIPO Arbitration Rules. 625

The (not always easy) question now arises: which of the provisions contained in a particular arbitration act applicable at the place of arbitration are really of a mandatory character? In general, the answer is that most of those provisions are of a **dispositive nature**, and only very few will be of a mandatory character. For instance, in respect of the Swiss Arbitration Act, probably the only Article of mandatory application is 182(3) of the PIL Act, referring to the requirement of equal treatment. 626

As far as the provision (in arbitration acts) relative to the determination of the applicable law is concerned, we may say that those provisions are **not** of a mandatory character. The author of this article is not aware of any country where the opinion has been expressed that the provision dealing with the applicable law was supposed to be of a mandatory character. Thus, if the parties choose institutional arbitration rules, the arbitral tribunal will have to take guidance from those rules (as further discussed hereinafter). 627

In the second instance, the arbitral tribunal will have to respect the provisions contained in the institutional arbitration rules chosen by the parties. Because, as we have seen, the provisions in the local arbitration acts are not normally of a mandatory character, we may thus conclude that, as a rule, an arbitral tribunal will have to be guided by the provision regarding the applicable law as contained in the particular institutional arbitration rules. 628

In the third instance, and to the extent that the institutional arbitration rules remain silent, an arbitral tribunal may take guidance from the non-mandatory provisions contained in the arbitration act, applicable at the place of arbitration, unless the parties have agreed otherwise. 629

Should there be a **fourth source of guidance** for an arbitral tribunal in the sense that, to the extent that the arbitration act remains silent and to the extent that the parties themselves have not ruled on a particular matter, it might have regard, or take guidance from, some code of civil procedure applicable at the place of arbitration (as has been done only too frequently in past decades, for instance in Germany)? The answer to this question is a **clear NO**. A local code of civil procedure has no author- 630

ity to be applied in international arbitration, and it would be unbearable for international parties to be confronted with local rules of procedure with which they are not familiar, no matter how “wise” those local procedural rules might be. With good reason, countries (as well as arbitrators) where it is known that, in the end, purely local procedural rules will be imposed to international arbitration (as if arbitration was akin to ordinary litigation) will be avoided.

c) Four Different Solutions

631 **Four different solutions** need to be distinguished and discussed:

- applying a conflict **system** (*littera d*) below)
- applying a conflict **rule** deemed appropriate (*littera e*) below)
- applying the **closest connection test** (*littera f*) below)
- applying the **voie directe**, or no particular requirement (*littera g*) below).

632 These four solutions are, still today, reflected in the various national arbitration acts as well as in the arbitration rules of leading arbitral institutions.

d) The Old Doctrine: Applying the Conflict System of the lex fori

633 A somewhat classic or traditional approach had been to apply the conflict-of-laws system applicable **at the place of arbitration**, i.e. the private international law of the *lex fori*. This was the prevailing approach **in the 1950s**, and it is quite surprising to note that this approach is still today moving about “like a ghost”, although it had already been pushed into an early grave in 1961 when the European Convention and its Article VII were adopted.

634 The reader should be aware of the importance and difference of the terminology:

- when speaking of a conflict-of-laws **system**, we will mean the entire private international law of a particular country. Thus, if a tribunal came to the (wrong) conclusion that it has to apply the conflict of law system prevailing at its seat, it might have to consult all the relevant textbooks available on that particular system, possibly including court practice etc.;
- in contrast, when speaking of a conflict-of-laws **rule**, we will mean only one (or more) particular rule (or rules) of private international law (but not an entire system); such a rule may be a rule forming part of the private international system at the place of arbitration, or of any other (national) private international law. Such a conflict rule may also be a **supra-national or an a-national conflict-of-law rule**.

635 Why has the solution to adopt the local conflict-of-laws system been criticized and **abandoned**? The **problem** with the application of a system of conflicts of laws is that such application has indeed failed to respond to two basic expectations of the business community, namely (i) **appropriate certainty** and (ii) **foreseeability** of its result.

This basic failure has to do with the fact that, if one looks more precisely at the various national systems of private international law, they value connecting factors differently and arrive at solutions which will differ from one another to the tune of 180 degrees. 636

For instance, most national conflict of laws systems aim at determining the closest connection of a particular contractual relationship, by defining the so-called “most characteristic performance”, or the “centre of gravity”. **However**, once this determination is made and once the party which is identified as being the party that had to render the most characteristic performance, basically two different solutions are then advocated and reflected in national laws. 637

The **first**, and indeed the prevailing, solution is to say that the contractual relationship should be governed by the law applicable at the place of business or habitual residence of that particular party which has to perform the characteristic performance. This is the solution which prevails in civil law countries influenced by the Swiss and German legal traditions. It has also been adopted by the Rome Convention of 19 June 1980 in its Article 4 which unifies the conflict rules of the contracting states. The pertinent section of Article 4 (2) reads as follows: 638

“Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence or, in the case of a body corporate or incorporate, its central administration ...”

According to the exception rule of Article 4 (5), the characteristic performance test “... shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country”. 639

The **second** solution, adopted by fewer countries, attach a preponderant weight to the place where such characteristic performance has to be rendered (**lex loci solutionis**). This approach still seems to be widespread in civil-law countries which were influenced by French law notions. – It is quite obvious that, in many cases, this second solution will guide the arbitral tribunal to an applicable law totally different from that resulting under the first solution. 640

For instance, a few civil-law countries (such as Spain and also, until very recently, Italy, prior to the enactment of its new law in 1994) still seem to attach a preponderant importance to the place of the formation of a contract (**lex loci contractus**), although this connecting factor is today more often than not of a purely accidental nature. Indeed, most contracts are signed in one place and countersigned in another. 641

Islamic conflict-of-laws rules seem to be divided, in that certain legal systems which were mainly influenced by French law tend to look to the *lex loci contractus* (Egypt, Syria, Jordan, Libya), while others to the place of performance (*lex loci solutionis*), e.g. Lebanon. Others, such as Saudi Arabia, Bahrain, Qatar and Abu Dhabi, seem to apply the law of the place of arbitration (*lex loci arbitri*). 642

Some socialist countries have shown a tendency to look to the *lex loci contractus* (such as the law of the Russian Federation, Hungary and Romania). Others look to 643

the *lex loci solutionis* (such as Bulgaria), and others to the law of the residence or place of business of the party which provides the characteristic performance (Poland and the Czech Republic).

644 This short reflection corroborates the statement that the private international law **systems** have failed to provide consistent, convincing and harmonious answers when aiming at determining the applicable law through the objective approach. **At the end of the day, every conflict-of-laws system is based on some implied legal fictions, and thus does not provide reasonable certainty and foreseeability to the international business community.**

645 It is not surprising that this situation has impaired the confidence and caused scepticism towards the application of national systems of conflict of laws. **This scepticism has paved the way towards today's modern approach, which has freed the international arbitrator from any duty or expectation to apply a particular conflict-of-laws system, such as for instance the system governing at the place of arbitration.**

646 It is important to be aware of the above situation in order to properly understand the rationale for proclaiming and emphasizing **the need for granting arbitrators the full authority and autonomy to determine themselves the method for guiding them towards finding the law or rules of law applicable to the particular dispute.**

647 In accomplishing such a task, arbitrators will be expected to weigh very carefully all the elements of a particular situation. Such a careful weighing, guided by international standards and taking into account **the (i) objectively fair and (ii) subjectively reasonable expectations of the parties**, promises to provide more certainty and foreseeability than the slavish application of a local conflict of laws system. What does this mean in practice? What then is the answer, if national conflict of laws systems have failed to provide an appropriate solution?

e) Applying the “Rule of Conflict Deemed Appropriate”

648 The solution to these questions is in Article VII of the 1961 European Convention which reads:

“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.”

649 In other words, an arbitral tribunal is no longer expected to apply a conflict **system** as a whole but instead is free to apply any conflict rule (i.e. an individual rule, as opposed to applying an entire system as per the old doctrine) which it deems “applicable” or “appropriate” (the latter term being used in some institutional Rules).

650 The European Convention stands out as **one of the most significant landmarks** of this century in the field of international arbitration in that it **freed** the arbitrator from local ties and perceptions (particularly from those reigning at the place of arbitration). Its Article VII has lead the way for numerous arbitration rules of leading

arbitral institutions, and these rules, in turn, inspired national legislators to bring the national legislation in line with this new perception.

Most of the major arbitration rules which came into force between 1960 and 1985 adopted the solution of Article VII of the European Convention, such as the ICC as revised in 1975, the UNCITRAL Arbitration Rules of 1976, the Inter-American Commercial Arbitration Commission Rules of 1978 (which correspond to UNCITRAL), the Rules of the Hong Kong International Arbitration Centre (HKIAC) of 1985, those of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and those of the sister-centre in Kuala Lumpur (both in 1978), the Rules of the Vienna International Arbitral Centre of 1991, etc.

f) A Variant: The “Closest Connection Rule”

The so-called “closest connection” (or “centre of gravity” or “most significant relationship”) is probably the central concept in private international law. An essential contribution to formulating guiding principles had been developed by the Swiss Federal Supreme Court in its long-standing court practice which had quite strongly influenced the scholarly discussions around the globe. According to this solution, the Arbitral Tribunal will, on the one hand, not be confined to applying a particular conflict of law system or a particular conflict of law rule but, on the other hand, will not have a *carte blanche* to simply choose any kind of law which it might fancy. Rather, the law or rules of law to be looked at should be that (those) which appears (appear) to be most closely connected to the contractual relationship.

This solution is certainly highly appropriate and thus acceptable. It has found its way into Article 4(2) of the Rome Convention (cited above), into the U.S. 2nd Restatement as well as into Article 187(1) of the Swiss Arbitration Act (Chapter 12 of the Swiss Federal Act on Private International Law), which reads as follows:

“The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.”

The closest connection rule has now also been reflected in the revised German Arbitration Act. See the new § 1051(2) of the X. Book of the German Code of Civil Procedure.

g) The Most Modern Solution: No Explicit Requirement

During the past decade, the notion has grown that it would seem wrong to impose any kind of constraints on international arbitrators by, for example, imposing a particular method to be adopted by them for the purpose of determining the applicable law or rules of law. Instead, the notion started to prevail that perceptions, around the globe, are different and that it should be left to the judgment and responsibility of the arbitrator **to proceed in the way which he thinks most appropriate.**

Thus, the most modern institutional arbitration rules no longer refer to any passage via a conflict of law rule. Instead, they simply provide that it will be for the arbi-

tral tribunal to determine the applicable law or rules of law. The method as to how this determination is or should be made is thus left open, and the arbitrator has the **freedom** to either be guided by a conflict-of-laws rule or, alternatively, may operate the so-called *voie directe*, by directly determining the applicable law or rules of law. Even in the latter case, however, the arbitrator will certainly apply some notion of private international law, at least for his internal thinking process, even though, under the *voie directe*, he will be under no obligation to provide a reasoning to explain on what legal grounds the applicable law or rules of law had/have been determined.

658 This most modern solution can, for instance, be found in the arbitration rules of the following institutions: American Arbitration Association (AAA), London Court of International Arbitration (LCIA), Netherlands Arbitration Institute (NAI; see also Article 1054(2) of the Dutch Arbitration Act), World Intellectual Property Organisation (WIPO/OMPI), Rules of the Milan Chamber of Commerce and the 1998 ICC Rules.

4. The Objective Approach: The Second Aspect Relating to the Substantive (Rules of) Law

659 In the discussion above, we have merely discussed the method according to which an arbitral tribunal will proceed to determine the legal regime which is to govern the particular contractual relationship. We have seen that the classic solution has been to go via a conflict of laws system. We then have seen that this approach has already been abolished in 1961, and replaced by another solution whereby the Tribunal is to be guided by a rule of conflict of laws “deemed appropriate”. Moreover, we have seen that this notion has been refined further in two different directions, one suggesting that the arbitrator should apply the closest connection test, and the other consisting of yet another step of liberalism, which exonerates the arbitrator from any task or requirement to apply a conflict-of-laws rule.

660 Under this Part we will now have to discuss the result of the whole exercise, namely the determination of the applicable “**law**” or the applicable “**rules of law**” (cf. *passim*).

a) Law – or Rules of Law?

661 At this juncture, we need to realize the semantical difference between “the law” and “rules of law”: The term “**the law**” is normally understood to mean one particular national law, such as the German, the Swiss law, etc. A majority of national arbitration acts as well as a majority of the institutional arbitration rules still refer to the notion of “the law” to be determined. This traditional (classic) approach, according to which arbitrators have to determine one particular national law as being the law governing a contractual relationship, was reflected in the European Convention of 1961, as well as in the numerous further rules that took major inspiration from that Convention such as, for example, the ECE Rules, the ICC Rules of 1975, the UNCITRAL Arbitration Rules, the UNCITRAL Model Law, the IACAC Rules, the

Hongkong Rules, the Kuala Lumpur Rules, the Singapore Rules, the Cairo Rules, the Rules of the Vienna Centre, those of the Croatian Chamber, those of the Chambers in Poland, Ukraine, Hungary, Zürich and the German Institution. Moreover, this traditional solution is reflected in the Rome Convention of 1980, in the U.S. 2nd Restatement, in the new German Arbitration Act of 1997/98 as well as in the 1996 English Arbitration Act.

By contrast, the term “**rules of law**” denotes a wider notion. It may not only mean a particular national law, but may, instead, mean general principles of law, *lex mercatoria*, any transnational concepts of law, principles and notions reflected in international conventions, or other principles of law such as those established by UNIDROIT in 1994. Indeed, in today’s landscape of globalising markets, transnational rules of law are becoming more and more important. Moreover, a growing trend to harmonise national laws has been noticeable in recent years in numerous fields, for example in the areas of banking and finance, in telecommunications and in the field of competition laws. In many other areas, standards are becoming internationalized, and particular usages of the trade continue to gain importance. Beyond doubt, the years to come will further enhance the importance of transnational rules of law, and it would be irresponsible for any arbitral tribunal to ignore them and to confine itself to applying a particular national law.

Against this background we may understand that, within the past decade, a very **significant development** has taken place: the moving away from the traditional concept according to which an arbitral tribunal, in the absence of a choice of law made by the parties, has the duty to determine one particular national law as being the law applicable to the contractual relationship which is under review before that tribunal. The more modern perception reflects the realisation that a particular national law is not necessarily the answer and may possibly not produce a satisfactory result. Thus, some modern legislators as well as most of the modern draftsmen who worked on the shaping of modern institutional arbitration rules have suppressed the requirement of determining “the law” and, instead, have adopted the wider term “rules of law”. In so doing they have, purposely, opened up the possibility for an international arbitral tribunal to conclude that, for example, a contractual relationship is subject to rules of international law, general principles of law, *lex mercatoria*, the rules adopted in certain multinational conventions, or the rules of law which found their expression in the 1994 UNIDROIT Principles.

This more modern – and indeed much more appropriate – solution has been adopted by the Swiss Arbitration Act (Article 187(1)), the Netherlands Arbitration Act (Article 1054(2)), the French Arbitration Act (Article 1496 NCPC), as well as by the Arbitration Rules of LCIA, NAI, Milan, WIPO. Moreover, this solution has also been adopted in the 1998 ICC Rules.

b) How to Evaluate the Two Regimes?

How can the old traditional solution (according to which “the law” must be determined) be evaluated and valued *versus* the more liberal and more modern solution according to which arbitrators are free to determine “the law or the rules of law”?

Again, when dealing with this question, professors and lawyers of the old school are queuing up to warn that the more modern solution will provide uncertainty, will reduce foreseeability, and will push the door wide open to complete arbitrariness in the field of international arbitration. However, those standing in that queue are likely to belong to that group of commentators that have not had the practical experience of having to deal with cases where the tribunal could reach a just and fair solution only thanks to the application of supra-national rules of law. Thus, these rules must be seen and **appreciated as a kind of “life-jacket” and “insurance policy”**.

666 The author of this Introduction still recalls an international arbitration in which he participated as arbitrator (but not as the chairman), which was one of those typical cases “crying out” for adopting a de-nationalized approach. However, the Chairman maintained a traditional position according to which the determination of the applicable law had to be made in favour of one particular law. The discussion and application of that law, however, resulted in an outcome which, even in the eyes of the Chairman, was not an appropriate or indeed a fair and reasonable solution. Nevertheless, he insisted that no other solution was available due to the constraints of the applicable national law and he then found justification and “comfort” in the old Latin dictum: “*lex dura, sed lex*”, which might be translated “*its a tough law, yet it is the law*”. With respect, in the view of the author, this is neither a satisfactory answer nor a satisfactory result, and such an outcome should not occur in international arbitration. Indeed, *summum ius, summa iniuria* would be a poison pill for international arbitration and for all those who place their confidence in it!

c) *Regrets*

667 Against the above background and experience, it was noted with regret and disappointment (see, in particular, Derains, Possible Conflict of Laws Rules and Rules Applicable to the Substance of the Dispute, in: ICCA Congress Series No. 2 (1984), 185 ss., in particular 193/93; see also the more detailed comments in Blessing, Arbitration Rules on Choice of Law, in ICCA Congress Series No. 7 (1996), in particular 435–438) that, when drafting the **UNCITRAL Model Law**, no consensus could be reached to reflect the term “rules of law” instead of the term “the law” in Article 28(2) UNC ML. Thus, arbitrators were given, according to the UNCITRAL Model Law, less authority as compared to that of the parties themselves. It is even more regrettable that two of the most recent pieces of legislation have failed to recognize the importance of this distinction: the **1996 English Arbitration Act**, in Section 46 (3), refers to the narrow term “the law” (purposely so as Lord Justice Saville explained); likewise, the new **German Arbitration Act** of 1998, in § 1051(2) SchiedsVfG, requires the determination of “the law” of the State with which the subject matter is most closely connected.

668 It can only be hoped, for the benefit of all arbitrating parties (whether from the West, the East, the South or the North) that, despite the narrow wording, a **broad** meaning and interpretation will be given to that term in the arbitral practice to be developed in the years to come. Otherwise, parties – users of the system of international arbitration – will need to consider whether to arbitrate in another country (such

as France, Holland or Switzerland), at least in those cases where they did not or could not agree on a choice-of-law clause in the framework of their contract, and where they did not provide for an institutional arbitration.

IX. Impact of Mandatory Rules, Sanctions, Competition Laws

1. Introduction

669 Assume that the parties had themselves designated the law governing their contractual relationship or, alternatively, assume that the governing law (or rules of law) has/have been determined by the Arbitral Tribunal: Is this then the complete answer as far as the applicable law is concerned?

670 The answer is: **NO**. Indeed, a substantial and growing percentage of cases is **affected by the interference of mandatory rules of law** which claim or demand to be respected or to be applied directly, irrespective of any law or rules of law chosen by the parties or determined by the arbitral tribunal. In the wide sense, the term “mandatory rules“ includes those (i) of an internal or domestic mandatory nature, and (ii) those of a foreign legal order, and (iii) those of an international character, which claim to be applicable irrespective of any law chosen or determined as being applicable, and (iv) those pertaining to a truly supra-national order (such as sanctions of the UN Security Council). In general, their aim is to protect economic, social or political interests of a particular state, or a wider community, beyond the interests of individual Parties.

671 There exists an abundance of scholarly writings on this topic. See e.g. Berger, *Die Einwirkung drittstaatlicher Eingriffsnormen auf internationale Verträge am Beispiel islamischer Zinsverbote*, Deutsches und internationales Wirtschafts- und Bankrecht im Wandel, Vol. 4. 1997; Berger, *Acts of State and Arbitration: Exchange Control Regulations*, in *Acts of State and Arbitration*, edited by Böckstiegel, 1997, 99–125; Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts* (1999); Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 J.Int.Arb, 4/1997, 23–40; Blessing, *Choice of Substantive Law in International Arbitration*, JIntArb 2/1997, 39–65; Böckstiegel, *Acts of State as Force Majeure For State Controlled Companies? Acts of State and Arbitration*, edited by K.-H. Böckstiegel, 1997, 143–148; Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, *Comparative Arbitration Practice and Public Policy*, ICCA Congress Series No. 3, 1986, 227–256; Drobnig, *Internationale Schiedsgerichtsbarkeit und wirtschaftsrechtliche Eingriffsnormen*, in *Liber amicorum Kegel*, 1987, 95–118; Erne, *Vertragsgültigkeit und drittstaatliche Eingriffsnormen*, 1985, and extensive materials cited there; see also the Commentary by the same author Monica Mächler-Erne ad Article 19 Swiss PIL, in Heinrich Honsell/Nedim Peter Vogt/Anton K. Schnyder, *Internationales Privatrecht*, 1996; Horacio Naon, *Choice-of-Law Problems in International Commercial Arbitration*, 1992; Guedji, *Theory of the Lois de Police – A Functional Trend in Continental Private International Law (A Comparative Analysis With Modern American Theories)*, *American Journal of Comparative Law*

Vol. 39, 1991, 660 ss.; Herrmanns, Public Policy and Arbitration – Cartel Law, Acts of State and Arbitration, edited by K.-H. Böckstiegel, 1997, 61–68; Hochstrasser, Choice of Law and Foreign Mandatory Rules in International Arbitration, *JintArb* 1/1994, 57–86; von Hoffmann, Internationally Mandatory Rules of Law Before Arbitral Tribunals, Acts of State and Arbitration, edited by K.-H. Böckstiegel, 1997, 3–28; Juenger, *Lex mercatoria* und Eingriffsnormen, *Liber amicorum Fritz Rittner*, 1991, 233 ss.; Knoepfler, L'article 19 LDIP est-il adapté à l'arbitrage international? in: *Liber amicorum Pierre Lalive*, 1993, 531 ss.; Lalive, Transnational (or Truly International) Public Policy and International Arbitration, *ICCA Congress Series* No. 3, 1989, 257–320; Lazareff, Mandatory Extraterritorial Application of National Law, *Arbitration International*, 1995, 137–150; Matray, Arbitrage et ordre public transnational, *Liber amicorum Pieter Sanders*, 1982, 241 ss.; Matray, Embargo and Prohibition of Performance, Acts of State and Arbitration, edited by K.-H. Böckstiegel, 1997, 69–98; Mayer, Mandatory Rules of Law in International Arbitration, *ArbInt* 1986, 274–293/322; Pengilly, The Extraterritorial Impact of U.S. Trade Laws – Is it not Time for “ET” to “Go Home”? *World Competition* 3/1997, 17–56; Ristau, Extraterritorial Provisional Measures, *International Dispute Resolution*, edited by Jack L. Goldsmith, 1997, 159 ss.; Sanders, Acts of State and Their Significance for Commercial Arbitration, Acts of State and Arbitration, edited by K.-H. Böckstiegel, 1997, 29–40; Schiffer, Normen ausländischen “öffentlichen” Rechts in internationalen Handelsschiedsverfahren, *Internationales Wirtschaftsrecht*, Vol. 7, 1990; van den Berg, The New York Arbitration Convention and State Immunity, Acts of State and Arbitration, edited by K.-H. Böckstiegel, 1997, 41–60; Voser, Die Theorie der *lois d'application immédiate* im internationalen Privatrecht, 1993.

Most of these mandatory rules are of a public law nature; some of them (but of course not all) may form part of a State's public policy (“*ordre public*”). Should such rules or norms be applied? This is, today, in more than fifty percent of the cases **one of the most difficult questions** with which an arbitrator may be confronted.

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2. 16 Cases from Recent Arbitral Practice

The following are **16 examples** of problems which had to be adjudicated in recent arbitral practice:

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- (1) Should an arbitral tribunal, which has to adjudicate a contract between a French supplier and a Romanian buyer, apply **Romanian exchange control regulations** which were invoked as a defense to effectuating an overdue payment, even though the parties had agreed that the contract would exclusively be governed by Swiss substantive laws? – Held, the particular Romanian regulations were, after careful analysis, regarded as being akin to a confiscation of the foreign investor's assets. They were disregarded by the tribunal, which concluded that the administrative regulation was used, in that particular case, in a discriminating way outweighing other motives which typically underlay such regulations (such as the

state's concern to stabilise the balance of payments preventing an undesired outflow of currencies). The tribunal ruled that it should not become an instrument in such an attempt and its role should not be compromised so that it would become the guardian of the foreign governmental agency. Unpublished Award, 1981.

- 674 (2) Should an arbitral tribunal exonerate the Polish importer of a metallurgical plant purchased from a German manufacturer because, in a certain Decree issued by General Jaruzelski in December 1981, the import of that plant was prohibited? In this context, is it material to check whether such **import restriction** was directed for the purpose of stopping only one particular project or whether the embargo aimed at stopping all imports (as in fact was the case, due to a break-down in the Polish economy)? Is the contract, in such situations, affected by an excusable *force majeure* and, if so, what are the financial consequences flowing therefrom?
- 675 (3) Should an arbitral tribunal, having to consider a contract under English law, apply a **US export restriction** for computer software and computer chips, preventing sophisticated sales to a state company of the former Soviet Union? – The case did not have to go forward; probably, the applicability of the US restrictions would have been denied by the Tribunal.
- 676 (4) Should an Arbitral Tribunal sitting in Stockholm affirm extraterritorial application of the **U.S. RICO Act** (Racketeer Influenced and Corrupt Organizations Act of 1970)? – Held, applicability was denied. It may be noted in passing that the arbitrability of RICO claims has been explicitly affirmed by the US Supreme Court; see the well-known decision in *Shearson/American Express v. McMahon*, 107 S.Ct. 2332, at 2345 (1987), which was one of the three landmark decisions standing in line with the earlier decision in *re Scherk v. Culver* (417 U.S. 505, 1974), where arbitrability over securities' issues had been confirmed, and the decision in *Mitsubishi v. Soler Chrysler-Plymouth* (473 U.S. 614, 1985), where arbitrability over US antitrust issues was affirmed (subject, however, to a "second look").
- 677 (5) Should a tribunal apply US President Carter's "**Iranian Assets Control Regulation**" of 14 November 1979, which operated as a freeze order addressed to a wide range of "persons subject to US jurisdiction" restraining Iranian public and private persons from withdrawing funds from American banks, their subsidiaries and branches? Or should it rather support Iran's allegation that the American exchange control regulation was misused as an economic weapon outside the permissive scope of Article VIII Section 2 (b) IMF Agreement? – The case did not have to proceed as a consequence of the Algier's Agreement of 19 January 1981. In the author's view, the arbitral tribunal would most probably have reached the conclusion that the "Carter Freeze Order" would not have deserved recognition by an international arbitral tribunal.
- 678 (6) More generally, how should an international tribunal look at the numerous **US trade sanctions enforced by OFAC** (Office of Foreign Assets Control of the US Department of Treasury) and other programs such as the "**Export Control Regulations**" monitored by the US Department of Commerce, the "**ITAR Regulations**" restricting the sales of military goods, the "**Antiboycott Programs**" of

the US Department of Commerce, the prohibitions against bribery of foreign officials by the “**Foreign Corrupt Practices Act**”, the “**Iran and Libya Sanctions Act of 1996**” and the tightening of the economic embargo against Cuba according to the so-called “**Helms Burton Act**”? – We may note that there are currently 11 OFAC Programs, each with distinct sets of restrictions. All of them prohibit or control activities of US persons, restrict economic dealings with and/or block assets of targeted foreign countries, entities or nationals. An excellent overview was provided by Kerr, Summary of U.S. Foreign Asset Control Regulations, delivered at the occasion of the Vancouver IBA Conference, September 1998. Since World War I, the **USA** has declared in total about 150 sanctions in total, whereof about 100 since World War II and about as much as **60** since 1993 only. Sanctions thus seem to be a center part of US’s strategy. US politicians strongly seem to believe in the necessity of sanctions. Many businessmen, however, question their effectiveness. – This author would by far exceed his competence if he expressed a view as to the necessity of that great number of sanctions. Nevertheless, one thing is clear: A sanction is a sort of breakdown, a failure; it may mean isolation (*vide* Cuba), and may seriously set back the development of a country and its integration within the world-family of nations. And, more importantly, it may hurt the most suffering part of the country’s population. Therefore, we all have to **strive for better solutions**. Sanctions might have been necessary in the 20th Century; for the next millennium, however, we should work on better solutions, on mutual assistance, mutual respect and integration in all fields (**rather than isolation**). **Economic integration, not isolation, holds the key for future stability, prosperity and peace**. Sanctions should no longer be on the customary *ordre du jour*, but should essentially be reserved to UN Resolutions as a kind of *ultima ratio* (this is a personal view of the author).

- (7) Should an Arbitral Tribunal sitting in Germany in respect of a dispute between an Italian supplier and a **Belgian distributor**, notwithstanding the choice of law in favour of the Italian substantive laws, apply the (well known) Belgian mandatory laws protecting agents and distributors in Belgium (by requiring a 36 months’ notice period and by providing a local *forum*)? – Held, the applicability of Belgian law was denied; see the Award in ICC Case No. 6379, 1990, discussed in ICCA Yearbook 1992, 212–220. 679
- (8) Should an arbitral tribunal which has to decide a dispute between a (formerly) Czech supplier and a Syrian State-controlled entity which had been concluded under Swiss law, consider or apply a Syrian Legislative Decree which **unilaterally** changed the **status** of the Syrian contract party (by directing that the party shall no longer be the State-controlled entity but only the indebted local operating company of the plant)? – Held, the application of Syrian law was denied, Interim Award on Jurisdiction in ICC Case No. 5977 (1988). 680
- (9) Should the arbitral tribunal accept the situation that, in the framework of a contract between a French supplier and a Libyan co-operative, the superior Libyan body simply **dissolved** the co-operative by an act of State? Was the arbitral tribunal correct when it disregarded that act and decided that, in so doing, the 681

Libyan State (or the particular authority dissolving the co-operative) made itself a party to the contract such that the arbitral procedure continued against that Libyan State party as a defendant party? – So decided in the Award in ICC Case No. 7245 (1994).

- 682 (10) How should an arbitral tribunal deal with the **expropriation** of an oil drilling and oil refining facility directed through an act of State, although the relevant contract and concession was made under foreign law and with a reference to general principles of law? – See the well-known three Libyan petroleum cases *BP Exporation Company (Libya) Ltd. v. Libyan Arab Republic*, *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic* and *Libyan American Oil Company v. Libyan Arab Republic*, discussed in numerous reports, e.g. see De laume, *State Contracts and Transnational Arbitration*, *American Journal of International Law* 75, 1981, 784 ss., in particular 791 ss.
- 683 (11) How should an arbitral tribunal, sitting in the United Arab Emirates, having to apply Emirates law and general principles of law in a gas delivery contract between a UAE State-controlled company and an American company, deal with the situation at the UAE Council of Ministers **prohibiting** the determination by ICC arbitration of that dispute by way of private arbitration, essentially on the rationale that arbitral jurisdiction would not be accepted in a matter concerning a State's natural resources? – The intervening Council of Ministers' decision was disregarded, Award in ICC Case No. 5331 (1988).
- 684 (12) Should an arbitral tribunal be concerned with the prohibition by certain Islamic countries to pay **interest** on outstanding debts, even though the contract in question is governed by a law which does not know such a prohibition? – The issue is complex and has been solved differently; this cannot be discussed here. Reference may be made to Branson/Wallace, *Awarding Interest in International Arbitration: Establishing a Uniform Approach*, *Virginia Journal of International Law*, Vol. 28 No. 4 (1988), 919–947; Sandrock, *Verzugszinsen vor internationalen Schiedsgerichten: insbesondere Konflikte zwischen Schuld- und Währungsstatut*, *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit*, Vol. 3, 1989, 64–99; see also most recently Berger, *Der Zinsanspruch im Internationalen Wirtschaftsrecht*, *Rabels Z* Vol. 61 No. 2 (April 1997), 313–343.
- 685 (13) Should an arbitral tribunal having its seat in Switzerland and sitting over a dispute between a German manufacturer/licensor and a French distributor/licensee whose contract has been made subject to Swiss law, apply the **EU Competition Laws**, in particular Article 85/86? – See, in a case between Italian and Belgian parties, the decision of the Swiss Federal Supreme Court in ATF 118 II 193, according to which an arbitral tribunal sitting in Switzerland **has to** exercise its jurisdiction to examine the contract under the tests of Articles 85/86 EC Treaty. See also below the 21 examples of EC competition law issues which came before arbitral tribunals.

- (14) Should, in a similar scenario of a licence agreement between a German manufacturer and a US licensee (whose contract has been made subject to Swiss law), apply – over and above the Swiss substantive law – **the U.S. antitrust laws**? In particular, should the arbitral tribunal affirm its jurisdiction (as well as objective arbitrability) in so far as the U.S. licensee, in the framework of its counterclaim, demands treble damages on the basis of the Clayton Act? – In the Hottinger/Fisher case, the arbitral tribunal sitting in Zürich clearly affirmed its jurisdiction to apply US antitrust law and, in so doing, to award treble damages. 686
- (15) Should an arbitral tribunal sitting in The Hague exonerate the non performance by a European Subsidiary of a large US Food Company which refused to sell food products to a Venezuelan buyer on the argument that the **trade sanctions against Cuba** (according to the Helms Burton Act) might be violated, although the contract had been made under the laws of the Netherlands Antilles? – The case did not have to go forward; most probably, the applicability of the Helms Burton Act would have been denied. 687
- (16) Should a tribunal, over and above the applicable German law, directly **apply the UN Security Council's sanctions** imposed (on the basis of Art. VII of the UN Charter) against former Yugoslavia? And if so, what are the legal effects thereof? (According to the UN Charter, the Member States are bound to implement the UN sanctions in their domestic laws (in most countries, these sanctions will not be directly applicable, but will require transformation into domestic law). 688

These are some of the situations taken from “real life”.

3. Different Categories of Mandatory Rules

As shown in these examples, the interfering mandatory rules may in two respects be of very different character. 689

a) *First: As to their origin, the interfering rules might pertain either:*

- to the **proper law** of the contract (*lex causae*). Such mandatory rules were long perceived as being *eo ipso* applicable whereas, by contrast, mandatory rules pertaining to another legal order were regarded as applicable under very restrictive notions only. These perceptions, on both counts, have slightly changed in recent years. In respect of the first category, views are expressed, for very well justified reasons, that they should be **scrutinized under the same tests** as those pertaining to an extraneous legal order. Indeed, they hardly deserve a paramount “application-worthiness” *per se*. In the author’s view, such scrutiny – as to their “application-worthiness” under a rule of reason – should be made in both cases: where the parties themselves had chosen the applicable law, and also where they failed to make a choice such that the law or rules of law had to be determined by the Arbitral Tribunal.

- or to the law governing at the **place of arbitration** (*lex fori*). Should an arbitrator be concerned at all with mandatory rules as might be applicable at the place of arbitration (apart from the mandatory provisions as are contained in the applicable Arbitration Act, which might be very few only)? Most scholars, for good reasons, will say NO, because it is not the duty of an Arbitral Tribunal to serve as the guardian of policing norms of the host state, in clear contrast to its State courts. Indeed, the author finds the reasoning in the ICC Award No 5946 (1990) **unconvincing and wrong**, where the Arbitral Tribunal sitting in Switzerland thought that it should not, for reasons of purely Swiss public policy, allow a claim for exemplary damages in the amount of USD 100,000; it denied the claim *inter alia* on the argument that damages going beyond compensatory damages (and thus containing an element of punishment) should be considered contrary to Swiss public policy which, as the Tribunal thought, should be respected (see ICCA Yearbook 1991, 97–118, at 113). – As another example, see the equally questionable decision rendered on 17/18 May 1984 by the USSR Maritime Arbitration Commission which had to deal with a bill of lading governed by the US Carriage of Goods by Sea Act of 1936, and which nevertheless reached the conclusion that the COGSA did not exclude the applicability of mandatory provisions of the USSR Merchant Shipping Code (Award No. 25, 1981, excerpts in ICCA Yearbook 1989, 203–206). – In contrast hereto, see the case referred to above where jurisdiction to rule on treble damages was affirmed by the arbitral tribunal sitting in Switzerland, although the notion of exemplary or treble damages is not known in Switzerland.
- or to a the legal order of a **third country**; this is the classical/typical case; or
- to a supranational order, such as e.g. resolutions of the UN Securities Council, or EU competition laws, or other norms pertaining to an **international public policy**, or
- lastly, to the legal order governing at the potential place **where enforcement** of the award might have to be sought.

b) Second: As to their policies and cultural values or social interests that aim to be protected:

690 As we will see later, not only is the precise origin of the mandatory rules of significance, but also, and indeed foremost, the values they aim to protect. It is therefore necessary in each case to investigate into their “*raison d’être*”, quite in the sense of looking behind the curtain. In fact:

- (i) some rules are aimed solely at protecting **certain monetary** interests of the State, such as exchange control regulations, or transfer restrictions, gold clauses etc.,
- (ii) some are of a **merely policing or fiscal** nature (including customs regulations),
- (iii) whereas others aim at safeguarding certain **economical (sometimes truly vital) interests** of a state, such as **import** and **export** restrictions,

- (iv) some aim at the protection of the people's **welfare**, including the protection of the economically weaker party, protection of the uninformed investor in securities' dealings/stock exchange transactions and the like
- (v) some aim at serving **political or military interests**, such as some of the embargoes and boycotts against a particular country; during the Second World War and thereafter see e.g. the various US and UK Trading With the Enemy Acts,
- (vi) some aim at protecting the **environment** and **animal** welfare, e.g. restrictions on the sale of protected animals and plants
- (vii) some aim at protecting the **free and fair trade** and the functioning of an effective market, such as **competition laws**, anti-corruption statutes etc.

4. Trade Sanctions and Embargoes in Particular

a) Introductory Note

The history of sanctions is probably as old as mankind. However, it seems that the "popularity" of sanctions had never peaked as high as during the past decade. On the political level, **diplomatic** sanctions have been and are being used. On the **military** level, sanctions will mean the use of force. In the **economic** field, sanctions are used as a tool for sanctioning or enforcing a particular behaviour. See hereto the excellent analysis provided by Frank Montag at the IBA Conference in Vancouver, September 1998, titled "Economic Sanctions in an International Legal Context and the European Union Perspective", available at the IBA under Ref.No. VR82/C. Hereinafter, the author will only deal with economic sanctions and embargoes.

Economic sanctions, in most cases, are used to serve political goals. They may emanate from one particular country, such as the USA. The USA have imposed over 60 trade sanctions in the past five years only. The oldest still active programme is the sanction against **North Korea**, dating back to 1950, prohibiting all exports and imports. The **Cuba** sanction of 1963 further prohibits the entry into US ports by vessels within 180 days of calling on Cuba. Sanctions against **Libya** date back to 1986. **Iran** sanctions in the aftermath of the hostage crisis were in place 1979–1981, and limited import sanctions were imposed in 1987 (expanded in 1995) in order to deter the support of terrorism. **Iraq** sanctions linked to those of the UN Security Council came into force on 2 August 1990. Specific sanctions addressed the **UNITA**, the union campaigning for the independence of Angola, with a limited arms embargo in 1997, expanded in 1998 to further import/export restrictions and a blocking regime for assets of UNITA. Limited sanctions against **Burma** were the response to large scale repression; these sanctions restrict new investments. **Sudan** sanctions as a response to the alleged support by Sudan of terrorism were decreed on 3 November 1997. Several sanctions had to do with the **Yugoslavia**, dating back to 1992 and 1994, with more recent sanctions against **Serbia** and **Montenegro**, of 9 June 1998. There exist three sets of sanctions targeting terrorist organisations, as well as sanctions

against narcotics traffickers; see hereto Kerr, Summary of U.S. Foreign Asset Control Regulations, IBA paper presented in Vancouver, September 1998.

693 Sanctions may also emanate from a series of states acting in concert. Obviously, **unilateral** sanctions may not prove to be particularly effective because they can easily be circumvented. Nevertheless, it is quite surprising how frequently for instance the United States, particularly in the past five years, have resorted to this tool. In contrast, **multilateral** sanctions will be the product of debated, collective political and economic goals and may receive much better international support. Embargoes and – if applied more extensively – boycotts, may be ordered against a state as a primary target, or against companies/individuals doing business with a particular state, or against certain persons (such as the legislation in some Arab countries aiming at boycotting business with persons suspected of having “zionist inclinations”).

694 Sanctions and embargoes may sometimes have a **specific** focus, such as embargoes on weapon, or in respect of particular raw materials (e.g. the embargo by certain Arab states against Israel following the Kippur war curtailing the oil supplies), or in respect of specific technology (e.g. during the times of the cold war, sensitive strategic goods including computer hard- and software could not be exported to the East Bloc and the Soviet Union). Where sanctions and embargoes apply generally, certain trade may be exempted for humanitarian reasons so as to allow the supply of food and medicine (e.g. in the case of Iraq).

695 A common feature of sanctions is the label of “**unfriendliness**”. Most of them will be issued in breach of rules of international law and in violation of the notion of free trade between states and individuals. The issue therefore does arise as to their **justification** in law: Article 2 (4) of the **UN Charter** prohibits the use of **force**, and Article 2 (7) states the principle of **non-intervention**. The term “force” as used in Article 2 (4) remains without definition, and it has been debated whether, apart from military force, the exercise of political or economic pressure and trade boycotts would fall under the term “force”. The view has been voiced that force, in its limited interpretation, would only cover a question of self-defence against an armed attack and sanctions ordered by the UN Security Council, but would not include **economic** threats. Another view, mostly voiced by developing states and parts of the former East Bloc, maintains that all forms of pressure, including those of a political and economic character, are meant to be outlawed. However, the US economic sanctions directed against Nicaragua (trade embargo) was not regarded for instance, by the International Court of Justice, as reaching to the level of a violation of the principle of non-intervention (ICJ Reports 1986, 126).

696 Similarly, the **removal of unilateral benefits** (which previously had been granted on a goodwill basis and not due to an international treaty obligation) would not normally be regarded as a retortion or sanction. Frank Montag, in his report, refers to the tariff benefits granted by the European Community under its Generalized System of Preferences (“GSP”), under which scheme the Community, for instance, reserves its right to withdraw benefits in whole or in part with regard to countries that engage in unacceptable forms of forced labour (e.g. in the domain of agricultural products). For instance, after a European Commission investigation in Burma (Myanmar) in 1997 where forced labour, coercion and violent reprisals were detected, the access to tar-

iff preferences was temporarily withdrawn by Council Regulation No. 552/97 of 24 March 1997.

The most critical questions arise, however, in the domain of **economic coercion**. The issue will be to know whether such coercion falls under the scope and reach of the principle of non-intervention under Article 2 (7) of the UN Charter. While in 1969 the UN General Assembly had condemned the “use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind” (General Assembly Resolution No. 2131 (XX), 1965), the critical border-line question will arise to determine whether the specific purpose of a sanction was to intervene in the domestic affairs of another state. Thus, the investigation into the aims **behind** any such sanctions will be a decisive factor. For example, the USA, although not directly involved, imposed sanctions against Argentina during the dispute over the Falkland Islands in 1982. Not only were military sales suspended, but also other trade and export-import bank credits and guarantees. These unilateral sanctions were neither justified as self-defence nor as being counter-measures, and were not authorized under Chapter VII of the UN Charter. Thus, those US sanctions were issued in breach of international law and lacked a justifying ground.

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b) Legal Justification of Sanctions

Sanctions may become justified either on the basis of a decision of the UN Security Council, or on the basis of an admissible act of self-defence, or on the basis of a bilateral or multilateral treaty. Under Chapter VII of the UN Charter (Articles 39–51), the Security Council was given the competence to determine “the existence of any threat to the peace, breach of the peace, or act of aggression” and to decide on measures which may be taken for restoring international peace and security on the basis of Articles 41 and 42. All UN Member States are **bound** by decisions of the Security Council (Articles 25, 48, 49). Obligations under the UN Charter will **prevail** over conflicting obligations arising under any other international agreements. Recent examples of UN sanctions are those against Iraq (1991 until today), Libya (1992 until today), Republic of Yugoslavia/Serbia and Montenegro (1992–1995), Haiti (1993–1994). Less far-reaching sanctions were imposed against Somalia, Liberia, Angola and Rwanda (essentially in the sense of arms embargoes).

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c) The Sanctions Against Libya

The UN sanctions against Libya take their origin in Libya’s failure to extradite two Libyan nationals who were suspected of being responsible for the bomb explosion on board the Pan Am aircraft over Lockerbie in 1988. In the beginning, the UN Security Council passed a non-binding Resolution No. 731 (1992) encouraging the Libyan Government to extradite the two individuals, whereupon Libya addressed itself to the International Court of Justice (“ICJ”), invoking its rights under the Montreal Convention of 1971 not to extradite these individuals. Thereafter, the UN Security Council passed the binding Resolution No. 748 (1992) imposing sanctions against

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Libya, whereupon the ICJ ruled that, by virtue of Articles 25 and 103 UN Charter, the Security Council's decision taken on the basis of Chapter VII had to take precedence over Libya's right under the Montreal Convention, and Libya's right to the provisional measures it sought was denied by the ICJ.

700 On the basis of the UN Security Council sanctions, air travels to and from Libya became banned, and the supplying, servicing and insuring of Libyan aircraft became prohibited, coupled with an embargo regarding the shipment of arms and regarding military assistance to Libya. A compliance monitoring programme regarding these sanctions was installed so as to report on violations. The Sanctions Committee was also mandated to consider special economic problems connected to these sanctions and, occasionally, to approve special flights to or from Libya on the ground of humanitarian needs.

701 A further UN Security Council Resolution No. 883 (1993) tightened the regime, directing all states to **freeze** the assets of the Government or of public authorities of Libya and of any Libyan undertaking. Hence, any sales, supplies or maintenance of specified equipment used in the petro-chemical production process became forbidden. However, the Resolution did not freeze assets derived from the sale or supply of Libyan petroleum, natural gas and agriculture products, obviously because Western European States heavily depend on Libyan oil.

702 While UN sanctions are to be observed by all UN Member States, it is left to each member state to **transpose** those sanctions into their own national law, unless such sanctions may deploy direct and self-executing effects. For instance, the American **ILSA** is part of the US response to the above mentioned UN Security Council Resolutions. There is a possibility to obtain **waivers** regarding the ILSA sanctions. Such waivers can be granted on an individual basis by the US President without requiring a review by the US Congress. However, there is no presidential authority to grant general or permanent waivers, neither to EU companies nor to those of other countries. Thus, ILSA waivers will remain to be case-specific and dependent on the U.S. President's discretion. In Switzerland, the transformation of the UN Security Council Resolutions regarding Libya led to a corresponding Regulation of the Swiss Federal Council, dated 12 January 1994 ("Verordnung über Massnahmen gegenüber Libyen", SR 946.208), which is still in force today.

703 Similarly, the **European Union** reacted on the basis of the new **Article 228a** which had been inserted into the **EC Treaty** in 1993 which provides for a special legal basis for imposing sanctions:

"Where it is provided, in a common position or in joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission."

704 This provision is situated at a hybrid crossroads between politics, security policy and commerce. While the political basis itself will fall outside the competence of the European Community, the **means** for achieving the political goals will, however, vest within the power of the European Community. Article 228a was further supplemented

by a new **Article 73g EC Treaty** for the more specific purpose of covering restrictions on the free movement of capital. Article 73g provides as follows:

“If, in the cases provided for in Article 228a, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 228a, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.”

While Article 228a EC Treaty provides for a wide scope of economical measures, it would, however, not serve as a basis for imposing an arms embargo. Such embargoes fall within the competence of each individual Member State. In respect of **Libya**, the European Community provided its support by adopting, on 14 April 1992, the Council Regulation No. 945/92 (OJ 1992 L 101/53), requiring Member States to prohibit the landing of Libyan aircraft and the provision of any kind of supplies or maintenance. Subsequently, the Council Regulation No. 945 was replaced by Regulation 3274/93 (OJ 1993 L 295/1) which reflected a more general trade embargo. The further Regulation 3275/93 prohibits the servicing of claims with regard to contracts and transactions banned by the Security Council Resolutions. 705

d) Sanctions Regarding Ex-Yugoslavia

The situation in connection with the break-up of the former Yugoslavia is quite similar in the sense that UN sanctions led to sanctions which the EU supported, acting in concert. The situation, however, is somehow more complex because the European Community had entered, as of 1 April 1983, into a **Cooperation Agreement** with former Yugoslavia (OJ 1983 L 41/2). The Civil War broke out in June 1991. In October 1991, the European Community decided to **terminate** the Co-operation Agreement and to suspend the benefits provided thereunder to Yugoslavia with immediate effect. Furthermore, the Coal and Steel Agreement was terminated on the basis of Article 238 EC Treaty and a consenting Resolution of the European Parliament. Further trade concessions and the General Scheme of Preferences Scheme (GSP) were also cancelled. 706

However, subsequently, trade related provisions abandoned under the 1983 Cooperation Agreement were restored for Croatia, Slovenia, Bosnia-Herzegovina and Macedonia by virtue of the EC Regulation No. 3567/91 (OJ 1991 L 342/1), and their GSP status was reinstated. 707

In 1992, however, due to the deterioration of the Civil War situation, the UN Security Council adopted its Resolution No. 757 (1992), declaring an economic embargo on Serbia and Montenegro. The European Community, in response thereto, adopted its Regulation No. 1432/92 on 1 June 1992 (OJ 1992 L 151/43, thereafter replaced by Regulation No. 990/93). When hostilities further increased during 1993, the embargo against Serbia and Montenegro was further strengthened on the basis of the UN Security Council Resolutions Nos. 942 and 943 (both 1994). 708

Meanwhile, Articles 228a and 73g had been incorporated within the EC Treaty and, on the basis of the wider scope and powers, broader EC sanctions were imposed by virtue of the Council Regulation Nos. 2471/94 and 2472/94 (OJ 1994 L 266/1 and 709

L 266/8); see also the Regulation regarding performance bonds No. 1733/94 (OJ 1994 L 182/1).

e) Criticism and EU Blocking Regulation As a Response

- 710 The GATT and the WTO Rules serve today as a sort of regulatory mechanism, limiting the use (or misuse) of unilateral economic sanctions. For instance, as a reaction to the Helms Burton Act, WTO panel proceedings were initiated (but later on suspended). The view was expressed that the dispute between the USA and the EU regarding the Helms Burton Act should possibly be resolved within the ambit of the OECD which is negotiating an Agreement on investment measures and could possibly constitute an even more appropriate form than the WTO.
- 711 The fact is that the European Union voiced strong criticism against the extra-territorial reach of the Helms Burton Act and ILSA. The EC Commission wrote to the US Secretary of State on 15 March 1995. Shortly thereafter, a Declaration was published on 5 April 1995 setting out the EU's concern regarding the proposed US sanction's **over-reaching extra-territorial application**. See further the European Parliament Resolution on Cuba, OJ 1996 C 96/294. The EU concern regarding US sanctions of that nature (including those regarding Iran and Libya) remained with little effect so that the EU, in order to defend its interests, had to resort to a **more drastic measure**, by enacting the **EU Blocking Regulation of 22 November 1996** (Council Regulation No. 2271/96, OJ 1996 L 309/1; see also the Commission Notice of 16 October 1996).
- 712 It does appear that, for the first time in its history, the EU Council of Ministers had achieved unanimity on a foreign policy measure. In this context, Patricia A. Sherman said: *"It seemed – albeit briefly – as if the EU finally had determined to go beyond diplomacy and rhetoric to face down US efforts to impose its foreign policy objectives on non-US entities."* Patricia A. Sherman, *Forgotten, But Not Gone: The EU's Blocking Regulation, A Trap for the Unwary*, *International Business Lawyer*, Vol. 28 No. 8 (September 1998), 341.
- 713 We may add that this attitude is mirrored also in the EU Commission's attitude in **antitrust matters** vis-à-vis the recognition of the U.S. effects doctrine as practised and required by the U.S. antitrust enforcement agencies (an attitude criticised by Karel van Miert, the head of DG IV). The U.S. **effects doctrine** dates back to the Alcoa case (*United States v. Aluminum Co. Of America*, 148 F. 2d 415 2nd Cir. 1945). The **European Court** of Justice and the Court of First Instance have always shown **reluctance** to endorse the effects' doctrine and, instead, rather resorted to the **single economic unit doctrine**, for instance in the ICI case (Slg. 1972, 619), the Geigy case (Slg. 1972, 787) and the Sandoz case (Slg. 1972, 845), followed by the famous Continental Can case (Slg. 1973, 215) and by Commercial Solvents (Slg. 1974, 223); see also Hoffmann-La Roche (Slg. 1979, 461), United Brands (Slg. 1978, 207), Tetra Pak (Slg. 1990, II-309) and Hilti (Slg. 1991, II-1439). However, the **EU Commission** itself does apply the effects doctrine, though in a more moderate way than the U.S. authorities (see in particular the aluminum import case reported in OJ 1985, L 92/1; see hereto the paper pulp cases, where the Commission based its assessment on the

effects doctrine, but where the ECJ tuned that down and, instead, argued that the cartel was implemented on the territory of the EU, thereby justifying the jurisdiction of the EU regulatory authorities).

By virtue of the Blocking Statute, natural or juridical persons were required to **inform** the Commission about any economic or financial interests that might become affected by the Helms Burton Act or by other US sanctions such as ILSA. In addition, the EU Regulation provides that no judgment of a court or tribunal, and no decision of an administrative authority located outside the Community which would give effect to those sanctions, could qualify for recognition and enforceability within the EU. Even **more drastically**, the Regulation made it illegal to comply with the Helms Burton Act or the ILSA. These provisions were further coupled with a right, given to Community nationals, to recover from the US beneficiaries (through private litigation in any Member State) the amount of damages awarded against them by any judgments or decisions based on the US sanctions (so-called “clawback provision”).

However, the EU Blocking Regulation did not really provide an effective shield against the impact of US sanctions. Rather, a “**catch 22**” situation arose, as Patricia A. Sherman described it, for EU companies and individuals caught between the conflicting requirements of US and EU laws. Thus, the need for further consultation was undeniable. Such consultations, for instance, took place when Total (the French oil company) announced that it would become the consortium leader to invest some USD 2 billion in an Iranian oil field, and where a kind of exemption or waiver under ILSA was needed for the purpose of these oil-related investments in Iran. The accommodation with such a waiver was reached by the US and the EU in the framework of the **18 May 1998 Understanding**.

Nevertheless, the EU Blocking Regulation No. 2271/96 remains in force, but appears to have lost much of its teeth and, in any event, does not seem to provide an effective shield against the undesired effects of the US sanctions. Thus, the US compliance regime has proved to **the stronger threat**, and companies and individuals operating on a world-wide basis seem to be effectively intimidated by the severity of the US sanctions. Is the EU Blocking Regulation therefore a “still-born child”? The author submits that it is not. Although, at the present time, it only applies (according to its Annex 1) to the Helms Burton Act and the d’Amato Act (Iran and Libya Sanctions Act of 1996), its scope may nevertheless be extended by a Council Resolution to any other/similar sanction imposing **over-reaching extra-territorial effects**. Moreover, the EC Council Regulation must be seen as a significant **yardstick**, or a kind of “traffic light”, for courts and arbitral tribunals when confronted with issues triggered by such sanctions.

The European reaction, the forceful interventions of the European Community (as a Member of the WTO) when bringing actions to the Dispute Settlement Body of the WTO, and when engaging in several rounds of bilateral consultations, are all **significant and serious manifestations of disapproval**. The antagonistic views started off by the United States relying on Article XXI of GATT to justify its objection to the creation of a panel, claiming that the Helms Burton Act was a “matter of the US national security”. A panel was nonetheless established on 20 November 1996. This did not prevent the antagonistic approach from developing further, until the proceed-

ings had to be formerly suspended on 25 April 1997, after the USA agreed to suspend Title III until the end of President Clinton's term, and after providing the US President with the authority to waive the application of Title IV of the Helms Burton Act. The suspension of the WTO Panel expired on 21 April 1998. Shortly thereafter, a EU-US Summit took place in London on 18 May 1998.

718 The outcome of the **18 May 1998 Summit**: At the occasion of the Summit, the EU requested from the US satisfactory **waivers** so as to do away with the **undesired extra-territorial effects** of the Helms Burton Act in the sense of a continued suspension of Title III and an Amendment regarding Title IV. In respect of ILSA, the EU demanded a waiver of its application regarding all EU Member States. At the occasion of the 18 May 1998 Summit, the resolution of the issues was shifted to the level of the broader negotiations regarding the Multilateral Agreement on Investment ("MAI"). The common denominator for the discussions was the common goal of ensuring the observance of international law standards in connection with expropriations, and emphasis on the undesirability of investments in expropriated property in contravention of international law. At the present time, as far as I know, the matter **is still not conclusively settled** as far as Helms Burton is concerned. Obviously, the matter is highly complex, moreover since the EC Council has no authority, nor external or internal powers in the field of investments (which remains within the domain of each individual EU Member State).

719 To sum up: The sketchy summary provided on economic sanctions leads to the following reflections:

- The promulgation of sanctions is an **emanation of each state's sovereignty**.
- **Political** interests are the driving force and still seem to outweigh concerns as to their admissibility under international law; international law would rather suggest that a state's **sovereign prerogatives will be limited by its boundaries**, such that the legislative acts should have no more but a **territorial** effect and application.
- However, we have seen a **flood of sanctions** (particularly emanating from the USA), coupled with a **strong claim of extra-territorial application**.
- This recent development has not been well received and has triggered **resistance**, for instance in the form of the **EU Blocking Regulation**.
- Sanctions, obviously, evidence to some extent the breaking-off of the normal communication lines. They clearly **evidence a failure** to come to agreeable terms. They mark a unilateral position and, as such, are not conducive to encourage a solution-oriented dialogue.
- As a mere observer the author may express the hope that the "**sanctionitis**" will remain a tool of the 20th century, but will soon be overcome when we step into the next millennium. Again, purely from an outside observer's perspective, it does seem that sanctions, **aiming at isolating another state** such as Cuba, **are not and should not really be the answer**. Rather, it would be the author's conviction that much more effort should go into an open dialogue so as to reduce tension and to foster the network of international trade-relationships, even with countries that

“did wrong” or transgressed through the acts of an ill-informed leader or government. The **1919** punishment against Germany quite inevitably led into the Second World War, and a lesson had been learned to do better after **1945**. Has the lesson, today, been forgotten?

- As a short conclusion, the author is tempted to say that he is not fully convinced of the need (nor of the effectiveness) of sanctions in general, and in respect of some of them in particular, and is not so far convinced that **isolation** is the answer to coerce or bring down another government or state.

Rather, the author is (still) an optimistic believer in the peace-fostering effect of a friendly but principled **dialogue**. One way to achieve this is to allow the ties automatically built by mutual trade and commerce to **foster a global integration** of all states (and not a global isolation of some of them). Perhaps this is idealism! 720

5. Exchange Control Regulations in Particular

While the sanctions discussed above essentially serve **political** goals, exchange control regulations rather aim at supporting **economic** policy considerations. Akin to sanctions, they want to be applied as *ius cogens* over and above the contractual terms agreed by the parties. Klaus-Peter Berger, in his excellent article, characterizes them as belonging “to the classical category of mandatory norms (règles d’application immédiate; loi de police; Eingriffsnormen)”. Berger, Acts of State and Arbitration: Exchange Control Regulations, in: Acts of State and Arbitration, 1997, 101. 721

The cases cited in Berger’s article inspire the understanding that domestic courts would be overly reluctant to apply foreign exchange control regulations, on an argument that they ought to have a limited territorial scope, such that any extension beyond the territory of the enacting state would provide “an unacceptable extra-territorial effect to them”. Berger, loc.cit., 107. 722

Arbitral tribunals, in contrast, having no *lex fori*, will rather tend to take a **pragmatic approach** which, according to Berger, should take “into account the court control of the award at the seat of the arbitration or in possible enforcement fora”. While agreeing himself to such approach, the author would nevertheless wish to add that he would place the emphasis differently: In his view, the arbitral tribunal should not, in the first place, take its guidance from concerns about setting aside procedures or concerns about the enforceability of the award. Rather, the key-guidance must come from a **careful analysis** in respect of the entire framework within which these exchange control regulations are situated. Thus, questions of the following nature may be relevant: 723

- What was the general economic and the more specific monetary background for promulgating the particular exchange control regulation?
- What was the intended effect thereof on domestic parties and international parties?
- What is the weight to be given to such exchange control regulation if it stands in contradiction to contractual requirements?

- Was the regulation of a general nature, or was it specific or aiming at protecting certain businesses only on a selective basis?
- How closely connected are the invoked exchange control regulations to the contract in question, or how remote are they?
- How to evaluate the impact when applying or disregarding the regulations?
- How do the economical or political values underlying the particular exchange control regulation compare to the more general opinion of the international business community, general international standards and a transnational ordre public?

724 Berger seems to reach a similar conclusion when he states that the international arbitrator will have to apply exchange control regulations if this is “necessary to enforce generally accepted principles and values of the international community of states”, and the author entirely shares his conclusion that the arbitrator “is always called upon to enter into careful value judgments against the factual and legal background of each individual case. The necessity of this case by case approach prohibits the arbitrator from attaching a presumed (per se) positive or negative effect or legislative intention to certain groups or categories of exchange control measures”. Berger, loc. cit., 116.

725 The above reflections, however, do not as yet provide the key for the solution which an international arbitral tribunal may have to find when **determining the inter-partes effect and consequences** of interfering exchange control provisions. Whether or not such control may pass the above described rule of reason test, the affected party may, as a matter of fact, simply be prevented from performing its financial duty, and thus a proper contract implementation may become affected by an **impossibility of performance**, or at least by a commercial impracticability of performance. **How then should, in such a situation, the commercial and contractual solution be shaped?**

726 Assume the case where a party had shipped products to the Xanadu party which ought to be paid in US-Dollars, and assume further that Xanadu subsequently enacted exchange control regulations prohibiting the payment in any currency other than Xanadu Rupees which are not freely convertible? If the arbitral tribunal accepted an impossibility of payment, or accepted a force majeure-situation releasing the Xanadu party from its obligation to pay in US-Dollars, it would reach an unbearable solution to the detriment of the foreign seller. If, in contrast, the arbitral tribunal disregarded the exchange control regulations on an argument that they do not deserve to be applied, the Xanadu party might still not be able to honour its contractual payment obligation, or the terms of an award (for instance because its national bank would simply refuse to effectuate a transfer in the required US currency). In cases of this nature, parties have sometimes pleaded that, by enacting such exchange control regulations, the state (in the above example Xanadu) made itself a contractually liable party, and would become answerable vis-à-vis the foreign seller. The arbitral award of 28 January 1994 rendered in ICC Case No. 7245, although in a different scenario where, by an act of state, the respondent party had been dissolved by the superior state body implemented by way of an “réorganisation administrative”, reached a solution in this sense: the Tribunal, in that case, unanimously ruled as follows: “*Juge que la*

[sc. superior administrative body of the particular state] a succédé aux droits et obligations du [local community, the named defendant in that arbitration, which became dissolved] qu'elle remplace comme partie au présent arbitrage et ce d'office et sans besoin de modification de l'acte de mission qui la lie du seul fait de la succession précitée."

Obviously, the situation is different where the exchange control regulation **had already been in place** when the particular contract was entered into by the parties. The **requirement of acting in good faith** does impose a duty on each party to disclose aspects that might materially affect a party's ability to perform its duties. Thus, if – in the above example regarding Xanadu – the foreign seller had not been aware of the fact that Xanadu had promulgated exchange control regulations prohibiting the payment in a freely convertible currency, and if the Xanadu party remained silent in this regard without appropriately directing the foreign seller's attention to such regulations, the Xanadu party would be acting in breach of a fiduciary duty, whether labelled as a direct contractual duty, or an ancillary duty, or a duty coming under the concept of *culpa in contrahendo*. In accord, Berger, loc. cit. at 117/118.

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6. The IMF Agreement

The basic objectives of the IMF Agreement (the text is reproduced in the DIS Volume 12 "Acts of State and Arbitration", edited by Böckstiegel, 1997, 187–208) are to monitor and harmonize foreign exchange policies among its member states and to stabilize their payment balances. As one of the tools to achieve such objective, **Article VIII Section 2 (b)**, requires the member states to mutually acknowledge and respect exchange control regulations, provided they are consistent with the objectives and policies of the IMF Agreement. The (more than 150) member states of the IMF have undertaken to also reflect this notion within the body of their domestic legislation. Thus, given the world-wide recognition of the IMF and its substantial economic significance, it does seem justified to accept the rationale of Article VIII Section 2 (b) as forming part of a supra-national economic legal order or *lex mercatoria*. Legal writers seem to agree very widely on this qualification and leads Klaus-Peter Berger to the following conclusion:

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"Application of the provision therefore is part of the international arbitrator's increased responsibility for the arbitral process as a whole. For these reasons, the arbitrator has to take account of Article VIII Section 2 (b) even if the conflict of laws rule of the *lex arbitri* gives him wide discretion in the determination of the law applicable to the substance of the dispute (*voie directe*). Berger, loc. cit. at 121; see also the further references and citations therein.

On the other hand, exchange control regulations **of a discriminatory or confiscatory character** or exchange control regulations camouflaging economic sanctions, would not deserve protection and would not satisfy the **"application-worthiness – test"**. Thus, the scope and reach of Article VIII Section 2 (b) IMF will have to be scrutinized **in each individual case** so as to determine whether the regulations have been issued for the sole purpose of protecting the balance of payment and the cur-

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rency reserves of the particular country. Exchange control regulations instituted for other reasons such as for instance for foreign policy reasons, or reasons of the national security will not qualify under the scrutiny made in respect of Article VIII Section 2 (b) of the IMF Agreement.

7. Competition Laws in particular

a) *Avoidance of EU Competition Laws Through Arbitration in a Non-EU State Such as Switzerland?*

[Note to the reader: Based on the Treaty of Amsterdam which entered into force as of 1 May 1999, Articles 85 and 86 as hereinafter quoted, have now become Articles 81 and 82 respectively.]

730 Can competition laws be avoided by resorting to arbitration? This is the title of an article by Frank-Bernd Weigand (Weigand, *Evading EC Competition Law by Resorting to Arbitration?*, *ArbInt* 1993, 249–258). The short answer is. **NO!**

731 Would **arbitration in Switzerland** (or in another Non-EU state) be the answer, i.e. the welcome “back-stage-door escape”, on the rationale that Switzerland (so far) stayed away from the EU, wherefore the EU competition law is not directly applicable in Switzerland, as it is in the EU Member States? This is the question we need to examine further.

732 In Switzerland, a frequently cited case is *Ampaglas v. Sofia*, a decision of the *Chambre de Recours* of the Canton of Vaud dated 28 October 1975 (published in *129 Journal des Tribunaux*, 1981-III-71). In that case, the ICC Arbitrator was confronted with a request by one of the parties to submit the issue as to the validity of the underlying contract to the European Court. *Eventualiter* the party requested the Arbitrator to find that the contract was null and void under Article 85 EC Treaty of Rome. The Arbitrator declined to suspend the case and opined that the Treaty of Rome was to be respected by all courts as well as by arbitral tribunals, and thus affirmed his jurisdiction to scrutinize the contract under the criteria of Article 85 EC.

733 In a complaint addressed to the Tribunal Cantonal Vaudois, the opposing party maintained that the Arbitrator lacked jurisdiction to consider the validity under the scrutiny of Article 85 EC. However, the Vaud Cantonal Court rejected that complaint and held in an *obiter dictum* that, according to Swiss doctrine, arbitrability of competition law issues was by no means excluded and that, therefore, the ICC Arbitrator had jurisdiction to scrutinize the relevant contract under the notions of Articles 85/86 EC.

734 This competence of an arbitral tribunal was specifically confirmed in a recent land-mark decision of the Swiss Federal Supreme Court rendered in *re G. SA v. V. SpA* on 28 April 1992 published in *ATF 118 II 193*. In that decision, the Swiss Federal Supreme Court explicitly stated that arbitral tribunals sitting in Switzerland must affirm their jurisdiction to scrutinize a contract in respect of its compatibility with the EC competition laws. The reading of the decision makes it clear that the Swiss Supreme Court not only meant an authority but indeed a duty which must be exercised by arbitral tribunals. The underlying case had to do with a Cooperation- and

Investment Contract between a Belgian group and various Italian companies. The purpose of the contract was to exploit mutual synergies by dividing up the marketing territories, and by certain pricing agreements. The contract was subject to Belgian law and contained an arbitration clause. The *ad hoc* arbitral tribunal sitting in Geneva rendered an interim decision *inter alia* refusing to suspend the arbitration until a decision by the EU Commission was obtained. The resultant Final Award was attacked by both parties who filed challenges to the Swiss Federal Supreme Court on the basis of Article 190 (2) PIL. The Supreme Court quashed the Award, remitting the same back to the Arbitral Tribunal, on the argument that the Tribunal failed to exercise its jurisdiction to scrutinize the relevant contract in respect of its conformity with Articles 85/86 Treaty of Rome. It is an interesting aspect of that case that the Federal Supreme Court considered the issue as a jurisdictional issue according to Article 190 (2) b PIL, where the Supreme Court exercises a broad scope of review.

While the arbitral practice in Switzerland, up to the end of the 1980s, had shown a certain **reluctance** to accept the interference of antitrust laws which are **extraneous** to the *lex causae*, the situation in Switzerland has **clearly changed during the 1990s**. For instance, an *ad hoc* arbitral tribunal sitting in Geneva rendered an award in June 1994 in re *L. Corp. et al. v. B. Inc. et al* in which it clearly affirmed that, over and above Swiss law (which was the proper law chosen by the parties) the contract had to be scrutinized in respect of its compatibility with Articles 85/86 EC. Moreover, two of the 16 cases referred to in the Introduction to this Chapter involved the issue of whether an arbitral tribunal sitting for example in **Switzerland** (or any other not-as-yet EU member State) should apply (or, to the contrary, disregard) the EU (or US) antitrust laws. Some further 20 cases are highlighted below.

In fact, the prevailing view today in Switzerland is that an arbitral tribunal having its seat in Switzerland **has to have regard** and, moreover, should directly **apply** – although **with a distant look** – the relevant competition laws even if they pertain to a foreign legal order (i.e. to a legal order which is outside the law governing the contractual relationship). What is meant by the above-noted “distant look-reservation”? – It is the author’s view that quite a number of decisions taken by the EU Commission are made in view of, or influenced by, political considerations. Indeed, sometimes decisions are “thin majority” decisions of the Commissioners, such as 11:9 decisions; and, obviously, there are “gives” in one case and “takes” in another. Moreover, the Commission is much concerned, and so are the Court of First Instance and the European Court of Justice, to form a case law through precedents. None of these reflections are, however, compelling for an arbitral tribunal. Its hands will be, and must be, free to do the optimum justice as between the parties, no more, and no less.

Thus, in the Swiss international arbitration practice, it must be regarded as **well settled** that an arbitral tribunal having its seat in Switzerland:

- **will affirm its jurisdiction**, as well as the **arbitrability**, for reviewing a contract between any parties (whether they are parties of member States of the European Union or not) from the perspective of compatibility with Articles 85/86 EC. In this context, the Swiss Federal Supreme Court, on 28 April 1992, rendered a landmark decision to this effect in re *G.SA v. V. SpA*, ATF 118 II 193; compare also the

“Labinal” decision rendered in Paris, 19 May 1993, discussed in Rev.Arb., 1993, 645 ss. and the “Velero” decision rendered in Paris, 14 October 1993, in Rev.Arb., 1994, 164 ss. See further the extensive study by Verbist, The Application of European Community Law in ICC Arbitrations, ICC Special Supplement, International Commercial Arbitration in Europe, 1994, 33–57 and the Extracts from ICC Awards on Arbitration and European Community Law published in the ICC Bulletin 2/1994, 44–60 and 1/1995, 1995, 52–71; moreover, the ICC has devoted a special volume to the topic: ICC Dossiers, Competition and Arbitration Law, 1993, with numerous articles; a recent article comes from Derains, L’application du Droit Européen par les arbitres – Analyse de la jurisprudence, L’Arbitrage et le Droit Européen, CEPANI (ed.), 1997, 67 ss.), and

- will make such review being done **irrespective** of the governing law chosen by the parties or determined by the arbitral tribunal; for instance, in ICC Case No. 7097 (1993), the arbitration clause provided that the arbitrators “*shall not decide in accordance with a specific national law but pursuant to the principles of equity and justice*”; however, the Arbitrators considered that the EU competition law was of a supranational nature and decided to apply it. In ICC Case No. 7673 (1993), the underlying contract was governed by Swiss law. Nevertheless, the Arbitral Tribunal held: “*It is generally agreed that under Article 187(1) PIL, arbitrators must or at least may observe the international public policies of other States or of the European Communities irrespective of the substantive law applicable.*”
- will likewise affirm its jurisdiction (as well as arbitrability) to review a contractual relationship under the perspectives of the **US antitrust laws** and, in so doing, will affirm its jurisdiction to rule on a claim **for treble damages**. The Arbitral Tribunal sitting in Zürich in re *Adolph Hottinger GmbH (Germany) v. George Fisher Foundry Systems (USA)* (Zürich Chamber of Commerce Case No. 202/1992), of which the author was the chairman (a case widely reported in American articles/journals), clearly reached the conclusion, in July 1994, to **affirm its jurisdiction** to decide on a counter-claim for **treble damages** made in respect of an alleged violation *per se* under the Sherman Act. It seems important to distinguish between arbitral jurisdiction to decide on treble damages, which should clearly be affirmed, and the totally different issue whether an Award imposing the payment of treble damages would, or would not, be enforced by a national court, wherever such enforcement might be sought. The criteria are entirely **different**.
- in the same context, a tribunal sitting in Switzerland and which awards treble damages is **not** likely to violate public policy in the sense of Article 190 (2) lit.e of the Swiss Private International Law; in accord: Zäch, Swiss International Arbitration – Civil Claims Arising From Restraints of Competition Affecting Markets Outside Switzerland, in: Comparative Competition Law: Approaching an International System of Antitrust Law, 1998, 267–287, at 285;
- will even proceed to an **ex officio** examination regarding the observance of Articles 85/86 EC where the situation is such as to give rise to doubts that a par-

ticular transaction might have anti-competitive effects on the EU market (even though none of the parties may have pleaded such issues). An explicit example is ICC Case No. 7181 (1992) where the Tribunal held: “*In view of the 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 prohibition of restrictive agreements.*” Similarly, in ICC Case No. 7315 (1992), the Arbitrators subjected the entire contract to the scrutiny of EC competition laws. In ICC Case No. 7539 (1995), the duty of the arbitrators was similarly confirmed: “*Il incombe en effet aux arbitres de soulever même d’office, mais avec toute la prudence requise, l’incompatibilité d’un accord qui leur est soumis (ou de certaines clauses) avec l’article 85 du Traité de Rome*”. Derains, in his article cited above, at p. 77, concludes “*que l’arbitre a le devoir d’appliquer le droit européen de la concurrence chaque fois que cette application correspond à un intérêt légitime, que la lex contractus soit ou ne soit pas le droit d’un Etat de l’Union Européenne.*” The rationale for this is that an arbitral tribunal should not lend its assistance to parties that may deliberately have aimed at avoiding the sanctions under Article 85(2). Likewise, under the **U.S. perspectives** set on the basis of *Mitsubishi v. Soler* (473 U.S. 614 (1985)); see hereto e.g. Jarvin, Case Note on *Mitsubishi v. Soler*, in: *Arbitration of Anti-trust and Competition Issues*, Swedish and International Arbitration, 1994, 66–73; Carbonneau, *Mitsubishi: The Folly of Quixotic Internationalism*, *Arbitration International*, 1986, 116–140; Lowenfeld, *The Mitsubishi Case: Another View*, *Arbitration International*, 1986, 178–190; Griffin, *U.S. Supreme Court Encourages Extraterritorial Application of U.S. Antitrust Laws*, *International Business Lawyer*, 1993, 389–393) and the threat of the “second-look-doctrine”, it is quite clear that an arbitral tribunal has a perceived **duty**, and not only a right, to examine the compatibility with U.S. antitrust laws *ex officio*, wherever a matter could have anti-competitive effects within the United States. A discussion of recent U.S. cases is contained in the study by Davidow, *Recent Developments in the Extraterritorial Application of U.S. Antitrust Law*, 20 *World Competition* 3/1997, 5–16.

- may **suspend** the arbitral proceedings pending an examination before the EU Commission; on the other hand, neither the parties nor the arbitral tribunal may submit an issue to the European Court for a determination according to Article 177 EC. This had been decided in the *North Sea Case* (CJEC 102/81 LR 1982, 1095 and in the later *Danfoss* decision, CJEC 109/88 LR 1989, 3199; see also the decision in *re Commune d’Almelo*, CJEC 393/290 LR 1994, 1477; Kornblum, *Private Schiedsgerichte und Art. 177 EWGV – Zur Befugnis bzw. Verpflichtung privater Schiedsgerichte, Vorabentscheidungen des EUGH einzuholen*, *Jahrbuch der Schiedsgerichtsbarkeit*, Vol. 2, 1988, 102–110.
- may, but only after consultation with the parties, **refer** a particular issue to the Commission, asking it for a determination (whether in the form of a decision or, more likely, in the form of a comfort letter or discomfort letter), and
- may, under the scrutiny made on the basis of a **rule-of-reason test**, recognize such a determination made by the EU Commission. In the same sense see

Baudenbacher/Schnyder, Die Bedeutung des EG – Kartellrechts für Schweizer Schiedsgerichte (1996), in particular Note 81.

738 **In sum:** On the basis of the above, we may conclude that Community competition rules will be applied by arbitral tribunals sitting in Switzerland quite in the same way as they would be applied if the tribunal sat in Germany or in France. **“The Swiss get up early and wake up late”**, as Drolshammer once said, is probably the best expression to characterize this phenomenon (Drolshammer, On the Relevance of Competition Laws (EC, U.S.) in International Arbitration – Remarks from a Swiss Perspective, ASA Special Series No. 6, 1994, 98–109, at 109).

b) Types of Competition Law Issues Submitted to Arbitral Tribunals

739 It may be illustrative to give an account of the manifold competition law and antitrust issues which, within the last five years, were submitted to arbitral tribunals:

(i) Cases and Issues under Article 85 (1) EC (now Article 81 (1) EC)

740 (1) Does an agreement between a **parent company and a subsidiary** fall under the scope of Article 85 (1) EC? In the same context, is the standard practice that the French subsidiary shall not export to Switzerland nor to Germany a violation, having regard to the particular structure of the **concern** or the group of companies? What elements will constitute effective control of the parent company over its subsidiaries under the criteria of Article 85 (1) EC thereby justifying a qualification as a single economic unit?

741 (2) How should trade practices and **apparent parallelism of behaviour** of the market be evaluated? When is it justified to conclude that the parallelism was triggered as a reaction to the market? When would it have to be qualified as a **conscientious concerted practice**? – This issue requires extensive evidence proceedings, examinations of witnesses and detailed reports in the sense of market surveys.

742 (3) When is the **trade between the Member States affected** in the framework of a contract between a Japanese producer and a Swiss distributor? Was, under the particular circumstances, a **merely potential impact** sufficient, or should the Arbitral Tribunal be impressed or guided by the allegation that the strong territorial restriction rather had a pro-competitive effect, enhancing trade and competition, and not the opposite?

743 (4) Should an Arbitral Tribunal be guided by the **de minimis Notice** in an **horizontal** relationship with an involved market share of probably below 5% where, however, **cumulative restraints** were imposed on the free marketing of goods?

744 (5) Was it a critical provision of the manufacturer to set **clear milestones to its distributor** which could only be achieved through an **aggressive** marketing of the products and through certain measures installed to keep the price at a very high

level? Was the additional requirement imposed on the distributor to submit **computerized lists of concluded sales** to the manufacturer of a nature to give him indirectly the control over price? Was such an information system responding to a **legitimate** goal of the manufacturer to monitor the efficiency of its world-wide distributors? Was, in the actual case, the manufacturer **exploiting a particular market power or even dominant position**, particularly through a vigorous policy to defend trade mark infringements? Was it a significant element of the case that the Japanese manufacturer had succeeded, outside the European Union, to **prohibit grey-market imports** by invoking its trade-mark whereas, as it appears, it did not pursue its threat to initiate court proceedings within EC member states seeking to avoid parallel imports (possibly on an assessment that it would not succeed, having regard to the strong views as were, in constant practice, expressed by the EC Commission and the European Court of Justice).

- (6) In the framework of the same case, the issue as to **discrimination** arose in the sense that the manufacturer sold the goods to distributors **on different price levels**, apparently calculating the different leverage and protecting force of its intellectual property rights. Was such behaviour legitimate, or did it amount to a violation of Art. 85 (1) and 86 EC? 745
- (7) Still in the same case, the legitimacy of the manufacturer's **control** over the distributor's **General Conditions of Sale** was questioned. 746
- (8) Was it legitimate for a **US licensor of know-how** to **restrict** its licensee in one European country to manufacture **no more than a certain number of tons per year** and requiring further that the product shall **not** be sold outside the territory? The licence agreement contained **certain ancillary restraints**, all of which brought the contract very close to Article 85 (1) EC. When the European licensee requested the removal of some of the restraints, withholding a significant amount of licence fees, the American licensor initiated arbitral proceedings. However, as a reaction, the European licensee then **threatened to submit** the Licence Agreement to the European Commission. The American licensor, which had so far taken a very strong stand, all of a sudden had to fear heavy fines and had to give up most of its positions in the framework of a negotiated settlement. 747
- (9) **Tying arrangements** seem to cause frequent dissatisfaction. In a recent case, a German licensee, manufacturing products under the grant of a patent licence of an American manufacturer/licensor, was happy, as it seemed, to be able to buy certain required ancillary components from its US licensor, and thus agreed to sign, as an ancillary contract to the licence, a **separate supply contract with a minimum term of 7 years**. After 1½ years, the German licensee discovered that **substitute products** would be available on the market that would do quite the same job, but for half of the price. It, therefore, started to buy those substitute products on the **grey market** (parallel imports, in particular from France). The US licensor initiated arbitral proceedings against its German licensee under the arbitration clause which was contained in the Licence Agreement only (**but not** 748

in the separate Supply Contract). It claimed performance under both contracts, payment of outstanding licence fees, compensatory and other damages payable by the German licensee, further orchestrated by a request for an injunction and preliminary relief. In its Defence, the German licensee raised the jurisdictional defence that the Supply Contract was not subject to arbitration, because it did not contain an arbitration clause. However, the Arbitral Tribunal, in a preliminary award, reached the conclusion that both contracts must be seen as forming **one single uniform transaction** (akin to the SOABI decision in ICSID Case No. ARB/82/1, ICCA Yearbook XVII/1992, 42–72, 51), but reserved for an examination on the merits to determine whether the Supply Contract was a **prohibited tying contract**. Subsequent to the jurisdictional decision, the German licensee **threatened** to submit the two contracts to the European Commission, and to request the Commission to examine in particular the following four aspects:

- Was the Licence Agreement imposed on the licensee through the market strength and dominance of the US licensor?
- Was the US licensor abusing its dominance *inter alia* by claiming exorbitant licence fees?
- Was the US licensor abusing its market power when making the German licensee agree to sign up for a seven years Supply Contract?
- Was the American licensor abusing intellectual property rights when requesting the licensee to be paid for the full life of patent protection in Germany, even though the patent was successfully challenged in 1998?

- 749 (10) In connection with the claim of a Finnish firm against the German subsidiary of a Swiss firm, the issue arose whether Claimant was entitled to address its request for arbitration not only against the German subsidiary (GmbH), **but also against the Swiss holding company** as the parent. The Swiss holding company raised the plea that it was not party to the agreement and did not sign an arbitration clause. Hence, it could not, as it argued, be sued in arbitration, and any award against it would be wholly unenforceable anywhere in the world and particularly in Switzerland. The Finnish claimant, however, argued in response that the Swiss holding company exercised control over its German subsidiary and engaged its own responsibility and liability when permitting that its German subsidiary **violate territorial and other restrictions** imposed on it. Apart from invoking an *alter ego* – situation (including arguments on the piercing of the corporate veil and under the so-called (and “famous”) “group of companies doctrine”), the Finnish Claimant also argued that the EU Commission and the ECJ, in constant practice, **had held parent companies liable for the behaviour of their subsidiaries** within the common market and, typically, imposed its sanctions and fines against the parent company under its **theory of the economic unity**. The Finnish claimant argued that an arbitral tribunal should be guided by the same notions and that **Article II of the New York Convention** on the recognition and enforcement of arbitral awards would **not be no a bar to it**.

- (11) Occasionally, arbitral tribunals had to **determine the relevant market**, to establish **available demand side substitution and supply substitution** as well as potential competition in respect of a particular product. Issues centred around the notion of the existence of a contestable market under the perspective of the so-called **SSNIP Test** (i.e. the test whether the parties, in view of a small but significant non-transitory increase in price) would switch to readily available substitutes or to suppliers located elsewhere. The test was conducted under the perspectives of Art. 85 and Art. 86 and difficult **evidentiary questions** arose to interpret market reports and to distinguish **marginal customers** from others. 750
- (12) A frequent topic is the **permitted use of intellectual property rights and their exhaustion**. While the existence of such IP rights ground in national law, their use and exploitation falls under the scope of the control by Art. 85 EC. Most cases dealt with **parallel imports**, but the writer also had to deal with cases where an abuse of IP rights was alleged **due to its dominant position** according to Article 86 EC. In the context of such dispute, an arbitral tribunal will also have to determine **whether international exhaustion should be applied** (which is more consumer-friendly and is the solution adopted in Switzerland) or whether regional exhaustion (in the sense of an **EC-wide exhaustion** as per the EC Trademark Directive) should be applied. 751
- (13) In one particular case, the writer had to deal with the issue of the **extension of patent protection in the USA due to TRIPS** and the defence by the opposing party that such an extension would be **anti-competitive under US anti-trust laws** and would give rise to treble damages in the framework of a counterclaim. 752
- (ii) Cases and Issues under Article 85 (2) EC (now Article 81 (2) EC)
- (14) A particularly difficult topic for arbitral tribunals is to apply Article 85 (2) EC and to deal with **the strict sanction of nullity**. Under what perspectives would it seem appropriate to determine that the nullity was of a **partial nature only**? *Quid* in the absence of a **rescue clause**? How to deal with a situation where one party, in confidence of the validity of the agreement, had **already delivered or paid**? Is the legal sanction (indeed required by Article 85 (2)) and supported by leading scholars appropriate that, even in such a case, **no claim for restitution** can be entertained? 753
- (15) Another particularly critical issue under Article 85 (2) has arisen when the parties, after a 2½ years arbitration, reached a **private settlement** without the assistance of the Arbitral Tribunal. They then communicated the Settlement Agreement to the Tribunal asking it to **reflect the Settlement Agreement in the framework of a so-called Consent Award** (Award on Agreed Terms). The Chairman, when receiving the Settlement Agreement, immediately realized that the Agreement provided for **an unlawful co-operation violating Article 85 (1)**. – In that situation, the Chairman refused to record the Settlement Agreement (even though he thereby jeopardized the readiness of the parties to pay for the arbitrators' fees!). 754
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(iii) Cases and Issues under Article 85 (3) EC (now Article 81 (3) EC)

- 755 (16) Under the perspectives of Article 85 (3) EC, an arbitral tribunal had to determine the **likelihood that a party would have obtained an individual exemption**, had it elected to submit the contract in question to the EU Commission. The party defended itself for its omission by arguing that the completion of the notification (according to Form A/B) would have involved several months of preparatory work and, in any event, it would have been extremely unlikely that the EU Commission would have rendered a decision. The other party opposed these arguments (even though it had voluntarily performed under the very same contract for more than two years before it decided to unilaterally terminate the contract, and at the same time refused to pay the last instalment of royalties). The opposing party also **requested the Arbitral Tribunal to submit the Contract** to the EU Commission and to stay the proceedings, pending a determination by the Commission on the issue whether the particular contract could have been exempted. – In this case, the Tribunal clearly said that it would **not** submit the Contract to the EU Commission on its own motion nor on the request of one of the parties, but if one of the parties elected to do so itself, the Tribunal could not prevent it and would not (as was requested by the other party) issue an **injunction** prohibiting the interested party to submit the contract. After the second hearing, the parties – assisted by the Tribunal – restructured the contractual terms and the dispute was settled amicably.
- 756 (17) **R & D co-operations** between parties are a **frequent** and always present difficult issue. In a recent case, the two “parents” (opposing parties in the arbitration) remained competitors despite the joint R & D venture. Thus, from that perspective, the joint development had no anti-competitive effect. However, they also determined, within the R & D Agreement, the terms of the future manufacturing, marketing and distribution of the product, virtually dividing the world-market and, in particular, **excluding** one of the parties from the EC market. The Agreement became even more critical since one party’s right to continue its own R & D programme was, as one party alleged, forbidden due to the terms of the Agreement. Several aspects of this agreement gave rise to **serious concerns**, for instance the market repartition (and strong market protection), coupled with further restrictions on individual R & D and a non-competition clause (all of which brought the Agreement close to some elements **black-listed** in Article 6 of the Block Exemption No. 418/85. However, in that particular case, the Arbitral Tribunal discarded those concerns.
- 757 (18) How should an arbitral tribunal react when realizing that the two arbitrating parties (both leading industrial groups outside the EC), in dispute over their own joint venture company held on a 50:50 basis, had in fact **not** created a **structural and concentrative joint-venture** but, quite to the opposite, a **non-structural co-operative joint-venture** with strong activity on the EC market? While the designated Chairman of the Tribunal reflected on the impact (and realized that, if it were a structural co-operative joint-venture, the parties could take advan-

tage of a merger control clearance according to the Regulation No. 1310/97 which, however, seemed unavailable due to the limited scope of the joint-venture as a mere distribution outlet, thus triggering the control under Article 85 (and not under the merger control), the claiming party requested a temporary suspension of the proceedings (and a suspension in respect of the proper constitution of the Arbitral Tribunal). – Shortly thereafter, the claim was withdrawn.

- (19) **Selective Distribution** is also an issue submitted to arbitration. In a recent case, a fashion **designer** with a world-wide brand name recognition cancelled the agreement with one of its major distributors operating a dozen or more retail stores on the basis that the looks of those stores was **not sufficiently supportive of the brand name's prestige**, an argument vigorously contested by the distributor (and owner of a chain of retail stores). The Arbitral Tribunal carried out a number of **site visits** to examine the case and to determine whether the criteria of the claiming fashion designer were **applied without discrimination**. A further issue was the legitimacy of the fashion designer's **price policy** which suggested the maintenance of high-priced products. Equally **critical**, under the perspectives of competition law, were requirements regarding **advertising and marketing**. 758
- (20) In connection with a dispute over the terms of a licence agreement, a licensee had invoked that the **provision on an exclusive grant-back obligation** was a **violative restraint**, and requested a declaratory award stating that the grant-back obligation in connection with improvements on the technology was valid **only on a non-exclusive basis and against an adequate royalty**. The licensor (claimant in the proceedings) defended the provision on the argument that the Licence Agreement, in its overall context, was favourable to the licensee, particularly through its **most favoured treatment clause**. 759
- (iv) Cases and Issues under Article 86 EC (now Article 82 EC)
- (21) In several cases, licensees disputed the terms of the Licence Agreement on the basis that the **imposition of minimum royalties and/or the calculation of percentage royalties** (including particular rebate schemes) were invalid because the licensor abusively **exploited its dominant position**. For the Tribunal, the difficult question arose whether it should (or must) sit in judgment over the **"pricing"** of the Licence Agreement which, at the time, appeared to have been quite carefully negotiated between the parties and where, at least at the time of the conclusion of the Licence Agreement, the licensee apparently **had had another option** to obtain the technology from a different source (such that its argument under the notions of the alleged "essential facilities doctrine" appeared to be rather weak). The Arbitral Tribunal indicated orally that, in its preliminary view, the arguments of the licensee were not very conclusive or convincing. 760
- (22) A further aspect of the same case was **the refusal of the licensor to supply updates** to the licenced technology due to licensee's default in respect of the roy- 761

alties. The Arbitral Tribunal, in this regard, had to deal with a request of the licensee for **preliminary relief**, whereby the Tribunal should order the licensor to make such updates available to the licensee during the arbitral proceedings. The licensee argued that it had made very substantial investments during its production lines to the particular technology and, therefore, would not be able to change or adapt the production process to a different technology. The Tribunal **analysed** these issues under a number of leading cases discussed in the United States and within the EC dealing with the “**essential facility doctrine**”, including the cases *United States v. Terminal Rail Road Association*, *Otter Tail Power Co. v. United States*, *MCI v. AT&T*, *Magill*, *European Night Services*, *British Midland/Air Lingus and others*.

c) Applying Competition Laws “With A Distant Look”

762 The above list of cases is limited to personal experience. The author could have extended the list by extracting the issues which have arisen under cases reported by the ICC etc. On purpose, this was not done. Moreover, deliberately, no further particular details are given in respect of the above 22 cases.

763 In all these cases a fundamental question might be to ask whether an arbitral tribunal should directly **apply** EU competition laws (or US antitrust laws) even if it does not form part of the *lex causae* or *lex voluntatis* and whether such application should be made in quite the same way as a competition enforcement authority or court would do. The question also arises whether such competition laws should simply be **considered** which is a somehow softer approach, leaving quite a wide area of freedom.

764 Such (and similar) questions also require reflection in connection with sanctions, embargoes, exchange control regulations and other types of mandatory rules. For the general answers to these questions see the Chapter 9 below. However, in the framework of competition laws, the author would like to summarize the following points:

- First, although competition laws are not generally considered to form part of a transnational public policy, it is nevertheless believed that they reflect a deeply routed notion in international commerce and trade which does in fact deserve recognition and application. Hence, there is quite a unanimity to say that competition laws cannot be disregarded and, in particular cases, would even have to be considered *ex officio*.
- Second, despite the foregoing, it is **not** this author’s view that an international arbitral tribunal is the servant (or “slave”) of the competition enforcement authorities. An arbitral tribunal, therefore, does not necessarily have to adopt the same approach as for instance the EU Commission or the FTC (to the extent that such a position, could at all, under the particular circumstances be anticipated).
- Certainly, this author believes that an arbitral tribunal must take care to inform itself very carefully about the reported cases and the extensive commentaries which are available. However, thereafter, having done such kind of “homework”, an arbitral tribunal **must sit back** and reflect on the solution (or application) which

does justice to the very particular parties, and which is the most appropriate under the prevailing circumstances.

- In other words, an arbitral tribunal should be freed from certain constraints under which a competition enforcement authority is working. These constraints are well known and need not be discussed here. Suffice it to say that many of the leading decisions rendered by the EU Commission or the ECJ have been influenced by their own political dynamics. Moreover, decisions of the competition enforcement authorities are tied to certain precedents, and thus may also be inspired by a concern to foster a certain case law. All of these considerations are **extraneous** to an arbitral tribunal.
- Therefore, the author has expressed the view that arbitral tribunals should consider (or apply) competition laws (such as Articles 85/86 EC etc.) with a “**distant look**”, which respects **the objectively fair and the subjectively reasonable expectations** of the parties; no more, no less.

d) Extraterritorial Application of Competition Laws by the EU Commission and the ECJ

The question remains in what way the EU Commission itself and the ECJ have considered the issue of the extraterritorial application of competition laws. The starting point certainly is the concept that each state has the authority (and sovereignty) to enact the laws applicable on its own territory. Whether it has the authority to extend the scope and reach of its laws beyond its own territory is one of the most fundamental controversies. In the United States, court practice has developed the “**effects doctrine**” on the basis of the ALCOA case of 1945. The doctrine was applied wherever the effects were “intended”. However, in the Hartford Fire Case (1993) and in the Nippon Paper Industries Case (1997) the qualifications of the “intention” was dropped, such that one will have to conclude that US antitrust laws will be applied wherever a transaction (irrespective of its geographical origin or location) might potentially have an impact on the US market. Thus, a concentration of two Japanese manufacturers of electronic components is likely to trigger the application of the US antitrust laws.

As far as Articles 85/86 EC are concerned, we will first have to note that the legislative text itself is geared at looking to the effects, irrespective of the place where the undertakings concerned are based, and irrespective of the place of the underlying agreements, decisions or concerted practices. This can be derived from the wording in Article 85 (1) EC “... *practices which may affect trade between ...*” and the similar wording in Article 86 EC “... *in so far as it may affect trade between Member States ...*”.

In practice, the European Commission has **affirmed the effects doctrine**, for instance in the cases ICI, Geigy, Sandoz, Continental Can, Euroemballage Corporation, Hoffmann-LaRoche, United Brands, Tetra Pak, Hilti, Commercial Solvents and Paper Pulp. In some of these cases, the EU Commission had argued on the basis of the **single economic unity of a group of companies**, and has therefore

attributed the acts and (in the Commercial Solvents Case also) the omissions of a subsidiary to its controlling parent company. In those cases, the Commission had no hesitation to impose fines against the parent company. The same approach is taken in the framework of the EC Merger Control. Recent cases such as UBS/Swiss Bank Corporation, Sandoz/Ciba-Geigy, Boeing/McDonnell Douglas, Elvia/Schweizer Rück, Nestlé/Perrier come to mind.

768 Interestingly, the ECJ has always shown a remarkable reluctance to clearly affirm the effects doctrine and has preferred to base its judgments on the **theory of the economical unity**, or on the **theory of the implementation** of an agreement or a practice. For instance, it argued that, where a certain agreement made outside the EU is implemented within the EU, the applicability of Articles 85/86 must be affirmed.

769 The difference of approach between the EU Commission and the ECJ appears to be of **academic** interest only. At the end of the day, both are likely to show quite exactly the same result. **For all practical purposes, we may therefore conclude that the effects doctrine is prevailing, both in the USA and in the EU**, and that the purely territorial approach is just not the way how competition laws work.

e) Private Law Remedies versus Administrative Sanctions

770 In an overall perspective, we need to realize, however, that – as far as competition laws are concerned – **private law remedies available through arbitration are not in the foreground of antitrust enforcement**. Burning areas such as **merger control, conscious parallelism and abuse of dominant position** will only exceptionally enter the “arena” of arbitration. Typically, in those situations, parties will not be linked by an arbitration agreement. Likewise, in respect of Articles 85/86 EC, there are hardly any civil actions within the European Union tried before State courts. In 1993, the EU Commission embarked on an attempt to revitalize the civil law based remedies, by endeavouring to more intensely include state courts.

771 Frequently, claims submitted to arbitration are ancillary to, and filed in addition to, investigations by the EU Commission. Only the latter is for example authorized to impose a **fine**; its exclusive competence is reflected in Regulation No. 17/62, Article 9 (3). Indeed, the two procedures serve **different purposes**:

- The administrative investigation may result in a heavy fine, but will not result in a civil law remedy to the aggrieved party.
- Thus, the aggrieved party will need to seek recourse to arbitration or litigation in order to recover damages suffered.

772 The primary role of the EU Commission is certainly justified, given the fact that the competition law enforcement process is closely linked to public policy issues (frequently standing in conflict with other policies such as industrial, small enterprises, regional, environmental, social and foreign trade policies). Moreover, competition law issues tend to imply **highly complex factual situations** which require broad investigative powers which are available to the enforcement agencies, but will not as such be available to an arbitral tribunal. Frequently, investigations will require co-operation between national and supra-national competition law authorities.

In contrast, in the **United States**, the picture is quite different in the sense that more use is made of civil law remedies in antitrust matters. The two public enforcement agencies (Federal Trade Commission and the Antitrust Division of the Department of Justice) are efficiently escorted by civil courts and arbitral tribunals. The latter two are given means which are in Europe otherwise reserved to the enforcement agencies, by having the possibility or even legal duty of imposing the payment of **treble damages and punitive damages**.

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f) In Switzerland: Arbitrability Under the Cartel Law of 6 October 1995

As far as Switzerland is concerned, a brief reference should be made to the Cartel Law of 6 October 1995 which, by and large, mirrors the basic provisions of the EC competition law (its Articles 5 essentially corresponds to Article 85; in particular, the exemptions in Article 5 (2) correspond to those in Article 85 (3) EC Treaty; Article 5 (3) prohibits horizontal agreements between actual or potential competitors; its Article 7 is an almost literal translation of Article 86 EC Treaty).

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According to the new Swiss Cartel Law, competition law issues are **arbitrable**. However, in respect of the procedure, Article 15 Cartel Law requires that, where the validity of a restraint of competition is concerned, the matter must be submitted to the Swiss Supervisory Commission which may look into the matter. It is, however, unclear whether such a domestic requirement would also be applicable to an international arbitral tribunal; this has not as yet been tested.

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Where it is alleged that a restraint of trade should be permissible for prevailing **public interests**, the matter will fall in the exclusive competence of the Swiss Federal Council; in that regard, jurisdiction will be removed from arbitral tribunals or State courts.

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8. Acts of State in Particular

The topic is of particular relevance in the area of intervening **Acts of State**. Reference may be made to numerous writings by Böckstiegel such as e.g. *Der Staat als Vertragspartner ausländischer Privatunternehmen*, 1971; *Arbitration and State Enterprises*, 1984; *States in the International Arbitral Process*, Arbitration International, 1986, 22 ss.; *Public Policy and Arbitrability*, ICCA Congress Series No. 3, 1987, 177 ss.; *Acts of State and Arbitration*, 1997. In essence, Acts of State of an **individual character** – mostly aiming at protecting that State's party, or freeing it from certain obligations – have in general, and for good reasons, not been well received by international arbitrators who denied their recognition. On the other hand, where acts had been of a **general nature and with a general scope of application**, moreover serving the public interest as opposed to protecting only one particular party, they had found recognition such that, in a particular case, the arbitral tribunal may **free** a party by, for example, accepting a *force majeure*-situation, provided that such situation (i) had not been foreseen, (ii) was not foreseeable and (iii) was properly notified to the aggrieved party. See hereto Blessing/Burckhardt, *Sovereign Immunity – A Pitfall in State Arbitration*, Swiss Essays on International Arbitration,

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107 ss., and numerous cases and materials cited there, in particular *C. Czarnikow v. Rolimpex* (1978) Q.B. 176 ss. (C.A.) and (1979) A.C. 351 ss., referred to in Note 36, in which case an act of *force majeure* regarding the export embargo directed by the Polish government with respect to the sugar deliveries was affirmed. Such *force majeure*, however, will, as a rule, only have an *ex nunc* effect, with the consequence that the work executed prior to the occurrence of the *force majeure* will have to be paid for.

9. Criteria Regarding the Application of Mandatory Rules

a) *The Issue Before State Courts*

778 Before dealing with arbitration, let us first examine the issue as it presents itself to the ordinary state court judge. Can/should/must he apply foreign mandatory rules of law? The **Rome Convention**, in Article 7, provides the following under the heading “Mandatory Rules”:

- “1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.”

779 Article 7 of the Rome Convention is, since 1 April 1991, applicable in **France** and in the **United Kingdom**, whereas **Germany** has expressed a reservation regarding Article 7 (which has not been transformed into German domestic law, apart from some aspects which are reflected in Articles 27 (3), 29 (1) and 30 (1) EG-BGB). By comparison: The **Austrian** Private International Law of 15 June 1978 is silent regarding foreign mandatory rules of law. Section 202 (2) of the **US Second Restatement**, Conflict of Laws, provides that enforcement of performance under a contract which is illegal at the place of performance cannot be required; otherwise, the American practice seems to be very hesitant to admit an interference by foreign mandatory laws; see Scoles/Hay, Conflict of Laws, 2nd Ed., 1992, 663 ss.

780 In **Switzerland**, Article 19 PIL (Private International Law of 18 December 1987, in force as of 1 January 1989) provides as follows:

- “1. When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to in this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law.
2. In deciding whether such a provision is to be taken into consideration, one shall consider its aim and the consequences of its application, in order to reach a decision that is appropriate having regard to the Swiss conception of law.”

According to the practice developed under this Article, **four conditions are pre-requisite** for the application of Article 19: 781

- (i) Clear evidence that the foreign legal provision is **intended to be applied** to the case mandatorily (so-called “*Anwendungswille*”).
- (ii) A **close connection** between the case and the foreign legal provision (so-called “*enger Zusammenhang*”).
- (iii) A **preponderant interest, deserving protection**, of one of the parties that the foreign mandatory provision be taken into account (“*schützenswerte und offensichtlich überwiegende Interessen einer Partei*”).
- (iv) The relevant interests of the party also deserve protection pursuant to Swiss law, and the result corresponds to the Swiss conception of law (“*Normzweck und Ergebniskontrolle*”).

Provisions which are comparable with Article 19 PIL can be found in Belgium and Denmark. 782

Of importance is the **Bretton Woods Convention** (Article VIII 2 b (1) Convention on the International Monetary Fund IMF), which provides: 783

“Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.”

In proceedings before state courts, the court will certainly have to apply its own **domestic** mandatory laws, such as export or import restrictions etc. But *quid*, about the application of **foreign** mandatory rules? Courts have traditionally been rather hostile (see the heritage in the doctrine, frequently headed “*Grundsatz der Nichtanwendung fremden öffentlichen Rechts*”). See e.g. the well-known Sensor-case discussed in RabelsZ 1983, 141 ss., where the Dutch courts in The Hague had to decide whether the US export restriction forbidding the export of certain high tech equipment to the former Soviet Union was to be applied against a Dutch subsidiary of a US parent company. The Dutch court refused to allow the US statute its intended extraterritorial application, making the delivery by the Dutch subsidiary possible. Similarly, US freezing orders regarding Libyan bank accounts held at English subsidiaries of US banks had been disregarded by UK courts. See hereto von Hoffmann, Internationally Mandatory Rules of Law Before Arbitral Tribunals, Acts of State and Arbitration, 8. 784

The most striking evidence of this attitude is the above mentioned **EU Anti-Boycott Regulation of 22 November 1996** which may be seen as a **protest** of the EU against the US sanctions under the Iran and Libya Sanctions Act (ILSA) and the Helms Burton Act regarding Cuba (Cuban Liberty and Democratic Solidarity (Libertad) Act, Public Law 104–114, 12 March 1996, named after its chief sponsors Senator J. Helms and Representative D. Burton). The Helms Burton Act codifies the economic embargo which dates back to the Kennedy area in 1963 and, moreover, provides for a right of US nationals to sue non-US firms trafficking in confiscated prop- 785

erties in Cuba (this section has been suspended by President Clinton effective 1 August 1996; on 16 July 1998, the President extended the suspension for another 6 months). The Act also prohibits the entry to the US of those who “traffic” in confiscated properties claimed by a US national. Ownership examination is conducted under a dual test, one in Cuba, one in the US, by means of a review by the Foreign Claims Settlement Commission (FCSC) who so far had dealt with some 10,000 Cuban claims, certifying about 6,000 and denying about 4,000.

786 With the growing globalisation, the attitude today is likely to shift to a more subtle approach, an approach which will favor the application of **apply a rule of reason test**.

b) The Issue Before Arbitral Tribunals

787 What is, and should be, the attitude of arbitral tribunals? Should it be the same as for state courts, or analogous, or entirely different? Should the arbitral tribunal be more reluctant to apply (or at least to take into consideration) foreign mandatory rules of law or foreign public policy rules? This is one of the most debated issues in international arbitration. For a discussion see Knoepfler, *L’Article 19 LDIP est-il adapté à l’arbitrage international?* Liber amicorum Lalive, 1993, 531–542; he **correctly** concludes that the Swiss Arbitration Act (Chapter 12 PIL) is an independent piece of legislation and that, therefore, Article 19 is not directly applicable for an international arbitrator; nevertheless, its ideas, in essence, reflect a *communis opinio* (also reflected in the Rome Convention, Article 7). See further Blessing, *Objective Arbitrability – Antitrust Disputes – Intellectual Property Disputes*, ASA Special Series No. 6, March 1994, 20. von Hoffmann speaks of some 50 ICC cases that have been reported, but this may account but for a very small percentage. See von Hoffmann, *Internationally Mandatory Rules of Law Before Arbitral Tribunals*, Acts of State and Arbitration, DIS Vol. 12, 1997, 12.

788 When considering the criteria, we need to **distinguish** between those applicable to **arbitrability**, and those relevant to the **substantive** decision.

c) Regarding Arbitrability

789 Should an arbitral tribunal decline **arbitrability** (and thereby decline its arbitral **jurisdiction**) simply because some foreign mandatory rules of law (whether of a national or supra-national nature), which proclaim to be applicable, might provide for the non-arbitrability of the dispute? Is this a kind of “arrogance” to which an arbitrator should yield? Or should one tend to assume that the mandatory character of specific rules would as such militate for their administration by state courts? Until a decade ago, the latter position had frequently received support, but has since then yielded to a different approach allowing for a prorogation of such issues to either foreign state courts or arbitral tribunals. In the **USA**, *Mitsubishi v. Soler* case in 1985 (however with the “threat” by the US court that the ultimate scrutiny would be reserved to the US courts), affirming the arbitrability of US antitrust issues, and the jurisdiction of a foreign arbitral tribunal to deal with them was an icebreaking one. See *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346 (1985); William

Park, in this connection, referred to the US “second-look-doctrine”. The precedent was followed in 1989 in the field of SEC matters in *Rodriguez de Quijas v. Shearson/American Express*. Reported in the ICCA Yearbook 1990, 141; 109 S.Ct. 1917 (1989). Similarly, in the field of arbitration clauses in bills of lading, the break-through came in 1995. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 115 S.Ct. 2322 (1995); ILM 1995, 1618 with note by De laume. In Germany, however, as Bernd von Hoffmann reports (loc.cit., 19 and cases referred to there), the courts are rather “*hostile towards arbitrability of securities claims which are covered by the Stock Exchange Act*”.

(i) In Switzerland

In Switzerland, the prevailing view is to answer **in the negative**, in the following sense. As correctly emphasized by Briner in his Report to the WIPO Forum on the Arbitration of Intellectual Property Disputes of 3/4 March 1994, “[*In respect of arbitrability*] ... *the least restrictive approach should be upheld in this connection. More precisely, one should favour the opinion that an arbitrator should not be concerned with foreign mandatory rules ... when determining whether a dispute is arbitrable or not.*” (Briner, The Arbitrability of Intellectual Property Disputes With Particular Emphasis on the Situation in Switzerland, WIPO Publication No. 728, 1994, 66). 790

Likewise, the Swiss Federal Supreme Court has reached the same conclusion in the *Fincantieri-Cantieri v. Oto Melara SpA* case. In that case, an Italian state-controlled company engaged the services of Melara to act as intermediary for the sale of military equipment to Iraq. Difficulties arose after 1987 when Iraq seized payments for the military equipment it had bought. Melara then commenced arbitral proceedings against the Italian company. However, the Italian company referred to the UN Security Council’s Resolution adopted in 1991 prohibiting any commercial activity with Iraq (which Resolution of course became binding law in Italy as well as in other European countries). The Swiss Federal Supreme Court, in *ATF 118 II 353* (also published in *Revue de l’Arbitrage*, 1993, 691 ss., followed by a Note by François Knoepfler) affirmed the arbitrability of the dispute. 791

This, in the author’s view, is the correct decision. It is based on Article 177 (1) of the Swiss Private International Law (PIL) which, in the sense of a material rule of conflict of laws, provides on objective arbitrability that “*any dispute involving financial interests can be the subject-matter of an arbitration*”. The effect of this provision is that the parties and the arbitrators are not referred to the *lex causae*, or to any other national law, in order to determine whether a claim is arbitrable. The Swiss solution has been praised as the most modern and most “arbitration-friendly” solution; it has also been adopted in the revised German Arbitration Act (§ 1030). 792

From the perspective of Article 177 (1) PIL, the dispute in *Fincantieri* was certainly arbitrable, and hence jurisdiction was rightly affirmed. This solution, as a consequence, has the advantage that it can be ascertained that an arbitral tribunal, by affirming arbitrability, will be able to exercise its arbitral jurisdiction and to then proceed to an examination of the substance of the claim on its merits. In Germany, the same view seems to prevail. Compare also Bernd von Hoffmann, loc.cit. at 20/21. 793

794 Thus, interfering (foreign) mandatory rules of law (in the above example a sanction expressed by the UN Security Council) are **not as such barriers to affirm arbitrability**. Thereafter, it will be the duty of the arbitral tribunal to determine in its decision on the merits whether the mandatory rule (or e.g. UN sanction) will affect the claim. In regard of an UN sanction, there is no doubt that an arbitral tribunal sitting in Switzerland will apply the same faithfully.

795 For instance, in ICC Case No. 6162 (1990) the Tribunal had to consider a contract between a French claimant and an Egyptian defendant. The contract provided for arbitration in Geneva and further, that Egyptian laws were to be applicable. The defendant argued that the arbitrator lacked jurisdiction because, under Egyptian law, a party was allegedly only permitted to submit a dispute to arbitration if a legal provision expressly allowed it to do so. The arbitral tribunal, however, refused to apply Egyptian law for determining the arbitrability issue, having regard to Article 177 (1) of the Swiss PIL (ICCA Yearbook 1992, 153 ss.). – In ICC Case No. 6379 (1990) the arbitrator disregarded the mandatory Belgian law which claimed to be applicable in respect of the exclusive distributorship agreement between the Italian claimant and the Belgian defendant (who initiated a counter-attack against the Italian company before the Belgian courts) (see ICCA Yearbook 1992, 212).

796 Is there a limit for affirming arbitrability? The author's answer is YES: a limit must be drawn where arbitrability must be denied on grounds of **public policy** in international affairs (this, however, is a very restrictive test because only a few mandatory rules, although being of a public law nature, may also qualify as forming part of international public policy). See hereto Blessing, *Arbitrability of Intellectual Property Disputes*, *Arb.Int.*, 1966, 191–221, in particular 205–207. Beyond arbitrability are e.g. matters where third parties are involved. This is the case in *erga omnes* rulings under Article 85 (3) Treaty of Rome (where exclusive jurisdiction vests with the EU Commission), or where the validity of a patent is to be determined (where the determination will mostly have to be made by the Patent Office).

797 Of course, once an arbitral tribunal has rendered its award, the issue of non-arbitrability according to some mandatory rules of law **might come back on the “scene”**, namely, first in the framework of a challenge against the arbitral award on jurisdiction (arbitrability) and, second at the ultimate stage when a party will possibly want to seek **enforcement** of the arbitral award against the opposing party. The latter may then try to resist enforcement by invoking the arbitrability defence according to Article V (2) (a) and possibly also (b) of the New York Convention of 1958. Obviously, it stands to reason that an arbitrator should not be unaware in respect of concerns regarding enforceability of “his” award. However, it would seem entirely wrong for an arbitrator to give that concern (as valid or rather speculative as it may be, given the uncertainty where enforcement will have to be sought) a weight which it does not deserve, or to give it a weight which would override a legally correct decision on arbitrability.

798 In response to a different opinion voiced at the Hague Conference of 4 July 1997 by Professor Catherine Kessedjian, who said – in connection with the question whether or not an arbitrator should decide to apply a mandatory rule of law – that the prevailing concern of every arbitrator should be to see to it that his product, i.e. the

award, should be **enforceable**, the author had basically reacted in the following way: The hard question really boils down to this: *“should the arbitrator, for concerns of enforceability, render a “wrong” decision which however promises to be easily enforceable, or should he not rather render a “right” decision the enforcement of which might, however, be less certain?”*

It is this author’s view that the arbitrator’s **prime duty** is to render a **correct decision**; the arbitrator’s conviction can not be sacrificed or “bastardized”; the concern of enforcement is a valid one but, in the overall hierarchy, of a “lesser” value. Moreover, in most of the cases the arbitrator does not know and can not know **where** ultimately the award-creditor may or will seek **enforcement** against the award-debtor’s assets. And above all, the author has seen in his practice that most **parties (companies) of standing** make it a matter of pride to honour international awards **voluntarily** even when they have lost an important case. They correctly feel that they owe no less to their own dignity, and to the business community within which they would like to continue to operate. By contrast: business parties who became known that they do not honour arbitral awards risk to be out of business tomorrow, or may otherwise have to pay a heavy price in future (as was the case in respect of certain states and state-controlled companies which ended up to pay very high, additional risk premiums in connection with new contracts and investments).

The author may therefore conclude that the issue of arbitrability:

- should **not be impaired** by taking into account or applying any foreign **mandatory** rules of law,
- should not be impaired by the arbitrator’s concern as to the **enforceability** of his award, but
- should be denied only if indeed the affirmation of arbitrability is to be regarded as a fundamental violation of **public policy** (as applicable in international affairs).

How would this issue be solved in other countries?

(ii) In Other Countries

When determining arbitrability, most civil law countries still retain the notion (as under the “old” Swiss Concordat on Arbitration) that arbitrability will pre-suppose a right or dispute in respect of which the parties have the right to compromise, or to freely dispose of. This notion obviously narrows the scope of objective arbitrability and might have as an effect that mandatory rules pertaining to the *lex causae*, where deemed applicable, might prevent a tribunal from affirming arbitral jurisdiction.

d) Regarding Substance

Under what circumstances, perspectives and **tests** should an arbitral tribunal either (i) take into consideration or (ii) directly apply mandatory rules of law over and above the law chosen by the parties themselves, or the law or rules of law which the tribunal, in the absence of a choice, had determined to be applicable?

803 **First**, an overall guidance for any arbitral tribunal must come from a scrutiny under the notions of **transnational public policy**. The notion of “transnational public policy” was essentially fostered by Professor Pierre Lalive and has since earned world-wide support. See Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, ICCA Congress Series No. 3, 1987, 257–320; Blessing, *The New International Arbitration Law in Switzerland – A Significant Step Towards Liberalism*, 5 J.Int.Arb. 2 1988, 54–64 and cases referred to there; in accord: von Hoffmann, *International Mandatory Rules of Law Before Arbitral Tribunals*, *Acts of State and Arbitration*, 22–24 and further references quoted there. The public policy in the sense of a transnational public policy is **different** and independent from a particular state’s national or international public policy, or from a particular state’s public policy in international matters. Attempts have been made to clearly define this “animal”, but none of them would seem to be convincing. One is somehow tempted to say that this phenomenon is somehow akin to the difficulty to define an elephant: You may say that an elephant is grey and big, and yet, this definition is neither helpful nor informative. But, nevertheless, when you see an elephant, you can immediately recognize it as such.

804 Are the demands, requirements and yardsticks of transnational public policy indeed as easily recognizable, akin to an elephant? From his personal and quite long-standing experience, the author may say: **Yes**. Berndt von Hoffmann has tried to identify some areas of consensus in this respect when he writes:

“There seems to be emerging consensus today that transnational public policy requires to enforce national prohibitions of corruption, smuggling, drug traffic, arms trade and the export of goods belonging to the cultural heritage. Also the enforcement of UN embargoes by arbitral tribunals should be based on transnational public policy. The observance of public international law is part of transnational public policy.”

805 Indeed, von Hoffmann touches on some of the elements, but obviously there are many more. The essential point to realize here is the statement **that transnational public policy is the key-word and yardstick against which to measure the claim of a national legislation to “export” its legislative prerogatives**, and to impose an extra-territorial recognition of the same. Although mandatory rules of law are seen to pursue public interests and perceived in a manner to override the interests of private parties, the international arbitrator is frequently confronted with the difficult tasks of adjudicating a clash between public interests of a state and the legitimate interests of the parties.

806 For this purpose, it seems useful to run through a kind of check-list which reflects **the leading criteria to be taken into account**; these can be identified as follows:

- (i) the rule in question must be a norm of a **mandatory** character;
- (ii) the mandatory rule must be such as to impose itself **irrespective** of the applicable law;
- (iii) the **preconditions** regarding the application (as per the particular mandatory rule) must be given; generally, the scope of mandatory rules must be construed narrowly;

- U.S. sanctions, for instance, show a great variety as to their definitions of blocked assets, the embargo imposed, the exempted businesses and transactions and the jurisdiction over “owned or controlled” U.S. persons; these need to be examined in detail;
 - frequently, the application *ratione personae* is critical: for instance, does a sanction only apply to the national company, or also to all of its subsidiaries around the globe?
 - and also *ratione materiae* the scope of application might trigger highly difficult problems; for instance: *quid*, in respect of the following situation: The main contract between Iraq and the German General Contractor was suspended due to the UN sanctions against Iraq. However, the German general contractor had made several subcontracts with suppliers who claimed performance of the subcontracts and/or damages. Were those also suspended, as an indirect consequence of the UN sanctions? For a parallel situation, see Award No. 1491 of the Milano Chamber, of 20 July 1992, published in ICCA Yearbook 1993, 80–91.
- (iv) there must be a **close connection** between the subject matter of the parties’ contract and the jurisdiction area or State that had promulgated the mandatory rule or norm; as Professor Hans van Houtte correctly stated: “*Extraterritorial jurisdiction to impose economic sanctions has to be justified under the standard of international law*”. van Houtte, Trade Sanctions and Arbitration, Int.Bus. Lawyer, April 1997, 166 ss., at 168. 807
- (v) the rule or norm as such must appear to be “**application-worthy**”, having regard to: 808
- its financial or socio-economic goals and underlying policies, examined under a functional analysis, in particular:
 - the nature of the values that aim to be protected by the norm, under the so-called “**shared-values-test**”: are these values of an essential character? does the norm reflect a notion pertaining to a truly transnational public policy? does it protect a fundamental principle or a universally recognized legal right?
 - the impact which the application of the interested norm will have on the particular contractual relationship;
 - the legal effects of the norm (nullity, or partial nullity; *force majeure* exception), balancing all interests at stake;
- (vi) the **result** must, in view of all circumstances, qualify as an “**appropriate result**”; 809
- (vii) the result must, therefore, **satisfy** the scrutiny under the perspectives, the demands and the supplementing or (sometimes) corrective **notions of a truly transnational public policy**. 810
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- 811 Obviously, the three last elements are the most important and also the most critical ones. In the end, the reflection on the “**application-worthiness**” (“*Anwendungswürdigkeit*”) will **essentially** come down to a careful assessment of the “**merits**” of the norm under a kind of “**rule-of-reason test**”, having regard to the protected interests and values, and having regard to its effects. In other words, the examination will amount to a determination of the **legitimacy** of the particular norm to impose itself on the parties. For instance, a “*strong and legitimate interest*” was denied in the ICC Case No. 6329, decided in 1991, where the arbitrators had to determine whether or not the US RICO Act deserved to be applied; see hereto Lazareff, *Mandatory Extraterritorial Application of National Law*, *Arbitration International*, Vol. 11, 1995, in particular 146–149.
- 812 The international arbitral practice has developed these criteria with **very subtle differentiation**. This author recalls having written, in his capacity as presiding arbitrator sitting on one of the cases mentioned in the beginning of this Chapter, more than 120 pages to discuss the major aspects considered by the Tribunal so as to determine the issue of the applicability and “application-worthiness” of a rule claiming to have a mandatory application.
- 813 In general, mandatory rules that “only” aim at protecting a State’s financial, fiscal or political interests, in most cases, have not been regarded as meeting the “application-worthiness-test”, unless there exist very particular circumstances or connecting factors justifying their application. An example is discussed in the decision of the Swiss Federal Supreme Court in ATF 118 II 348, 353 in re *Banco Nacional de Cuba v. Banco Central de Chile*.
- 814 Academics in Switzerland and Germany will like to use the term “**Sonderanknüpfung**” (a term that does not really translate, meaning a special rule of conflict of laws justifying a special connection to an extraneous legal order); the author would suggest to strike this term from the vocabulary as far as international arbitration is concerned. The term has its justification for the purpose of scholarly writings and State court practices, but the author sees **no need** and no merits to use this term as far as international arbitration is concerned. In fact, the yardsticks for using a “*Sonderanknüpfung*” are not at all the same in State court proceedings and in international arbitration. The latter has developed its own criteria which, in the author’s view, are more subtle and more differentiated than those developed in State court practices.

10. Legal Effects

a) *As to the Substance*

- 815 Two situations should be distinguished:

First: the sanctions pertain to, or form part of, the *lex causae*:

- 816 Contracts concluded in violation of **already existing** mandatory laws are **null and void** according to the *lex causae*; thus, performance will be made impossible – **except in those** cases where the Arbitral Tribunal would have to reach the conclusion, in a specific case, that such mandatory laws could not be recognized (for instance if they clash with an overriding norm or public policy).

Where an **already existing contract** is affected by newly promulgated “super-
vening” mandatory rules, performance will become illegal, and the aggrieved party
might plead a **force majeure situation**, unless, again, those mandatory rules of law
are not, in a special situation, recognized, or deemed “recognizable”, by the Arbitral
Tribunal (typical examples occurred in State contracts, where the State issued a
decree or regulation aiming at interfering into a particular contractual relationship for
the benefit of one of its agencies).

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During the existence of the *force majeure* situation, performance under a contract
will normally remain in suspense. Work or services rendered in good faith up to that
moment will normally have to be paid for, since *force majeure* will, unless specifi-
cally agreed otherwise, have an *ex nunc* effect only. A classic example was the arbi-
tration case *Krupp v. Kopex*, decided by an Arbitral Tribunal sitting Zürich by an
Award rendered on 9 September 1983. Krupp’s deliveries were, in the last moment
before transportation by railway to Poland, affected by General Jaruzelski’s Decree
issued on 21 December 1981, prohibiting all further industrial imports in a value of
many billions of Dollars, essentially because of unavailability of foreign currency.
Nevertheless, the industrial equipment already manufactured by Krupp had to be paid
for. As a consequence, the Polish party was well advised to rather see to it that the
import could nevertheless take place on the basis of a special permit, so that, for the
benefit of the Polish economy, the facility could be erected for the price it anyhow
had to pay to Krupp.

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Once the intervening trade sanction is lifted, the contract will – at least theoret-
ically – come to life again. However, after a certain lapse of time, the parameters of
the resurrecting contract might have to be renegotiated in good faith, since the resum-
ing of the performance might have become substantially more onerous to the
aggrieved party (typically for the party that will have to resume its works). Thus, an
Arbitral Tribunal might have to consider carefully the impact of such sanctions. It
might have to declare a contract terminated or extinct due to its suspension over a
longer period of time, and determine the consequences thereof – a difficult and deli-
cate task! For instance, the UN Security Council, in connection with its *Resolution*
No. 687/1991, had requested the Member States to take precautions that Iraqi parties
were not allowed to claim redress as a consequence of the sanctions imposed against
the Iraqi State. An Arbitral Tribunal might also have to consider whether, after the lift-
ing of the Iraqi sanctions, an Iraqi party could claim resurrection of the suspended
contract, or whether it would not be more appropriate, under the circumstances, to
consider the affected contract terminated, because the resuming of the performance
might amount to an unbearable burden for the supplier, or might even have become
impossible. In respect of Yugoslavia, the UN Security Council’s *Resolution No. 1022*
of 22 November 1995, for instance, excluded any claims by Yugoslavian parties in
respect of contracts that had been affected by the UN embargo.

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Second: where the sanctions pertain to a **third legal order**, or a supranational
order:

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The legal effects are basically the same as above. Foreign sanctions subsequently
introduced might be admitted as factual or legal obstacles for the outstanding perfor-
mance, on grounds of *force majeure*.

b) Mere Authority – or Duty to Apply Mandatory Rules even ex officio?

- 821 We have discussed the tests and yardsticks under which an arbitral tribunal may have to take into account, or directly apply, mandatory rules of law. The question remains whether a tribunal should consider the effects of mandatory rules only if and when pleaded by one of the parties as a defence, or whether it may consider to apply mandatory rules *proprio motu*, even if none of the parties raises the issue.
- 822 A reading of Article 7 of the Rome Convention clearly inspires the understanding that a state court may give effect to mandatory rules *ex officio*. Likewise, Article 19 PIL (applicable for State courts in Switzerland) does not necessarily require a plea by one of the parties. Mächler-Erne, Commentary ad Article 19 PIL, N 29, in: Honsell/Vogt/Schnyder, Internationales Privatrecht, 1996.
- 823 The **most clear affirmation** that a tribunal should be **authorized** – and where the facts of the case so suggest – should indeed be **obliged** to raise issues of the application of mandatory rules *ex officio* is made by many scholars **in the area of competition laws**.

11. Concluding Remarks

- 824 One of the most difficult issues in international arbitration is the **impact of mandatory rules of law** (including trade restrictions, sanctions, embargoes, exchange control regulations, UN Security Council’s decisions, competition law rules) that require to be applied, or at least considered, as *ius cogens* irrespective of the applicable law. On the one hand, the international arbitrator is **not the guardian of the interests of foreign states** which sometimes show a kind of arrogance in seeking to impose their national laws, perceptions and interests on others.
- 825 On the other hand, the international arbitrator is **not** simply the “**obedient servant**” of the parties, and he is not only called upon to pass a decision in respect of the *inter-partes* contractual interests. His responsibility is not solely vis-à-vis the parties (as had too frequently be maintained), but goes beyond: The arbitrator of our times, and certainly of the times to come, **has to apply a broader perspective**, a perspective which is not solely confined by the interests of the parties and will have to **take into account the general notions and requirements of the transnational public policy**. Such transnational public policy may, in individual cases, derogate from the mutual intentions of the parties. For instance, an arbitral tribunal might have to take into account (or even directly apply) the antitrust laws pertaining to a third legal order, as it might have to take into account and honour sanctions of the UN Security Council, or to respect exchange control regulations enacted in conformity with Article VIII Section 2 (b) IMF Agreement – even though the parties themselves had not thought that such norms should interfere with their contractual relationship. Should the role, mission and ethics of the international arbitrator, therefore, be reconsidered?
- 826 Basically, there is wide support for the conclusion that such **norms of a transnational public policy ought to be applied ex officio**, even if not particularly alleged

by one of the parties. On the other hand, it would certainly not be justified to expect from an arbitral tribunal to carry out sua sponte detailed investigations where particular “indicators” are absent. In the same sense, particular exclusion agreements made by the parties aiming at curtailing an arbitrator’s authority to take into account or apply requirements forming part of a transnational public policy cannot be regarded as valid or admissible. The author can only agree with the conclusion reached by Klaus-Peter Berger: “It cannot be argued that parties to an international arbitration may legitimately mandate their arbitrators to ignore legal rules and principles which are part of transnational public policy.” Berger, *Acts of State and Arbitration: Exchange Control Regulations*, 124.

The impact of mandatory rules of law must be seen as **one of the most burning issues** in international commerce and trade, as it is in the daily international arbitration practice. Legal **“positivists”** are horrified when realising that the issue of mandatory rules triggers questions such as those pertaining to a rule of reason analysis, because – as they fear – such analysis might reduce the certainty and predictability of a particular contract. But they are **wrong** as regards their conclusions on the (i) necessity, (ii) desirability, and (iii) the degree of uncertainty. 827

First, the respect of basic notions of a transnational legal order is, today, more **necessary** than ever before. International business, business behaviour and the exercise of rights is no longer solely the affair of operating in isolation of the rest of the world. The continuously expanding globalization demands mutual respect and does require, from the arbitrator, an orientation which is not only grounded in a particular national legal system (no matter how excellent that might be), but which is well-grounded within those notions that form part of a transnational “ordre public” or *lex mercatoria*. Thus, the transnational public policy has become an underlying implied (or, sometimes, supplementary or corrective) legal order which is essential. 828

Second, the **desirability** of such wider orientation can hardly be doubted at the present time. 829

Third, the **degree of uncertainty** is much narrower than sometimes feared even though, at the end of the day, the question whether or not to apply mandatory rules of law will rest on the **essentially subjective appreciation**, i.e. on the arbitral tribunal’s rule of reason test (or its test in respect of the **“application-worthiness”**, as the author used to call it). As a matter of fact, a tribunal’s orientation which takes into account the elements herein discussed and the “yardsticks” of transnational public law must be seen and appreciated as one of the most central “protective devices”, as a kind of guarantee, or insurance policy, or “life-vest”. It does not create uncertainty or unforeseeability of law; on the contrary, it does assure that sound and carefully reflected justice is done. It is, therefore, the writer’s experience, and indeed also his own practice, that arbitral tribunals go to very detailed researches, evaluating numerous aspects from different perspectives, before reaching a conclusion for or against the application or the taking into account of a mandatory rule of law. 830

The discussion in this Chapter has shown that a **number of criteria** have been developed in order to determine the application of mandatory rules and, in particular, their **“application-worthiness”**, having regard to all circumstances. There is no short answer to the present topic, **and thus there is no short conclusion**. This report is but 831

a summary, and the discussion in each individual case is one of the most demanding and challenging tasks for today's arbitrator. **There is no definitive answer, no "recipe for all seasons", no "cook-book" for the solution that holds the key to all situations. Each case has its own "dynamics", is different, and merits its own very careful examination, for which this report can only contribute a few basic reflections.**

X. Interim Relief and Discovery in International Arbitration

1. Interim Relief

The immediate availability of interim relief is often of a crucial concern to parties engaged in international business and trade. The need typically arises at a point in time when the Arbitral Tribunal will not as yet be constituted. Limited jurisdiction according to some Arbitration Acts and limited *imperium* of the Arbitral Tribunal over third parties, coupled with limited means of enforceability, may be conceived as a particular **trouble**. And yet, it would be entirely wrong to conclude that an Arbitral Tribunal is powerless and disabled.

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a) Objectives of Interim Measures

We may distinguish three basic objectives of provisional or interim measures:

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- **ensuring** that the very purpose of the arbitration is not frustrated while awaiting the pronouncement and enforcement of the Arbitral Tribunal's decision on the merits; thus ensuring the **effectiveness** of judicial/arbitral protection; preventing a party from concealing or transferring beyond the reach of the relevant jurisdiction the property which is the subject-matter of the dispute or the assets from which the successful party may find satisfaction;
- **regulating** the **conduct** of and the relations between the parties during the arbitral proceedings; there might be a need, during the arbitral proceedings, for the parties to do or abstain from doing certain acts (e.g. suspend the calling of a performance bond) so as to preserve the *status quo* until a final decision on the dispute has been rendered;
- **conserving evidence** and regulating its administration; for instance, a piece of evidence may otherwise become unavailable, either through an act of one of the parties, or through the passage of time.

Terminology: "Conservatory and provisional measures" is an expression frequently used. The AAA Rules use the term "*interim measures*", and as a sub-category "*measures for the conservation of goods*". Not all provisional measures are of a conservatory nature, for instance those that require a party to perform certain acts, and not all of them aim at simply maintaining the status quo (e.g. the prolongation of a performance bond; the order to continue performance of a construction site, the order to make certain things available to the Tribunal's inspection (LCIA Rules), the order to dispose of property (LCIA), to sell perishable goods (AAA IAR), the order to produce documents, to provide security for costs (LCIA, WIPO, NAI) or even to provide security for the claims (LCIA)). In arbitral practice, little importance is given to semantical distinctions.

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835 There exists abundant literature dealing with interim or provisional measures which cannot be listed here. The ICC has devoted a special volume to the examination of “Conservatory and Provisional Measures in International Arbitration”, ICC Publication No. 519 (1993); one of the more recent contributions on the subject comes from late Semple, *The UNCITRAL Model Law and Provisional Measures in International Commercial Arbitration*, *The Arbitration and Dispute Resolution Law Journal* (ADRLJ December 1994), 269–289. A highly interesting report on the practice of the Iran-US Claims Tribunal in respect of interim measures can be found in van Hof, *Commentary on the UNCITRAL Arbitration Rules – The Application by the Iran-US Claims Tribunal*, 1991, 175–191.

b) Different Categories of Interim Measures

836 We may distinguish:

- 837 (1) **Pre-award attachments** will seek to prevent a debtor from removing assets/monies kept with a third party (bank, security dealer). Thus, typically, attachment orders are addressed to a **third party**, i.e. a party not otherwise involved in the dispute. The Arbitral Tribunal itself will **not have jurisdiction** over such third party; thus, the Tribunal’s order would be an exercise in futility. Attachments, therefore, will only be **available from the State court**. Pre-award attachments are known in most countries, including the USA, most European countries (including Switzerland, Germany, France, the Netherlands, Sweden). In most countries the creditor may acquire a lien on the debtor’s property, and the creditor may be protected by a priority right over the claims on the same property by subsequent creditors.
- 838 (2) A **sequestration** denotes an order whereby the goods or assets in dispute, while remaining within the debtor’s possession, will have to be conserved by the debtor.
- 839 (3) A **preliminary injunction** will seek to protect the property in dispute or protect certain rights of a non-monetary nature. The order is typically addressed to one of the parties to the dispute and thus the Arbitral Tribunal is competent to issue the injunction. The order may command or prohibit the performance of an act.
- 840 (4) An order for **security for the amount in dispute** may be granted where the right over a specific sum of money is in dispute; the Tribunal may order that the amount be paid into a blocked bank account, or be secured otherwise.
- 841 (5) An order for the **preservation, custody or sale of perishable goods** may be granted by the Tribunal.
- 842 (6) Sometimes, the Tribunal might see the necessity to **appoint an independent expert or determinator** so as to ascertain the status of facts or events.
- 843 (7) An order for **security for costs** will require the claimant party to provide a security to reimburse to respondent the costs incurred, should the action not prove successful.

c) *The Scope of Interim Measures*

What is the scope of the measures which may be ordered by the Arbitral Tribunal? 844

The **UNCITRAL Arbitration Rules** provide for a wide authority, and so does the **UNCITRAL Model Law**. It should be noted here that, when drafting the **Model Law**, it was discussed whether the measures which a tribunal should be empowered to take should specifically be limited to “*measures for conserving or maintaining the value of goods forming the subject matter in dispute*”, but ultimately the broader power was approved which provided for any measures of protection, including e.g. an order for using or maintaining machines, or completing work on a construction site so as to prevent irreparable harm, preserving evidence or protecting trade secrets and proprietary information. See hereto Holtzmann/Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, 1989, 530 ss.). The broad wording of the UNCITRAL Model Law is also contained in the **AAA IAR** (Article 21 (1)), the **WIPO Rules** (Article 46 (a)) and the **1998 ICC Rules**.

In general, under the broader perspective of UNCITRAL, WIPO, AAA and the new 1998 ICC Rules, the scope of the measures **may not only be of a conservatory or protective nature** (such as the preservation of means of proof, the maintaining of a present state of affairs and the temporary storage of goods), but may include measures aiming at **creating or modifying** a particular state of affairs (such as e.g. to safeguard the continued execution of a particular performance – compare hereto the provision in the FIDIC Rules regarding the continuation of construction works – to restrain the pursuance of a particular activity – including an injunction in cases of unfair competition or in connection with an asserted violation of intellectual property rights of any kind, or to protect monetary interests by way of e.g. ordering the prolongation of bank guarantees, or the issuance of a performance bond). 845

The **1985 LCIA Rules** seem to be slightly **narrower** as regards to their scope, because they only allow orders for “*the preservation, storage, sale or other disposal of any property or thing under the control of any party*”, and thus the question does arise whether the LCIA Rules would be broad enough to also cover an order of a tribunal to provide a bank guarantee, or to prolong a performance bond, or to continue works on a construction site. 846

The new **1998 LCIA Rules** now reflect a new provision which is synchronized with Section 39 of the **1996 English Arbitration Act**. Article 22 (1)(j) of the 1998 LCIA Rules provides for an authority of the Arbitral Tribunal to grant any relief “*which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties*”. This provision is complemented by the further provisions in Article 22 (i)(g) and (h) according to which a party can be requested to make any property, site, thing or document available, or to preserve store, sell or dispose of any of them. 847

d) *Who Has the Power? – Four Different Systems in National Laws*

Does the Arbitral Tribunal have power to order interim relief? This question has **to be checked, in each individual case, against two regimes: first** against the regime 848

governing at the place of arbitration, i.e. the applicable **Arbitration Act**; and **second**, where the parties had provided for institutional arbitration, the Tribunal's authority will moreover have to be checked against the applicable **institutional arbitration rules** (regarding this second aspect, see Chapter 5 below).

849 In essence, the various national **Arbitration Acts** reflect **four different systems**:

- (1) The Arbitral Tribunal **does have the power** to grant interim relief; its orders will be **binding** on the parties, but the Tribunal will not have the power to directly enforce its order; this is the case in the USA, Switzerland, Belgium and a number of other countries.
- (2) The Arbitral Tribunal has the **power** to grant interim relief, but its orders will **not** have a binding effect; this was the case under the old Swiss Concordat, Article 26, according to which the parties could voluntarily submit to provisional orders proposed by the arbitral tribunal; the Concordat no longer applies to international arbitration; a similar solution is reflected in Article 47 of the **ICSID Rules**.
- (3) The Arbitral Tribunal has the power to order interim relief **only if and when the parties have specifically agreed** to confer such powers onto the Arbitral Tribunal, but in the absence of such a specific agreement, the Arbitral Tribunal will have no power; this is the situation under Section 39 of the **1996 English Arbitration Act**. This Section provides that the parties are **free to agree** that the Arbitral Tribunal shall have the power to order on a provisional basis any relief which it would have power to grant in a final award. Section 39 (2) exemplifies that this may include a provisional order for the payment of money or the disposition of property as between the parties, or an order to make an interim payment on an account of the costs of the arbitration. – This wording suggests an understanding that the 1996 English Arbitration Act provides for a **limited authority only**, limited in two respects: **First**, the authority to grant interim relief must be specifically conferred onto the Arbitral Tribunal (which is expressed in Section 39 (4); this will only rarely occur in practice!). We may note that earlier drafts did not contain this restriction; see the 1996 Report on the Arbitration Bill published in *Arbitration International* 3/1997, 306/307. And **second**, the scope of such interim relief is **restricted** to such relief as could be granted in the framework of a final award. The author is of the opinion that Section 39 deserves quite some **criticism**. For instance, the Working Party for revising the ICC Rules clearly rejected the English concept as being far too restrictive. – Fortunately, the presumption of authority is reversed under the **LCIA Rules** which do provide for the authority for an arbitral tribunal to rule on interim relief.
- (4) The Arbitral Tribunal **does not have any power to order interim relief**, and the jurisdiction for ordering provisional measures is **exclusively reserved** to the State court; this is the case in Austria, Italy, Greece, some Scandinavian Countries.

850 This last solution is the most critical solution. **Two further questions** arise here:

- **first**, is such prohibition of a **mandatory** character, or would it still be possible for the parties to specifically agree that Arbitral Tribunal shall be allowed to rule

on interim relief; if so, where the parties had provided for institutional rules to govern their arbitration, the authority as contained in such institutional rules will then prevail, and

- **second**, whether the prohibition under the *lex arbitri* would only have to be respected where interim measures would have to be **enforced through the courts** of the country where the Arbitral Tribunal has its seat. See in particular Briner, Special Considerations Which May Affect the Procedure, ICCA Congress Series No. 7, 1996, 364:

“Obviously, the national prohibitions of the *lex arbitri* are only applicable if interim measures have to be enforced through the courts of the country where the Arbitral Tribunal has its seat. If the national law at the seat of the arbitration provides that the power to order interim measures lies exclusively with the State judge, no agreement of the parties to the contrary, whether explicit or by reference to arbitration rules, will produce effects for measures which, if they are not voluntarily enforced by the parties, would require the assistance of the local jurisdiction” (with reference to Bernardini, *Les pouvoirs de l’arbitre*, ICC Publication No. 519 (1993), 22–31, specifically at 27).

Thus, for instance where none of the parties is a national of the country at the seat of the arbitral tribunal, and where the measure will not need enforcement in the country of the *forum*, the tribunal might still consider itself authorized to decide on interim measures (despite of the fact that the *lex arbitri* reserves that prerogative to the State courts). 851

e) The Authority Under Institutional Arbitration Rules

The various provisions on interim relief reflected in institutional arbitration rules shall not be recited here; however, this report makes numerous references to the provisions contained in the international arbitration rules of the American Arbitration Association of 1 April 1997 (“**AAA IAR**”) the rules of the London Court of International Arbitration as of 1 January 1995 (“**the 1985 LCIA Rules**”) and the new rules which entered into force as of 1 January 1998 (“**the 1998 LCIA Rules**”), the ICC Rules of Arbitration of 1975 as amended 1 January 1988 (“**the 1975 ICC Rules**”), and the new ICC Rules coming into effect as of 1 January 1998 (“**the 1998 ICC Rules**”), the Arbitration Rules of the World Intellectual Property Organization effective as of 1 October 1994 (“**the WIPO AR**”), the UNCITRAL Arbitration Rules (“**UNCITRAL AR**”), the UNCITRAL Model Law (“**UNCITRAL ML**”) and the Rules of the Netherlands Arbitration Institute (“**the NAI Rules**”). 852

f) Non-Exclusive Arbitral Jurisdiction of the Arbitral Tribunal

Most of the Rules are silent with respect to the question whether the Arbitral Tribunal should have or not have exclusive jurisdiction and (respectively whether the requesting party is at liberty to either submit its request to the Arbitral Tribunal (when constituted) or to any competent judicial authority). An exception is laid down in Article 853

23.1 **Geneva** Rules which clearly provides for an alternative authority; compare also Article 37 (4) **NAI** Rules. The understanding and common consensus in this respect is clear: The requesting party, by and large, is free to either apply to the Arbitral Tribunal, or to apply to a local State court. Both solutions have their own advantages and disadvantages. There is no generally valid answer as to a certain preference to be given to either solution. This entirely depends on the individual circumstances.

854 In this context, most Arbitration Rules clearly express the notion that it is **not incompatible** with the agreement to arbitrate to address a request for interim measures to any judicial authority (and that such a request cannot be deemed to be waiver of the arbitration agreement); see the explicit provisions in Article 26 (3) UNCITRAL Rules; Article 9 UNCITRAL ML; Article 22 (3) AAA IAR and Article 46 (d) WIPO Rules. Article 25 (4) of the 1998 LCIA Rules provides, that, by agreeing to LCIA arbitration, the parties are taken to have agreed to submit requests for interim measures of protection to the Tribunal only (and not to any court of law or other judicial authority). The 1975 **ICC** Rules expect a party to apply to the arbitral tribunal for granting interim relief, whereas an application to the ordinary judicial authority should be made in “*exceptional circumstances*” only (Article 8 (5)). Interim relief under the new 1998 ICC Rules is discussed above in Part III 2(w).

855 Sometimes State courts act **in competition** with Arbitral Tribunals in matters of interim relief. Both may have to decide on their own jurisdiction, including the validity of the arbitration agreement – and the criteria applied may be different. *Quid iuris*, if a party applies to a State court requesting a **permanent** injunction (and not only a provisional or preliminary injunctive relief)? Does such a request constitute a waiver as far as the agreement to arbitrate is concerned?

856 Moreover, State courts are in general more hesitant to look into the merits of a case where the arbitrators have been appointed and have already looked into the matter. In fact, the Arbitrators, once in control of the case, will be **much better placed** to consider the needs and requirements for interim relief, and will be able to fine-tune the same during the course of the proceedings.

g) How to Evaluate Whether and to What Extent Interim Relief Should Be Granted?

857 Although hardly ever spelled out in any arbitration rules, it is widely believed that an applicant must show or satisfy **five elements**:

- *prima facie* **jurisdiction** over the case; see e.g. the IUSCT case *Behring International v. Islamic Republic of Iran Airforce et al.*, discussed in van Hof, Commentary on the UNCITRAL Arbitration Rules; The Application by the Iran US Claims Tribunal, 1991, 179/180;
- an irreparable **harm** or injury to the requesting party;
- an **urgency** of the measure; see hereto Bond, The Nature of Conservatory and Provisional Measures, in ICC Publication No. 519 “Conservatory and Provisional Measures in International Arbitration”, 1993, 18/19;

- a **likelihood** of success on the merits; see e.g. the case *Southern Seas v. Petroleos Mexicanos* (regarding the vessel “Messianiki Floga”) reported in the 11 Yearbook Commercial Arbitration (1986), 209 s.;
- if deemed necessary, an appropriate **security** to be posted by the applicant; the Arbitral Tribunal is likely to consider the potential damage which might be caused to the opposing party and, depending on such appreciation, a Tribunal will frequently require the applicant party to post a security, in most cases a bank guaranty, to cover the financial impact, either to the full extent, or to a certain degree. The granting of the provisional relief would, in such cases, be made conditional upon the applicant furnishing such security.

How should an Arbitral Tribunal, in an individual case, evaluate or determine the kind of use, if at all, it should make regarding its authority to pronounce interim relief? How far should it go when exercising its discretion? Where are the **yardsticks** to guide the Tribunal to find an appropriate balance? 858

The first source of information, obviously, is the relevant contract; where the contract is silent, the Tribunal is likely to make an overall **interpretation** of the contract and, in particular, the spirit it reveals. Such an overall interpretation may, for instance, show that the parties had assumed and accepted, in the underlying contract, very considerable and uncovered commercial risks – and if such were the conclusion, it would hardly be justified to direct far-reaching protective measures. By contrast, if the interpretation of the overall spirit of the contract shows that the parties had painstakingly endeavoured to confine the limits of their risks and had themselves provided for numerous protective tools etc., a Tribunal will probably find it appropriate to issue a protective interim order, if the circumstances have driven the accepted risk-sphere way out of the contractually accepted range. 859

The second source of information will be the governing law or rules of law which might contain provisions for protecting a creditor (for instance in Swiss law see Articles 92/93, 204 (2) and 427 of the Swiss Code of Obligations). 860

The third source will be an overall **appreciation (i)** of the likelihood of irreparable harm which might be suffered by the applicant without the protection of the interim relief required, **(ii)** of the rated chances of success on the merits, appreciated of course on a *prima facie* basis, and **(iii)** of the availability of an appropriate security to compensate the opposing party, should the interim measure turn out to be ill-founded or excessive (such that it will later on have to be reversed by the Tribunal). 861

Of no relevance is the question whether the interim measure asked for by the applicant, or contemplated by the Tribunal, would also be available from the local state court. It is the author’s view that the Arbitral Tribunal has independent authorities which need not be backed up by the (possibly more limited) authorities of a state court judge. However, where an interim measure is not self-executory and might require, for its implementation, the assistance of the local judiciary, then an order providing for a remedy not also available to the local court may prove to be ineffective. For instance, in **Switzerland**, the Tribunal can – if the provisional order is not voluntarily complied with – seek the judicial assistance from the local Swiss court (Article 183 Swiss Private International Law Statute “PIL”), either from the court at 862

the place of arbitration, or from another Swiss court (e.g. from the court at the place of residence of a witness). The Swiss court will, applying its own procedural law, examine the Tribunal's request; it will neither make a *de novo* examination, nor simply affix a rubber-stamp on the Tribunal's order in the sense of an *exequatur*. Rather, the court will adopt a middle-way and, in essence check on a *prima facie* basis, whether certain formal prerequisites had been met and whether, on the merits, the urgency and/or the exposure to irreparable harm or damages is sufficiently explained, and whether the measures ordered by the Arbitral Tribunal are also available under the state court's own domestic procedural law.

h) Ex-parte Orders – A Violation of Due Process?

863 Requests for interim relief are, in most cases, time sensitive. Moreover, the protection sought by the applicant may frequently be frustrated if the opposing party was informed or warned of the measure to be taken by the Arbitral Tribunal. Notice of the Request for Interim Relief might as such lead to the destruction of material evidence, or to the flight of monies, the disposal of assets, or to the disclosure of trade secrets. All of this calls for the **necessity** to allow for a Request being filed to the Arbitral Tribunal *ex parte* only, without notifying that Request to the opposing party, and for the Arbitral Tribunal to urgently consider such application and to rule on an *ex parte* basis.

864 This procedure is, of course, **highly critical** under fundamental requirements of due process, in particular the right of the opposing party to be heard and to be treated with **equality**.

865 In arbitral practice known to the author of this report, *ex parte* injunctions have occasionally been granted by Arbitral Tribunals in those cases where the Tribunal was satisfied that the rights of the applicant party could only be satisfied if the measure be pronounced without prior warning to the other party.

866 Where interim relief is granted *ex parte*, it will of course be necessary for the Tribunal to then grant the opposing party the possibility to **comment** on the order as issued, and Tribunal must then fully consider the case as stated by the opposing party, being prepared to **adjust**, or as the case may be revoke, the provisional order. This, in the author's view, would **restore** the equality of the parties and would satisfy the right to be heard and the notions of due process.

i) Pronouncing Interim Relief in the Form of an Arbitral Award

867 According to many institutional arbitration rules, in particular according to Article 26 (2) **UNCITRAL** AR, Article 46 (c) **WIPO** AR, Article 21 (2) **AAA** IAR, Article 23 (2) **CAMCA** AR and Article 23 (1) 1998 **ICC** Rules, the Tribunal may pronounce provisional measures either in the form of a simple procedural Order, or by delivering a Award.

868 As far as the Swiss Arbitration Act (Chapter 12 PIL) is concerned, there is no explicit provision in this respect. One therefore must conclude that the format in which to "wrap" a decision on interim relief pertains to the authority of the arbitrators. They may, if deemed appropriate, decide to issue an award, and not only a pro-

cedural order or direction. If an award is delivered, it will of course have to be motivated.

j) Binding Nature and Enforcement of Interim Measures by State Courts

Where the Arbitral Tribunal has the authority to rule on interim relief, its order (or award) will be contractually **binding** upon the parties. As we have seen, however, the Arbitral Tribunal will not itself dispose of **coercive** means to enforce the same. However, practice has shown that the parties, in most cases, voluntarily comply with the measure as imposed by the Tribunal, and will think twice before deciding to ignore it.

Thus, the concern regarding the enforceability of interim measures – while recognized as being an important issue – must nevertheless be seen in the overall perspective.

Moreover, there are quite a number of provisional measures which do in fact require enforcement. For instance, the Tribunal may authorize a party to call a performance bond, or to sell perishable goods; such party will then exercise such right itself, without any enforcement proceedings being necessary for the purpose.

If the Tribunal had issued an order for preserving a certain *status*, or for the production of documents, or for making a certain thing available for inspection by the Tribunal, and if the opposing party does not comply with such an order, we again might conclude that **enforcement** of such compliance might **not be the only answer** or concern: Indeed, the Tribunal may as well simply evaluate the situation and consider the behaviour of the party in the framework of its decision on the merits, and the drawing of **adverse inferences** will in most cases be the appropriate answer to the situation.

Apart from the above, the proper enforcement or enforceability of decisions on interim relief is a major topic of discussion, and attempts are being made to interpret the New York Convention of 1958 in a sense that it would indeed cover the enforcement of decisions of a provisional nature only, provided they are issued in the form of an Award.

The difficulty here is that the term “award” is not as such defined within the New York Convention. Therefore, it may depend on the legislation of each country to determine what an award, under the perspectives of the New York Convention, really is. If the test is that the arbitral decision must be **“binding”**, then an award made in respect of interim relief would meet such test (because it is binding on the parties). If, however, the test is that the award must be **“final”** in the strict sense (with *res judicata* effect) then the threshold would not be met (because *per definitionem* a decision on interim relief is not as such final, in contrast to an interim award or a partial award on some of the issues on the merits).

The idea inspiring all those Arbitration Rules which allow the issues of provisional measures in the form of an award is to make such an award enforceable under the terms of the **New York Convention of 1958**. The question, however, remains whether this idea works out, or would rather pertain to some “wishful thinking”. Numerous discussions took place on the subject to achieve the desired enforceability,

and Gerold Herrmann repeatedly suggested to enact a uniform rule to provide for such enforceability, even if the measure is limited in time or revisable under its terms, on the argument that the decision is nevertheless definitive (according to its terms) and binding on the parties.

876 We also recall Professor Sandrock's convincing proposal to add a new sub-paragraph to Article 35 UNCITRAL ML as follows: "An interim measure ordered by virtue of Article 17 shall also be deemed to be an arbitral award in the sense of para. 1 of this Article." His proposal was made against the background that it would seem too illusory (we agree!) to dream of the possibility of amending the New York Convention of 1958. See Sandrock, *Einstweilige Massnahmen internationaler Schiedsgerichte*, *Jahrbuch für die Praxis der Schiedsgerichtsbarkeit*, 1987, 93. The author has made similar proposals at various conferences, for instance at the 1997 New York Arbitration Day; his proposals were supported by V.V. Veeder and Professor Lebedev.

k) The Provisions on Interim Relief in the 1998 ICC Rules and in the 1994 WIPO AR

[Regarding the new Article 23 ICC 1998, see the comments in Part III, 2 (w).]

877 The wording in Article 46 (a) WIPO AR, by and large, corresponds to Article 21 (1) AAA IAR; it grants a wide power for the Arbitral Tribunal to order interim measures of protection. The provision also stands in line with Article 26 (1) UNCITRAL AR and Article 17 UNCITRAL ML and Article 25 1998 LCIA Rules. See also Article 37 NAI Rules, Art. 28 of the International Arbitration Rules of the **Zürich** Chamber of Commerce; compare further with Art. 32 of the Rules of the **Milano** Chamber of National and International Arbitration; Art. 16.6 of the **German-French** Chamber of Commerce and Industry; Art. 3.4 of the **Russian** Maritime Arbitration Commission Rules. No provision is contained in the **ICSID** Rules, the Rules of the Arbitration Institute of the **Stockholm** Chamber of Commerce and the **CIETAC** Rules.

878 We may note, however, some slight differences: The 1985 LCIA Rules, in Article 13 (1), allow such measures "*only after giving the Parties a proper opportunity to state their views*" – a wording which may seem to exclude an *ex parte* order.

879 The other Rules (WIPO, ICC, AAA, ICC 1998, UNCITRAL AR and UNCITRAL ML) do not contain such a qualification. In fact, it is the author's view to say that, in case of urgency, an arbitral tribunal must be able to issue such an order for interim measures on an "*ex parte*" basis. Thereafter, the aggrieved party will have to be given an opportunity to state its comments thereto, for further consideration by the Arbitral Tribunal (which subsequently may reconsider or amend the order issued which, of course, does not have a *res judicata* effect).

880 The Tribunal may make the granting of such a provisional order subject to an appropriate **security**. Under the AAA Rules and the UNCITRAL AR such a security can be asked only "*for the costs of such measures*" – which seems to be a rather narrow qualification. – What are the "costs" of such a measure? – Does this include a coverage for the potential damage which the aggrieved party may suffer as a consequence of the order? – Probably not!

The UNCITRAL ML (Article 17), the WIPO Rules and the ICC 1998 Rules do not contain such a qualification, and this certainly means that the Arbitral Tribunal is free to demand a security not only for the costs of a particular measure but also for the **potential damage** which may result therefrom. This is the better solution. It also conforms to Article 183 (3) of the Swiss Private International Law Act.

The Experts working on the WIPO Rules noted that the ICC had established specific rules (the “ICC Pre-Arbitral Referee Procedure” – in force as of 1 January 1990) for the immediate appointment of a “**referee**”, who should be able to function prior to the setting up the Arbitral Tribunal. The referee is given the power (i) to order any conservatory measures or measures of restoration, (ii) to order any payment which ought to be made, (iii) to order a party to take any step which ought to be taken according to the relevant contract, and (iv) to order any measures to preserve or establish evidence. These Rules, however, have never been used in practice, although they are very carefully drafted. Their Article 6.6 provides that parties undertake to carry out the Referee’s order without delay and waive their right to all means of appeal or recourse or opposition to a request to a state court or other authority to implement the order.

A slight difference between the WIPO Rules and the UNCITRAL ML may be noted here: Article 17 of the UNCITRAL ML makes it clear that the addressee of the Tribunal’s order can only be the other party (or parties) involved in the particular arbitral proceedings, but not any third party. This limitation was deliberately inserted into the Model Law – but even without such an explicit restriction, it is quite unlikely for an Arbitral Tribunal to assume the power to order a third party to take any action (unless permitted to do so by law). One commentator (commenting in Summer 1994 on the then circulating draft of the WIPO AR) suggested that the Tribunal should also be empowered to ask any ordinary state court or judicial authority to issue, take or make any provisional orders or other interim measures it deems necessary. His proposal, though, did not find its way into the WIPO Rules, essentially because it may seem unlikely that a foreign court would accept to exercise such jurisdiction on the basis of a request from the Tribunal. The situation may be different if such a request is addressed to a judicial authority within the country of the place of arbitration, if such a judicial assistance is provided for according to the local Arbitration Act; see hereto the explicit provision to this effect in Article 183 (2) of the Swiss Private International Law Act “PIL”).

The UNCITRAL AR, in Article 26 (2) were the first Rules to provide that an order for interim measures of protection may be issued in the form of an interim **award**. This wording was then taken over by the AAA IAR (Article 21 (2)) as well as by WIPO in Article 46 (c) and most recently in the 1998 ICC Rules. The effect of this provision, however, is less clear than one may expect.

On Security for Claims and Costs: The 1985 LCIA Rules (in Article 15.2), the 1998 LCIA Rules (in Article 25) and the NAI Rules (in Article 38) were the only ones which provided for an explicit authority of the Arbitral Tribunal to order a party to provide a security for legal and other costs of the opposing party. Following the Ken-Ren Saga, most people will be convinced that such a provision may be of importance and might have prevented the spending of considerable time and money. The concept

of the LCIA and the NAI regarding security for costs has now also found its way into the WIPO Rules; see Article 46 (b).

886 However, the question remains: Is it good practice in international arbitration that a party files requests for the posting of security for costs incurred (such as lawyers' fees), or even for the amount of the claim as such – as this may be possible in ordinary court proceedings and under various Codes on Civil Procedure? The prevailing answer, as of today, certainly is a **NO**. Indeed, a notion prevails that it pertains to the general commercial risk of being engaged in business and trade that a party may find itself involved in arbitral proceedings (either as Claimant or as Respondent) and that the up-front costs connected thereto (i.e. the deposit to secure the tribunal's costs and the costs to retain legal counsel, travelling costs etc) will have to be borne/paid by that party, at least for the time being. Yes, in case of success, the winning party may expect to be awarded a compensation for such costs (according to the rule "the costs follow the event"), but nevertheless, until such time, the party will be out of pocket for those costs. At the end, it will run the risk of being unsuccessful to collect the sums (and compensation) awarded to it by the Arbitral Tribunal in the framework of enforcement proceedings. – Despite these risks, it would **not normally** seem to be justified, in international arbitration, to ask for a security for costs. The WIPO Rules do not suggest that this should be seen differently, however, special circumstances may justify a different approach, and in respect of those exceptional circumstances, it was important to include a slightly tempered clause within the WIPO Rules, since Article 6 (b) specifically says: "... if it considers it to be **required by exceptional circumstances** ..." – a restriction which is not contained in the LCIA Rules.

l) The Problem of the Non-Existing Arbitral Tribunal – And the WIPO Answer

887 At the time when the communications between the parties break down and when the injured party will most need the protection of the Arbitral Tribunal, it **will not yet be there** to provide a life-vest. Frequently, a cooperation with state courts will be necessary so as to complement the arbitral functions.

888 This is the *point de départ* for the WIPO fostering its "**WIPO Emergency Relief Rules**", which are based on an initial draft worked out by Plant, followed by new drafts prepared in consultation with the WIPO Expert Group. These Rules are intended to apply only in those cases where the parties had specifically designated their application.

889 The Rules provide for **two types** of procedures, both of which being initiated by a "Request for Relief":

- the first as an **inter partes procedure**, with very short time limit for filing an Answer to the Request within 60 days, followed by a Hearing and resulting in an **Award**, and
- the second as an **ex parte procedure**, resulting only in an **Order** (which will have a contractual effect only).

WIPO has constituted a panel of highly experienced stand-by arbitrators drawn from the existing list of WIPO arbitrators, with sufficient geographical representation. 890

m) Topics for Further Reflection

This Part has raised several questions which require continued reflection: 891

- (1) Interim relief granted ***ex parte*** – a violation of due process?
- (2) **Authority** to decide on interim relief under the particular institutional arbitration rules, but **no authority** under the applicable Arbitration Act. ⇒ *Quid?*
- (3) The project of the “**Emergency Relief Rules**” proposed by WIPO.
- (4) Should an Arbitral Tribunal, which pronounces a provisional measure, be authorized to pronounce at the same time certain **sanctions** in case of non-compliance (for instance the sanction that the non-complying party’s claim would not be heard)?
- (5) What is the experience regarding the pronouncing of interim relief in the **form of an Arbitral Award**; does it enhance enforceability; it had been reported that in one or two cases enforcement in the **United States** had been obtained; it would be of interest to discuss those cases.
- (6) Should the **UNCITRAL** Model Law (Article 35) be **amended** as per Professor Sandrock’s proposal, in the sense that an Arbitral Awards regarding interim relief shall also be deemed to qualify as an Arbitral Award in the ordinary sense? See Chapter 10 above, *in fine*.

2. Discovery of Documents

a) Discovery English Style / American Style?

In general, we need to distinguish between general and specific discovery, and English and American style of discovery. An excellent report comes from Morgan, Discovery in Arbitration, Journal of International Arbitration, 3/1986, 9–25. 892

American discovery embraces the submission by one party to the other of written interrogations and the taking of oral testimony of witnesses of the other party, employees, agents and of third parties. 893

b) Is Discovery Allowed / Available?

The first (and most important) source of information is the **agreement** between the parties: Have they agreed, in their contract, that a party may require the inspection and/or production of documents – or have they so agreed in the framework of the arbitration ? If so, the arbitral tribunal has a contractual basis for ordering the appropriate kind of discovery. 894

In the absence of a contractual basis, and in case the arbitration is under the Rules of an **Institution**:

895 The institutional arbitration rules will have to be checked in the first instance, and in the second instance the provisions of the local **Arbitration Act** at the place of arbitration (but only to the extent that they are mandatory, which is not normally the case as far as the production of documents are concerned; thus, for all intents and purposes, the institutional arbitration rules are setting the scene); with regard to the *US Oil v. XNOC* Case see e.g. Section 34 (2) (d) of the 1996 English Arbitration Act.

896 In the case of an *ad hoc* arbitration: the local Arbitration Act which controls the arbitration should be checked. However, rules pertaining to domestic procedures in state courts are **not** applicable in international arbitration, and indeed (i) should not be applied, and (ii) should not be referred to by the parties or an arbitral tribunal.

c) Do Institutional Arbitration Rules Provide For, or Allow, Discovery?

897 The short answer is NO. In fact, none spell out an explicit authority of the Arbitral tribunal to order “discovery” although there are certain provisions dealing with the authority of an arbitral tribunal to order the production of documents, see e.g.: 1998 LCIA Article 22.1 (e), 1997 AAA IAR Article 19 (3) and 22 (2), 1998 ICC Article 20 (5), 1994 WIPO Article 48 (b) on documents and Article 52 on confidential information, 1976 UNCITRAL AR Articles 24, 25 [reflecting more the civil (than common) law practice], 1985 UNCITRAL ML Article 26 (1) (b) [production of documents to an expert only, thus again heavy imprint of continental practice], 1965 ICSID Convention Article 43 (a), 1983 IBA Rules of Evidence Article 4 (under revision; see below); compare also the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings, Notes 48–54.

d) Arbitral Practice

898 Is there a (unwritten) right to discovery (i.e. to the disclosure and production of all documents relevant to the case), whether favorable to the cause of the party who has them in its possession or control ?

- common lawyers tend to affirm this question, being educated according to the practice in their ordinary courts; indeed, they might not like to lose their “*favourite indoor sport*” (as Andreas F. Lowenfeld called it in *Arbitration International*, 1986, 185)
- civil lawyers are generally horrified and may equate discovery with a “bastardization” of the arbitral process and may feel that discovery has been overdone and has even been abused in ordinary courts in too many US litigations.

899 Thus, there is a disparity of views on the subject matter, and it is certainly recommended that an arbitral tribunal should make this point clear at an early stage of the proceedings (as this is suggested in the UNCITRAL Notes 50/51).

900 In the practice of international arbitral tribunals, orders for general discovery of documents are indeed rare (unless both parties might specifically have agreed thereto); instead, an arbitral tribunal might however be inclined to order the production of documents on a limited scale.

This is so **even though** an arbitral tribunal would most probably, under practically all institutional arbitration rules, have the power to organize the procedure (absent an agreement among the parties) as it itself thinks fit and most appropriate, which authority does – in the author’s view – **include** the inherent authority to order discovery. In accord: Marriott, *Evidence in International Arbitration*, Arbitration International, 1989, 280–290, at 284, and Morgan, *op.cit.*, 19). A very comprehensive overview comes from Gary B. Born, *International Commercial Arbitration in the United States*, 1994, 81–84 and 825–861.

Moreover, most institutional rules contain an explicit provision, which allows the arbitrators to request a party to produce documents, and other evidence deemed relevant; see above. The common procedure and practice rather may be described as follows:

- within the first exchange of (mostly written) pleadings or “Memorials” each party introduces (as exhibits to the Memorials) the documents on which it wishes to rely;
- in a subsequent phase, a party may submit **requests** to the other party for the production of specific additional documents, or categories of documents;
- if a party **refuses** to voluntarily provide those documents, an **application** to the arbitral tribunal for determination may be made;
- the tribunal is likely to **require**, in respect of each document, that a precise description of the document (date, approximate date, nature, addressee etc.) be given, coupled with an explanation as to why the documents would appear to be relevant to the case;
- the tribunal will **adjudicate** the situation in terms of relevance, reasonableness, the respective rights of the parties and the desirability of having the documents for rendering the award;
- if the request is granted by the tribunal ordering disclosure, an application may in most cases be available to the local courts for assistance and enforcement of such order in case of non-compliance.

In general, arbitral tribunals are not enthusiastic about making orders for the production of documents, even though it clearly might dispose of such power under the applicable institutional arbitration rules. Thus, tribunals prefer to indicate to the refusing party that its refusal might be taken into consideration when evaluating the evidence, and that the party refusing a manifestly reasonable request will risk that an adverse finding will be made by the tribunal.

Therefore, there is rarely any compulsory discovery process in the arbitration practice known to this author. Even the Iran-US Claims Tribunal did not, as far as the author could trace, order the production of documents under its application of the UNC AR, although it had been an almost typical situation that US companies left Iran abruptly, often without having been able to take along their records (which, thus, remained under the control of the Iranian party); see hereto Briner, *The Evaluation of Evidence* (*liber amicorum* Bär & Karrer, 1997, 41 ss.); rather, the IUSCT drew

negative inferences from the refusal of one party to submit documents in its possession or under its control; see the cases cited in Aldrich, *The Jurisprudence of the Iran-US claims Tribunal*, 1996, 339 ss.

905 The compulsory exchange of documents is, therefore, not a standard feature in international arbitration, **unless** there was a contractual right agreed upon by the parties to serve as a basis. For this purpose, it will often be necessary to interpret the contract between the parties for determining whether it must be understood to explicitly or implicitly allow, or provide for, a right of the parties to discover documents. Antitrust cases might, however, require special thoughts on this topic.

906 Compare further Hunter, *Modern Trends in the Presentation of Evidence in International Commercial Arbitration*, *The American Review of International Arbitration*, 1992, Vol. 3 and 4, 204 ss., at 206. Even Mustill/Boyd, *Commercial Arbitration*, recommend that an arbitrator should use his power to order discovery “with discrimination”, rather contemplating specific discovery only, confining an order for discovering documents to what is material, or to order appropriate inspection of documents. Hascher, in his *Collection of Procedural Decisions in ICC Arbitration 1993–1996*, provides an excellent summary, commenting on the procedural decision taken in ICC Case No. 5542; see 62–67. See also ICC Case No. 6401 reported by Hascher on 152–160 regarding the production of documents in the hands of third parties.

907 This author does not, on the other hand, share the view as it had been expressed by Friedland in his article published in Mealey’s *International Arbitration Report*, September 1997, 27, where he said that the compulsory exchange of documents is “*a standard feature*” in international commercial arbitration; it is rather the author’s understanding that US state courts also have shown great reluctance to impose intrusive discovery requirements upon arbitrating parties; see hereto furthermore Friedland, *Arbitration Under the AAA’s International Rules*, *Arbitration International*, 1990, 301–319, at 310; but the author cannot claim to have conducted a sufficiently thorough overview of the US practice. As far as the discovery order in the ICSID Case *AGIP v. Congo* is concerned, see Friedland in *Arbitration International* 1986, 347.

3. The IBA Rules of Evidence, of 1 June 1999

908 The **IBA Rules on the Taking of Evidence in International Arbitration** first came out in 1983 and have since been, for some 15 years, under revision under the chairmanship of Avvocato Giovanni Ughi, Rome. They were finally approved at the IBA’s Council Meeting in New York on 1 June 1999. Before that, countless working sessions were held at international *fora*, such as at the occasion of the IBA Congresses and Conferences, in order to reach a universally acceptable *formula*, a masterpiece in mediocrity, as the author is tempted to call it.

909 Yes, the IBA Rules do strike a **very sound balance** between different procedural perceptions and traditions, between common law and civil law approaches. A lot of fine tuning was made since David W. Shenton wrote, with respect to Article 3 (1), that

“there is no obligation on any party to disclose documents other than those on which it desires to rely” (Shenton, An Introduction to the IBA Rules of Evidence, ArbInt 1985, 118-128, at 123), explaining further that there are only provisions against surprises, requiring the parties to exchange lists of documents in advance etc. Today, a look at the now finalised revision of the IBA Rules will certainly lead to the conclusion that these Rules deserve to be considered seriously, as indeed being an excellent **set of “ground rules” for the taking of evidence**. They easily fit into *ad hoc* procedures, as they easily fit into institutional arbitration, such as cases handled under the ICC Rules, the LCIA Rules, or those of the Zürich Chamber of Commerce (see hereto Article 2 IBA Rules). Thus, it is the author’s experience that parties will normally be very comfortable to accept these Rules.

In discussing their applicability, the author (when sitting as the chairman of an arbitral tribunal) normally suggests that the IBA Rules should simply be used as **“yardsticks”**, in the sense of *“considering them and taking them into account as a guidance”*, leaving however the freedom to the arbitral tribunal to determine otherwise, if in the tribunal’s opinion a solution different from the one suggested in the IBA Rules would seem to respond better to the particular needs and requirements of the individual case and the fair and reasonable expectations of the parties. The reason behind this cautious approach is that the revised IBA Rules have not yet stood the test of time. However, the author would also feel very comfortable if the parties required the tribunal to “apply” the Rules (which would not grant the freedom to discard the Rules, or some of them).

Article 3 deals with the production of **documents**, requirements for “Requests to Produce”, objections thereto and, with reference to Article 9.2, the determination by the Arbitral Tribunal. Article 4 discusses the designation of **witnesses**, their designation, written witness statements, appearance before the Tribunal, default and the like. Articles 5 and 6 deal with experts and tribunal-appointed **experts**, Article 7 with **on-site inspections** and Article 8 with evidentiary **hearings**. The important Article 9 states the **criteria** under which the Tribunal should assess, evaluate or exclude evidence.

The IBA Rules are **silent** with regard to **depositions**, a procedure widely used particularly in the USA. Depositions may greatly facilitate the evidentiary process in complex arbitrations, and a chairman of an arbitral tribunal should certainly think of mentioning or proposing this mode as a practical means of organising the gathering of evidence.

While addressing concerns of **confidentiality**, for instance in Articles 3 (7), 3 (12) and 9 (3), the IBA Rules are not very explicit in this respect; compare thereto Article 52 WIPO Arbitration Rules. Parties, therefore, might sometimes wish to consider the proposing or drafting of so-called **Protective Orders**, such orders to be issued by the tribunal for the sake of determining exactly the level(s) of confidentiality of certain categories of documents, access to such documents (by defining the persons which may see of the documents, including e.g. categories of documents marked “for attorneys’ eyes only”), the restricted use of the said documents in the framework of the arbitration and in any ensuing court proceedings.

XI. *Ad hoc* Arbitration and Institutional Arbitration in Switzerland

1. *Ad hoc* Arbitration and UNCITRAL Arbitration Rules

914 There have always been a large number of international arbitrations conducted in Switzerland on an *ad hoc* basis, i.e. without the involvement of an arbitral institution. Their mainly foreign parties express their confidence in the Swiss legal system, as well as their confidence in the support and assistance given by the Swiss national courts at the seat of the arbitral tribunal, should this be required in specific instances. On *ad hoc* arbitration see La live, *Avantages et inconvénients de l'arbitrage ad hoc*, 301 ss.; Aksen, *Ad hoc* versus Institutional Arbitration, ICC Bulletin 1/1991, 8 ss.; Meyer-Hauser, *Ad hoc* Schiedsgerichtsbarkeit und UNCITRAL Verfahrensordnung, in: *Schiedsgerichtsbarkeit*, Europe Institute Zürich, 207–222.

915 There were also numerous *ad hoc* proceedings conducted under the UN-ECE Arbitration Rules of 20 January 1966. Today, the **UNCITRAL Arbitration Rules** are naturally preferred, e.g. combined with a stipulation that the President of the Zürich Chamber of Commerce (or the President of the Swiss Arbitration Association) should be the *appointing authority*.

2. The International Chamber of Commerce (ICC) and Other Foreign Institutions

916 A very significant percentage of all ICC arbitrations are conducted in Switzerland. Equally significant is the number of Swiss arbitrators which each year are confirmed by the ICC. For statistical details see the first issue, in every calendar year, of the “ICC Bulletin”; cf. e.g. ICC Bulletin 1/1997, 1/1998 and 1/1999.

917 Less frequent are those arbitration cases conducted on Swiss territory which are governed by the arbitration rules of other international arbitral institutions (e.g. the LCIA, the Vienna International Arbitral Centre, AAA, WIPO).

3. Arbitration Under the Auspices of Swiss Chambers of Commerce

a) The Zürich Chamber of Commerce (ZCC)

918 International arbitration under the aegis of the **Zürich Chamber of Commerce** is particularly rich in a tradition which goes back to the years before the First World War. Its International Arbitration Rules were revised as of 1 January 1989. One of their characteristic features is the fact that the presiding arbitrator is always appointed by the President of the Chamber of Commerce (from a list of accredited and well-

known presiding arbitrators). The parties may agree that each of them shall appoint one arbitrator (see the Chambers' Model Clause B). Otherwise, the President of the Chamber of Commerce shall submit to the presiding arbitrator, upon his nomination, a so-called "list of four" ("*Viererliste*"), i.e. a list with four names of other candidate co-arbitrators (suggested by the Chamber of Commerce), from which the presiding arbitrator can then choose two to sit as co-arbitrators (Article 12(3) of the ZCC International Arbitration Rules of 1 January 1989). In **multi-party arbitration** there will always be a three-person arbitral tribunal which is constituted by the Chamber of Commerce. See in particular P. Karrer, Multi-party and Complex Arbitration under the Zürich Rules, in: "Aspekte des Wirtschaftsrechts", Festgabe zum Schweizerischen Juristentag 1994. The Zürich Rules contain a few specific provisions regarding the arbitral procedure itself; thus, they provide for a certain amount of structure – well tested through decades of experience in handling international arbitration – which Chapter Twelve does not provide. All in all, the 1989 Zürich Rules have undoubtedly prove to be an impressive success.

The Zürich Chamber of Commerce has separate Conciliation and Arbitration Rules governing **domestic arbitration**, revised in 1985. Reference should also be made to the **Zürich Mini-Trial Rules** of 1984, designed to provide the parties with a structure for modern ADR proceedings according to the well-tried American formula. 919

b) The Basel Chamber of Commerce

The **Basel Chamber of Commerce** Arbitration Rules of April 1981 were revised in May 1995. It is immediately apparent that the Rules have been drawn up most carefully. They draw a distinction between international proceedings (which are governed by Chapter Twelve) and purely domestic proceedings between Swiss parties, to which the Concordat applies. The Rules allow a free choice of the presiding arbitrator and are, in this regard, more flexible than those of the Zürich Chamber of Commerce. In **multi-party arbitration** the arbitral tribunal is either appointed by agreement, with the consent of all the parties, or by the Arbitration Committee (Article 11) – which is an appropriate and flexible solution. The procedural provisions include what is vital, without imposing a restrictive straitjacket on the procedure. 920

Article 29 of the Basel Chamber of Commerce Arbitration Rules quite rightly provides that **set-off pleas** can even be raised before an arbitral tribunal if the claim which is to be offset does not fall under the arbitration clause; the provision corresponds to the solution already provided by the Zürich Chamber of Commerce (see Article 27 of the ZCC International Arbitration Rules). Article 48 of the Basel Rules provides that proceedings must generally be concluded within 12 months from the constitution of the arbitral tribunal and that the arbitral award is to be pronounced within three months thereafter. Provision is also made for an **expedited procedure** (Article 41 of the Basel Rules) or "*fast-track arbitration*". Article 42 deals with optional conciliation proceedings. The only cause for regret is the fact that, in Article 43 (2) of the Basel Rules, the German version uses the word "Recht" (law) instead of the term "Rechtsregeln" (rules of law); however, this will be understood to 921

mean exactly the same as the provision in Article 187 (1) PIL, which also erroneously uses the restrictive term “Recht” instead of *correctly* referring to “Rechtsregeln” (as per the correct term “*règles de droit*” in the French statutory wording or “*rules of law*” in the English wording). For the significance of this distinction between *law* and *rules of law*. – A useful tool comes from Bodmer/Christen/Dür r, *Wegleitung zum Schiedsreglement der Basler Handelskammer*, 1996.

c) The Geneva Chamber of Commerce

- 922 The **Geneva Chamber of Commerce** (Chambre de Commerce et d’Industrie de Genève) published its revised Arbitration Rules in January 1992, which were the first Chamber of Commerce Rules to also make provision for **expedited arbitration** (cf. Tschanz, *The Chamber of Commerce and Industry of Geneva’s Arbitration Rules and their Expedited Procedure*, JIntArb 4/1993, 51 ss.; cf. also the detailed comments by Imhoos, *The 1992 Geneva Chamber of Commerce and Industry Arbitration Rules under Scrutiny* (JIntArb 4/1992, 121 ss.).

d) The Berne Chamber of Commerce

- 923 The **Berne Chamber of Commerce** has also shaped new rules on arbitration, dated 18 April 1990. Under the Bernese Rules, the presiding arbitrator is appointed by the Chamber’s Arbitration Committee, unless the parties agree otherwise. It will then be the responsibility of the parties to each appoint a further arbitrator (unless they have agreed on a single arbitrator; see Article 4). In order to lodge a **counterclaim** or **set-off plea**, a corresponding/similar arbitration agreement is required under Article 9 (see the opposite solution for the German/Swiss Chamber of Commerce).

e) The Ticino Chamber of Commerce

- 924 The **Ticino Chamber of Commerce** Rules of 1982 have been replaced by new Rules which were published in March 1997. The new Rules no longer require that one of the parties be a member of the Chamber of Commerce; they apply to both, domestic and international arbitration. The parties’ choice regarding the appointment of arbitrators (including the chairman) is not restricted. Regarding set-offs, the solution in Article 12 is similar to that in Zürich and in Basel. Articles 22–24 deal with multi-party arbitration and third party interventions. In contrast to Article 26 of the old 1982 Rules, the local Ticino Code of Civil Procedure no longer applies as a subsidiary procedural law. The new carefully crafted Rules certainly mark a considerable progress, and pave the way for Lugano to gain importance as a centre for arbitration. An excellent study comes from Bonzanigo, *Il nuovo Regolamento di arbitrato di Lugano: Presentazione e temi scelti*, 1997, who specifically deals with the important issue regarding set-offs.

f) Harmonisation Efforts and Project

- 925 At the instigation of ASA, discussions started some time ago with the aim of developing **uniform rules** for the various Swiss Chambers of Commerce which are

actively involved in international arbitration. The idea is to establish “*International Arbitration Rules of Swiss Chambers of Commerce*” such that the Chamber at the seat of the arbitral tribunal (e.g. in Basel, Berne, Geneva, Lugano, Zürich etc.) will be administering the case under those uniform rules. This unification was supported by some of the Chambers, but rejected by two others, so that the project has been shelved for the time being. Meanwhile, the Chambers of Commerce in Basel and Lugano have promulgated new Rules (see the preceding paragraphs). In any event, unification would certainly enhance the importance of the various Chambers in the field of international arbitration. Indeed, it is difficult for foreign “users” to understand why each of the Chambers, as above described, operates with different Rules. As an intermediary solution, a proposal is on the table to provide for International Arbitration Rules (entirely based on the UNCITRAL Arbitration Rules) of the Swiss Chamber of Commerce for all those cases where the parties had not made a precise indication of a particular institution or Chamber of Commerce and where, therefore, a sort of “safety net” will be needed to ascertain proper arbitral jurisdiction.

g) The Swiss-American Chamber of Commerce

The **Swiss-American Chamber of Commerce** (Zürich) also introduced its revised Arbitration Rules in November 1990. One particular feature of these rules is the fact that, in Article 15, they maintain a **strong local link** in that a subsidiary reference is made to the law of civil procedure applicable at the seat of the arbitral tribunal (i.e. the Zürich Code of Civil Procedure). This stands in contrast to the view generally taken in international arbitration (variously stressed in this Introduction) that a foreign party should not have to bother with the impact of local procedural law. Thus, the Rules do not seem to be particularly attractive to American business parties. Article 13.2 also expressly requires a **majority decision** by the arbitral tribunal (in contrast to Article 189 (1) PIL, which as we have seen gives the presiding arbitrator the authority to decide alone in the absence of a majority).

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h) The German-Swiss Chamber of Commerce

The revised Arbitration Rules of the **German-Swiss Chamber of Commerce** bear the date of 4 October 1991. The parties each appoint one arbitrator; the presiding arbitrator is then appointed by the Chamber’s Presidential Committee. Article 10 contains an unusual provision according to which the arbitral tribunal can decide whether to appoint a secretary who will have a consulting vote in the tribunal’s deliberations; the consent of the parties for such appointment is not required. Article 16 provides that an arbitral tribunal shall have jurisdiction over a **set-off plea** even if a different arbitration agreement or *forum* clause applies to the set-off claim; this seems to be a better solution than that arrived at by the Berne Chamber of Commerce. Here too, however, it is regrettable that, for making an award, a **majority decision** will be necessary (Article 29; see the remark above regarding the Swiss-American Chamber of Commerce).

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4. The Tribunal Arbitral du Sport (“TAS”), Lausanne

928 The **Court of Arbitration for Sport (“CAS”)** [**Tribunal Arbitral du Sport (“TAS”)**] has been in existence in Lausanne since 1984 and has already dealt with over 100 cases since it was set up. Its current Code of Sports-Related Arbitration is in force since 22 November 1994. The seat of the Sports Tribunal is always in Lausanne, irrespective of the place where the procedure in fact takes place (see below regarding the Olympic division’s mission in Atlanta). Thus, Chapter 12 PIL as the *lex arbitri* applies. Objective arbitrability is governed by the wide scope of Article 177 (1) PIL and will quite unquestionably provide a legal basis for arbitral jurisdiction, simply for the fact that all matters in sports have become matters which are also connected to pecuniary values. A selection of awards is published in the *Recueils TAS*.

929 The Swiss Federal Supreme Court, in its famous “Gundel-Decision” (ATF 119 II 271) recognised that TAS awards are pronounced *by independent arbitrators* and that their decisions can therefore be categorised as arbitral awards (in contrast, the lower Cantonal court instance of Vaud had held in 1988 that the Swiss Football Association’s Sports Tribunal could not be recognized as an arbitral tribunal, for lack of the required independence of its arbitrators). The question of independence was disputed because of the close connection between the International Olympic Committee and the TAS. The IOC has meanwhile set up the **International Council of International Sports Arbitration (“ICAS”)** for overseeing the activities of the TAS; the segregation from the IOC should establish and guarantee the independence of the TAS from the IOC. See Paulsson, Arbitration of International Sports Disputes, ArbInt. 1993, 359 ss.; id, in: Mealey’s International Arbitration Report October 1993, 12, commenting on the decision of the Swiss Federal Supreme Court of 15 March 1993 in the case of *Gundel v. FEI*; see also Schwaar, Nouvelles du Tribunal Arbitral du Sport, Bull. ASA 1989, 369 ss.; M’Baye, Sports et arbitrage, Bull.ASA 1990, 114 ss.; Simon, L’arbitrage des conflits sportifs, Rev.arb. 1995, 185–218; Kaufmann, Arbitration and the Games, Mealey’s International Arbitration Report, February 1997, 20–29. – An interesting insight is offered by Baddeley, Une sentence d’un intérêt particulier, Bull.ASA 1997, 143–153, commenting on the report by Kaufmann-Köhler published in Bull.ASA 1996, 433 ss.; see also the further materials referred to therein. An excellent study as been presented by Netzele, Der Sportler – Subjekt oder Objekt?, ZSR, NF 115, 1996, 1–133. For good reasons, the TAS maintains a roster of arbitrators, although the concept of a closed list has been criticised.

930 Times ago, sport used to be governed by simple rules of fairplay, and there was little necessity for the law to penetrate into this area. Today, sport has become heavily commercialized and can hardly be distinguished from any other commercial activity. An essential function of the TAS is to provide a *forum* for a fair and fast adjudication of disputes, and thus to “install”, and to provide access to, the “rule of law” in an area otherwise governed by an uncontrolled application of (i) the provisions in the articles of sporting clubs and associations and their disciplinary procedures and sanctions and (ii) the sporting rules of the particular sport. Arbitral jurisdiction in these special areas is the more important since ordinary judicial procedures did not (and in fact cannot) hold the key for providing satisfactory and foreseeable solutions.

The TAS, for the first time, delegated an *ad hoc* division, the so-called “Olympic Division”, to Atlanta from 19 July to 4 August 1996, lead by Professor Gabrielle Kaufmann-Kohler (Geneva); its procedures, although conducted in Atlanta, remain procedures of the TAS governed by the PIL. The participating athletes were asked to sign a declaration thereby accepting the finality of the jurisdiction of the TAS for determining any kind of disputes connected to the Olympics. Some athletes had, however, voiced criticism by arguing that the imposition of the TAS’ arbitral jurisdiction was an abuse of monopoly power of the sporting organisations; this argument, however, would not seem to be meritorious as long as the arbitral jurisdiction is exercised fairly and independently. The Olympic *ad hoc* division determined a number of cases in an almost instant procedure, with hearings over night and decisions communicated in the early hours of the morning, with the exception of one particularly difficult doping case where expert opinions had to be obtained. 931

On 16 January 1998, the Swiss Arbitration Organisation (ASA) devoted its main annual conference to sports-related arbitration; the conference also focused on the emerging *lex sportiva*, as an emanation of notions pertaining to the *lex mercatoria*, and on one of the most delicate subjects in the area of sports, i.e. the competition law-issues, particularly those connected to certain contracts and practices of bundling the central marketing of sporting events (mainly football, car racing and boxing championships) through broadcasting, merchandising and sponsoring agreements. The reports have been published in ASA Special Series No. 11 (Nov. 1998). 932

5. The World Intellectual Property Organisation (WIPO) Arbitration Center, Geneva

An important arbitration center opened in Geneva on 1 October 1994: the **World Intellectual Property Organization (WIPO/OMPI) Arbitration and Mediation Center**. WIPO was formed in 1970, based on the Stockholm Convention of 14 July 1967, as a successor organization to the Bureaux for the Protection of Intellectual Property (the latter having been set up in the years 1883 and 1886 in accordance with the Paris and Berne Conventions); it became affiliated to the UNO in 1974. WIPO's objectives are the protection and promotion of intellectual property rights. As of 1999, it has a membership of 171 countries. At the time of its creation, WIPO had set itself the aim of providing an arbitration center in Geneva, operated as a unit of its International Bureau, in order to administer international disputes, in particular (but not exclusively) those with an **intellectual property** component. Although based in Geneva, WIPO accepts cases and serves parties from around the world, and arbitral tribunals may have their seat anywhere in the world. 933

WIPO has promulgated three sets of Rules, the “**Mediation Rules**”, the “**Arbitration Rules**” and the “**Expedited Arbitration Rules**” (WIPO Publication No. 446), which were elaborated by an international team of experts consisting of Francis Gurry (WIPO), Professor Albert Jan van den Berg (Amsterdam), Gerold Herrmann (UNCITRAL, Vienna), Jan Paulsson (Paris) and Marc Blessing (Zürich). For detailed information on the genesis of the WIPO Rules see the reports by the 934

Working Group for the Resolution of Intellectual Property Disputes Between Private Parties, published in: Arbitration Materials 3/1992, 84 ss.; 4/1992, 178 ss.; 2/1993, 156 ss.; World Trade and Arbitration Materials, 5/1994, 179 ss.). The public inauguration of the WIPO Rules took place at the Joint WIPO/ASA Conference in Geneva on 20 January 1995; see WIPO Publ. No. 741(E), with detailed reports submitted by Gurry, Paulsson, van den Berg, Herrmann, Melis, Schwartz, Lutz and Blessing (the latter providing a synopsis in respect of the provisions of the most important international arbitration rules, i.e. ICC, LCIA, AAA, Vienna Centre, UNCITRAL Arbitration Rules, UNCITRAL Model Law, in comparative analysis to the WIPO provisions). In March 1997, the Columbia Law School and the Parker School devoted an international conference, held in New York, to the thorough examination of the WIPO Rules in comparison to the institutional rules. The proceedings of the Conference will be published in the fall of 1999. A working paper submitted to that conference in the form of a chart provided a very useful synopsis comparing the major Arbitration Rules; it has since been published in 1998 by Juris Publishing under the title “A chart Comparing the International Commercial Arbitration Rules”.

935 There is a large amount of international literature available on the thorny issue of **arbitrability** in the field of intellectual property; see e.g. WIPO Publ. No. 728(E) and (F), 1994, with papers on the “Worldwide Forum on the Arbitration of Intellectual Property Disputes” of 3 and 4 March 1994. See also Blessing, Arbitrability of Intellectual Property Disputes, ArbInt. 2/1996, 191-221 and materials cited therein.

936 Efficient **interim relief** is a particularly important matter in IP disputes, and time is a critical factor. Frequently, the time needed to constitute an arbitral tribunal (particularly where the defendant party does not cooperate) may cause irreparable harm. Therefore, WIPO has, since the Summer 1995, been working on the establishment of the **WIPO Emergency Relief Rules** which will be promulgated in 1999. These Rules intend to provide a unique tool for parties in need of immediate interim relief pending the constitution of an arbitral tribunal. The WIPO Center will be able to resort to the assistance of many of the most experienced international arbitrators from around the globe who have agreed to make themselves available on 24 hours’ notice so as to act as **Emergency Arbitrators** and to rule on interim relief within a few days (either by rendering an order, or by rendering an award). In case of particular urgency, interim measures may be available on the basis of an *ex parte* application, whereupon the Emergency Arbitrator may immediately issue his Order; in such event, however, the Order would still give the aggrieved party an opportunity to comment and to explain why the Order should be lifted or modified. However, in normal cases, the other party will be granted an opportunity to be heard by the Emergency Arbitrator prior to his taking any decisions.

937 Since its inauguration, WIPO has placed much emphasis on promoting **ADR** (in particular mediation). It has organized a number of excellent two-day seminars on mediation techniques. Beyond doubt, there is much to be learned in this area, for all of us! A little more about this can be found in the following Part of this Introduction.

938 A new field of disputes, and a particular and urgent need for dispute settling mechanisms, have arisen in the recent years due to the proliferation of **electronic commerce** on the **Internet**. The Center has redesigned its web site which now includes an Internet

based system for administering commercial dispute involving intellectual property. By doing so, the Center aims to increase and facilitate access to its dispute settlement mechanisms, while reducing costs. Apart from lending itself to the resolution of conventional commercial disputes, the WIPO system may be used for **electronic commerce disputes** such as, for example, those regarding the on-line conclusion of licensing agreements or those arising out of the registration of Internet domain names. The system is Internet-based, which means that users can access the procedures through a Web-site, such as the site of the WIPO Center (<http://www.arbiter.wipo.int>) or that of a service or content provider. The system offers a secure way for parties to communicate electronically, and in the near future, through audio and video facilities. The system includes such functions as automatic notifications, a fee payment procedure as well as a database to support the logging and archiving of submissions. Furthermore, the WIPO on-Line Expedited Arbitration Rules were adapted to fit this on-line environment. In addition to this initiative, the WIPO Center has also been actively collaborating with various sectors of commerce to develop tailor-made dispute resolution schemes. For example, the WIPO arbitration and mediation system has been used in the textile design industry, in connection with the on-line licensing of digital works and the registration of Internet domain names. The latter process will be discussed in the next paragraphs.

It will be of greatest interest to monitor WIPO's new E-Commerce Scheme, and to compare it to **ICC's URETS Project, i.e. the ICC "Uniform Rules for Electronic Trade and Settlement (URETS)"** which, in early September 1999, had been submitted to the ICC National Committees in its final draft form. 939

The **WIPO Internet Domain Name Process** was conducted at the request of the United States Government and with the approval of the 171 Member States of WIPO. It involved extensive consultations with the public and private sectors, conducted through a website established for the Process (<http://wipo2.wipo.int>) and through 17 physical meetings held in 15 countries and five continents. The Process culminated in the publication of a Report on 30 April 1999, which was transmitted, as mandated, to the Board of the Internet Corporation for Assigned Names and Numbers (**ICANN**). 940

The WIPO Report made recommendations on:

- (i) improved registration practices to reduce the tension between, on the one hand, the privately administered and globally accessible domain name system (**DNS**) and, on the other hand, the publicly administered and territorially based intellectual property rights system;
- (ii) a uniform dispute-resolution policy for adoption in the generic top-level domains (**gTLDs**), the scope of which would be limited to complaints of the bad faith registration of domain names in abuse of trademark rights;
- (iii) the introduction of a mechanism for granting exclusions in respect of marks that are famous across widespread geographical area, and across various classes of goods and services;
- (iv) the impact on intellectual property of adding new gTLDs.

941 The Governmental Advisory Committee of ICANN, at its meeting in Berlin on 25 May 1999, endorsed the WIPO Report and recommended to the ICANN Board that it put in place the means for making data on domain name registrations available and report on the implementation of the uniform dispute-resolution policy by its next meeting in August 1999. It also advised that the WIPO recommendations on famous marks and the impact of new gTLDs be referred to the ICANN Domain Name Supporting Organization (DNSO) for consideration. The ICANN Board, at its subsequent meeting in Berlin on 27 May 1999, noted that “most of” the WIPO recommendations on registration practices had been adopted in the ICANN Statement of Registrar Accreditation Policy. It referred the WIPO recommendations on a uniform dispute-resolution policy to the DNSO for its recommendations by 31 July 1999, and scheduled subsequent action, on the basis of the DNSO’s recommendations and any other public comment, for its Board meeting in August. The Board referred the WIPO recommendations on famous marks and the impact of new gTLDs to the DNSO to report back after the its August 1999 meeting.

942 Two areas appear critical as of September 1999: the availability of accurate and reliable contact details of domain name registrants (dealt with in the WIPO recommendations on registration practices) and a uniform dispute-resolution policy. These are critical because they represent the minimum means for achieving the respect of intellectual property in the DNS and because ICANN has accredited five testbed registrars and 52 post-testbed registrars to participate in the Shared Registry System for .com, .net and .org. The testbed registrars have also been asked by ICANN to work toward the voluntary adoption of a uniform dispute-resolution policy. However, the multiple options considered in respect of a uniform dispute-resolution policy (see the WIPO Report on the WIPO Internet Domain Name Process of 30 April 1999, WIPO Publication No. 439 E), the DNSO’s deliberations and the encouragement of testbed registrars to adopt voluntarily a policy suggest the fear that the opportunity to achieve a workable, uniform dispute-resolution policy for the prevention of abusive registrations may become endangered.

XII. ADR (Alternative Dispute Resolution)

1. ADR: Is it an Entry Ticket to Paradise – or into a Better Mousetrap?

This chapter is for those who have learned that the (quite odd) dictum “time is money” is wrong: Time is much more than money. Time is life!

ADR (Alternative Dispute Resolution) is a commonly used term, imported from the United States, for settling disputes by mutual agreement. ADR in its wider sense includes both arbitration (as an alternative to ordinary court proceedings) as well as mediation or conciliation of disputes (in all its variations). ADR in its narrower sense (as the term is used here) however only covers meditation or conciliation proceedings and its variations. These ADR proceedings are not, of course, governed by Chapter Twelve PIL. Nevertheless, they must be briefly outlined here, because every practitioner and arbitrator needs to be familiar with the characteristics and advantages offered by ADR procedures. 943

Unlike ordinary court proceedings and arbitration, ADR is **not a judicial process**, is not conducted with *imperium* and does not culminate in a final and enforceable decision, but, where the process is successful, will yield to a contractual settlement agreement between the parties, or at least a recommendation for settlement or a report submitted by the “Mediator”, for further considerations by the parties. According to one English definition: “ADR is any method of resolving an issue susceptible to normal legal process by agreement rather than by imposed binding decision.” 944

ADR is **popular** not only in the USA, but also in Australia (particularly as a result of the Courts (Mediation and Arbitration) Act), and in the Asiatic Far East (in China as well as in Japan, Korea and other countries), where there is a deeply rooted aversion to formal procedures. In Europe, ADR was a slow-starter but is now beginning to gain importance, and it seems that the aversion to this American “import” is being overcome. Such aversion or scepticism had still been noted by the ICC Working Group (chaired by Jean-Claude Goldsmith) in its final report; cf. Goldsmith, ICC Working Group Report on ADR, *The American Review of International Arbitration* 1993, 413–474. 945

The late Gillis Wetter once remarked: “ADR is the stuff dreams are made of, nothing else”. And indeed, until very recently, mediation procedures **had very rarely been used** in Europe (in marked contrast to the USA, as well as in contrast to Japan, for example, where almost 99% of disputes are resolved by way of mediation and not by way of arbitration). Those voicing scepticism about ADR procedures will typically remark that, “of course” (as they will say), the commencement of any arbitral proceedings will be preceded by negotiations on both sides and that, if those failed, any other attempt to merely resolve the dispute by means of mediation would be a useless exercise and a complete waste of time. – But most of these voices, as the author may 946

remark here, may have learnt very little about the true and most essential centerpiece of any mediation process: the “art of communication” and the “art of negotiation”.

947 ADR prompts reactions covering anything from **scepticism to enthusiasm**. Nevertheless, any person seeking to resolve a dispute in the most efficient and businessman-like manner should become well-acquainted with mediation (in its wider sense) and the various variants of ADR methods. This part of the Introduction can highlight just a few main lines of thought; it cannot claim to provide a detailed analysis.

948 Conciliation/mediation undoubtedly constitutes the very oldest form of resolving disputes, whether in the form of direct negotiation between the parties themselves (mostly termed “**conciliation**”) or with the intervention of one or more third parties as mediators (then mostly termed “**mediation**”, although all kinds of terms are used and it would be a waste of time to attempt any definitions). The revival of ADR during the past two decades certainly has several reasons, one being the crisis in the overburdened legal process before the state judiciary (mainly in the USA); Professor Lawrence Tribe (Harvard) described that phenomenon as follows:

“Too much law, too little justice; too many rules, too few results.”

949 Another reason probably is the increasing **proceduralisation of arbitration proceedings**. – Are we just reinventing some ancient customs? Or is ADR more than that? Is it new? – The author’s answer is: ADR, properly understood, is indeed new and requires a **very extensive and demanding new learning process**, which may not be completed up to the very end of one’s professional life!

2. Grounds for Using ADR Methods and Their Advantages

950 The *crux* of the matter, with regard to direct negotiation and settlement endeavours between the parties, will generally be the fact that the structure of those negotiations is too vague, that they are conducted by unsuitable people (because they are already “used”, “prejudiced” or “worn out”) and that during the settlement discussions, **rigid positions are built up, rather than creative solutions sought**.

951 The strong upturn in many different kinds of ADR procedures in the USA (Mediation, Conciliation, Med-Arb, Arb-Med, rent-a-court/judge, multi-door court, drive-through filing, night/week-end court, court-annexed conciliation/mediation, court-annexed arbitration, non-binding fact-finder (expert), binding fact-finder (expert), private jury, mini-trial, MEDALOA) and in some other parts of the world does at least provide sufficient reason to question **why** alternative dispute resolution is so successful in the USA, when it would appear, in Europe, to have fallen on rather stony ground. In any event, we need to learn from the (particularly American) **positive experience**, and we need to learn how to constructively apply ADR in Europe as well. Numerous ADR conferences have recently led to a **reorientation of ideas** with regard to the sceptical approach in Europe, and have shown that even arbitration is not the ideal world, because – despite the enthusiasm of many professionals, including that of the author – arbitration may not always provide the most suitable means of resolving disputes. – *But why not?*

ADR is **more flexible, more pragmatic**, more business-oriented. These are not just catchphrases, but real advantages justifying the use of ADR methods, particularly in all those situations in which there is a **long-term business relationship** at stake between the parties concerned. A typical example of this would be construction contracts (e.g. in relation to infrastructure projects), joint venture agreements, long-term supply contracts etc. In all these situations, it is of primary importance that a good understanding be maintained. An even in one-off business, the medieval saying popular amongst the Zürich traders in the 15th century, namely: **“Business people always meet twice in their life-times”**, might reflect a truism. The author would even dare to suggest that this *dictum* might have a lot to do with ADR!

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3. The Most Important Institutional Rules

There is no shortage of ADR Rules on the market which will provide a certain amount of structure to the process, e.g.

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- the Conciliation Rules of the **Zürich Chamber of Commerce** of 1985 and, in particular, its frequently quoted Mini-Trial Rules of 5 October 1984,
- the Conciliation Rules of the **ICC** of 1 January 1988, cf. in particular Schwartz, International Conciliation and the ICC, ICC Bulletin 2/1994, 7 ss.,
- the Commercial Mediation Rules of the American Arbitration Association (**AAA**) of 1 January 1992 (with separate Rules for various individual sectors of the industry, e.g. the AAA Construction Industry Mediation Rules of 1 January 1992),
- the **UNCITRAL** Conciliation Rules of 1980, cf. the Commentary by Herrmann in ICCA Yearbook 1981, 170–190,
- the Rules of the London Court of International Arbitration (**LCIA**), which until 1999 applied the UNCITRAL Conciliation Rules; however, in 1999, the new LCIA Mediation Procedure was launched,
- the **CPR Rules** (CPR Institute for Dispute Resolution, formerly called: Center for Public Resources, New York, which provides a large amount of documentation and specimen documents available and with which many of the “Fortune 500 Companies” are associated by way of a declaration of intent in the sense of a corporate policy statement (“pledge”),
- the Rules of the **Chartered Institute of Arbitrators** (CIA, London),
- the Rules of the Centre for Dispute Resolution (**CEDR**) in London,
- the Rules of the British Academy of Experts,
- the Rules of the Society of Construction Arbitrators, London
- the Rules of the International Center for Settlement of Investment Disputes (**ICSID**, Washington),

- the Rules of the **Hong Kong** International Arbitration Centre,
- the Rules of the Korean Commercial Arbitration Board,
- the Rules of the Japan Commercial Arbitration Centre,
- the Rules of the Australian Dispute Center and of the Australian Commercial Dispute Centre,
- the Rules of the Kuala Lumpur Regional Centre for International Arbitration,
- the Rules of the B. C. International Commercial Arbitration Centre in Vancouver,
- the Mediation Rules of the **World Intellectual Property Organisation (WIPO/OMPI)** dated 1 October 1994; WIPO also holds very well attended one- or two-day seminars on Mediation,
- the Minitrial Rules of the Netherlands Arbitration Institute of 1 September 1995.

954 Three important organisations (from the above list) outside Switzerland have specialised in ADR Procedures, in particular: **AAA**, **CPR** and **CEDR**. All three institutions organise countless conferences, *workshops* and training programmes and have extensive materials available on various methods and aspects (cf. e.g. the “Guide for Drafters of Business Agreements” by CPR). For further materials on ADR, see Blessing, *The Mediation Rules of WIPO and Others – A Ticket to Paradise, or Into a Better Mousetrap?*, in: WIPO Publ. No. 741(E), 1995. See also Blessing, *Streitbeilegung durch ADR und pro-aktive Verhandlungsführung*, ASA Bull 1996, 123–189. See further Spitznagel, *Alternative Dispute Resolution (ADR), Aktuelle Probleme des europäischen und internationalen Wirtschaftsrechts* (1998), 365 ss. American materials provide valuable reading, most of all AAA’s compendium “ADR & the Law” (1997). An impressingly voluminous binder (with current updates) has been constituted by R. M. Smith, *ADR for Financial Institutions*, 1998, published by the West Group. An excellent tool is the “Mediator’s Deskbook” by Kathleen M. Scanlon (published 1999 by CPR).

4. Requirements for the Mediator

955 What, therefore, are the **requirements of a mediator**? The most essential element undoubtedly is the **personality** of the mediator. First of all, he must be guided by the principles of **objectivity, fairness and justice**. Further, the success or failure of the mediation proceedings will largely depend on his ability to communicate well with the parties. Instead of drawing up our own profile of what is required of a mediator, the following profile is cited from Martindale-Hubbell, *Dispute Resolution Directory* 1995, 3–23 s.: a successful mediator “*possesses a range of innate and acquired skills, including the ability to analyze complex legal issues quickly, good judgment, excellent communication and negotiation skills, poise, stamina, a good understanding of human nature and practical psychology, patience and tolerance, good listening skills, a sense of fairness, a calm demeanour, an ability to sidestep and defuse confronta-*

tions, a manageable ego, absolute impartiality ...” This is just how the list of required “virtues” starts, and the question which would seem legitimate to ask is who would really feel comfortable to fit such a bill! – Be that as it may the author would simply add that similar characteristics are also required of the lawyers advising parties in the framework of a mediation process!

5. Some Particular Characteristics of ADR Procedures

a) Confidentiality Agreement

One of the special features of any kind of mediation procedure is the parties’ strict requirement of (and need for) **confidentiality**. Basically, any party participating in a mediation procedure will be extremely anxious to ascertain that the statements and concessions it may make in view of an amicable solution will not thereafter be used against it, for instance in any subsequent litigation or arbitration, should the mediation proceedings fail to bring about a resolution of the dispute. It is therefore advisable and indeed customary for parties to conclude a carefully drawn up **Confidentiality Agreement** at the beginning of the mediation proceedings. Cf. Blessing, The Mediation Rules of WIPO and Others, WIPO Publication No. 741(E), 122; for a simple specimen form cf. Martindale-Hubbell, Dispute Resolution Directory 1995, 6–153, and the CPR Model Agreement also set out there (clause 9), 6–175. See also the provisions in the WIPO Mediation Rules, Articles 14–17, or the much shorter provisions of Article 14 of the UNCITRAL Conciliation Rules, Articles 6, 10 and 11 of the ICC Conciliation Rules, or Article 12 of the AAA Commercial Mediation Rules.

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b) Waiver Regarding the Statute of Limitations

Another significant feature is that parties will normally wish to agree that any running **statute of limitations** be suspended for the duration of the mediation proceedings (to the tune that the limitation period has not already expired before the proceedings commence). Such an agreement will be particularly necessary where the chosen mediation rules do not already contain a provision to that effect. For instance, Article 27 of the WIPO Mediation Rules already infers that the parties, using the Rules, will be taken to have agreed that the running of a statute of limitations shall be suspended, to the extent permitted by the applicable law. See also Article 16 of the UNCITRAL Conciliation Rules. However, the law governing a particular contract or claim might, in a critical situation, force a party to initiate arbitration proceedings (or ordinary litigation) so as to effectively interrupt a statute of limitations. In such a case, the party may most probably obtain a suspension for as long as the mediation procedure will be conducted.

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c) So-called Caucus Sessions

One characteristic feature of ADR procedure is the so-called **caucus session**, i.e. a private meeting between the mediator and one of the parties only, during which the

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mediator is given confidential information by the party which cannot, as such, be disclosed to the other side without its express consent. However, such confidential information will normally be of importance for the mediator, allowing him to better shape his perception and the solution he may wish to propose to the parties. See also Articles 11 and 12(c) of the WIPO Mediation Rules, Article 10 (2) of the AAA Commercial Mediation Rules, the CPR Rules; less explicitly, Article 10 of the UNCITRAL Conciliation Rules.

d) Quid when the Mediation Procedure Does Not Succeed?

959 In this regard, the WIPO Mediation Rules, in Article 13 (b), contain an interesting and rather unique provision which is noteworthy. The provision says that the mediator, if he believes that any issue in dispute cannot be resolved through mediation, will not simply close the file thereon and terminate his unsuccessful mission but will, instead, try to then act as a “**disputologist**” (a term borrowed from Sir Michael Kerr) in the sense that he will then discuss with the parties various possibilities which might be conceived to resolve the particular issue.

960 In fact, it is not at all a necessary or inevitable consequence of a failed mediation that parties will thereafter have to embark on complicated, full-fledged “*lege artis*” arbitration proceedings. Instead, there exists a variety of other options which may provide a quicker result on a more focused basis. Thus, a failing mediation may nevertheless bring about a partial agreement on various points at issue, and may help the parties to precisely identify the one or two key-issues yet to be resolved, possibly through an expert determination regarding a particular status of facts (or in respect of the valuation of a particular asset), or through a Med-Arb procedure, MEDALOA (see hereto below), or through an ordinary arbitration. Such an ensuing procedure (initiated after a failing mediation) will have the advantage and indeed chance of being clearly focused, and of concentrating on the essence, and may be concluded within very short periods of time.

6. The Main Characteristics of ADR Compared to Arbitration

961 An ADR procedure (as against court or arbitration proceedings) can only be successful if its advantages and characteristic features are both recognised and utilised. A comparison of its **characteristics** (confined to a short list only) results in the following:

Court/Arbitration Proceedings:	ADR / Mediation:
• Contentious/adversarial procedure • likely to disrupt the business relationship • gets into the machinery of the legal department which controls the process • extensive evidentiary materials will be produced, burdening the process • tends to build up fixed and mostly extreme positions which are inflexible (and mostly wrong at the same time!) • formal procedure • joint sessions only, no caucusing • binding mechanism • adjudicatory function • decides • the rule of law governs; fact-finding and legal merits decide over success or failure • determines issues that have arisen in the past; solves the past, but no or little perspective towards the future • the arbitrator can hardly be “creative” • geared to the paradigm win/lose (i.e. “I win, you lose”) • the process is rights-driven and problem-oriented • takes a lot of time; one year would be overly optimistic; 2-3 years the average, and many procedures take 4 years and more • expensive • enforceability of the arbitral award: yes, via the New York Convention	• Cooperative procedure and spirit • not (or less) disruptive • remains within the hands and the active control and responsibility of the management • only the key- and best materials should be filed • wants a pragmatic, principled and flexible negotiation • non-legalistic procedure, although carefully structured • joint sessions and separate caucus sessions • non-binding mechanism • advisory function • solves or recommends • although both play a role, the main emphasis will be on the commercial perspectives which prevail • looks not only backwards, but also (and essentially) looks to the future, and to common perspectives and goals • the mediator can assist the parties to “enlarge the cake”, thus to develop a creative and mutually advantageous solution • the “win/win” paradigm prevails • the process is interest-driven and result-oriented • speedy; the “mediation-window” will normally be open for 3 months, sometimes slightly longer • very cost-effective • no enforceability of the mediator’s recommendation; a settlement agreement will be contractually binding and enforceable according to its terms

We will now briefly look at some of the methods used for ADR.

7. Essentially Preventive Methods

a) Partnering

- 962 A partnering scheme will normally provide for periodical meetings held during the implementation phase of the contract, with the view towards maintaining an ongoing dialogue. The concept is inspired by the notion that it will be more conducive to voice and discuss problems and causes for dissatisfaction, rather than to allow them to disturb the relationship. In most cases senior management involvement will be expected, and the meetings are frequently chaired by a neutral person or facilitator.

b) Claims Appeals Committee

- 963 This scheme is frequently used in oil and gas contracts. The committee is typically composed of a senior executive of each party who is not otherwise involved in the matter and thus will be able to have a somehow distant look on the issues. A second function of the Claims Appeals Committee may consist of the task to review conflicts which could not be solved on a lower level, for instance on the level of a partnering scheme. Usually, the procedure is slightly more formal and more structured, with written executive briefs being exchanged on the issues.

c) Disputes Review Board (DRB)

- 964 As the name implies, the **Disputes Review Board (DRB)** is a forum which decides claims or differences of opinion (the terminology used is not uniform; the expressions “**Claims Review Board**”, “**Contract Disputes Advisory Board**” (CDAB) and the like are also used). Ever since the very positive experience with the first DRB in the so-called Eisenhower Tunnel Construction Project in Colorado (1975–1981), the DRB concept has been advanced worldwide (particularly by the American Society of Civil Engineers). It is now an established tool of the trade amongst legal advisors (lawyers and legal consultants). DRBs are common in **construction contracts**, e.g. in contracts for the construction of pipelines, oil drilling platforms, dams, tunnels (such as the Channel Tunnel and the Boston Central Artery), power stations, airports (such as the recently opened new airport in Hongkong). The idea is to ensure that construction work continues in progress, with differences of opinion which arise during the building project immediately becoming the subject of proper competent consideration (without having to wait years), so that a quick solution can be reached.

- 965 A DRB is therefore generally **appointed when construction works commence**. It will meet regularly (or as required) until the construction works are completed. Sessions are generally held on site. DRB members are kept informed of the construction progress by way of progress reports. The DRB’s function is to resolve or regulate emerging differences of opinion and problems in a structured manner whilst still continuing to act in an informal, communicative and pragmatic way. Each of the parties (client/employer and general contractor) will normally each select an independent engineer or expert renowned in their particular field to be DRB members,

along with a chairperson (who will in most cases be a lawyer). They must commit themselves to the project for its whole duration.

The **DRB clauses** must be carefully drafted in order to define whether the DRB panel can simply make recommendations, which are not binding on the parties, whether it is authorised to pronounce binding decisions until such time as the construction work is completed (being then subject to re-examination by an arbitral tribunal), or whether certain DRB areas can be assessed in a binding and definitive manner (in the form of an expert determination), with the parties (and also any later arbitral tribunal) being bound by that assessment. The latter structure is rather infrequent and requires particularly careful wording; it can be imposed, however, for the purposes of establishing facts which it will later be either impossible or difficult to check. A simple specimen **DRB Agreement** can be found in Martindale-Hubbell, Dispute Resolution Directory 1995, 6–129/130. Cf. also Myers, Alternative Dispute Resolution in the US Construction Industry, IntBusLawyer 1995, 164 ss. and statements contained there on the DRB in the Boston Central Artery/Third Harbour Tunnel construction project.

Provision will generally be made in the DRB agreement for proceedings to be held at an expedited pace. For instance, in a major Canadian project, the applicant party was required to file, eight weeks before the hearing, a documented and substantiated submission, whereas the responding party was to file its answer four weeks before the hearing. Where applicable, two weeks before the hearing, any submissions or reports by the consultant had to be filed. At the hearing, oral submissions were restricted to a maximum of 2½ hours, not more than two experts per party were allowed, for examination and cross-examination, followed by closing statements. Thereafter a decision by the DRB panel was to be made within two weeks, in the form of a written determination or recommendation. The decision could then be checked by the applicant party, which had to submit a settlement offer. If that offer was rejected by the other party, the normal procedural channels were still available, by initiating arbitral proceedings (however with the proviso that further work on the project was not to be delayed or suspended, in the sense of a waiver to invoke an *exceptio non adimpleti contractus*). A similar procedure is described in the article by Meyers cited above.

DRBs have by now become the norm in **major projects**, and every lawyer or counsel advising in the field of building or construction projects should have familiarity with this “animal”. Their popularity stems from the success enjoyed by this manner of resolving disputes “right at the start” (and not much later and after the fact in the course of arbitration proceedings when – as frequently is the case – the relevant facts can no longer be ascertained). For instance, in the framework of the Hongkong airport, some one hundred DRB procedures took place, and in all those cases an “on the spot” resolution could be reached; according to Neil Kaplan, only one dispute had to step up to the level of a subsequent arbitration.

DRBs have **no arbitral authority** in the legal sense; they do not therefore come under Chapter Twelve of the Swiss Private International Law Act, although they do today constitute one of the most important means of resolving disputes.

The use of the institution of **Escrow Bid Documents** is also a technique designed to avoid a subsequent dispute: Both parties (particularly the general contractor) will

entrust their important/confidential internal documentation and calculations on the project to the DRB panel (or to a third party) as escrow agent. The DRB (or, as the case may be, the arbitral tribunal) can then avail itself of that documentation for ascertaining the parameters on which, internally, the bid for the project had been calculated. The bid documents held in escrow may for instance, in a dispute regarding extra work, serve to better understand whether a particular job of a turn-key project had been considered within or outside the scope of the works, and may moreover be useful to quantify the tasks in monetary terms.

8. Essentially Resolutive Methods

a) *Early Neutral Evaluation / Fact Finding*

- 971 The parties will jointly appoint a highly recognized expert, consultant, engineer or lawyer to evaluate crucial issues of fact or law. His/her report and conclusion will, however, not be binding on the parties, as opposed to the expert determination described below.

b) *Expert Determination*

- 972 The expression “**expert determination**” (“*Schiedsgutachten*”/“*Expertise-Arbitrage*” in Switzerland, “*Schiedsgutachten*” in Germany, “*bindend advies*” in Holland, “*expert determination*” in England) means the binding determination of a legally material fact by one (or more) examiner(s) or valuer(s) or expert(s). The expert’s duty is to arrive at a **binding** determination (binding for the parties), and this mandate distinguishes him (and the expert determination as such) from the task of a mere expert or surveyor (and from a surveyor’s report) which is not mandated to make a binding determination. In Holland, for instance, the procedure of the “*bindend advies*” is frequently used in consumer disputes; the procedure is not governed by the Dutch Arbitration Act, and the decision is not an award in the technical sense.

- 973 In Switzerland, likewise, expert determination falls outside the scope of arbitration and is thus not governed by Chapter Twelve of the PIL. It must be assessed from a purely contract law point of view. For a recent discussion see the case reported in Bull. ASA 1996, 695–701. – Expert determination should not be confused with **the role of an expert appointed in the framework of arbitral proceedings**, or with the questions which arise in connection with the appointment and function of experts (whether appointed by one of the parties or by the arbitral tribunal).

- 974 The expert determinator (arbitral expert, also often inaccurately or misleadingly referred to as “arbitrator”) fulfils a **quasi-arbitral function**, whereas an arbitrator (properly so-called) or arbitral tribunal decides the dispute as a whole. The emphasis is not so much on possible incorrect terminology, but rather on the actual intentions of the parties, as derived from the contract between the parties and/or its interpretation. Reference is made, with regard to examples of definitions in practice, to Rüede/Hadenfeldt, Schweizerisches Schiedsgerichtsrecht, §5 III and Jolidon, Commen-

taire du Concordat suisse sur l'arbitrage, 63 ss., and literature and decisions cited and referred to there.

The **subject matter of an expert determination** can be questions of fact, preliminary legal issues or even individual questions of law. An expert determination also includes so-called “quality arbitration” in merchandising. Provisions on expert determination are found not only in contracts for property deals or in the **construction industry** but also, for example, in M&A transactions (for valuing certain assets, shares, including intellectual property rights), or in insurance conditions (for the purposes of establishing the quantum). The large international auditing firms frequently act in such function. Sometimes, expert determination (rather than arbitration) is used for adapting a contract to changed circumstances, for instance for re-adjusting the contract price to bring it in line with relevant markets.

Since a clear distinction has to be drawn between the function of an expert determinator and that of an arbitrator, it is advisable to clearly and carefully define the intended function. The following may have to be spelled out in respect of the determinator’s mission:

- the facts to be investigated, together with as precise a description as possible;
- any special qualifications which might be required of the expert determinator;
- a clear statement that he/she is to act as expert determinator (and not as arbitrator or mere expert);
- whether the expert determinator is to be appointed by mutual consent of the parties (with the assistance of an appointing authority in the event of disagreement or default);
- the way in which the expert determinator is to proceed; this includes procedural issues such as e.g.:
 - whether the parties are to be heard at a hearing or individually;
 - whether written preparatory submissions are to be filed (and how many);
 - whether the expert determinator should have authority to make further enquiries of the parties; for example, inspecting books and business documents;
 - whether the latter should or could take place in the presence or absence of the other party;
 - whether he/she can require the parties to lodge other documentation, including documents which the parties have not submitted of their own volition;
 - whether he/she can consult third parties;
- the time limit for concluding the expert determination;
- rules with regard to fees and sums to be paid on account by one or other (or both) of the parties;

- the rules governing the final apportionment of costs (50:50, a different apportionment, or costs to be awarded according to the outcome of the enquiry);
- and, finally, and most important is, that the findings of the expert determinator should be considered final and binding on the parties.

977 Where an expert determination is to be carried out, a judge or arbitrator involved in the dispute (either then or later) will not have authority and jurisdiction to determine those facts himself; the expert determination therefore has a **binding effect** in respect of the findings arrived at.

978 One vital question is whether (and, if so, under what circumstances) an expert determination can be **challenged**. There is no right of appeal or setting aside (e.g. to a cantonal court or to the Swiss Federal Supreme Court). Criticism on simple errors or misjudgments of the expert determinator will not suffice for this purpose; even a seriously erroneous finding by the expert determinator might still be binding and upheld if he or she at least addressed the right question. On the other hand, however, it is to be assumed that an expert determination is **not binding** if the determination was affected by deliberate misinformation by one of the parties, or if one of the parties applied unlawful pressure or exerted influence on the expert determinator, such that his/her independence no longer appeared to be assured, or if the determinator misconducted himself/herself by violating the principle of equal treatment of the parties or their right to be heard (provided that the correct conduct of the expert determination necessitated or implied in the first place that the party or parties should be heard, which is not always the case), or if the expert determinator could have been challenged as an arbitrator.

c) *Mini-Trial*

979 The **Mini-Trial** consists of the parties presenting their dispute in an adversarial (but highly condensed) proceedings before a **Mini-Trial Panel** made up of one high-ranking executive from each of the parties concerned, together with a neutral presiding arbitrator. These executives are expected to be in a position to assess the issue in relation to their own company from their own personal, dispassionate and sovereign point of view. This feature is indeed the characteristic element and idea behind the Mini-Trial-concept. The procedure goes back to the patent infringement case in the year 1977 between Telecredit Inc. and TRW Inc.; following many years of ineffective proceedings, the case was reconsidered under the Mini-Trial procedure, culminating in an agreement after a two day hearing. A few other famous Mini-Trial proceedings followed, involving firms such as Shell Oil, Intel Corp., Borden Inc., Texaco, Sohio and Guilbane Building Co. From the statistical point of view, however, mediation proceedings are much more common.

980 At the instigation of Anton Pestalozzi as *spiritus rector*, and inspired by the impressive concept and thoughts behind the Mini-Trial, as realised at the time by **CPR** and En Dispute Inc., the **Zürich Chamber of Commerce** brought in its own Mini-Trial Rules. They were adopted on 5 October 1984 and, although used very little since then, have nevertheless gained a great deal of respect internationally, and

have been the subject of much discussion. The example of Zürich was recently followed by the **NAI** (Netherlands Arbitration Institute). **CPR** launched a new Mini-Trial Model in the summer 1996.

d) Conciliation, Facilitation

The function of the conciliator or facilitator is to bridge the gap between the parties through his/her skills for effective negotiation. In general, the terms conciliator/facilitator are used to denote a function which does not require him or her to make known his/her own views or proposals. Is this, therefore, a simple or even primitive task? Not at all; the handling of effective communication is one of the most difficult tasks and requires personal qualities which are rarely found. 981

e) Mediation in the Classical Sense

The basic procedure is described below under the heading “Med-Arb”. – In comparison, the role of a mediator is a more active one, and may be more active than that of a conciliator. However, the author is attaching no significance whatsoever to such semantical distinctions. The mandate is relevant, and to development of the procedure. Thus, a silent listener may grow into the function of a conciliator, become a mediator, and end up being an arbitrator (for instance in Med-Arb). There are no limits to this process at the service of the parties. 982

f) Mediator Directed Negotiation

This term connotes a somehow less formally structured procedure. Rather than collecting succinct mediation briefs from the parties or their lawyers, the mediator under this scheme may prefer to actively lead structured discussions, typically with more high level management involvement than in a mediation procedure. 983

g) Med-Arb

Med-Arb is one of the praised recipes drawn from the plentiful “cookbook” produced by American lawyers. Under a “Med-Arb clause” the parties agree to first of all conduct mediation proceedings before a mediator or a mediation panel. The mediation procedure generally begins with the claimant party – and then the other party – first of all filing a mediation brief with the mediator, setting out a concise statement of the facts and legal basis of claim (sometimes confined to 30 or 50 pages for example), together with the principal documentation. A hearing then takes place before the mediator, followed by questioning of both parties by the mediator. 984

After that, it is customary both in American and European practice for **caucus sessions** to be conducted. These consist of the mediator withdrawing for private talks with just one of the parties, in order to establish that party’s point of view, perspectives, opportunities, constructive suggestions etc. and to sound out the basis for an agreement. It goes without saying that the mediator is not authorised to give the other 985

party this information *tel quel*, and that information of this kind shall be passed across to the other party only to the extent that the party concerned gives its express agreement thereto. It is thus one of the mediator's most important tasks to carefully ascertain the form in which he can/should make use of information given/acquired in caucus sessions. A caucus session will then take place between the mediator and the other party, followed by joint or further separate meetings. This in-depth consideration of each individual party's point of view and perspectives should enable the mediator to put forward a constructive proposal for agreement. Up to this point the procedure is no different than conventional mediation.

986 What happens, however, if no agreement is reached as a result of this mediation? According to traditional European thinking, a mediator whose efforts have not led to an agreement or a settlement will be considered **"exhausted"**. He will have received private and confidential information from the parties which he should not be allowed to use in ordinary court or arbitration proceedings. For this reason, therefore, European arbitration rules (and also Anglo-Saxon rules) provide that a mediator or conciliator must not thereafter "change hats" and act as arbitrator. **However, must this necessarily be the case?** The Americans have put forward extremely convincing arguments against this being so. Med-Arb specifically consists of making that very same mediator take on the role of arbitrator, if mediation should fail. It is precisely because he has been able to more or less "peep behind the curtains" of procedural argument that he should be the right person to arrive at a fair conclusion in arbitration proceedings.

987 It might well be argued that, from this point of view, parties might possibly not be prepared to allow very great concessions during the mediation. The successful examples of very major disputes discussed at conferences do show, however, that this need not always be so. The Med-Arb concept, which has in some cases been considered in England to be almost contrary to public policy (although the short paper by Newman, The Med-Arb Debate – Some Contributions, in: "Arbitration" Vol. 60 3/1994, 173 ss. sounds more accommodating), has now been given statutory recognition in Bermuda. – In any event, it never seems to be wrong to continually **question borrowed concepts** as to their further right of existence. For a note on the countless kinds and variations see most recently Martindale-Hubbell, Dispute Resolution Directory 1995, 3–31.

h) MEDALOA

988 It would seem that American creativity for new forms of mediation knows no limits, and it is not the purpose of this Introduction to discuss each and all the various different forms in existence (some of which have already been mentioned above). Among the most recent of these creations, dating from 1993 (or, more precisely thought up by Robert Coulson, still then President of the American Arbitration Association), does nevertheless deserve a brief mention: **MEDALOA** stands for **Mediation and Last Offer Arbitration**, the essence of which is as follows: First of all, **mediation** takes place between the parties and a mediator. During this mediation procedure, both of the parties will ultimately have made their best possible offers, without the parties succeeding in agreeing on the difference between the two offers.

Arbitration proceedings will then take place between the parties. These will not be full/extensive arbitration proceedings “from A–Z”, but rather arbitration proceedings in which the arbitrator will only have to decide in favour of either party A’s last offer or that of party B.

It is plain that, under a MEDALOA agreement, the parties will agree on the structure of any arbitration procedure (e.g. short deadlines, only one exchange of memorials, concentration on the most important documents in the sense of best evidence only, oral hearing of a restricted length, so that a very speedy resolution of the dispute can be expected, e.g. a maximum of 90 days for the mediation proceedings and a further maximum of 90 days for any arbitration which may be necessary. Basically, the idea is that in his award the arbitrator **only has authority to opt for one of the two offers**, and cannot award any sum between the two offers. This has the advantage of forcing the parties to weigh up their final offer in the prior mediation proceedings very carefully (which would not be the case if the arbitrator had the flexibility to award any amount he wanted between those two offers. In this latter case, both parties would stick to their extreme positions).

It could be argued that the disadvantage with such procedure is that it has very little in common with a subtle arbitral finding and does indeed look far more like a **“Russian roulette”** or a “Texas auction”. After a more careful reflection, however, it should be emphasised that the field is not wide open for arbitrary solutions because the parties themselves had previously defined the low and the high end of the bracket. Moreover, parties are sometimes predominantly interested in a speedy arbitral decision in situations where the dictum “time is money” must be replaced by either **“time is more than money”**, or by “more time is less money”. And, finally, it should be recalled that, for instance in the case of joint venture agreements, a “roulette-type” contractual solution is often provided as a means for overcoming a **deadlock situation** between 50:50 partners (where under a well-known formula (much used in practice) both parties have to state a figure without knowing in advance whether they will have to sell their own share package to the other party for that amount, or whether they will have to buy the other party’s share package for that same figure). The taking and accepting of risks of that nature, therefore, is not something extraneous to those in charge of a company’s management.

A MEDALOA procedure, therefore, has its risks, and its appeals. It not only combines speed and cost effectiveness, but also constitutes a **clear risk limitation exercise** for the businessman (whereas the margin of risks in an arbitration is often much wider). The procedure also leads to an effective arbitral award open to international recognition and enforcement (which is not the case with other mediation procedures). It should be said in any event, from the point of view of Chapter Twelve, that the party autonomy embodied in Article 182 enables the parties to limit arbitration proceedings in this way, to apply short deadlines and also make provision for a so-called “documents only” procedure. They can also, of course, waive a reasoned award (deriving from Article 189(1)) and waive possibilities for setting aside procedures (under the conditions set out in Article 192). Thus, MEDALOA must be permissible; the only requirements of such procedure are the equal treatment of the parties and the right to be heard within the meaning of Article 182(3). Reference is made, with regard to a

model clause for MEDALOA, to Blessing, Drafting an Arbitration Clause, in: ASA Special Series No. 8 (1994), 76 s. and Blessing in: WIPO Publ. No. 741(E) 1995. For (as yet) scanty literature, see the article by the “inventor” Coulson, MEDALOA: A Practical Technique for Resolving International Business Disputes, JIntArb 2/1994, III ss.

9. The Challenge: New Requirements for Effective Communication

992 The question will generally not be whether ADR procedure is appropriate to resolve a specific dispute, but rather whether **we ourselves** (you and I, as lawyers, consultants, business people involved, or as mediators) are **sufficiently “fit”** for ADR. This self-critical question is more particularly addressed to lawyers, who have become accustomed throughout their many years of practice to proceeding in disputes against an “opponent”. ADR does, in fact, require a **radically different attitude and way of thinking**. ADR can only succeed when this change is achieved in respect of all the persons involved in the process. Indeed, the ADR negotiating technique must be learned, ideally by training in small working groups. And it **can** be learned – at least by those who are prepared to work on themselves, to step out of their routine, by those who will be prepared to take it on them to work on and change their own patterns and to work on the many inapprehended pre-suppositions. [The author cannot himself claim to already have reached any suitable level in this educatory work. The author rather considers himself to be a learner/beginner – and also believes that, during our lives, we are and remain learners and beginners].

993 The few remarks hereinafter should identify some of the basics; for a more detailed report see Blessing, Streitbeilegung durch ADR und pro-aktive Verhandlungsführung, ASA Bulletin 1996, 123–189.

994 **Identify and segregate the human problems!** Most disputes arise out of (or have to do with) human problems such as anger and other emotions between those individuals who were involved in the performance of a certain contract. For instance, the engineer who once felt offended by the project manager, causing a growing deterioration of the business relationship (and this may well be the real cause for a dispute resulting in a costly arbitration). The best way for identifying such human problems is to discuss them openly, rather than to ignore or swallow them; thereafter exclude emotions for the purpose of the further negotiations; possibly you may wish to use different people which will be able to take a fresh and independent approach!

995 **First walk in the other party’s shoes!** In the above sense, it is necessary that, first of all, you place yourself in the position of your adverse party so as to fully understand its concerns, perspectives, constraints and the implications of any solutions. Looking at oneself through the eyes of the other party is always a very educative exercise!

996 **No positions!** The typical behaviour in negotiations is to argue and negotiate on positions (“*this is my position ...*”; “*this is my bottom-line ...*”; “*you may take it or leave it ...*”). A positional negotiation is in most cases wrong and counter – producti-

ve; it makes yourself blind to other alternatives; it may even prevent you from understanding the other party's case and problem (which is an essential prerequisite for your ability to come to an amicable solution).

Look for and define common goals, common concerns, common/shared interests and values! Instead of emphasizing antagonistic views, instead of focusing on opposed and incompatible positions, it is in most cases much better to devote the time to consider and identify the common interests. The focus should be "*solution-oriented*", rather than "*problem-oriented*" (indeed, all of us will recall examples where most of the time available for negotiations was used to emphasize the problems, instead of concentrating the intellectual efforts on mutual interests). 997

Work out common solutions! To work on common solutions is a different approach from what is usually done, namely the defining and proclaiming of one's own position. It is a common approach which requires a creative and imaginative thinking. 998

"Enlarge the cake!" In the Harvard "*Getting to Yes*"– terminology, this will mean exploring whether and if so, how, new business perspectives, options and variations can be added, so as to make the stake of the cake bigger for each party – such that there shall not necessarily be a winner and a loser, but in fact two winners. 999

Define the second and third best alternatives! Forget about the maximum result you had in view to shoot for – because you will not get it anyway. Extreme positions can never be realised in a settlement. Instead, use all your efforts, time and imagination to work on and develop second and third best alternatives. Only these will be realistic and will have a reasonable chance to be commonly acceptable. 1000

These are almost trite fundamental ideas. It is nevertheless worthwhile giving them more attention. Although the process of negotiation cannot simply be learned from a textbook, reference is made to the bestseller by Covey, *The 7 Habits of Highly Effective People*, 1989 (which, the author thinks, is an absolute "**must**" for almost everybody) and his more recent book *First Things First*; Fisher/Ury, *Getting to Yes*, 1981 plus the more specific publication by Ury/Brett/Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, 1993; also Goldberg/Sander/Rogers, *Dispute Resolution, Negotiation, Mediation and Other Processes*, 2nd Ed. 1992; Singer, *Settling Disputes – Conflict Resolution in Business, Families and the Legal System*, 2nd Ed. 1995; Fisher, *Jenseits von Machiavelli*. Reference is also made to some fine books which are not just confined to business negotiation tactics, i.e. O'Connor/Seymour, *Introducing Neuro-Linguistic Programming (NLP)*; *The New Psychology of Personal Excellence*, 1990; Dyer's bestsellers *Your Erroneous Zones*, followed by *Pulling Your Own Strings* and *Your Sacred Self*. 1001

It is an established fact that most long and wearisome arbitration proceedings could be avoided by a good negotiating process. The above comparison also shows that a mediation procedure can be **very much more creative** than an arbitration procedure. In an arbitration procedure, it will only seldom be possible for the wider mutual (even future) business perspectives of the parties to be taken into account. Unlike a mediator, an arbitrator cannot come up with creative, business-oriented alternatives *sua sponte*. He is confined to a judicial assessment of the past and to existing contractual rights and obligations; **his job is therefore simply to deal with** 1002

the “sins” of the past. Properly conducted mediation proceedings, however, could (and should) be able to do much more, i.e. enable a constructive – and friendly! – dialogue to take place between the parties. The mediator is the essential catalyst to make this happen, and he will have many tools at his disposal. Thereby, the parties are also rendered a most valuable service *pro futuro*. On the other hand, improperly conducted proceedings – whether in arbitration or mediation – will lead to positions becoming fixed, and to a hardening of attitudes instead of a *rapprochement*.

1003 To act as arbitrator or mediator with the above spirit, and to achieve an amicable resolution of a dispute, is one of the greatest **challenges** for any lawyer or counsel, or anybody else who may be concerned with the efficient resolution of disputes. To quote the final remarks addressed by the author of this Introduction to the ADR Conference in Geneva on 12/13 November 1992:

“... but most of all, during our entire life-time, we are always beginners and we are learners. ADR will only work if we first start working on ourselves so as to become suitably fit for ADR. ADR is a challenge for lawyers: for those who are truly committed to concentrate on efficiency and clarity (while those who prefer to do a paper-shuffling job, and want to “play around” with no less than 100 dossiers, may be horrified by ADR).

ADR should be the optimum alternative for businessmen, and it is for us to see to it that this can happen and prove to be true ... In short: What is arbitration to me, and what is ADR? Arbitration is not only a process and a technique; **it is a science and an art** – and ADR even more so: it is **the** distinguished manner of a highly structured negotiation process. It is the **most noble way** of dispute resolution. **ADR is thus a culture and an art** – for us to make them grow!”

XIII. The Swiss Arbitration Association (ASA)

1. General. Conferences. Publications

The **Swiss Arbitration Association** (Schweizerische Vereinigung für Schiedsgerichtsbarkeit, Association Suisse de l'Arbitrage, Associazione Svizzera per l'Arbitrato), known by its French acronym **ASA**, was formed in 1974 as an association within the meaning of Article 60 ss. ZGB (Swiss Civil Code). Its objects are the furtherance of national and international arbitration. ASA has grown very considerably during the 1990's (to the tune of about 50%) and has become an association of world-wide reputation; in 1999, the membership totaled about 800, made up of approximately 550 members practising in Switzerland, 21 firms established in Switzerland, and 230 members practising abroad. Most of the members of ASA are practising lawyers and professors particularly involved in international arbitration (whether as attorneys, legal counsel or arbitrators). ASA has published a handbook with biographical details of its most active members (ASA Special Series No. 10 "Profiles of ASA Members 1998 – 2000") which (as well as other ASA publications) can be obtained from the ASA Secretariat situated in Basel (St. Alban-Graben 8, 4001 Basel).

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ASA is, deliberately, **not an arbitral institution** administering international arbitrations. It cannot therefore be compared with the ICC, the LCIA, WIPO, AAA or with any other arbitral institutions set up e.g. by Chambers of Commerce around the globe. It is the deliberate philosophy of the ASA to work in close collaboration with all these arbitral institutions; nevertheless, it does not want to "compete" with them. ASA also takes the view that there is no demand these days for another set of institutional rules; there are enough of them available on the "market". For *ad hoc* arbitration, the provisions of Chapter Twelve provide an adequate basis and a guarantee that proceedings can be properly conducted, if necessary with the assistance of the national courts. The UNCITRAL Arbitration Rules are also to hand and will provide a certain format to *ad hoc* arbitration. As regards institutional arbitration, numerous procedures are conducted in Switzerland under the *aegis* of the ICC, LCIA, Zürich and Geneva Chamber of Commerce and others.

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ASA traditionally organises **conferences** or seminars twice a year on issues of current interest, principally in relation to international arbitration. For instance, in 1992 a Conference was organized on "Investing in Eastern Europe and Arbitration" (see ASA Special Series No. 5); in 1993 on "Objective Arbitrability – Antitrust Disputes – Intellectual Property Disputes" (see ASA Special Series No. 6); in 1994 on the "Arbitration Agreement – Its Multifold Critical Aspects" (ASA Special Series No. 8); in 1996 a Conference was organized on the "New York Convention of 1958" (ASA Special Series No. 9) and a further Conference on the "Impact of Insolvency Proceedings on Arbitration"; in 1997, a conference was held on the "Costs in International Arbitration" and a further Conference, held on 5 September 1997, dealt with the Impact of Mandatory Rules of Law (in particular of competition laws); in January 1998 a joint Conference was held with the Tribunal Arbitral du Sport in

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Lausanne, dealing with arbitration in sports and sports-related matters (ASA Special Series No. 11).

1007 In addition to these conferences, **colloquiums** and meetings are held at regular intervals in Zürich (in conjunction with the Zürich Bar Association's "Fachgruppe Schiedsgerichtsbarkeit"), in Geneva and in Basel. The object of these colloquiums and meetings is to exchange information and experience, to discuss legal and procedural issues, new materials (articles, publications), arbitral awards and decisions by national courts, and to periodically report on papers and materials contained in the countless relevant periodicals which are published on international arbitration. The ASA's principal concern is to provide and promote an intensive **exchange of know-how** between older and younger colleagues in these working groups (attorneys/arbitrators); the idea being, not least of all, to thereby also contribute to the education and training of both attorneys and arbitrators. Most recently, ASA has organised **Practice Building Seminars** of two to three days, offering specialised training courses. A further seminar took place in January 1999, organised in cooperation with the DIS (German Institution of Arbitration).

1008 The ASA's publications appear in the quarterly **ASA Bulletin** which has been the responsibility, ever since the beginning in 1983, of the former President (and now Honorary President) of the ASA, Professor Dr Pierre Lalive, and his editorial colleagues. The ASA Bulletin provides reports on current developments in the field of international arbitration both in Switzerland and abroad. It has become an important source of information. The articles and reports are published in French, German or English, according to the author. ASA also publishes information brochures with concise information on international arbitration issues (cf. e.g. **ASA Special Series** No. 1, 2 and 4). Further issues are planned.

1009 By virtue of an express provision in its statutes, the President of the ASA is empowered to act as Appointing Authority to appoint an arbitrator or a presiding arbitrator or to determine where an arbitral tribunal should sit.

2. International Orientation

1010 ASA is also very active outside Switzerland, particularly by its participation in countless **conferences** and seminars on international arbitration. It works closely together with **arbitral institutions**, particularly the ICC, the LCIA, the AAA, the DIS, the Vienna Center, the NAI (Netherlands Arbitration Institute) and the Chambers of Commerce in Stockholm and Milan.

1011 ASA has also concluded a number of bilateral **Cooperation Agreements** with important arbitral institutions, including those in Bulgaria, Hungary, Poland, Romania, the Czech Republic, Ukraine, Croatia, the People's Republic of China, Hongkong, Korea, Taiwan, Hongkong, Japan, Australia, Singapore, Thailand, India, South Africa, as well as the American Arbitration Association, the Cairo Regional Centre, the Kuala Lumpur Regional Centre, the Deutsche Institution für Schiedsgerichtsbarkeit (DIS), the Camera Arbitrale di Milano. All of these Cooperation Agreements have been published in the ASA Bulletins.

Although the ASA is not an institution, it is nevertheless a member of the **International Federation of Commercial Arbitration Institutions (IFCAI)**. The IFCAI is an international federation consisting of over 80 arbitral institutions around the globe. 1012

3. Future Prospects

Switzerland has become known as a meeting place, a place in which to talk and to negotiate. It traditionally offers its **good offices** in this respect and considers that it has a duty (or even a **vocation**) to continue this role and to thereby make a contribution towards the peaceful resolution of disputes, whether of a political or commercial nature and whether between different countries, state-controlled organisations, private firms or private individuals. 1013

ASA and its members aim to have as much **instrumental** effect as possible in putting these ideas into practice. The essential requirements for this purpose are both comprehensive expertise and personal integrity. This applies to lawyers, legal consultants and experts, as much as to arbitrators and mediators. Personal integrity also includes tolerance vis-à-vis other points of view, other convictions, cultures, values and other legal traditions. 1014

Switzerland's Arbitration Act provides **an optimum form of liberal instrumentation** assisting parties both in this country and abroad to resolve their differences, whether in an adjudicatory or advisory capacity. The ASA Members' mission to serve thus will include all kinds of advice, whether in order to prevent conflict (by way of appropriate advice for the drafting of contracts), or in order to resolve disputes (e.g. by way of good-faith negotiations, or by way of mediation or arbitration). 1015

Author

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Bär & Karrer, a Swiss law firm with offices in Zurich, Lugano, Zug and London handles all types of legal work for Swiss as well as foreign corporate and private clients. Bär & Karrer advises on corporate matters, commercial transactions, mergers and acquisitions, banking, financing and underwriting, intellectual property, anti-trust, taxation, trusts and estates as well as on European Community law matters. In addition, clients are represented in Swiss courts and in domestic and international arbitrations.

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