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the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.[17]

It should finally be noted that since the arbitration agreement is conceived as independent of the main contract in which it is contained, its own validity is not necessarily determined by the law applicable to the main contract.[18]

5.05 Law applicable to the arbitration agreement

Even when a contract is expressly subject to a particular law, as by a stipulation for example that "any difference arising hereunder shall be settled . . . according to Belgian law," it is not certain that the validity, scope, and effects of the arbitration clause would be determined by reference to Belgian law.

This is so because of the autonomy of the arbitration clause, recognized by the ICC Rules (*see* Section 5.04). By referring to ICC arbitration, the parties have accepted that the arbitrators are to decide upon challenges to their jurisdiction and to the validity of the main contract. In so doing, ICC arbitrators need not apply the law applicable to the merits of the dispute.

An arbitral tribunal comprising three leading scholars of international arbitration (namely Professors Sanders of Holland, Chairman, and Goldman and Vasseur of France), in a 1982 award which became a matter of public knowledge as a result of a challenge before the Court of Appeal of Paris,[19] specifically held that their determination of the scope and effect of the arbitration clause would not be based on the law chosen by the parties as applicable to the merits (French law), but on 1) the common intent of the parties as revealed by the circumstances of the negotiation and performance of the contract, and 2) usages conforming to the needs of international commerce.[20]

17 For a review of the notions of separability of the arbitration clause and arbitral *compétence-compétence* as reflected in various institutional rules and international treaties, *see* Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, II YEARBOOK 172, 197-200 (1977).

For an award holding that an arbitration clause was effective although the contract was generally subject to an approval of equipment which had not materialized, *see* ICC Case 4555/1985, I ICC AWARDS 536; English translation *in* II ICC AWARDS 24.

In ICC Case 4145/1983, I ICC AWARDS 559, English translation *in* II ICC AWARDS 53, the arbitrators held, at 100, that: "the question of validity or nullity of the main contract, for reasons of public policy, illegality or otherwise, is one of merits and not of jurisdiction, the validity of the arbitration clause having to be considered separately from the validity of the main contract (*see* Art. 8(4) ICC Rules)."

The French Supreme Court has held that the novation of a contract by a subsequent settlement agreement did not neutralize the ICC arbitration clause in the original contract, Cosiac (Italy) v. Luchetti (Italy) *et al.*, decision of 10 May 1988, 1988 REV. ARB. 639.

18 Some ramifications of this observation are illustrated *infra* Note 22.

19 Isover St. Gobain v. Dow Chemical France *et al.*; ICC Case 4131/1982, I ICC AWARDS 146, 465, upheld by the Paris Court of Appeal, decision of 21 October 1983; 1984, REV. ARB. 98; extracts in English *in* IX YEARBOOK 132 (1984).

It may be queried whether application of French law as such would have led to a different result, since reference to the common intent of the parties and to trade usages are consistent with, and indeed encouraged by, French law.[21]

An arbitrator who does not refer to a particular national law to determine the validity, scope, and effects of the arbitration clause gives himself a particularly wide berth to apply the growing body of published international awards, if not as precedents reflecting general principles of an international law merchant, then at least as evidence of usages.[22]

This development increases the significance of published ICC awards as evidence of generally accepted practice relating to the validity and effects of the arbitration clause.

Under Article V (1)(a) of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, the agreement to arbitrate is examined either by reference to the law stipulated by the parties or, failing such a stipulation, to the law of the place of arbitration. Given the fact that the law applicable to the arbitration clause is rarely the subject of a specific stipulation, it is hardly surprising to find that most national court decisions under the New York Convention have applied the law of the country where the award was

20 Other awards holding that the arbitration clause is not subject to the governing law of the main contract include: ICC Cases 4381/1986, II ICC AWARDS 264 (specifying that ICC arbitrators may rule on the validity of the arbitration clause without referring to any national law whatsoever); 4695/1984, II ICC AWARDS 33; 4604/1984, I ICC AWARDS 546 (Italian law governed the contract, but arbitrability under Italian and ECC competition law is decided under the law of the place of arbitration: Geneva).

21 As of 1981, Article 1496 of the French Code of Civil Procedure reads:

"The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to the rules of law he deems appropriate. In all cases he shall take into account trade usages."

22 As Professor Lalive, sole arbitrator, stated in ICC Case 1512/1971, I ICC AWARDS 3, 33, 37 at 39, the usages of international commerce are that an arbitration:

"shall only be governed by the rules of arbitration chosen by the parties . . . Once the parties have agreed to . . . the ICC Rules, there is no possibility to rely against the ICC Rules, upon any provision of the law of Pakistan or the law of India."

Since the leading case of Hecht v. Buismans, decided by the Paris Court of Appeal in 1970, 1972 REV. ARB. 67, by virtue of the autonomy principle the French courts will not, in international cases, apply a prohibition of arbitration under the substantive applicable law of a contract to invalidate an arbitration clause contained in it. (In the *Hecht* case, a French law invalidating arbitration agreements by commercial agents was disregarded.) *See also* the authorities cited *supra* Note 2.

In its much-heralded judgment in the *Dalico* case, Khoms El Mergeb v. Société Dalico, 1994 JDI 432, 1994 REV. ARB. 116, the French Court of Cassation declared that as a result of the autonomy principle the "existence and effectiveness" of an arbitration clause are to be assessed "according to the common intention of the parties, with no necessary reference to a national law."

rendered.[23] What this means is that prudent ICC arbitrators, although free to decide on the validity of the arbitration clause without reference to a national law[24] should also deem themselves bound, under Article 35's exhortation that they "shall make every effort to make sure that the Award is enforceable at law," to take account of the law of the place of arbitration.[25]

Since the law applicable to the merits of the dispute does not necessarily govern the arbitration clause, parties may specifically stipulate the law governing the arbitration clause, whether or not they opt for the same law as applicable to the merits (*see* Section 8.03). The following Sections 5.06—5.11 suggest the legal questions that might have to be resolved in relation to the arbitration clause.

5.06 Form of the agreement to arbitrate

Article 6(3) of the ICC Rules—which provides that unless the defendant accepts to appear, the request for arbitration will be denied unless the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist—seems to suggest that at a minimum some written proof must be given confirming the existence of that agreement.

The New York Convention expressly recognizes, in Article II(2), that an exchange of letters or telegrams may constitute an "agreement in writing." The notion of an "exchange" would seem to preclude that acceptance of a proposal to submit to arbitration could occur passively (by failure to protest).[26]

23 See Commentary, XI YEARBOOK 450 (1986); *see also* Deutsche Shachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co. *et. al.*, decision of the Court of Appeal of England, of 24 March 1987, [1987] 2 LLOYD'S L. REP. 246, [1987] 2 ALL E.R. 769; extracts *in* XIII YEARBOOK 522 (1988), holding that even if the proper law of a contract calling for ICC arbitration were that of Ras Al Khaimah, the "proper law of the arbitration is Swiss; "reversed on other grounds by the House of Lords, [1988] 2 LLOYD'S L. REP. 293, 2 ALL E.R. 833.

24 As in ICC Cases 4131/1982, I ICC AWARDS 146, 465; 4381/1986, II ICC AWARDS 264.

25 *Cf.* ICC Case 4472/1984, I ICC AWARDS 525 (sole arbitrator sitting in Zürich, referring to local authorities in holding that to decide upon his own jurisdiction he "must verify that the arbitration agreement is valid under the law applicable at the seat of the arbitral tribunal").

By a judgment of 21 March 1995, the Swiss Federal Tribunal held that the scope of an arbitration clause should, in order to achieve consistency with the New York Convention, be determined by reference to the law of the seat of arbitration; excerpts *in* XXII YEARBOOK 800 (1997).

26 A letter appointing an arbitrator was considered sufficiently responsive to telexes proposing arbitration that it was held to constitute agreement; Swiss Federal Supreme Court decision of 5 November 1985, Tracomin S.A. (Switz.) v. Sudan Oil Seeds Co. (U.K.) 1985 ARRÊTS DU TRIBUNAL FÉDÉRAL 31B 253, summarized *in* XII YEARBOOK 511 (1987). The failure to respond to a letter, written one and a half months after signature of a contract not containing any arbitration clause and stating that the contract was subject to standard conditions which did contain a reference to arbitration and had applied to a previous contract between the same parties, was held by the French Supreme Court not to constitute tacit acceptance, Confex (Rum.) v. Ets. Dahan (France), decision of 25 February 1986, 1986 JDI 735; summarized *in* XII YEARBOOK 484 (1986). *See also* the award of the Hamburg Commodity Exchange Grain Merchants' Association Arbitral Tribunal dated 7 December 1995, XXII YEARBOOK 55 (1997) (no jurisdiction in absence of defendant's signature or other expression of intent to conclude an arbitration agreement). *Cf.* Hill v. Gateway 2000, 105 F. 3d 1147 (7th Cir. 1997) (arbitration clause enforceable even though included in a computer purchase contract which was sent to a buyer who ordered the computer by telephone but did not return the contract, the terms of which indicated that they would apply if the computer was kept for more than 30 days); Kahn Lucas Lancaster, Inc. v. Lark International, Ltd., 1997 WL 458785 (S.D.N.Y.) (arbitration clause in purchase order). *See generally* Section 29.02, as well as Neil Kaplan, Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice? 12 ARB. INT. 27 (1996); Richard Hill, *Formal Requirements for Arbitration Agreements: Does Kahn Lucas Lancaster v. Lark International Open Pandora's Box?* 12 MEALEY'S INT. ARB. REP. 18 (October 1997); and Paul Friedland, *U.S. Courts' Misapplication of the Agreement in Writing Requirement for Enforcement of an Arbitration Agreement under the New York Convention*, 13 MEALEY'S INT. ARB. REP. 21 (May 1998).

German courts have held an arbitration agreement *valid* under Article II of the New York Convention in one case where a French seller had written to the German buyer that he wished to submit their dispute to arbitration under the International Wool Agreement of 1965 (which in fact localizes arbitration in the country of the seller) and the latter had written back affirmatively, but later refused to participate in arbitration on the grounds that he had not specifically agreed to arbitration in France,[27] and in another case where the agreement to arbitrate was contained in a broker's confirmation sent by the broker to each party, signed and returned by each party to the broker, but not directly exchanged between the parties,[28] but *invalid* under the Convention in cases where the arbitration agreement was contained in a sales confirmation to which the buyer did not object.[29]

27 Decision of the *Landgericht* of Bremen of 8 June, 1967, DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALEN PRIVATRECHTS IN DEN JAHREN 1966 UND 1967, 860, published with an English summary *in* ICA NY CONVENTION V. 46; summarized *in* II YEARBOOK 234 (1977).

28 Decision of the *Landgericht* of Hamburg of 19 December 1967, 1968 ARTBITRALE RECHTSPRAAK 139; published with an English summary *in* ICA NY CONVENTION V. 47; summarized *in* II YEARBOOK 235 (1977). (The broker did not forward the confirmation of each party to the other party. However, the court noted that under German law the broker is authorized to record the intent of both parties.)

See also P.E.P. Shipping v. Noramco Shipping Corp., 1997 WL 358118 (E.D. La.); Overseas Cosmos Inc. v. NR Vessel Corp., 97 Civ. 5898 [DC] (SDNY), 13 MEALEY'S INT. ARB. REP. B-11 (May 1998).

29 Decision of the *Bundesgericht* (Supreme Court) of 25 May 1970, 1970 WERTPAPIER MITTEILUNGEN 1050; published in French translation in 60 REVUE CRITIQUE DU DROIT INTERNATIONAL PRIVÉ 88 (1971); summarized *in* II YEARBOOK 237 (1977); decision of the *Oberlandesgericht* of Düsseldorf of 8 November 1971, DIE DEUTSCHE RECHTSPRECHUNG AUF DEM GEBIETE DES INTERNATIONALES PRIVATRECHTS IN DEM JAHRE 1971 (1971) 492; published with an English summary *in* ICA NY CONVENTION V. 50; summarized *in* II YEARBOOK 238 (1977) (in both cases, awards nonetheless enforced because tacit agreements to arbitrate were acceptable under national laws).

Awards were also rejected by courts in Italy and Switzerland because the agreement to arbitrate was contained in unreturned sales confirmations: decision of the Court of Appeal of Naples of 13 December 1974, Ditte Frey, Milota, Seitelberger (Austria) v. Ditte F. Cuccaro e figli (Italy), 11 RIV. DIR. INT. P.P. 552 (1975); published with an English summary *in* ICA NY CONVENTION V. 22; summarized *in* I YEARBOOK 193 (1976); decision of the *Tribunal cantonal de Genève* of 6 June 1967, J.A. van Walsum N.V. (Netherlands) v. Chevelines S.A. (Switzerland), 64 SCHWEIZERISCHE JURISTEN-ZEITUNG 56 (1968); published with an English summary *in* ICA NY CONVENTION V. 2; summarized *in* I YEARBOOK 199 (1976).

Of course, in the final analysis the attitude of one's adversary's home courts may not be determinative of the international validity of the award, but as a matter of practically—especially if the other party has no assets abroad—it may be quite important. There are many instances where, for example, it would be more appropriate to have the arbitration take place in a developing country, close to the place of performance of the contract, than in Europe. Parties from industrialized countries are sometimes overly reluctant when faced with a proposal to accept arbitration in a developing country. They do not realize that the essential neutrality of the proceedings may be assured by the manner in which arbitrators are nominated and operate under the ICC Rules.

The fact that the ICC's Court of Arbitration, whose permanent seat is Paris, approves awards does not mean that the award is rendered in Paris.[12] Nor does the fact that hearings are held elsewhere alter the principle that the award is deemed to originate in the city formally designated as the place of arbitration.

7.03 Language of arbitration

The official languages of the ICC are *English* and *French*, but parties may correspond with the Secretariat in other languages; translations will be prepared into one of the official languages if a document is to go before the Court. The fact that the contract is written in English does not prohibit the defendant from answering the Request for Arbitration in French, since the decision with respect to the language of the arbitration is to be taken by the arbitrator and not by the Secretariat or the Court. Once the matter comes before the arbitrator, Article 16 of the Rules applies:

> In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

If the contract was drafted in both French and Arabic, the arbitrator, wishing to avoid any semblance of favoritism, may be reluctant to give precedence to either language even though it was used throughout the negotiation and subsequent execution of the contract. The result may be cumbersomeness, confusion, and great expense. Similarly, a contract in English may nonetheless give rise to a bilingual arbitration if it is shown that during the life of the contract, all written communication between the parties was in French.

The language problem may be quite troublesome, particularly if the arbitrator has a personal preference for working in a language other than that desired by one of the parties. Reasons of principle (some would say pride) may also enter the picture. The 1998 Rules may be said to have slightly downgraded

12 The High Court of Delhi has specifically so held, in a decision of 28 August 1970, Compagnie Saint Gobain Pont-à-Mousson (France) v. Fertilizer Corporation of India Ltd, summarized *in* II YEARBOOK 245 (1977).

the role of the language of the contract; the prior version of the provision quoted above (Article 15(3) of the 1975 Rules) used the expression "... relevant circumstances and *in particular* to the language of the contract." This is a matter where predictability is especially important, because it is germane to the choice of arbitrators (and indeed advocates). It is therefore wise for contract drafters to define the language to be used in any arbitration.

The clause defining the language of arbitration may furthermore specify that a party wishing to produce a document in a language other than that of the arbitration must provide a translation thereof, but this kind of detail may be handled at the Terms of Reference stage after a dispute has arisen (*see* Section 15.02); an acceptable rule is very likely to be adopted as a function of the basic principle that one language is *the* language of the arbitration.

In other cases, of course, it may be appropriate that the arbitration be bilingual, with or without equal status for the two languages. The authors have encountered the following provision:

> The language of the arbitration shall be English, but either party shall be free to make any submission in either English or French without providing a translation thereof.

7.04 Law applicable to the merits of the dispute

The topic of applicable law comes last in this category of "generally recommended additional elements," because strictly speaking the question of applicable law is independent of the choice of forum. A contract governed by Greek law may give rise to a dispute before any number of jurisdictions: a court in Greece, an arbitral tribunal sitting in Greece, an arbitral tribunal sitting elsewhere, or, for that matter, a court of another country. Indeed, international contracts often have different articles dealing with applicable law and jurisdiction.

In theory at least, there must be one national law that has a paramount claim to determine the obligations arising out of a contract. There are some questions that may not be decided according to general principles, no matter how much confidence the parties have in the fairness of the arbitrator. *See generally* Chapter 35.

Various legal systems may provide different and incompatible solutions for issues such as those relating to the prescription of litigation (statute of limitations), to the transfer of title and risk, to the rate of legal interest,[13] and to the time limit imposed on the buyer to complain about the quality of goods as delivered. (One might note that common-law practitioners are likely to view issues of statutes of limitations and legal interest rates as procedural rather

13 For an arbitral award containing an extensive discussion of the law applicable to an agreement between a French seller and a Spanish buyer, concluding with the application of the rate of interest provided by French law in commercial matters, *see* ICC Case 2637, I ICC AWARDS 13.

than substantive matters, and look to the law of the forum. In ICC arbitration, it would seem appropriate to hold these issues to be governed by the same law that governs the merits, which is often the only one the parties agreed to.)

Nevertheless, it is rare in ICC arbitration that the primacy of one or another national law turns out to be crucial. This fact may be explained by the comprehensive and detailed nature of the international contracts involved, as well as by the command of Article 17(2) of the Rules which provides that:

> In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.

Nevertheless, no matter how careful the contract draftsmen may be in seeking to define the conditions under which they intend contractual obligations to be created, limited, or extinguished, it is always possible that a specific rule of law will be required to dispose of a precise and unpredicted issue.

For this reason, parties are generally not well advised to stipulate expressly that their contract is to be governed by no national law whatsoever. A stipulation of the following kind may therefore be viewed with some misgivings:

> The present contract shall be governed by general principles of law, to the exclusion of any single municipal system of law.

If a dispute turns on a question with respect to which there cannot be a philosophical answer based on fairness as perceived in general principles, and the contract does not contain clear provisions in this respect, the arbitrator's task may become impossible if he cannot refer to a specific national law. Accordingly, it is generally preferable to say nothing about applicable law rather than to exclude expressly all municipal systems.

As will be discussed in more detail in Chapter 17, the absence of a choice of law need not be a handicap. It may well be that as many cases are submitted to ICC arbitration without the parties' stipulation of applicable law as there are with it. Frequently, the parties could not reach agreement as to applicable law and simply left this issue—which in fact may never become relevant—to be determined by the arbitrator.

Nonetheless, to avoid polemics (not to mention the costs and delays that sometimes arise, especially in large cases, when vast written and oral submissions may be required only to reach a preliminary decision on applicable law) it is generally preferable to stipulate applicable law.[14] The provision may be worded quite simply, *e.g.*:

> The present agreement is governed by the laws of _____, to the exclusion of its rules of conflict of laws.

14 A somewhat different view is expressed by Krishnamurthi, *op. cit.* Note 7, who writes at 211 that "if a particular law is specified by a party with a stronger bargaining position, the opposite party

it seems useful to make clear, as per the final phrase of the above clause, that the law chosen should apply to the merits of the dispute.

This choice of law does not necessarily determine either the *procedure* to be used in the arbitration, which under Article 15 of the Rules is a separate matter (*see* Section 8.02) or the law that gives the arbitration agreement its obligatory character (*see* Section 8.03).

The Indian courts, however, have unfortunately made the choice of Indian law extremely dangerous in cases where the parties have chosen a place of arbitration other than India. They have done so by reasoning that if Indian law is the proper law of a contract, it is also (absent a contrary stipulation) the law governing the arbitration clause, and holding that this means that Indian courts have jurisdiction to examine any complaints about the arbitration under Indian law once the award is rendered—even if it is rendered outside India. It is of course the last proposition which runs entirely counter to the legitimate expectations of contracting parties. The Indian approach also runs counter to the international trend,[15] and has been roundly criticized.[16] It was believed that the Indian 1996 Arbitration Act cured this problem,[17] but in late 1997 the Indian Supreme Court found a way to reassert Indian hegemony over an arbitration having taken place in London.[18]

In *Metex v. T.E.K.* Directorate, unpublished judgment of 1 March 1995, the Turkish Supreme Court took the unfortunate position that a reference to "Turkish laws in force" meant not only substantive law but also the Turkish Code of Civil Procedure, and that therefore an award rendered in Switzerland which did not accept the applicability of Turkish procedural rules could not be enforced in Turkey—although there was no demonstration or even allegation that the losing Turkish party had been prejudiced by the failure to follow any specific procedural rule, or even that it had raised any objection as the arbitration proceeded. When choosing a neutral venue, parties do not expect that annulment proceedings may be brought in two different jurisdictions—particularly when one of them is that of one of the parties' home country.

15 The Court of Appeal of Paris set the lead in 1970 *in* Hecht v. Buismans 1972 REV. ARB. 67, holding that the rule under French law to the effect that a commercial agent cannot enter into a binding arbitration agreement may not be invoked to nullify an arbitration clause in a contract between a French agent and a Netherlands company, irrespective that the stipulated proper law of the contract was that of France, because "in international arbitration, the agreement to arbitrate, whether concluded separately or within the legal document to which it relates, always has a complete juridical autonomy, save exceptional circumstances, from the latter."

16 *See* Jan Paulsson, *The New York Convention's Misadventures in India*, 7 MEALEY'S INT. ARB. REP. 3 (June 1992); *International Jurist Flays India for Overstepping Bounds*, THE PIONEER (Delhi), 6 October 1992, at 3, reprinted *in* W. MICHAEL REISMAN, W. LAURENCE CRAIG, WILLIAM PARK & JAN PAULSSON, INTERNATIONAL COMMERCIAL ARBITRATION 1242 (1997).

17 *See* Jan Paulsson, *La réforme de l'arbitrage en Inde*, 1996 REV. ARB. 597.

18 Sumitomo Heavy Industries Ltd. v. ONGC Ltd. *et al.*, (1998) 1 SUPREME COURT CASES 305.

enforced in Turkey—although there was no demonstration or even allegation that the losing Turkish party had been prejudiced by the failure to follow any specific procedural rule, or even that it had raised any objection as the arbitration proceeded. When choosing a neutral venue, parties do not expect that annulment proceedings may be brought in two different jurisdictions—particularly when one of them is that of one of the parties' home country.

The practical consequence is that the well-advised non-Indian drafter in such circumstances should either eschew Indian law as the proper law of the contract, or stipulate that the arbitration clause is subject to the law of the place of arbitration (*see* Section 8.03). The same precaution should be taken with respect to Pakistani law, and perhaps also other neighboring countries which might be influenced by the Indian approach.

Under certain circumstances, when parties are prepared to accept an applicable law but wish to make sure that by such a choice they have not undermined the effect of specific provisions of the contract, the following wording may be adopted:

> All substantive issues in dispute shall be decided by reference to the terms of the present agreement; in the event that it is found to be silent with respect to a particular issue, such issue shall be decided in accordance with the substantive law of (country) _____ .

The purpose of this clause is to avoid that the stipulation of a national law adds obligations to those defined in the contract, or limits rights intended to be created. This type of clause may also be important to the parties' bilateral dialogue before arbitration commences. In other words, it may reduce a party's confidence in its ability to invoke an alleged provision of applicable law that is contrary to the terms of the contract. Arbitrators may be expected to take this stipulation as a reinforcement of the command of Article 17(2) of the Rules. If, to the contrary, the intent to give precedence to the contract is disregarded, one may still argue that nothing was lost in the attempt.

It should not be forgotten that the choice of governing law does not only contribute rules for decision in case the contract is ambiguous or incomplete; it also implies the application of the mandatory rules of the chosen law.[19] (A "mandatory rule" is one that cannot be altered by contractual stipulation.) But if one's subjection to mandatory rules is a matter of volition (*choice* of law), it stands to reason that one may contractually limit that subjection. This argument, comforted by the wide berth given to party autonomy in international arbitration, favors the upholding of clauses that limit applicable law to matters not dealt with by the contract.

It may be posited that giving effect to this kind of clause will favor the contractual acceptance of a wider range of national laws in international contracts, reducing in particular the reluctance to accept the less well- known laws of new nations.

19 *See* Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT. 274 (1986).

On occasion, a party's reticence with respect to the proposed applicable law is not based on an unspecified fear of the unknown, but on a perfectly well-understood feature of the law in question. Thus, one may be prepared to accept the law of country X except for the fact that the Civil Code in that country provides that contractual liquidated damages clauses are subject to review and revision by courts as triers of fact. Another example, often seen in practice, is the exclusion of the Swiss Code of Obligations' liberal rules of set-off (*compensation*), which may be unacceptable to a party fearful of having to wait for contractual payment pending long hearings on alleged defects of goods or services it has provided.[20] Accordingly, clauses have been negotiated to the effect that:

> The law of X shall govern, to the express exclusion of Article _____ of its Civil Code.

The practitioner should realize that international party autonomy is put to its test in this context. It is not the authors' purpose to take a doctrinal position, but simply to point out that parties' ingenuity in drafting these types of clauses has limits. Provided, however, that a *fraude à la loi* (a stipulation of law manifestly intended only for the purposes of avoiding legal obligations) is not demonstrated, ICC arbitrators will tend to uphold the parties' agreement. In the exceptional case where the clause is not given full effect, the pragmatist may observe that he is not worse off for having tried.

May "general principles of law" be chosen to govern an international contract? As seen above, such principles can hardly dispose of precise technical legal issues such as prescription of claims (statute of limitations). Even as to matters of interpretation and emphasis, the body of "general principles of law" is neither well-defined nor readily researched (*see* Chapter 35). On the other hand, it is argued in the name of realism that contracts originating and performed in an international *milieu* should not be dealt with in the same manner as contracts having no connection outside a single given country. To apply one national law may yield results that appear capricious and arbitrary when set against the parties' expectations. An ICC arbitrator's task when applying Swedish law to an international contract is not to imagine how a Swedish judge would treat the same issue arising between two Swedish parties. In other words, there appears to be a "common law" of international contracts, having a moderating effect with respect to peculiarities of municipal law. Even within national legal systems it is perfectly acceptable to refer to trade usages, and one body of trade usages may be that of international trade, thus giving application to Article 17(2) of the Rules. Indeed, even the

20 The arbitral tribunal in ICC Case 3540/1980, I ICC AWARDS 105, 399, expressly recognized this possibility.

most vehement opponents of "general principles" as governing law would allow the application of *lex mercatoria* as rules of custom.[21] In sum, without taking sides in a complex academic debate, one may well conclude that in ordinary commercial contracts, the stipulation of "general principles" does not have demonstrably greater positive consequences than those generally flowing from Article 17(2) of the Rules,[22] and still leaves unresolved the question of the ultimately applicable law.[23]

When parties cannot reach agreement, they sometimes stipulate that *both* of their respective national laws are to be applicable to the extent they are in concordance.

To deal with the case of conflict, they may provide that the arbitrator shall somehow determine an intermediate position between the two results mandated by the two bodies of law. This is an unsatisfactory concept, as may be seen if one assumes that Law No. 1 deems the contract to be invalid, and Law No. 2 does not. No "intermediate" position is conceivable. A preferred variant would be to let the arbitrator determine applicable law in the absence of concordance. He would then do so in accordance with Article 17(1) of the Rules. In most cases, at least the *rules of conflict* of the two countries will be in concordance, and the arbitrator would follow predictable conflict of laws reasoning to determine which of the two laws (or even perhaps a third law) will apply.[24]

With respect to the particular case of contracts between States or State entities and private parties, the question of applicable law is particularly pointed: the State generally does not, as a matter of principle, wish to subject its contract to the laws of a foreign co-contractant; the private party is reluctant to submit to a law whose contents may be altered by the State.[25]

Some arbitral tribunals have *presumed* that in such a context the parties did *not* intend for the law of the contracting State to apply because of the unacceptable possibility that the law would be modified in contradiction with contractual undertakings.[26]

Similar reasoning was applied by the ICC arbitral tribunal in ICC Case 1434/1975, I ICC AWARDS 263. This presumption has not, however, always been accepted by arbitrators.[27] Accordingly, it behooves negotiators on both sides to seek to define a clear understanding of applicable law. Some solutions are as follows:

- Acceptance of the law of the contracting State. Some contracting States require such acceptance (and may invoke regulations prohibiting State subjection to foreign law) and are in a position to impose this preference. In most cases, the fear of legislative change for the sole purpose of achieving an altered legal position in a particular contractual relationship is exaggerated. Even if such an event should occur, the neutrality of an ICC tribunal may be such that it would refuse, as a matter of international *ordre public*, to countenance abuse of legislative power.[28]
- "Freezing" the law of the contracting State as of the date of signature of the contract. It is hardly reasonable to expect that by accepting such a clause a sovereign State has tied its hands with respect to legislation in the public interest. Rather, the clause would constitute an instruction to the arbitrator to consider changes to be inapplicable for the purposes of establishing contractual rights and obligations. In other words, the State may change its laws, but such a change will not add to its co-contractant's contractual obligations, and if it detracts from its contractual entitlements, the consequent loss would be repaired by a corresponding award of damages. Sophisticated long-term

21 *See* Wilhelm Wengler, *Les principes généraux du droit en tant que loi du contrat, 1982* REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 496, n.60.

22 "It is not excluded that ('general principles of law and justice') are, partly, the same as the 'trade usages', which arbitrators have to take into account anyway, according to Article 17(2) of the ICC Rules," award of 29 November 1980 in ICC Case 3380/1980, I ICC AWARDS 96, 413 (Pierre Lalive, Chairman).

23 An examination of the relevant arbitration clauses in 237 cases submitted to the ICC Court in 1987 revealed that only one provided that disputes should be settled "on the basis of international law," and *none* mentioned *lex mercatoria*, Stephen Bond, *How to Draft an Arbitration Clause*, 6 J. INT. ARB. 65 (September 1989).

24 *See* Yves Derains, *L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige*, 1972 REV. ARB. 99.

25 *See generally* Pierre Mayer, *La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat*, 1986 JDI 5.

26 In the 1963 award rendered by Pierre Cavin, judge of the Swiss Federal Tribunal (Supreme Court), in the *ad hoc* arbitration between Sapphire International Petroleums Ltd. (Canada) and the National Iranian Oil Company, extracts in English *in* 1964 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1001, the sole arbitrator viewed the following considerations, "reinforced" by other factors, as paramount in excluding the application of the law of the defendant State entity:

> "Under the present agreement, the foreign company was bringing financial and technical assistance to Iran, which involved it in investments, responsibilities, and considerable risks. It therefore seems normal that they should be protected against any legislative changes which might alter the character of the contract and that they should be assured of some legal security. This could not be guaranteed by them by the outright application of Iranian law, which it is within the power of the Iranian State to change." *Id.* at 1012.

27 *See, e.g.*, Saudi Arabia v. Arabian American Oil Company (the *Aramco* award), 1963 INTERNATIONAL LEGAL REPORTS 117.

28 *See* ICC Case 1803/1972 between the Société des Grands Travaux de Marseille and the East Pakistan Industrial Development Corporation, summarized *in* V YEARBOOK 177 (1980), where Andrew Martin, Q.C., sitting as sole arbitrator, had to come to grips with a Presidential Order of Bangladesh which in effect purported to extinguish contractual obligations of the defendant State company. He concluded, *id.* at 181, that:

> "It is . . . painfully clear . . . that the Disputed Debts Order was made for the sole purpose of being injected as a spoliatory measure into the present arbitration."

contracts involving States often specifically envisage the possibility of legislative change, and define its financial consequences as between the parties.

- Accepting the law of the contracting State, but only insofar as it is in concordance with the law of the private co-contractant. The potential difficulties of such a clause have been discussed above. A frequent variant is to accept the law of the State insofar as it is in accordance with a non-national body of norms, such as international law, "general principles of law," equity, norms recognized in the international petroleum industry, and the like. This type of reference to more than one system of law was illustrated by the three well-known arbitrations decided in the 1970's and arising out of the Libyan nationalisation of oil concessions. As required by the Libyan Petroleum Code, each of the litigious concession agreements was governed by Libyan law to the extent it was harmonious with international law; all issues with respect to which there was no such concordance should be decided in accordance with general principles of law. While this construct might have benefited from simplification, the fact is that all three arbitral tribunals were able to operate under these provisions.[29]

See also Case No 723 of the Netherlands Arbitration Institute, Setenave v. Settebello; as reported in the FINANCIAL TIMES on 27 February 1986, the otherwise unpublished award unanimously refused to recognize a Portuguese decree designed to procure contractual benefits to a Portuguese State-owned shipyard in detriment to the rights of a foreign purchaser of a supertanker, holding that to do so would be contrary to "concepts of public policy and morality common to all trading nations," and this despite the fact that the contract was in principle governed by Portuguese law. A less drastic way to reach the same result was suggested in 1982 by the distinguished *ad hoc* tribunal in the familiar *Aminoil v. Kuwait* arbitration: " . . . Kuwait law is a highly evolved system as to which the Government has been at pains to stress that 'established public international law is necessarily part of the law of Kuwait,'" IX YEARBOOK 71, at 73 (1984). *See also* Section 35.03(i).

29 The three awards have been published as follows: 53 INTERNATIONAL LAW REPORTS 297 (1979) (the *BP Award*); 1977 JDI 350-389, English translation *in* 17 ILM 3 (1978), (the *Texaco-Calasiatic Award*); 20 ILM 1 (1981) (the *LIAMCO Award*). *See also* the American Arbitration Association award of 24 August 1978, Revere Copper and Brass, Inc. (U.S.) v. Overseas Private Investment Corporation (U.S.), 17 ILM 1321 (1978); extracts *in* V YEARBOOK 202 (1980) (principles of public international law considered applicable to an agreement between the Jamaican Government and a U.S. mining company because it "could be regarded as belonging to the category of long term economic development contracts").

CHAPTER 8

OCCASIONALLY USEFUL ELEMENTS

8.01 Negotiation, conciliation, or mediation as precondition

Contracts often stipulate that in case of dispute, the parties are required to attempt to reach settlement by negotiation, conciliation, or mediation (or a combination thereof) before proceeding to litigation. Occasionally, it is even stated that such settlement efforts must be given a chance for a stated period of time before adversarial proceedings may be commenced.

The attractiveness of such a "cooling-down" mechanism possibly appears greater at the time of negotiating the contract than at the time the dispute arises. If both of the parties feel it is in their interest to settle, negotiations will ensue irrespective of what the contract provides. If one of the parties is convinced of the pointlessness of negotiation, the settlement-efforts precondition may seem to it to be no more than a hypocritical nuisance requiring *pro forma* compliance.[1]

Nonetheless, there are circumstances when such preconditions are called for. One such case is when contractual relationships are so complex and delicate that the parties realize that an adversarial proceeding ending with a cut-and-dried decision (likely to involve termination of contract and the payment of damages) would be deeply unsatisfactory for both sides. In other words, the parties share a profound desire to continue their relationships, and, fearing the disruptive potential of litigation, want to place as many buffers as possible between themselves and face-to-face conflict.

In the latter situation, it would appear useful to give some content to the process of negotiation or mediation. Specific mechanisms for the facilitation of

1 In ICC Case 2478/1974, excerpts *in* III YEARBOOK 222 (1978); 1975 JDI 926, the arbitral tribunal explicitly rejected an argument that the existence of a clause providing for negotiation in the event of currency fluctuation implied an obligation to reestablish the contractual equilibrium if it were altered by such an event.

settlement attempts may be defined. In the ICC context, such a mechanism is ready-made: conciliation under the ICC Rules (*see* Section 38.01).

At any rate, one should be extremely careful not to confuse settlement efforts with arbitration. In particular, it is fatal to the arbitral process to provide that the arbitrators' decision must be acceptable to both sides. This simply is not arbitration. It means that the ordinary courts retain full jurisdiction.[2]

8.02 Rules or law of procedure

When referring to the French notion of the law applicable to the *procédure arbitrale*, one must realize that the expression may mean either of two things: the rules of procedure to be applied by the arbitrator (narrow meaning) or the law applicable to the arbitral proceedings as an institution (broad meaning). The latter concept may be referred to as "the law of the arbitration." It applies to the arbitration agreement, the relationships between the parties and the arbitrator, the rules of procedures to be applied by the arbitrator, and the award itself.

The law of the arbitration may be conceived as "a system of law underlying the proceedings," which in the international context may at different stages of the process implicate several national laws relevant to the determination of the obligatory effect of the arbitral mechanism.[3]

In practice, the important thing to note about the law of international arbitration is that parties have great latitude in choosing rules of procedure. The ICC Rules represent at once a product and an affirmation of this freedom, Article 15(1) providing that:

> The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the Rules of procedure of a national law to be applied to the arbitration.

The concept embodied in the last phrase first appeared in the ICC Rules in 1975. The 1955 Rules had provided that unless the parties agreed otherwise, the rules of procedure of the place of arbitration would apply. Article 15(1) is a manifestation of the possibility open to parties to delocalize ICC arbitration (*see* Section 1.06). It has given rise to academic controversy[4] but in practice

2 For a case in point, *see* the decision of the *Landgericht* of Heidelberg (23 October 1972) confirmed by the *Oberlandesgericht* of Karlsruhe (13 March 1973), summarized *in* II YEARBOOK 239 (1977).

3 *See* Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, *in* 1981 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 358, at 376 *et seq*.

4 *See* William W. Park and Jan Paulsson, *The Binding Force of International Arbitral Awards*, in 23 VIRGINIA JOURNAL OF INTERNATIONAL LAW 253 (1983) and the references cited therein.

appears to work without great problems (*see* Chapter 16). Concretely, the parties have a number of choices:

- To say nothing, in which case the arbitrator is free to determine rules of procedure if necessary to resolve issues with respect to which the ICC Rules are silent.
- To adopt the rules of procedure of the municipal law of the seat of arbitration.
- To adopt the rules of procedure of another municipal law. (This possibility is explicitly acknowledged by the New York Convention, as well as by the French Decree of 1981 on International Arbitration.)[5]
- To adopt the rules of procedure established by a body other than a national legislature, such as the UNCITRAL Rules.
- To set forth a number of specific rules in the arbitration clause itself, disposing of the various questions treated throughout this Chapter 8.

The choice of procedural rules may be particularly significant if the place of arbitration has not been stipulated (*see* Section 7.02). Since the chairman will generally be a jurist trained in the country of the seat ultimately chosen, he may be used to rules of procedure different from those with which the parties' counsel are familiar.

Quite often, the parties are able to resolve some issues of procedure at the stage of the Terms of Reference (*see* Chapter 15).

8.03 Law governing the arbitration agreement

As set forth in Section 5.04, the arbitration agreement is analysed as having a legal existence independent of that of the contract in which it appears, and as explained in Section 5.05, the law applicable to the arbitration agreement need not be the same as the one applicable to the main contract.

The parties may therefore seek to stipulate expressly the law to be applied to determine the validity and effect of the arbitration clause. Such stipulations

5 Article V of the New York Convention *passim*, particularly paragraph V(1)(e). Article 1491 of the French Code of Civil Procedure.

In an unusual twist on this theme, the English Court of Appeal, in Naviera Amazonica Peruana S.A. v. Compania International de Seguros del Peru, [1988] 1 FTLR 100, excerpts *in* XIII YEARBOOK 156 (1988), held that: "in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the 'seat' of the arbitration."

In the premises, language to be found in two different documents (general conditions and endorsement) supported contradictory potential venues (Lima and London) but the only specific reference to arbitration spoke of "the conditions and laws of London." The English courts held that the seat should therefore be London. For the articulation of the "potential practical problem" of enforcing an award rendered in London pursuant to the "once-in-a-blue-moon set of circumstances" of this case in the courts of Peru, *see* Martin Hunter, Case comment, 1988 LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY REVIEW, at 23.

are rare, perhaps because the parties are satisfied that if such a question arises, their submission to arbitration will not be invalidated by any law likely to be applied. In recent years, however, unfortunate cases in India and Pakistan have given a new importance to this matter. These cases have held that even when an arbitration is conducted outside the country, local courts may control the arbitral process (e.g. by issuing injunctions against arbitrators or setting aside awards) if they consider that their law applies to the arbitration agreement.[6] This approach defeats the objective of neutrality sought by parties to international contracts. It suggests that with respect to legal systems which might follow these examples, foreign parties should not accept their law as applicable to the substance of the contract without carefully isolating the arbitration clause. To this effect, they may be inspired by Article 59(6) of the World Intellectual Property Organization's Arbitration Rules, which provides:

> The law applicable to the arbitration shall be the arbitration law of the place of arbitration, unless the parties have expressly agreed on the application of another arbitration law and such agreement is permitted by the law of the place of arbitration.[7]

Alternatively, the parties simply assume that the law applicable to the main contract also will govern the arbitration clause. If the arbitrator is convinced that this was the mutual understanding of the parties, he would doubtless feel impelled to accept that conclusion.[8]

In circumstances where a competing potentially applicable law is thought unfavorable to arbitration, an explicit stipulation to the effect that the law applicable to the arbitration clause shall be that applicable to the rest of the contract may be useful.

8.04 Rules of conflict of laws

If one has not been able to agree to a substantive law, it may seem somewhat absurd to seek to stipulate that the rules of conflict of a given country (or those invented by resolutions or commentary) shall be applied to determine the substantive law. After all, if one is prepared to accept the rules of conflict in vigor in Country X, why do the parties not simply take legal advice from a jurist of that country? On finding out that the courts of Country X would apply, say, Indonesian law to the envisaged contract, they could then just as

6 *See* Sir Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT. 137 (1997); Jan Paulsson, *The New York Convention's Misadventures in India*, 7 MEALEY'S INT. ARB. REP. 3 (June 1992); and, regrettably demonstrating that this problem was not overcome by the 1996 Indian Arbitration Act, *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. et al.*, (1998) 1 SUPREME COURT CASES 305.

7 XX YEARBOOK 240, at 361 (1995).

8 It will be recalled, however, that in the ICC award described in Section 5.05 (*Dow Chemical*), the arbitrators applied international usages, to the exclusion of any national law, even though French law was applicable to the main contract.

well make things clear and stipulate directly that Indonesian law is applicable to the contract.

In other words, if the parties cannot agree to a proper law, how can they agree to the rules of conflict that determine the proper law?

Yet it happens. One explanation is that neither side in fact does know the rules of conflict of the neutral country under consideration. Many countries have very little in the way of precedents or learning in the field of conflicts. And even those that do generally favor a "grouping of contacts" approach that leaves room for considerable subjective appreciation. In other words, one really does not know what the applicable law will be until the arbitral tribunal decides.

Even in cases where the result of the application of given rules of conflict is quite predictable (thus, the law of the seller is consistently applied to sales contracts by Western European courts), the "indirect" method of approaching applicable law may be appropriate for formal reasons. For example, negotiators for State trading organizations of some countries occasionally offer the thought that it would be incompatible with the "sovereignty" of their country for them to agree to subject the contract to a foreign law. It may be easier to state that the arbitrators in deciding the case are to apply the rules of conflict of some neutral country. If the result is that a foreign law is applied, this will be the arbitral tribunal's responsibility. The State organization itself will not have yielded "sovereignty" in this respect.

It should be recalled *in fine* if the parties do not agree in this respect, the arbitral tribunal shall, under Article 17(1) of the Rules:

> apply the rules of law which it determines to be appropriate.

Much attention has been given to the manner in which arbitrators determine the "appropriate" rules of law, and we shall revert to this issue in Chapter 17. For present purposes, it suffices to say that ICC arbitrators here as in other respects tend to seek solutions in harmony with the parties' legitimate expectations. In one notable award, a sole arbitrator, sitting in Switzerland, found the following succinct expression of his search for a neutral method: "Failing an international convention or a uniform law which is applicable in the States of the contracting parties (France and Spain), the problem must be examined on the basis of certain general rules of connection of international private law."[9]

9 ICC Case 2637/1975, I ICC AWARDS 13. ICC arbitrators, particularly in light of Article 17(1) of the Rules, characteristically hold that "the international arbitrator has no *lex fori*, from which he can borrow rules of conflict of laws," award in ICC Case 1512/1971, I ICC AWARDS 3, 33, 37, 207. *Accord*, awards rendered by Judge Lagergren as sole arbitrator in the *ad hoc* B.P. v. Libya arbitration, award of October 10, 1973 on the merits, 53 INTERNATIONAL LAW REPORTS 297, at Section IV.A; by the ICC tribunal presided by Professor Battifol in ICC Case 1250/1964, I ICC AWARDS 30; and by the tribunal in ICC Case 3540/1980, I ICC AWARDS 105, 399.

8.05 Powers of amiable compositeur

The notion of the arbitrator acting as *amiable compositeur* appears to be a creation of French legal thinking. An arbitrator must apply the law, and not his own concepts of fairness, unless the parties give him the power to disregard strict rules of law. If they do so, he becomes an *amiable compositeur*. Literally, the expression could be translated as "author of friendly compromise," but it would be a mistake to conclude from the word "friendly" that this is the same thing as a conciliator or mediator. The *amiable compositeur* remains an *arbitrator*; he renders a decision that is binding on the parties.

On the other hand, the *amiable compositeur* need not take the law as he finds it. He may refashion rules in the interest of fairness as he perceives it. He may thus be said to have the function of legislator as well as judge. It would therefore be wrong to conclude that an ordinary arbitrator acts as an *amiable compositeur* if he applies *lex mercatoria* or even principles of equity. The ordinary arbitrator must determine that such principles in fact exist, and that they may be applied to the case at hand.

The expression *amiable compositeur* does not seem to have an English equivalent, and appears in French in contracts drafted in other languages. Paradoxically, the *amiable compositeur* function is, according to a comprehensive French dissertation by Eric Loquin, in practice more frequently carried out by U.S. arbitrators (who do not think of themselves as doing anything special in so acting) than by French arbitrators.[10] One might surmize that this phenomenon is traceable to the wide awareness in Anglo-American legal development of "equity" as an integral element of "law."

Nevertheless, the fact that *amiable compositeur* arbitration is likely not to be well understood by national judges in certain countries, such as England,[11] makes it unwise to provide for *amiable compositeur* arbitration in such places.

The consequences of giving the arbitrator *amiable compositeur* powers does not include the neutralization of imperative norms of public policy (*ordre public*). The *amiable compositeur* arbitrator cannot have greater freedom than that of the parties at the time they established his mission. Nor does this power mean that the rules of law will necessarily be disregarded. After all, in a given case, the rule of law may indeed coincide with fairness. What it *does*

10 L'AMIABLE-COMPOSITION EN DROIT COMPARÉ ET INTERNATIONAL, Librairies Techniques, Paris, 1980. The 1978 version of the Rules of Procedures of the Inter-American Commercial Arbitration Commission (IACAC) contains a recommended clause providing that the "arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono*."

11 *See* REDFERN & HUNTER at 37, U.K. Department of Trade and Industry, *Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill*, 10 ARB. INT. 189, at 224-5 (1994). In fact, the English Arbitration Act 1996 did not embrace the concept; *see* Stewart Shackleton, *The Applicable Law in International Arbitration Under the New English Arb* 375, at 379 (1997).

mean is that the arbitrator acting as *amiable compositeur* will not apply the letter of the law unless he is in fact satisfied that it corresponds with fairness.

But when he decides *not* to apply the law, what is the *amiable compositeur* finally doing? To refer to intuition or legal "culture" is to invite the application of subjective values, a dangerous thing in view of the fact that the international framework must fit a world where ethical values are not always shared. Having surveyed a number of awards rendered by *amiable compositeur* arbitrators, Mr. Loquin concludes that it is possible to discern two objective approaches. The first is centered on rules of a general nature, such as (a) a presumption of intended equality in the contractual *quid pro quo*; (b) a presumption of intended equality of risk; and (c) applying the requirement of good faith. The second is more innovative: to work toward the solution which seems to have the best prospects of being accepted by both parties without compromising their potential future dealings.

Are arbitrators acting as *amiables compositeurs* free to temper the application of contractual terms if they feel that this would result in harshness in a particular case? One commentator has suggested[12] that such powers are most likely to be recognized in cases where, at the time they agree to *amiable compositeur* arbitration, the parties recognize that their contract is subject to unforeseeable future events. This may be the case with respect to long-term contracts or with others, such as a motion-picture distribution agreement, whose financial consequences depend on highly unpredictable consumer response. In these situations, one may conclude that the parties specifically intended to reduce the drastic consequences of risk by relying on the wisdom of the arbitrator, and that that was the reason they gave him *amiable compositeur* powers. In an ordinary contract, tempering the contractual provisions would not have such a justification: it would be tampering.

The fact remains, in the international setting, that arbitrators tend to adjust the application of law in favor of giving full effect to the parties' agreement rather than to "adjust" the parties' agreement in order to give effect to a personal evaluation of what would have been a fair bargain. Indeed, international arbitrators are likely to moderate the application of law in favor of the parties' agreement even if they do *not* have *amiable compositeur* authority.[13]

In the specific framework of ICC arbitration, one may well wonder if there are any practical consequences of according *amiable compositeur* powers to the arbitrator. After all, Article 17(2) of the Rules provide that:

> *In all cases* the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages. (Emphasis added.)

12 Ernest Metzger, case note, 1982 REV. ARB. 220, at 222.

13 JULIAN LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (1978).

If the ordinary arbitrator shall in all cases refer to trade usages, one would expect him rarely, if ever, to disregard settled expectations in a particular type of industry. And it would certainly be unusual that the negotiators not only perceive that the contract is contrary to usage, but want to allow the arbitrator to be able to repair matters as *amiable compositeur* by disregarding what was drafted.

Since it is difficult to conceive that draftsmen suffer from such doubts as to the appropriateness of the contractual rules they have defined that they would—in the same breath, as it were—expressly empower the arbitrators to disregard these rules, one is left with the neutralization of strict rules of law as the fundamental motive for granting *amiable compositeur* powers. There may be complex cases where the impact of one or more potentially applicable laws is difficult for the negotiators to measure, particularly in an unknown country, or negotiating under severe time constraints. Under such circumstances, it may be felt useful and appropriate, by stipulating *amiable compositeur* arbitration, to reduce the risk that unintended technicalities of an imperfectly apprehended applicable law prevent the arbitrator from giving effect to the parties' intent.

In ICC arbitral practice, the *amiable compositeur* question comes up at the time of drafting the Terms of Reference, since Article 18(1)(g) of the Rules invites the parties to specify in that document whether they wish to grant such powers. At this ripe stage of litigation, it is unusual that the parties reach agreement, since it is generally apparent who is favored by a legalistic approach, and who would benefit from giving wide berth to arguments based on equity. Accordingly, if there is to be agreement regarding *amiable compositeur* powers, it generally will occur in the initial arbitration clause.

Is there a difference between giving the arbitrator power to decide "in equity" (or *ex aequo et bono*) as opposed to acting as *amiable compositeur*? This question is a controverted one among scholars.[14]

One rather doubts that it makes a great deal of difference in practice. Whether an arbitrator is asked to act as *amiable compositeur* or to decide in equity, he

14 In his commentary to the Swiss Intercantonal Concordat on Arbitration, Andre Panchaud wrote flatly in his note under Article 31: "The award in equity is that rendered by an *amiable compositeur*." The official German text of the 1961 European Convention on International Commercial Arbitration reflects the same perception, translating the decision of an *amiable compositeur* as being one rendered "in accordance with equity".

The 1965 ICSID Convention arguably also assumes the same identity of functions since it refers only to decisions *ex aequo et bono*, and not *amiable compositeur*. Wilhelm Wengler, for his part, insists on the difference between the two concepts, arguing that a decision in equity is but a "refined" application of the law (*i.e.* conscious of fairness in a particular context), whereas the *amiable compositeur* seeks a solution based on considerations independent of legal norms but deemed to be important given the parties' particular dealings and context; *see Les principes généraux du droit en tant que loi du contrat*, 1982 REVUE CRITIQUE DU DROIT INTERNATIONAL PRIVÉ 478-9.

realizes that something more is asked of him than to determine the letter of the law and apply it to the facts. In both cases, the principles of law are inevitably part of the context on the basis of which one may determine what had been the parties' legitimate expectations when entering into contract. In fact, one may safely assume that a quantitative analysis of ICC awards would reveal no significant difference in the number of references to legal rules or principles if they were grouped under the categories of "equity decisions" and *amiable compositeur* decisions, respectively.

Nevertheless, as a matter of contract drafting, it is clear that if the parties desire to give their arbitrator the maximum freedom to fashion his decision according to his personal judgment, they should give him the power of *amiable compositeur* rather than to authorize him to decide in equity. For if there is a difference between the two concepts, it is that the arbitrator is more bound to the law in the latter case.

The question is then whether the parties do not prefer the predictability of application of precise norms laid down by governing law and (more importantly in international contracts, which are generally very complete) agreements as negotiated, on the grounds that this perspective allows one to discern the rules of the game of performance: any future arbitration will be won if one has been more scrupulous than one's co-contractant in respecting legal and contractual obligations.

It should be kept in mind, finally, that while they may disregard certain contractual clauses in order to restore a fair commercial balance to the parties' bargain,[15] *amiable compositeur* arbitrators may not rewrite the contract by creating new obligations. They may adjust or disregard, but not create (*see* generally Chapter 18).

The following clause appeared in an English language contract:

> The arbitral tribunal shall have the broadest powers to decide as an equitable mediator upon the issues submitted to it, without needing to observe legal or procedural rules.

This is a typical *amiable compositeur* clause. However, the expression "equitable mediator" (a clear misnomer inconsistent with the very concept of an arbitrator) should have been replaced by the French expression *amiable compositeur*, which like *force majeure* appears to be the best way to say what

15 *Accord*, PHILIPPE FOUCHARD, ARBITRAGE COMMERCIAL INTERNATIONAL 404-5 (1965), cited with approval by the ICC arbitral tribunal in Case 3267/1979, excerpts *in* 1980 JDI 961; excerpts in English in VII YEARBOOK 96 (1982).

Even if acting as *amiables compositeurs*, arbitrators are not, "according to general principles . . ., authorized to take a decision contrary to an absolutely constraining law, particularly the rules concerning public order or morals," award in ICC Case 1677/1975, I ICC AWARDS 20.

one means. If one is truly loath to use a foreign phrase, the following clause covers the concept of *amiable compositeur:*

> The arbitrator shall be entitled to decide according to equity and good conscience and shall not be obliged to follow the strict rules of law.[16]

8.06 Powers to adapt the contract

Arbitration is not invariably the settlement of a dispute. There are situations where the parties simply need to *adapt* their contract in view of factors unknown at the time of contracting. Two categories of adaptation may be involved: filling gaps and modifying the contract.

Filling gaps may be necessary for several reasons. It may be that the missing element is of great importance, but the parties simply were unable to take into account factors imponderable at the time of contracting. The arbitrators may even determine the contractual price, provided applicable law allows this mission to be entrusted to a third party. In this context, the arbitrator is not to decide a dispute, but simply to complete the contract. In other cases, the parties simply did not take the trouble to specify certain details, thinking them to be minor and unlikely to give rise to difficulties. If, to the contrary, a dispute arises, they want the arbitrator to supply the missing term of the contract, naturally in the light of practice in the relevant industry. Thus, the arbitrator may be called on to rule on the type of packaging in which goods ought to be delivered to the buyer, the parties having stipulated without more a certain quantity to be delivered "FOB airport,"[17] or a total number of X deliveries is specified for a total period of Y months without defining the intervals between individual deliveries.

Modifying the contract may be particularly vital to the success of long- term projects, with respect to which the evolution of the product market, rates of currency exchange, technological developments, politics, relative competitive advantages, and the like, may make it highly desirable to provide for an arbitral adjustment of the contract. Otherwise, the sole alternative to a negotiated solution would be the termination of the contract with a possible award of damages. Both parties may agree at the time of negotiating the contract that they must find a way of ensuring better long-term stability for their association.[18]

National laws take different positions with respect to the limits of arbitrators' capacity to adapt contracts.[19]

16 Suggested by MICHAEL MUSTILL & STEWART BOYD, COMMERCIAL ARBITRATION 74 (2d ed. 1989).

17 The reader will recognize this term as one of the INCOTERMS developed by the ICC, *see* ICC publication No. 460 (1990 edition of the INCOTERMS).

18 *See generally* WOLFGANG PETER, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS (2d ed. 1995).

19 *See* Section II(3) of the various *National Reports* appearing in the ICCA HANDBOOK; thus, for example, V.V. Veeder writes with respect to England, VOL. II, SUPPL. 23 (March 1997), at 22: "no difficulty arises if the tribunal is authorised to fill such gaps;" Albert Jan van den Berg with respect to the Netherlands, VOL. III, SUPPL. 7 (April 1987) at 7: "the new Act ... explicitly allows parties to authorize an arbitral tribunal to modify or fill gaps in a contract" (Art. 1020(4)(c)); *but* Bernardo Cremades with respect to Spain, VOL. III, SUPPL. 13 (September 1992) at 6 that the situation "needs to be clarified by case law;" Robert Briner with respect to Switzerland, VOL. III, SUPPL. 13 (September 1992) at 12 that "the opinion that arbitrators cannot be entrusted with the power to fill gaps is probably too restrictive, but this question is still undecided." For more detailed discussion, *see* Bernard Oppetit, *Arbitrage juridictionnel et arbitrage contractuel*, 1977 REV. ARB. 315 (expressing doubts as to the situation in France); Peter Schlosser, *Right and Remedy in Common Law Arbitration and in German Arbitration Law*, 4 J. INT. ARB. 27, at 30-32 (1987) (concluding confidently that under German law parties have the freedom to authorize arbitrators to adapt contracts).

The Resolutions of the Working Group on Arbitration and Technology at the 6th International Congress on Arbitration (Mexico City, 1978) included a paragraph 9 that called for "giving to the arbitrators sufficient powers to fill all possible gaps" in order to be able to adjust to technological developments, IV YEARBOOK XXV (1979).

20 In one ICC case, the arbitrators reasoned as follows:

> "the price increase was susceptible of objective determination on the basis of available statistics and thus any possibility that it could have been fixed arbitrarily and artificially by one of the parties, which might have rendered the contract illegal or at any rate unenforceable, was avoided . . . The dispute could be submitted to an arbitral tribunal to fix the price increase by reference to objective factors . . ."

ICC Case 4761/1987, II ICC AWARDS 302, at 307. But for an instance where ICC arbitrators *refused* to establish a new indexation clause to replace an industrial index which had ceased to be published, and this although they had the authority to decide as *amiables compositeurs*, *see* ICC Case 3938/1982, I ICC AWARDS 503.

21 ICC Case 5754/1988, unpublished, quoted in section 6.03. *Contra*, REDFERN & HUNTER at 182.

Many appear not to have envisaged the problem in legislation or case law. Yet in the practice of international contract negotiation and international arbitration, the adaptation of contracts is a matter of importance, and ICC arbitrators frequently deal with adaptation clauses.[20]

Although ICC arbitrators have on at least one occasion held the language of the ICC Model Clause to be broad enough to allow them to adjust the price of a long-term contract when the parties fail to agree to a periodic price revision as contemplated under the contract,[21] drafters seeking the possibility of arbitral adaptation of contracts should include a specific clause recognizing its need and setting forth as explicitly as possible the elements that are to determine (a) when an adaptation is called for and (b) the extent to which it should be effected.

In response to the apparent needs of international practice, the ICC has attempted to offer a variety of alternative approaches to the matter. These mechanisms—conciliation or technical expertise—may either complement or supplant the device of giving the arbitrators the mission to adapt the contract. They are described in Chapter 38.

8.07 Powers and procedures for provisional relief

Until their revision in 1998, the Rules did not explicitly acknowledge the authority of ICC arbitrators to order interim or conservatory measures. Under the prior editions, it was therefore important in certain circumstances to avoid doubt by making contractual provisions in this respect.

Now Article 23(1) entitles the arbitral tribunal, unless the parties have provided otherwise, to order "any interim or conservatory measure it deems appropriate." It also makes clear that such a measure may be conditional upon the requesting party providing security, and that it may take the form of an order or an award.

The appearance of this new feature of the Rules makes it far less important for drafters to complement arbitration clauses in this respect. Indeed, Article 23(2) makes clear that a party may *also* seek judicially granted interim or conservatory measures without thereby being deemed to infringe or waive the agreement to arbitrate. This obviates yet another element of the prudent drafter's kit of yesteryear.

A leading Swiss arbitrator, noting that some countries' laws expressly reserve the judge's prerogatives of granting provisional relief even when the dispute is subject to arbitration, has commented that:

> It is desirable that the arbitrator be able to exercise this power, which will, for example, allow him to order continued performance irrespective of the litigation, or to the contrary, to authorize the taking over of the work site by a new contractor or by the owner, to demand guarantees from one party or the other, and the like.[22]

There have been occasional instances in ICC arbitrations, particularly in large projects for the construction and start-up of industrial plants, where experienced and confident arbitrators have ordered parties to make provisional payments into an escrow account, thereby allowing expenditures to be made occasionally under the control of an expert appointed by the tribunal—to maintain the project at least in suspended animation (if not in progress) pending resolution of the dispute. In appropriate circumstances, an explicit contractual stipulation may be useful, tailor- made to the likely requirements of the works or transactions contemplated, so as to avoid controversy as to the concrete application of Article 23.

Naturally, one should not lose sight of the limited nature of the arbitrators' sanction in this regard. If a party refuses to obey the provisional order, compliance must be secured by enlisting the assistance of ordinary courts. If this may be done only by having the provisional order take the form of an award

22 Claude Reymond, *Problèmes actuels de l'arbitrage commercial international*, 1982 REVUE ÉCONOMIQUE ET SOCIALE 5.

approved by the ICC Court and submitted to recognition (*exequatur*) proceedings, one may wish that one had found a way to make the stipulation self-executing, by stipulating the consequences of non-compliance.[23]

Finally, although arbitrators lack powers of enforcement, and cannot grant attachments or hold parties in contempt, all of which powers are reserved for national courts, the effectiveness of provisional orders issued by arbitrators should not be underestimated. Parties do not ordinarily flout procedural orders made by arbitrators under contractually granted powers. To do so would be to risk incurring the disfavor of the tribunal and casting doubt on one's own good faith.

8.08 Procedural details

In view of the fact that the ICC Rules say very little about the specifics of procedure, parties may wish to reach agreement on certain basic questions of procedure. Otherwise, the arbitral tribunal will have very wide discretion under Article 15(1) of the Rules.[24] Since the rules so established depend to great extent on the legal training and habits of the chairman or sole arbitrator, whose nationality may be unpredictable on the date of contracting, it may be useful to set forth some basic principles in the arbitration clause itself.

In practice, however, such matters are usually dealt with in the Terms of Reference established after arbitral proceedings have been commenced. It often appears easier to tailor rules to an existing litigation than to preconceive detailed rules to cover any possible future litigation.

One should always bear in mind that primacy is to be given to the will of the parties. If the parties are agreed that a given procedural issue should be resolved in a particular way, the arbitrators should accede to their wishes in all but the most exceptional situation (such as a request for a procedural step contrary to fundamental principles, or involving the arbitrators in vast efforts they could not have anticipated when accepting their mandate).

23 Going somewhat further than Article 23 of the Rules, THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR CLAUSES IN INTERNATIONAL CONTRACTS 88 (2d. edition 1999) suggests the following contractual provision:

> Without prejudice to such provisional remedies in aid of arbitration as may be available under the jurisdiction of a competent court, the arbitral tribunal shall have full authority to grant provisional remedies and *to award damages for the failure of a party to respect the arbitral tribunal's orders to that effect*. (Emphasis added.)

24 Arbitrators' exercise of this discretion is generally accepted by national courts asked to rule on challenges to awards. *See, e.g.*, Laminoirs Tréfileries-Cableries de Lens S.A., v. Southwire Co., 484 F. Supp. 1063 (1980); summarized *in* VI YEARBOOK 247 (1981), where ICC arbitrators' refusal to allow cross-examination of an adverse witness on the grounds of irrelevance was held to be within the scope of their authority and did not constitute a ground for the U.S. party to resist execution of the award.

statute, the Sherman Act, despite the contract's explicit choice of Swiss governing law.[2] Moreover, the Court warned that an American judge asked to enforce any award resulting from the arbitration might have a second look at the process to insure that the United States' antitrust law had in fact been taken into account.[3]

Not only does national arbitration law affect ICC arbitration, but the ICC Rules in turn affect the application of national law. Many nations permit annulment or non-recognition of an award because the parties' agreement (which includes the ICC Rules[4]) was not followed with respect to the arbitral procedure[5] or the constitution of the arbitral tribunal.[6]

Sometimes the mandates of national arbitration law run parallel to the ICC Rules. For example, Article 15(2) of the Rules provides that the arbitral tribunal shall in all cases "act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." This fundamental principle of ICC arbitration echoes analogous notions of due process and equal treatment contained in national law.[7]

28.02 Matters Affected by National Arbitration Law

Familiarity with national arbitration law commends itself both before and after a dispute has arisen. At the time the arbitration clause is drafted, lawyers should try to select an arbitral venue where the judiciary monitors an arbitration's fundamental procedural fairness, but does not review the merits of the arbitrator's conclusions of fact or law. The venue should also be in a country that adheres to the 1958 New York Arbitration Convention, which many nations apply only on the basis of reciprocity, to awards rendered in the territory of another contracting state.

2 *See* footnote 19 of Mitsubishi v. Soler, 473 U.S. 614 (1985). *See generally*, William W. Park, *Private Adjudicators and the Public Interest*, 12 BROOK. J. INT. L. 629 (1986).

3 The Court's problematic "second look" doctrine is discussed at 473 U.S. 614 (1985), pages 637-38.

4 For example, arbitrator independence would be incorporated into an arbitration clause by reference to the ICC Rules (see Article 7), regardless of whether the arbitral situs prohibits or allows arbitrator links with one of the parties.

5 *See* UNCITRAL Model Arbitration Law, Article 34(2)(a)(iv) and Article V(1)(d) of the New York Convention. *See also* 1996 English Arbitration Act, § 68(2)(c), defining serious irregularity for which an award may be challenged to include "failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties."

6 *See* French *NCPC* Article 1502(2), which permits annulment of an award if the arbitral tribunal was improperly constituted (*irregulièrement composé*), and cases discussed in Matthieu de Boisséson, *LE DROIT FRANÇAIS DE L'ARBITRAGE* (1990), at paragraph 795 (pages 833-34).

7 *See e.g.*, 1996 English Arbitration Act § 68, French *NCPC* Article 1502(4), Swiss L.D.I.P. Article 190(2)(d), U.S. Federal Arbitration Act, § 10(a)(3) and UNCITRAL Model Arbitration Law, Article 34(a)(ii).

Later, after a claim has been filed, national arbitration law may become relevant if judicial proceedings are instituted to compel arbitration, to attach assets, to stay competing judicial proceedings, to remove biased arbitrators, or to obtain the production of evidence. Subsequent to the arbitration, courts may be asked to vacate, confirm or enforce an award on grounds as diverse (depending on the country) as a denial of due process, an excess of jurisdiction or even a mistake on a point of law.

The following five matters are among those aspects of national arbitration law which most frequently affect ICC arbitration.

(i) *The Validity of the Arbitration Agreement.* Like the New York Arbitration Convention, the laws at most major arbitral centers require arbitration agreements to be in writing, but may differ on how prominent the "writing" must be (first page in capitals? just above the signature?), whether it may be incorporated into a contract by reference to the rules of a trade association, or whether by its conduct a party may be deemed to have accepted a document containing an arbitration provision.

(ii) *Subject Matter Arbitrability.* Some countries require that disputes relating to public law matters (competition, patents, securities, discrimination) must be submitted to courts rather than arbitrators.

(iii) *Preconditions to Arbitration.* In some jurisdictions, only courts are empowered to determine whether arbitration claims have been filed within relevant express or implied time limits.

(iv) *Interim Measures.* To support arbitration, courts sometimes compel testimony, secure the attendance of witnesses, preserve evidence, arrange for sale of perishable goods, or remove non-performing arbitrators. In addition, courts of competent jurisdiction may deal directly with urgent matters such as the enforcement of confidentiality obligations or security agreements that have been excluded from the agreement to arbitrate, or are covered by Article 23(2) of the ICC Rules.

(v) *Review of Awards.* Courts at the arbitral seat generally may set aside an award if the proceedings are not fair or if the arbitrators exceed their mission. In some countries courts may also hear appeals on issues of law.

28.03 The Arbitral Situs

(a) The "Law of the Arbitration."

The arbitral situs—also called the arbitral "seat" or the place of arbitration—will be designated either in the arbitration agreement or by the ICC Court. Although the arbitral seat serves as the focal point for the proceedings,

In the United States courts have generally refrained from exercising jurisdiction over an arbitration based solely on a choice-of-law clause.[66] Courts of other nations, however, have occasionally taken a different view, and asserted power to annul awards made outside their borders, based only on a choice-of-law clause in the principal contract.[67]

In this connection, one must remember that the New York Arbitration Convention, for better or for worse, allows non-recognition of awards set aside by "a competent authority of the country in which, *or under the law of which*, that award was made."[68] Thus it is theoretically possible for an annulment in a country other than the arbitral situs to serve as a defense to award recognition under the Convention. This does not mean, however, that the exercise of jurisdiction by that other country is sound policy.

28.06 Keeping National Law in Perspective

The torrent of arbitration law reform during the past two decades[69] has often been fueled by expectations of "invisible exports," a euphemism for fees to arbitrators, lawyers and expert witnesses.[70]

66 *See* International Standard Electric Corporation (ISEC) v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172 (S.D.N.Y. 1990). When an award was rendered in Mexico pursuant to a contract subject to New York substantive law, the loser sought to have it set aside in New York. The federal district court concluded that only Mexican courts had the power to vacate an award made in Mexico.

67 *See* Oil & Natural Gas Commission v. Western Company of North America, 1987 All India Reports SC 674, *excerpted in* 13 YEARBOOK 473 (1988); National Thermal Power Corporation v. Singer Corporation, Supreme Court of India, 18 YEARBOOK 403 (1993). *Compare* Renusager Power Co. Ltd. v. General Electric Co. (1993), *discussed in* Tony Khindria, *Enforcement of Arbitration Awards in India*, 23 INT. BUS. LAWYER 11 (January 1995). *See generally* Jan Paulsson, *The New York Convention's Misadventures in India*, 7 MEALEY'S INT. ARB. REP. at 3-8 (June 1992); J. Gillis Wetter & Charl Priem, *The 1993 General Electric Case: The Supreme Court of India's Re-Affirm Pro-Enforcement Policy Under the New York Convention*, 8 INT. ARB. REP. (December 1993); F.S. Nariman, *Finality in India: The Impossible Dream*, 10 ARB. INT. 373 (1994); Lawrence Ebb, *India Responds to the Critics of its Misadventures under the New York Convention: The 1996 Arbitration Ordinance*, 11 MEALEY'S INT. ARB. REP. 17 (1997).

68 New York Convention Article V(1)(e).

69 The chronicle of new arbitration statutes includes *inter alia* legislation in England (1979 and 1996), France (1981), Belgium (1985 and 1997), the Netherlands (1986), Portugal (1986), Switzerland (1987), Spain (1988), Hong Kong (1990, 1996 and 1997), Italy (1994), Germany (1997), as well as the UNCITRAL Model Law (1985) and its progeny. *See generally* Adam Samuel, *Arbitration in Western Europe: A Generation of Reform*, 7 ARB. INT. 319 (1991).

70 In connection with the 1996 English Arbitration Act, the Departmental Advisory Committee on Arbitration advised that "The fact is that this country has been very slow to modernize its arbitration law and this has done us no good in our endeavor to retain our pre-eminence in the field of international arbitration, a service which brings this country very substantial amounts indeed." 1996 Department of Trade and Industry, Departmental Advisory Report, paragraph 335, at 69. *See also* discussion of the movement to adopt the UNCITRAL Model Arbitration Law in the United States in Alan Scott Rau, *The UNCITRAL Model Law and Federal Courts: The Case of Waiver*, 6 AM. REV. INT. ARB. 223 (1995), in which Professor Rau refers to the "bizarre chapter of wishful thinking" that a state can attract international arbitration business simply through

How much the overhaul of a national legal régime will in fact increase the adopting country's selection as situs for ICC arbitration remains debatable. When, how and why legislative reform makes a country more desirable as an arbitral situs will depend not only on the stage of development of prior law, but also on the impact of non-legal influences. Geography and history often matter more to the choice of an arbitral situs than the efficiency of the legal environment, and may even trump the impact of a marginally less favorable statute, assuming consensus on what exactly constitutes a juridical environment favorable to arbitration.

More than one country has been a popular situs for international arbitration notwithstanding a legal régime which, at the relevant times, was generally considered as hostile to the business community's expectation of arbitrator autonomy. England attracted international arbitration (although not as much as some lawyers desired), even before the 1979 and 1996 reforms which made the legal framework for international arbitration more user friendly. Switzerland's popularity as an arbitral situs developed at a time when merits review of "arbitrary" awards prevailed under the *Intercantonal Concordat*.[71] Both nations gained favor as places to arbitrate due less to their national law than to factors such as England's central role in modern commercial and financial matters, and the Swiss reputation for neutrality and efficiency. The impetus for the reform in these jurisdictions came largely from lawyers and arbitrators who had already tasted the fruits of successful practice, and were anxious to keep business from going elsewhere.[72]

The role of historical accident does not mean that the quality of arbitration law does not matter, however. Particularly at the margins of venue selection, a reputation for a good or bad arbitration law will often cause a migration among otherwise plausible locations. Boston will not soon replace London or Paris as a center for international commercial arbitration, no matter how fine an arbitration statute the Commonwealth of Massachusetts adopts. However, costly judicial meddling in arbitration by English courts might well result in some arbitrations moving over the Channel to Paris or Geneva.

adoption of the Model Law.

71 Awards may be annulled if considered as "arbitrary" due to "violation of law or equity". *See* Article 36(f) of *Concordat Intercantonal sur l'Arbitrage*, which governed international arbitration in most Swiss cantons before the *Loi fédérale de droit international privé* took effect in 1989. Since 1989 the Concordat will apply only if the parties so elect in writing. *See LDIP* Article 176.

72 For the selection of England and Switzerland as locations for arbitration, *see* statistics on England and Switzerland as seats of arbitration in Appendix I of the first (1984) and second (1990) editions of W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION.

28.07 Courts and Arbitral Jurisdiction[73]

While the parties to ICC arbitration expect the arbitrators to be the sole judges of the merits of the dispute, the same cannot necessarily be said about the limits of their own power. The interaction of national law and ICC arbitration implicates an allocation of functions between arbitrators and courts which can be both elusive and complex with respect to the when, how and by whom an arbitrator's jurisdiction will be determined.

Imagine for example that a claim is made on the basis of an arbitration clause which the defendant says is invalid. Should the defendant be able to go to court at the outset of the proceedings to contest the arbitrators' jurisdiction? Or must the defendant wait until an award is rendered, and then move to have that award set aside? If an award has already been issued, what (if any) deference should a reviewing court show to the arbitrator's finding? If the arbitrator has found the principal contract invalid, will this necessarily entail invalidity of the arbitration clause? As discussed below, such questions are usually analyzed according to two oft-confused notions: *compétence-compétence* and separability.

(a) Compétence-Compétence.

The concept referred to as *compétence-compétence* (literally "jurisdiction concerning jurisdiction") links together a constellation of disparate notions about when arbitrators can rule on the limits of their own power.[74] Depending on the context, reference to an arbitrator's "jurisdiction to decide jurisdiction" has operated with three quite distinct practical consequences: (1) the arbitrators need not stop the arbitration when one party objects to their jurisdiction; (2) courts delay consideration of arbitral jurisdiction until an award is made; (3) arbitrators decide questions of their own jurisdiction bindingly, with no judicial review.

(i) No Need to Stop the Arbitration.

In its simplest formulation, *compétence-compétence* means no more than that arbitrators can look into their own jurisdiction without waiting for a court to do so. In other words, when one side says the arbitration clause is invalid, there is no need to halt proceedings and refer the question to a judge.[75] However, under this brand of *compétence-compétence* the arbitrators' determination about their power would be subject to judicial review at any time,[76] whether after an award is rendered[77] or when a motion is made to stay court proceedings or to compel arbitration.[78]

On this matter it is important not to confuse the allocation of functions between arbitrators and the ICC Court with the allocation of responsibility between arbitrators and national courts. Under Article 6 of the ICC Rules, if the ICC Court is "*prima facie* satisfied" that an arbitration agreement exists, any jurisdictional challenge of a deeper nature goes to the arbitrators. This does not mean, however, that national courts will be deprived of power to make jurisdictional determinations when asked to stay litigation, enjoin arbitration or vacate an award.[79]

(ii) Courts Consider Jurisdiction Only After Award.

French law goes further, however, and delays court review of arbitral jurisdiction until *after* an award is rendered. If an arbitral tribunal has already begun to hear a matter, courts must decline to hear the case. When an arbitral tribunal has not yet been constituted, court litigation will go forward only if the alleged arbitration agreement is clearly void (*manifestement nulle*).[80]

To some extent, what is at issue here is the timing of judicial review. Going to court at the beginning of the proceedings can save expense for a defendant improperly joined to the arbitration. On the other hand, judicial resources

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73 *See generally*, William W. Park, *Determining Arbitral Jurisdiction*, 8 AM. REV. INT'L ARB. 133 (1997).

74 *See generally*, Carlos Alfaro & Flavia Guimarey, *Who Should Determine Arbitrability?*, 12 ARB. INT. 415 (1996); William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT. 137 (1996).

75 *See e.g.*, Christopher Brown Ltd v. Genossenschaft Oesterreifchischer Waldbesitzer, [1954] 1 Q.B. 8.; 1996 English Arbitration Act § 30.

76 The same English Arbitration Act that in § 30 provides for arbitrators to determine their own jurisdiction as a preliminary matter also permits judicial challenge of any jurisdictional determination (Act § 67) and provides for stay of litigation only if the court is satisfied that the arbitration agreement is not "null and void, inoperative or incapable of being performed" (Act § 9).

77 *See e.g* Swiss *Tribunal fédéral*, 17 August 1995, Vekoma v. Maran Coal Company, 14 SWISS BULL. 673 (1996) with commentary by Philippe Schweizer. ICC award rendered in Geneva, arising out of dispute over delivery of coke; courts in Switzerland will examine the arbitrators' jurisdictional determinations *de novo*.

78 *See e.g.* Three Valley Municipal Water District v. E.F. Hutton, 925 F. 2d 1136 (9th Cir. 1991) (held for the court to determine whether contracts were void because of signatory's lack of power to bind principals) and Engalla v. Permanente Med. Group, 938 P.2d 903 (Cal. 1997) (malpractice claim against a health care provider referred to *ad hoc* arbitration which left administration to the parties rather than an independent institution; Supreme Court of California found that the habitual delays in the process constituted evidence of fraud by health care provider). *See also* Swiss *Tribunal fédéral*, 16 Jan. 1995, Compagnie de Navigation et Transports v. Mediterranean Shipping Company, ATF 121 II 38, where the court called for a full examination of the scope of the arbitration clause before stay of judicial proceedings in favor of an arbitration outside of Switzerland, while admitting that in a domestic arbitration the court might be limited to a "*prima facie* review" of the arbitration agreement's validity.

79 *But see* Apollo v. Berg, 886 F. 2d 469 (1st Cir. 1989), where the court relied in part on what was then Article 8 of the ICC Rules (now Article 6(2)) to limit the court's own review function. After the defendant had questioned whether the arbitration clause remained valid after contract assignment, the federal court turned over to the arbitrators the question of the arbitration clause's validity. The decision has been questioned. *See* William W. Park, *The Arbitrability Dicta in First Options v. Kaplan* 12 ARB. INT. 137 (1996) at 147-48.

80 *See* Article 1458 of the *Nouveau code de procédure civile*, discussed in Chapter 31.

One thing is certain: almost all authorities recognize the principle of arbitrators' duty of confidentiality, and accept the arbitrators' corresponding right not to be questioned as to the content of the award or the deliberation and reason that led to it. Yet even this generally recognized principle can sometimes give rise to difficulties of application.[48]

48 In a Swedish case the U.S. counsel of one of the parties disclosed the text of an interim award on jurisdiction to Mealey's International Arbitration Report where it was published. After publication the Chairman of the arbitral tribunal disclosed the award to a member of the Supreme Court of Sweden because the Supreme Court was considering in another matter the same point of law. The offended party sought to overturn the award and disqualify the arbitrator. In a surprising decision the Stockholm City Court found that the party's breach of confidentiality entailed the nullification of the award. The Court of Appeal reversed the City Court's decision (Bulgarian Foreign Trade Bank, Ltd. v. A.I. Trade Finance, Inc., Case T 1092-98, Judgement of 30 March 1999, 14 MEALEY'S INT. ARB. REP. A-1 (No. 4, April 1999) finding that there was no statutory obligations of confidentiality for arbitration in Swedish law and while secrecy was an important attribute of arbitration, one could not say that there was an absolute and binding implied obligation of confidentiality. In the case it found that in any event any breach by the party revealing the award could be sanctioned by damages and that the invalidating of the arbitration award was not justified. It further found that the Chairman of the arbitral tribunal, who had revealed the award to a member of the Supreme Court purely for intellectual legal reasons, could not be disqualified (a point that was not ruled on by the court below). The Court of Appeal's decision seems to fall into the main line of confidentiality cases before national courts. However, the Swedish Supreme Court, which granted leave to appeal, will still have the last word. *See* Hans Bagner, *Confidentiality in International Commercial Arbitration Practice to be Considered by the Swedish Supreme Court*, 14 2MEALEY'S INT. ARB. REP. 9 (No. 9, September 1999).

CHAPTER 17

CHOICE OF SUBSTANTIVE LAW

17.01 Freedom of arbitrators to apply "appropriate" rules of law

i) Liberalization of choice of law process by the 1998 Rules

It is advisable to choose the applicable law in the principal agreement. Most systems of law give parties wide latitude to select the proper law of their contract. The various elements that should go into the exercise of their choice have been described in Section 7.04. When the parties fail to make an express choice, the arbitrators must deal with the issue. Article 17 of the Rules, as revised in 1998, gives the arbitrators wide discretion since they are permitted to choose the applicable law without reference to a particular system of choice of law; in addition they are allowed to apply "rules of law" as contrasted with a specific national law.

Article 17 of the ICC Rules provides, in part, that:

> (1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
>
> (2) In all cases, the arbitral tribunal shall take account of the provisions of the contract and the relevant trade usage.

The modification of the Rules confirms the liberal power of the parties to determine the legal standards governing their obligations. While most contracts provide for the application of a single national law, parties sometimes choose independent rules of law such as the Vienna Sales Convention, or the UNIDROIT Principles of International Commercial Contracts, or "the rules of law governing contractual obligations common to England and France". Parties may also choose to apply "general principles of international law" or similar formulations (such as the principles of *lex mercatoria*), although it should be recognized that such formulations seldom supply sufficiently defined standards to resolve all the legal issues which may arise. The revised

Rules confirm that when parties act in this way arbitrators should accept their decision.

When the parties have not made any determination, Article 17(1) gives to the arbitral tribunal the power to apply "rules of law", thus a broader power than that granted by Article 13(3) of the 1975 Rules which implied a requirement to choose a single national law as the "proper law" of the contract designated by a rule of conflicts of law. This requirement was at odds with arbitral practices.

Even if in most cases where the parties have not designated the applicable rules of law it may be expected that the arbitral tribunal will choose a single national law as governing the obligations of the parties, Article 17(1) gives the arbitral tribunal a wider freedom in these circumstances than it theoretically enjoyed under the prior Rules. The arbitral tribunal is free to apply directly the law which it deems appropriate without any necessity to investigate any "rule of conflict", whether of a national law or otherwise, in making that determination. This empowerment to use the "*voie directe*" in choice of law also coincides with the tendencies of recent arbitral practice.

The freedom of the arbitral tribunal, like that of the parties, to apply rules of law other than those of a single state provides a flexibility to meet the intentions of the parties and to respond to all the circumstances of a case.

ii) Background of choice of law process in ICC arbitration

The choice of law process in international arbitration has attracted much scholarly writing.[1] The complexity of the process is such that in some cases an interim award may be required on the issue, preceded by full written and oral submissions. Such a process entails substantial additional expenses and delays, which could have been avoided had a law been designated in the principal agreement.[2]

1 *See* FOUCHARD GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, PART V (Kluwer 1999); Berda Wortmann, *Choice of Law by Arbitrators: The Applicable Conflicts of Law System*, 14 ARB. INT. 97 (1998); M. Blessing, *Choice of Substantive Law in Arbitration*, 14 J. INT'L ARB. 339 (1997); Yves Derains, *The ICC Arbitral Process, Part VIII: Choice of Law Applicable to the Contract and International Arbitration*, 6 ICC BULL. 10 (May 1995); A.F.M. Maniruzzaman, *Conflict of Laws in International Arbitration: Practice and Trends*, 9 ARB. INT. 371 (1993); Horacio Grigera Naón, (Secretary General of the ICC Court of Arbitration 1997-__), CHOICE OF LAW PROBLEMS IN INTERNATIONAL ARBITRATION (J.C.B. Mohr 1992); O. Lando, *The Law Applicable to the Merits of the Dispute*, 2 ARB. INT. 104 (1988); Julian Lew, APPLICABLE LAW IN INTERNATIONAL ARBITRATION (1978).

2 Parties sometimes argue that it is indispensable for the arbitrators to render an interim award on applicable law, because they would otherwise be unduly burdened by having to present their case on the merits without being able to marshall their arguments in a coherent manner under the law which will ultimately govern the case. For an example of the arbitrators' rejection of such an argument (in a case where the parties "one after the other, but rather sporadically," invoked French and Tunisian law), see ICC Case 5103/1988, 1988 JDI 1207.

Prior to 1975, the ICC Rules contained no specific provisions on the choice of law or the arbitrators' powers to establish applicable law if the contract failed to stipulate it. In the absence of choice of law criteria in the Rules, ICC arbitrators tended to apply the conflict of laws rules of the law of the place of arbitration. The seat of arbitration was thus viewed as analogous to a judicial forum; the assumption followed that it was naturally the law of the place of arbitration, *lex fori*, which governed choice of law questions. This concept had been adopted in a 1957 resolution of the Institute of International Law, which declared: "The rule of choice of law in the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference."[3] Its application would usually result in giving the national law of the forum a general vocation in respect to arbitrations, not limited to procedural issues. By 1961, when the European Convention on International Arbitration was adopted, this concept had gone to an early grave.[4]

Article 13(3) of the 1975 ICC Rules, inspired by the European Convention, was aimed at liberating the choice of substantive law from national rules of conflict of laws, just as Article 11 liberated arbitrators from necessarily following national laws of procedure. One of the reasons for this liberalization was that if the seat of arbitration was picked by the ICC Court in the absence of agreement by the parties, such forum might have no connection with the parties or with the dispute. Worse, application of its conflict of laws system might result in application of a law unintended by either party. In a comment on the 1955 Rules,[5] Professor E. J. Cohn used the example of a dispute between a German firm and an English firm arising under a contract in which the parties chose neither the proper law of the contract nor the place of arbitration. If the Court of Arbitration had picked a city in a Swiss canton as the seat, Swiss choice of law rules would have designated German law as the proper law of the contract. However, under both German and English private international law, English law would have governed the contract. Professor Cohn, although devoted to the application of the procedural and choice of law rules of the seat, suggested that in such a situation the arbitrators should as an exceptional

3 1957 ANNUAIRE DE L'INSTITUT DU DROIT INTERNATIONAL 469.

4 Article VII(1) of the European Convention, 21 April 1961, UNTS vol. 464, p.364, No. 7041 (1963-64), gives arbitrators the freedom to choose any conflict of laws rules it deems appropriate. (*see generally* Section 37.03). The same approach is taken by Article 28(2) of the UNCITRAL Model Law ("... the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.") Article 46(3) of the English Arbitration Act 1996 is to the same effect. Other laws (French, Dutch) do not require the arbitrators to apply any conflicts rule at all. Note that while conventions and arbitration laws of various countries may provide indications of choice of law rules to be applied by arbitrators, they are not mandatory. They all permit the parties to choose the rules of law applicable to their dispute either directly or indirectly by the adoption of institutional arbitration rules. By choosing the ICC Rules, the parties have made an indirect choice of law.

5 E.J. Cohn, *The Rules of Arbitration of the International Chamber of Commerce*, 14 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 132, 162 (1965).

matter be free to apply the choice of law rules common to the national conflict of laws systems of both parties.

The modern trend is to recognize that any perceived obligation to apply the choice of law rules of the seat stems from a false comparison of the seat of an arbitral tribunal with a judicial forum. A national court judge must apply the conflicts rules of the forum. He applies his own national law to determine the proper choice of law rules. These are the rules of the state upon which his powers depend, and may express the state's policies as to the correct determination of the extent of legislative jurisdiction of other states. The international arbitrator's powers, on the other hand, are derived from an arbitration agreement, and an arbitrator does not exercise public or institutional powers in the name of the state. As Pierre Lalive has written:

> The arbitrator exercises a private mission, conferred contractually, and it is only by a rather artificial interpretation that one can say that his powers arise from—and even then very indirectly—a tolerance of the state of the place of arbitration, or rather of the various states involved (states of the parties, of the *siége*, of the probable places of execution of the award), which accept the institution of arbitration, or of the community of nations, notably those which have ratified international treaties in the matter. Would it not be to force the international arbitrator into a kind of Procrustean bed[6] if he were assimilated to a state judge, who is imperatively bound to the system of private international law of the country where he sits and from which he derives his power of decision?[7]

Even before the adoption of the most recent ICC rules, ICC arbitrators had taken the position that an arbitrator should not be compared to a state court judge in the choice of law process since arbitrators have no obligation to apply the law of the seat as an assimilated *lex fori*. For example, an ICC arbitral award of 1970 held:

> The rules determining the applicable law vary from one country to the next. State judges derive them from their own national legislation, the *lex fori*. But an arbitral tribunal has no *lex fori* in the strict sense of the word, particularly when the arbitration case is of an international nature by virtue of the object of the dispute, the choice of the arbitrators, and the organization itself which supervises the arbitration, in this instance the International Chamber of Commerce.[8]

6 Readers will recall the myth of Procrustes, who seized unsuspecting travellers and made them fit his bed, cutting off their legs if they were long, stretching them if they were too short. *See* Jan Paulsson, *Arbitration Unbound*, 30 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 358, at 362 (1981).

7 Pierre Lalive, *Les règles de conflits de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 REV. ARB. 155, at 159.

The ICC Rules now recognize that it is undesirable to assimilate the arbitrator to a national judge in respect to choice of law rules. Article 17(1) of the Rules accordingly gives arbitrators freedom not only to apply choice of law rules other than those which would be applied by national courts at the seat of the arbitration but also to choose an applicable substantive law without the necessity of passing through the rules of a national choice of law system; they are also enabled to apply directly "rules of law". This last disposition opens the issue of whether ICC arbitrators may rule on a contractual dispute without regard to any national substantive law whatsoever. This topic will be discussed in Section 17.03 with respect to the concept of applying trade usages and *lex mercatoria*.

17.02 Choice of law criteria most frequently used in ICC arbitration

If the parties have not chosen the substantive law applicable to the contract, the arbitrators will generally determine the national law or laws pursuant to which the agreement should be interpreted and its performance weighed. This subject was introduced in Section 8.04.

A review of ICC arbitration practice reveals that the following methods are most frequently used by arbitrators to determine the proper law of the contract: (i) application of the choice of law systems in force at the seat; (ii) cumulative application of the choice of law system of the countries having a relation with the dispute; (iii) application of general principles of conflict of laws; and (iv) application of a rule of conflict chosen directly by the arbitrator.[9]

To these have been added the liberalizing effect of Article 17(1) of the 1998 Rules which permit the arbitral tribunal to apply directly "the rules of law which it determines to be appropriate" without reference to any system of conflicts.

i) Choice of law system in force at the seat

Since 1975 the ICC Rules have not required arbitrators to follow *the choice of law rules of the seat of arbitration*. However, even the most liberalized 1998 Rules do not prevent an arbitrator from using these rules if the arbitrator

8 ICC Case 1689/1970, reported by Yves Derains *in* 1972 REV. ARB. 104; *see also* ICC Case 1512/1971, extracts *in* 1 YEARBOOK 128 (1976); extracts in French translation *in* 1974 JDI 904, where the sole arbitrator (P. Lalive) declared: "The international arbitrator does not dispose of any *lex fori* from which he could borrow rules of conflicts of laws."

9 The following methods have occasionally been suggested, but by and large have been dismissed by ICC arbitrators: application of the conflicts of laws rules of the country of which the arbitrator is a national; application of the rules of the country whose courts would have had jurisdiction had there not been an agreement to arbitrate; and application of the rules of the country where the award would likely be executed. The difficulties of applying these methods to international as opposed to domestic arbitrations are reviewed *in* Lalive, *supra* note 7, at 160-164.

finds them appropriate for the particular dispute at hand. There may, however, be no significant relationship between the seat and the parties or the dispute; this is frequently the case where the Court of Arbitration fixes the place of arbitration. As a general proposition in such cases, there is less reason for applying the conflict of laws system at the seat of the arbitration than there is for applying its procedural rules (*see* Chapter 16). On the other hand, an arbitrator may find it appropriate to apply the choice of law rules of the venue if the arbitration agreement specifically stipulates the place of arbitration, particularly if there are other indices that this choice reflects a desire to implicate the legal order of that country.

The case for applying the conflicts rules of the seat of arbitration depends on the analogy of the seat to a judicial forum. In its most exaggerated form, such an analogy would lead to the direct application of the law of the seat as the proper law of the contract on the theory that a choice of forum implies a choice of its substantive law to govern the contract. A few ICC arbitral tribunals, in what appear today to be outdated cases, have taken this position.[10] In recent years, the substantive law of the place of arbitration has been applied in a few isolated cases. Such cases have been conditioned on the absence of preponderant connecting factors with another country, with the arbitrators concluding that in choosing the place of arbitration the parties manifested their lack of objection to application of the laws of that place as the proper law, particularly if local arbitrators were also chosen.[11]

The adoption of the conflict rules of the seat (and not directly its material law) is an attenuated form of the same approach.

An example of the recent application of the conflict rules of the seat of arbitration was supplied by *Westinghouse v. Republic of Philippines*[12] ICC arbitration chaired by a prominent Swiss arbitrator, Professor Claude Reymond. At issue was what law governed the performance and breach of a contract calling for the construction, equipment and supply of a nuclear power plant to the Philippines on a turnkey basis. While the parties had agreed that the construction and interpretation of the agreement was to be governed by

10 Those cases have taken as a starting point the maxim *qui elegit iudicem elegit ius* (who chooses the judge chooses the law) and have transferred it to the arbitral situation (*qui elegit arbitrum elegit ius*). Such a presumption has been applied with some regularity and logic where parties have chosen a national arbitral association encompassing a set of legal values, as in Eastern bloc arbitration associations. *See* Lew, *supra* Note 1, at 192. Lew also cites examples of some ICC awards in the 1950s in which Swiss arbitrators took a similar position. *Id.* at 192. A more recent example is found in ICC Case 2735/1976; extracts *in* 1977 JDI 947 (sales contracts between U.S. and Yugoslav parties; given the absence of any clear connecting factor with a specific legal system, the arbitrators concluded that the parties' choice of Paris as the place of arbitration at least meant they had *no objection* to the application of French law).

11 *See, e.g.* ICC Case 2391/1977, described by Yves Derains *in* Case Commentary, 1977 JDI 949.

12 Preliminary Award of 19 December 1991, ICC Arbitration No. 6401, 7 MEALEY'S INT. ARB. REP. B1 (January 1992).

Pennsylvania law, the domicile of Westinghouse, the negotiating history showed that the parties had been unable to agree on the law to govern validity, performance and breach. Exercising its power under Article 13(3) [Article 17 of the 1998 Rules] to determine the applicable law by selecting and applying the rules of conflict it deemed appropriate, the tribunal applied the provision of the Swiss Private International Law Act [SPILA] relative to arbitration stating:

> The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such choice, according to the rules of law with which the case has the closest connection.

The tribunal noted that this provision relating to the conduct of the arbitration did not itself provide all the elements necessary to determine the choice of law, notably how to determine the jurisdiction with which the case had the closest connection.[13] It accordingly turned to the general conflicts provisions of the SPILA which, while not mandatory with respect to international arbitration, clarified how the "closest connection" should be determined.

Article 117 of the SPILA provides that a contract is governed by the law of the state with which it is most closely connected which in turn is determined by the habitual residence of the party providing the "characteristic performance." In a construction contract the characteristic performance is clearly that of the supplier/builder. Application of these principles led to the application for the issues of validity and performance of the contract of the same Pennsylvanian law (habitual domicile of Westinghouse) as had been agreed by the parties for its construction and interpretation.

There are numerous ICC cases applying the private international law rules of the place of arbitration.[14] Some of the earlier examples of this choice were influenced by the linkage between the arbitration and the law of procedure at the place of arbitration under the 1955 Rules.[15] Others opted for local rules of conflict to avoid appearing to have an arbitrary preference;[16] they often did

13 The tribunal did not explore the idea that by having chosen the ICC Rules the parties had empowered the arbitrator (under the pre-1998 Rules) to choose the applicable law according to "the rule of conflict he deems appropriate" which theoretically might indicate a proper law or rules of law other than those with which the case has the closest connection, a rather theoretical exercise in any event.

14 *See* Lew, *supra* note 1, at 201-202, 239-240, and 255-272.

15 The 1955 Rules provided that where rules governing the proceeding were not supplied by the Rules or a law of procedure chosen by the parties then the rules would be provided "by the law of the country in which the arbitrator holds the proceeding". While no similar provision existed for choice of law rules, many arbitrators found it natural to apply the same national law applicable to procedure. The mandatory linkage with the procedural law of the seat was abolished in the 1975 Rules and has been progressively deemphasized since.

16 This sentiment was expressed in a 1967 award in ICC case 1455, where a Swiss arbitrator sitting in Switzerland declared, in respect to a dispute between German and Yugoslav parties: "There is no such thing as potential rules of conflicts of laws which would tell an arbitrator from a third

not consider any alternatives apart from: a) applying the conflict rules of the place of arbitration, and b) adopting the conflict rules of the country of one of the parties.[17]

In practice today, relatively few ICC arbitrators rely solely upon the choice of law system of the seat of arbitration to determine the proper law of the contract.[18]

In those cases where weight is given to the conflicts system of the seat, it is usually reinforced by reference to other systems of conflict relevant to the dispute. Such is the cumulative approach, to be described next. Whether special weight will be given to the rules of conflict of the seat may well depend upon the nationality of the arbitrators. English arbitrators are more likely to give such emphasis since the law in which they are trained tends to consider arbitration as part of the national system of justice, whereas continental arbitrators are more likely to apply the cumulative system.

ii) Cumulative application of choice of law systems

The most frequent method used by ICC arbitrators to choose an appropriate conflict of laws rule is perhaps *the cumulative application of the different rules of conflict* of the countries having a relation to the dispute.[19] The approach is particularly satisfying to arbitrators when the different relevant conflict systems yield the same results.[20] Thus the comparative approach

country, without any link with the legal relationship between the parties, according to the private international law of what country he should determine the law applicable to the substance of the dispute. There is furthermore no criterion which could tilt the scales in favour of German private international law or Yugoslavian private international law. Application of either one would look like an arbitrary preference. Hence the solution which in actual practice is the most accessible is to refer to the rules of conflict of the *lex fori*," cited *in* Lew, *supra* Note 1, at 256-257.

17 *See, e.g.* the award in ICC Case 1455/1967, *id.*

18 *See, e.g.* ICC Case 1422/1966, *in* 1974 JDI 884, where the award states in respect to choice of a conflict system: "Considering that it is appropriate to eliminate forthwith the law of the forum, whose connection with the case is purely fortuitous." *Accord*, ICC Cases 4434/1983 JDI 893; 2730/1982, 1984 JDI 914. In light of this clear trend, the following statement by a sole arbitrator in ICC Case 5460/1987 appears aberrant and anachronistic: "The place of this arbitration is London, and on any question of choice of law I must therefore apply the relevant rules of the private international law of England," XIII YEARBOOK 104, at 106 (1988), particularly in light of the fact that the place of arbitration in that case had been established by the ICC rather than by agreement of the parties. Article 46(3) of the English Arbitration Act 1996 now makes clear that there is no obligation for an arbitral tribunal to apply English conflicts rules simply because the seat of arbitration is in England.

19 Among the published ICC decisions applying the cumulative approach to choice of law are: ICC Arbitration No. 4996/1985, 1986 JDI 1131, ICC Arbitration No. 4434/1983, 1983 JDI 893, ICC Arbitration No. 2879/1978, 1979 JDI 990; ICC Arbitration No. 2096/1972, quoted *in* Yves Derains, *L'application cumulative par l'arbitre des systèmes de conflits de lois intéressées au litige*, 1972 REV. ARB. 99, at 110.

20 *See, e.g.* ICC Case 3043/1978, *in* 1979 JDI 1000, where the arbitrator declared in passing that the result would not be different under any of the conflict systems of national laws having any connection with the controversy. When two laws with claims to applicability would lead to inconsis-

used by arbitrators resembles the approach used by many courts in determining applicable law: by examining the provisions of the various potentially applicable substantive laws, it may be determined that in fact there is no conflict and thus no need to make a choice.[21] For example, an arbitrator sitting in Switzerland to decide a dispute between an English and a French party might find that if the choice of law rules of England, France or Switzerland were applied successively, the same material law of the contract would always be chosen. The cumulative method is particularly apt for use in the arbitral process. By reference to the various potentially applicable rules of conflict, the arbitrators are able to infuse an international element into the proceedings and assure both parties that the issue has not been determined by the narrow application of the system of a single state, whose relationship to the dispute is not necessarily predominant.

iii) Application of general principles of conflict of laws

There is a divergence in the reasoning of different ICC tribunals in determining the jurisdictions which have a sufficient relation to the dispute to require that their conflicts system be taken into consideration. Tribunals which emphasize the contractual nature of the proceedings tend to give primacy to the laws of the parties to the dispute and those relating to the transaction.[22] Tribunals with a more procedural approach will consider the conflict system of the place of arbitration and in some cases refer to the laws of the parties to the transaction only to confirm primary reliance on the conflict system of the seat.[23]

Other arbitrators have eschewed both the seat-of-arbitration and the cumulative approaches, more broadly applying *"general principles of conflict of laws."*[24] Like the cumulative application of different systems, this method is based on a comparative approach but with decreased attention on the connection between the examined laws and the contractual relationship at issue.

In one ICC case, the arbitrator concluded that under "international conceptions of private law," the center of gravity of contractual relations was the place where a commercial agent exercised his activities; thus the law of that

tent results, ICC arbitrators have used their freedom to choose applicable law to favor the law under which contractual provisions are deemed valid, ICC Cases 4145/1984, 1985 JDI 985; 4996/1985, 1986 JDI 1132.

21 In ICC Case 1525/1969, cited *in* Derains, *supra* note 19, at 99, the arbitrators decided that it was unnecessary to determine whether the issue of prescription was governed by the statute of limitation of Turkey (one year) or Czechoslovakia (three years) since in any event a claim had been filed within the shorter period.

22 *See, e.g.* ICC Cases 1759 and 1990 of 1972, cited *in* Derains, *supra* note 19, at 105.

23 ICC Case 2438/1975, *in* 1976 JDI 969 (arbitrator in Switzerland confirmed choice of Spanish law by reference to conflict of laws systems of Switzerland, Italy and Spain).

24 ICC Case 2096/1972, cited in Derains, *supra* note 19, at 110.

country should be applied.[25] In other cases on similar grounds the law of the place of performance was chosen.[26] In another case, the arbitrator applied "criteria of localisation generally applied in private international law" in order to determine the jurisdiction with the closest connection to the transaction.[27] Sometimes an arbitrator will expressly state that he "does not deem it necessary to determine the applicable law according to any national system of conflict of laws," including those of the jurisdiction with the closest connection to the case;[28] instead, he will determine the applicable law by the criteria of "objective localization"[29] as permitted under generally accepted choice of law rules. A recognized source of general principles of conflicts of law is international conventions on the subject whether in force or not and whether or not the countries of which the parties to the arbitration are nationals are bound by the Convention.[30]

iv) Application of a conflict of laws rule chosen directly by the arbitrator

A fourth approach widely used by arbitrators is *to apply a conflict of laws rule directly*, without reference to a national law system or systems.[31] Thus, in determining whether a party had capacity to contract, the arbitrator would apply the conflict rule that questions of capacity are determined by the national laws of the person concerned, without seeking to demonstrate that that rule has a foundation in a specifically applicable national law.[32] Since this method requires at least an implicit recognition of what the arbitrator perceives as universal norms or usages as concerns choice of law,[33] it may often be analyzed as a tacit adoption of "general principles."

v) Free choice by arbitrator without reference to any system of conflicts

A final approach, specifically recognized in Article 17(1) of the Rules and its provision that, in the absence of party choice, the arbitral tribunal may apply the rules of law "which it determines to be appropriate" is the choice by the arbitrator of the applicable law (or rules of law) without passing through any system of conflicts whatsoever. This possibility of *direct choice* of the applicable law permits arbitrators to choose rules of law appropriate for the very case before them, without concern for whether the same principles could be applied in another case. One of the factors which weighs on whether a law would be deemed appropriate is whether it would recognize and give force to the agreement between the parties. Where parties have entered into an agreement and entrusted its interpretation and enforcement to arbitrators it goes without saying that the arbitrators will favor the application of a law which permits its enforcement over one that will invalidate it.[34] Since arbitrators utilizing the *direct choice* method will generally seek to justify their choice by reference to principles of some kind, the method is not always distinguishable from the arbitrators' freedom *to apply a conflict of law rule directly*.[35] But the *direct choice* method in theory liberates the arbitrators from having to justify and explain their choice by the application of choice of laws principles. Nevertheless, in order to fulfill its obligation under Article 25(2) to give a reasoned award the arbitral tribunal should state why it found the rules of law it chose to be appropriate.

25 ICC Case 2585/1977, cited *in* Y. Derains, Case Commentary, 1978 JDI 998. *See also* ICC Case 2680/1977, cited in *id.* at 997-998.

26 ICC Arbitration No. 3755/1988, 1 ICC BULL. 25 (December 1990) (turnkey contract); ICC Arbitration No. 6560/1990, XVII YEARBOOK 226 (1992).

27 ICC Case 2734/1977, cited *in* Y. Derains, *supra* note 25 at 998.

28 ICC Case 3043/1978, 1979 JDI 1000.

29 *Id.*

30 Conventions which are frequently referred to include the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the Vienna Convention of 1980 on the International Sale of Goods, and the 1955 Hague Convention on the Law Applicable to the International Sale of Goods. For an example, *see* ICC Arbitration No. 7585/1994, 1995 JDI 1015, note Y. Derains (Application of the Vienna Convention of 11 April 1980 together with cumulative application of relevant national choice of law rules).

31 *See, e.g.* ICC Case 2879/1978, *in* 1979 JDI 990. In this particularly well-reasoned award, the arbitrators simply affirmed that they would apply the law of the place of performance of the contract, using this criterion without any indication of having found it in any particular national law or laws. This approach, as well as the free choice by an arbitrator without reference to any system of conflicts (*see* 17.02 v, *infra*) has been characterized by P. Lalive as the *voie directe*, in *Les règles de conflits de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, *supra* note 7, at 181. *See also* ICC Cases 4132/1983, 1983 JDI 891; 3880/1983, 1983 JDI 897.

32 *See* ICC Case 2694/1977, *in* 1978 JDI 985.

33 This recognition was entirely *explicit* in ICC Case 4650/1985, extracts *in* XII YEARBOOK 111 (1987), involving a U.S. architect and a Saudi Arabian company, where three arbitrators sitting in Geneva reasoned as follows, *id.* at 112:

> The arbitral tribunal does not deem it necessary in this case to decide on a specific rule of conflict to designate the proper law of the contract in view of the fact that most major rules in some form or other point to the place of the characteristic or dominant work and that in the opinion of the arbitral tribunal there can be no doubt that the dominant or characteristic work performed under the agreement was performed in Georgia, USA.
>
> The arbitral tribunal notes that a decision in favor of the laws of the State of Georgia would be consistent with international rules regarding the provision of engineering services.

34 *See* ICC Arbitration No. 4145/1984, XII YEARBOOK 97 (1987), 1985 JDI 985, note Y. Derains; *see generally*, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 876 (Kluwer 1999).

35 *See* Pierre Lalive, *Les règles de conflits de lois appliquées au fond du litige par l'arbitre international siégant en Suisse*, 1976 REV. ARB. 155 and text at footnote 31, *supra*.

17.03 Application of contractual terms, relevant trade usage, and "lex mercatoria"

i) Application of contractual terms and relevant trade usage

In a review of the first edition of this book, J. G. Wetter wrote that

> . . . in practice (except in England and possibly also in the U.S.), international arbitral tribunals consider juridical issues as *questions of law* and not as facts to be proven by experts or otherwise. Such issues are then decided *directly* and are encompassed by the maxim *jura novit curia*. (In recent years, international law is increasingly invoked in awards. It is probably not unusual that arbitrators who rely on it and declare its contents lack academic training in the subject.) Be this as it may, there is no doubt that the first and most obvious duty of an international arbitral tribunal is to decide issues of law in accordance with applicable law, even if in a given case each arbitrator lacks practical as well as formal competence.[36]

This observation as to the "first and most obvious duty" of an international arbitrator should be recognized as a building block for analysis rather than as a final conclusion. It is commonplace for national laws to consider as a general rule that business contracts form the "law of the parties" (*pacta sunt servanda*), and national laws may take account of trade usages when evaluating the parties' undertakings and performance. To what extent will then the otherwise relevant rules of the applicable law give way to contractual

36 Book Review, 1984 SVENSK JURISTTIDNING 156, at 160, note 3. With regard to the question of how an ICC tribunal should inform itself as to the applicable law, *see* Case 5418/1987; XIII YEARBOOK 91 (1988), in which a tribunal presided by an Austrian chairman, sitting in Paris, dealt with a controversy with respect to the means of establishing the applicable (Hungarian) law as follows:

> "When determining the law the tribunal may either make its own research or appoint an expert under Art. 14(2) of the [prior] Rules or may hear experts presented by the parties. It is a matter of the circumstances of the given case whether the tribunal assumes that one or the other way is more appropriate." *Id.* at 102.

Whichever alternative is used, the arbitral tribunal should take care to assure that the due process rights of the parties are preserved, and that each is given the opportunity to respond to the interpretation which is presented against it. In ICC Arbitration No. 5285, where the place of arbitration was Mexico City, the arbitral tribunal appointed its own expert on New York law but did not inform the parties of the identity of its expert or his conclusions. The award was attacked in New York on due process grounds, an attack which failed only because the complaining party had not objected to the procedure at the time and was held to have waived the objection, ISEC v. Bridas, 745 F. SUPP. 172 (S.D.N.Y. 1990), XVII YEARBOOK 639.

As to the situation in England, *cf.* the statement by the sole arbitrator in ICC Case 5460/1987, XIII YEARBOOK 104, at 106 (1988): "Under the rules of English private international law, foreign law is a question of fact, to be established by expert evidence; failing evidence to the contrary, English private international law compels me to assume that any foreign law is the same as English domestic law." Pursuant to Section 34 of English Arbitration Act 1996 an arbitral tribunal now has discretion as to procedural and evidential matters and hence may take the initiative, as permitted under the ICC Rules Article 17(1), to determine the choice of law issue without hearing expert testimony and without considering the choice of law issue as one of fact.

terms and to evidence of usages? Apart from this abstract question, international arbitrators have every reason to reflect on the practical reality that one of the reasons for choosing arbitration is to avoid an overly legalistic approach to the solution of commercial conflicts. Businessmen frequently feel that courts do not understand the realities of trade and commerce. Arbitrators, whose mission is derived entirely from the parties' contract, should, and generally do, give precedence to the rules the parties established for their relationship, *i.e.* the terms of their contract. It is for this reason that Article 17(2) of the ICC Rules provides that "*in all cases* the Arbitral Tribunal shall take account of the provision of the contract and the relevant trade usages." (Emphasis added.) At the time this formulation was included in the 1975 Rules, Jean Robert, Vice Chairman of the Court of Arbitration, stated: "It is legitimate here to think that this formula opens the way to a form of arbitration more or less unbound, in the future, from legalistic constraints."[37]

The requirements of Article 17(2) may be seen either as a complement to the provision of a national substantive law determined to be applicable to the contract, or as a substitute for application of a national substantive law.

Even where arbitrators have determined that a single national law governs the interpretation and execution of the contract in question, specific terms of the contract tend to take precedence over principles of statutory or case law, unless the legal provision is of mandatory effect (as for instance laws relating to the exercise of state power).

Reference to trade usages may frequently fill gaps in the applicable law, since usages in the world of international commerce may frequently develop more rapidly than the law.[38] Trade usage may be found in formalized rules such as the Incoterms published by the ICC and widely accepted in international sales and shipping contracts, the Uniform Rules and Practice for Documentary Credits (also published by the ICC), and the ICC rules governing standby letters of credit known as International Standby Practices (ISP 98).[39] They are also found in standardized conditions of contract applicable to certain industries, or included in widely accepted international treaties (such as the Hague Convention on Sales of 1955 or the 1980 Vienna Convention on the International

37 ICC Document No. 420/179, 25 May 1975.

38 An example of such a supplementary reference to trade usage is found in ICC Case 1472/1968, quoted *in* Yves Derains, *Le statut des usages du commerce international devant les juridictions arbitrales*, 1973 REV. ARB. 122, at 141. The tribunal in that case decided, for the interpretation and execution of the agreement, to "apply French national law, completed, if necessary, in supplementary fashion, by the rules and usages . . . applicable to international contracts." A more recent example is found in ICC Arbitration No. 8873/1997, 1998 JDI 1817, note Dominique Hascher.

39 For the DOCDEX Rules, see Section 38.09. The ISP 98 Rules were formulated by the ICC's Institute of International Law and Banking and were introduced to clarify the distinction between standby letters of credit and standard commercial (or documentary) letters of credit. The rules came into effect on January 1, 1999.

Sale of Goods) even though such treaties do not apply as a matter of law to the transaction. Numerous other trade usages or practices will be recognized according to the nature of the transaction and the field of activity.[40]

Arbitrators have referred to trade usages as a substitute for the application of a national law. Thus, in a claim by a French company against a Spanish company and a Bahamian company for reimbursement of expenses for the preparation of a submission for a public works project in Spain, the arbitral tribunal rejected the application of Spanish law to the interpretation of a series of contracts among different members of two international groups of companies.[41] While acknowledging that Spanish law and regulations would be applicable to corporate formalities and to the regulation of operations in Spain, the tribunal held that Spanish law would not be applicable either to the evaluation of the consequences of pre-operational negotiations between the parties or to the responsibility for preparing the preliminary study in question. In these circumstances, the tribunal found that the contractual relations among the parties were to be determined under general principles of law and international usages and customs.

The application of trade usages is consistent with the primacy of contractual terms. Usages may be deemed incorporated into the contract as a matter of specific intent (for instance, if reference is made in the contract to Incoterms, or contracting regulations), or by implication (a custom is not referred to but is deemed by the arbitrators to have been within the contemplation of the parties).[42] In this sense trade usage can be said to be internal to the contract and an expression of what the parties intended or can be deemed to have intended.

ii) Application of lex mercatoria

In addition to relevant trade usage which they are bound to apply under the Rules arbitrators may be led to apply what is sometimes referred to as the new *lex mercatoria*, or international law merchant (*see* Chapter 35). As has been seen in Section 7.04, parties occasionally enter into an explicit agreement that the norms of international commerce are to govern their contract.

40 *See* ICC Case 3202/1978, extracts *in* 1979 JDI 1003 (general conditions of factoring). An overview of the application of trade usage by arbitrators in ICC arbitration is found in Dossiers of the Institute, INTERNATIONAL TRADE USAGE, ICC Pub. No. 440/4.

41 ICC Case 2375/1975, extracts *in* 1976 JDI 973. *See also* ICC Case 1990/1972, extracts *in* 1974 JDI 897 and 1972 REV. ARB. 100; extracts in English *in* III YEARBOOK 217 (1978). In the latter case, having determined that all issues relating to the termination and adaptation of the contract due to external circumstances could be determined on the basis of the contract itself, the arbitrator found that it was nonetheless necessary to refer to provisions of national law to determine whether a charge of unfair competition was justified.

42 This statement is cited with approval by DERAINS & SCHWARTZ, 225, who attempt to distinguish between trade usage, said to be based on an agreement by which the parties observe the usual practices in their sector of business, and *lex mercatoria*, said to be legal rules arising out of international commerce independent of the agreement of the parties. There is, however, considerable overlap between the two concepts.

In the absence of a specific agreement, the arbitrators may nonetheless determine that such was the intent of the parties and submit the agreement to such international norms. This is not always a satisfactory solution as neither general principles of law nor trade usages present a complete system of law. Certain questions by their nature are ordinarily (but not exclusively) governed by a national law (such as capacity to contract, corporate powers, prescription, statutory interest, and the like). Nevertheless, in an increasing number of international disputes, arbitrators have ruled that the obligations of the parties are to be determined according to international trade usages and customs or general principles of law without reference to a specific national law. In many cases such awards may more nearly establish the real intent of the parties than would the application of a conflictualist approach which seeks to impose a single choice of national law.

Reference to general principles of law has a long tradition in international arbitration.[43] What has become more remarkable in ICC arbitral precedents is the readiness of some tribunals to state expressly that they have decided the case without reference whatsoever to any national law. One of the first such declarations of emancipation was the award rendered in ICC Case 1641/1969, where the tribunal baldly stated:

> The parties did not indicate in their agreements or their correspondence the national law to which they intended their relationship or their disputes might be subjected.
>
> They thus implicitly gave the arbitrator the discretion and the power, in order to interpret their obligations, to apply the norms of law and, in the absence thereof, commercial usages.[44]

In commenting on this decision, the then Secretary of the ICC Commission on International Arbitration noted that the expression "norms of law" was indistinguishable from expressions such as "general principles of law" or "rules common to civilized nations."[45] Over the thirty years since that decision, a number of ICC tribunals have found it possible and appropriate to base their decisions on general principles or usages without any reference to a single

43 Some of the famous early arbitral precedents which looked to the application of generally recognized international norms or a "common law of nations" include: Petroleum Development (Trucial Coast) Ltd. v. Sheik of Abu Dhabi, 2 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 247 (1952); S.E.E.E. v. Yugoslavia, Arbitral Award of 2 July 1956 of Messrs. Panchaud and Ripert, extracts *in* 1959 JDI 1074; the Aramco Case, 1963 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 272.

44 *See* extracts *in* 1974 JDI 888.

45 *See* Y. Derains, Case Commentary, 1974 JDI 890.

national governing law.[46] They have done so in cases where they had *amiable compositeur* powers and in cases where they did not.[47]

The concept of a legally binding resolution of contractual disputes not founded on a specific national proper law stirred controversy among scholars.[48] It may be of interest to consider how the issue has been dealt with by the courts in the few notable cases that have arisen in Austria, France and England.

In *Norsolor v. Pabalk Ticaret*,[49] Norsolor, a French company, had been held liable by ICC arbitrators for breach of contract with its Turkish commercial agent, and ordered to pay damages. Vienna had been selected by the ICC as the place of arbitration. No applicable national law had been agreed by the parties, nor had the parties given the arbitrators the power to act as *amiables compositeurs*.[50]

46 *See, e.g.*, ICC Case 3267/1979, extracts *in* 1980 JDI 961, where the arbitrator, having confirmed the absence of a choice of law clause in the contracts, and having noted that neither party had relied on a specific provision of national law, applied "the general principles widely admitted and regulating international commercial law, without reference to a particular system of law." A similar approach is found in ICC Case 1859/1973, extracts *in* 1973 REV. ARB. 133, where the arbitrator stated: "The contract was to be performed in three different countries . . .. it was clear that the parties intended to refer to the general principles and practices of international trade." *See also* ICC Arbitration No. 8365/1996, 1997 JDI 1078, note Jean Jacques Arnaldez (contract provided that applicable law was international law; arbitrator held that the reference to international law expressed parties' wish that contract be governed by no national law at all; held that contract was governed by *lex mercatoria*); ICC Arbitration No. 8385/1995, 1997 JDI 1061, note Yves Derains (application by sole arbitrator of *lex mercatoria* regarding piercing the corporate veil of a company).

47 *Amiable compositeur* awards *see* Chapter 18 (which are based on the premise that they need not be founded in law): ICC Cases 3267/1979, 1980 JDI 961, extracts in English *in* II YEARBOOK 96 (1982); 3540/1980, 1981 JDI 914, extracts in English *in* VII YEARBOOK 124 (1982); and an *ad hoc* award of 1977, 1980 REV. ARB. 560, extracts in English *in* VII YEARBOOK 77 (1982). Awards rendered by arbitrators not empowered to act as *amiables compositeurs*: ICC Cases 3131/1979 (*Norsolor*), IX YEARBOOK 109 (1984) (upheld by the Austrian Supreme Court, IX YEARBOOK 159 (1984) and enforced by the French Supreme Court, 24 ILM 360 (1985)); Fougerolles v. Banque du Proche Orient, unpublished award rendered in Geneva, enforced by the French *Cour de cassation*, 9 December 1981, 1982 JDI 931, 1982 REV. ARB. 183; 3820/1981, VII YEARBOOK 134 (1982); 4338/1984, 1985 JDI 981; and 5065/1986, 1987 JDI 1039. *See also* the award of 20 June 1980 rendered by arbitrators of the Netherlands Oils, Fats and Oilseeds Trade Association, extracts *in* VI YEARBOOK 144 (1981).

48 For contemporary restatements of the reluctance to embrace *lex mercatoria* as a juridical system giving rise to legal obligations, *see* P. Lagarde, *Approche critique de la lex mercatoria*, in LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES, *supra* note 37, at 125; M. Mustill *The New Lex Mercatoria: The First Twenty-Five Years*, 4 ARB. INT. 86 (1988); *see also* J. Paulsson, *La lex mercatoria dans l'arbitrage CCI*, 1990 REV. ARB. 55 and Filip DeLy, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA (North Holland Press 1992).

49 Supreme Court, Austria, 18 November 1982, 1983 RECHT DER INTERNATIONAL EN WIRTSCHAFT 29, 868; excerpts in English *in* IX YEARBOOK 159 (1984).

50 ICC Arbitration No. 3131, IX YEARBOOK 109 (1984).

The arbitral tribunal had applied no single national law, whether French, Turkish, or Austrian, but had simply based its decision on its understanding of the agreement, on *lex mercatoria*, and on the principles of good faith dealings and mutual trust in business relations. The arbitrators affirmed that they understood *lex mercatoria* to include a rule that damages are payable if a contract is wrongfully terminated causing loss to the innocent party. In the award the word "equity" was used twice.

Norsolor sought to have the award set aside by the Austrian courts. The Court of Appeal of Vienna set aside a portion of the award (to wit the amount of damages),[51] reasoning that the arbitrators had failed to conform to the second sentence of Article 13(3) of the 1975 Rules:

> In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.

The Court of Appeal deemed this sentence to require the arbitrators to ground their decision in a national law determined by a conflict-of-law analysis, (a requirement which no longer exists in the 1998 Rules); it was not permissible to refer to *lex mercatoria*. As the arbitral tribunal had not shown that French and Turkish law were identical with respect to the principal issues of the case, the Court of Appeal felt that the arbitrators had had a duty to determine which of the two laws was applicable.

The Austrian Supreme Court reversed the decision and reinstated the award.[52] It held in particular that the arbitrators had not violated any mandatory norms of law. Furthermore, the Supreme Court rejected the argument that the arbitrators had exceeded their jurisdictional powers. Although it recognized that the arbitral tribunal had applied principles of equity in awarding the sum of 800,000 French francs, and that the parties had not given to the arbitrators the powers of *amiables compositeurs* under Article 13(4) of the 1975 ICC Rules, the arbitrators' action was not in excess of their jurisdiction; the decision disposed of issues within the scope of the agreement to arbitrate.

Article 17(1) of the 1998 Rules (replacing Article 13(3) of the prior version of the Rules) is intended to confirm arbitrators' authority to follow the approach taken in this case, when it states that in the absence of agreement by the parties the tribunal "shall apply the rules of law which it determines to be appropriate."

51 Summarized *in* VIII YEARBOOK 365 (1983).

52 *Supra* note 49.

In a similar decision,[53] the French Supreme Court also upheld an ICC award rendered in Geneva where the arbitrators, having applied principles "generally applicable in international commerce," were accused by the losing party of having usurped the role of *amiables compositeurs*. The evolution of French case law led a respected commentator to affirm that henceforth there is no doubt that international *lex mercatoria* comports positive juridical norms.[54]

Indeed, French law now permits parties and arbitrators to subject an international contractual dispute to norms other than those provided by a single national legal system; rather than speaking of "the proper law" of contracts, Article 1496 of the Code of Civil Procedure as of 1981 provides:

> The arbitrator shall decide the dispute according to the *rules of law* chosen by the parties; in the absence of such a choice, he shall decide according to those he deems appropriate.
>
> He shall in all cases take into account trade usages. (Emphasis added.)[55]

In light of the fuller discussion in Chapter 35, the authors would sum up the present situation as follows. ICC arbitrators have the duty under Article 17(2) of the Rules to "take account of . . . the relevant trade usage" and may pursuant to Article 17(1) apply "rules of law" as opposed to a specific national law. To the extent that they refer to *lex mercatoria* in this limited sense, arbitrators may concomitantly be applying a national law. Indeed, it has become commonplace to find references in ICC awards to prior awards, and although one should be aware of the dangers of creating a context in which tribunals become concerned about the implications of their decisions for parties other than the ones before them (whose contract is, after all, the only source of the arbitrator's authority), the emergence of a body of arbitral precedents appears to have some utility, particularly in situations where the otherwise applicable law is difficult to determine.[56]

The controversy begins when arbitrators are invited to declare *lex mercatoria* or some other general set of rules to be the sole proper law. It is true that the

53 *Cour de cassation*, 9 December 1981, Fougerolle (France) v. Banque du Proche Orient (Lebanon) 1982 JDI 931; 1982 REV. ARB. 183. The *Norsolor* award itself was subsequently granted exequatur in France. *Tribunal de grande instance de Paris*, 20 June 1983, Société Norsolor S.A. v. Société Pabalk Ticaret Sirketi 1983 REV. ARB. 465.

54 B. Oppetit, Case Note, 1982 JDI 931, at 940.

55 Reproduced in the Annex to Chapter 30. As of 1986, Article 1052(2) of the Netherlands Code of Civil Procedure authorizes arbitrators, in the absence of a party stipulation of applicable law, to decide in accordance with "the rules of law" they consider "appropriate." The legislative history indicates that such "rules of law" need not be found in national legal systems but may be derived from *lex mercatoria*; A. J. van den Berg, *National Report*, XII YEARBOOK 3, at 25 (1987).

56 ICC Case 4761/1987 gave rise to Terms of Reference agreed by both parties (Italian and Libyan) to the effect that Libyan law was "in principle applicable to all aspects of the dispute," but that in the absence of proof of Libyan law, the tribunal "shall apply *lex mercatoria*, i.e. general principles of law," extracts *in* 1986 JDI 1137.

supreme courts of Austria (as the place of arbitration in the *Norsolor* case) and France (as the place of execution in the *Fougerolles* case) have appeared to accept the legitimacy of awards rendered on such a foundation. It is likewise true that the Court of Appeals of England accepted in 1988 to recognize such an ICC award rendered in Geneva,[57] stating: "By choosing to arbitrate under the Rules of the ICC and, in particular, Art. 13(3), the parties have left proper law to be decided by the arbitrators *and have not in terms confined the choice to national systems of law*."[58] (Emphasis added.) There is thus increasing support for the proposition that lex mercatoria is more than an academic concept.[59]

One must immediately note, however, that the matter remains controversial and so invites litigation. In England, for example, the just-quoted decision has hardly generated enthusiasm for the proposition that arbitrators sitting in England may declare *lex mercatoria* as the proper law. To the contrary, commentators have questioned whether an award rendered under such circumstances would be consonant with English public policy, particularly in the absence of a stipulation by the parties in favor of *lex mercatoria* or some other form of general principles.[60] Whatever the arbitrator's private opinion about the normative comprehensiveness of *lex mercatoria* as a legal system, and irrespective of its attractiveness if the sole criterion is the appearance of neutrality, it is the present authors' view, as matters stand today in most countries, that ICC arbitrators run the risk of doing mischief if they declare *lex mercatoria* to be the governing law. The proper conduct would seem to be that of the tribunal in ICC Case 4650, which declined to accept *lex mercatoria* as the applicable law in the absence of any proof that the parties had so intended; "the choice of such a law would require an agreement between the parties . . ."[61] Arbitrators have considerable freedom under the ICC Rules. The authors are aware of no case in which an ICC award has been set aside on the grounds that the arbitrators made a mistaken choice of applicable law. ICC arbitrators may rely on usages and on arbitral precedents, irrespective of their determination of applicable law. Under these conditions, it would seem futile and imprudent to make abstract declarations to the effect that they have ren-

57 Deutsche Shachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd., [1987] 2 LLOYD'S L. REP. 246, [1987] 2 ALL E.R. 769; extracts *in* XIII YEARBOOK 522 (1988); reversed on other grounds by the House of Lords, [1988] 2 ALL E.R. 833.

58 XIII YEARBOOK at 535 (1988).

59 *See e.g.* FOUCHARD, GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 945 (Kluwer 1999); E. Gaillard, *Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules*, ICCA CONGRESS SERIES No. 7, 570 (Kluwer 1996).

60 *See, e.g.*, Mustill, *supra* note 48, at 108.

61 XII YEARBOOK 112 (1987). (A three-member tribunal sitting in Geneva and chaired by R. Briner.)

ered an award on a legal foundation whose legitimacy may still not be apparent to many national courts.[62]

17.04 Influence of public law and international public policy

Parties to international contracts often refer to arbitration as a conscious attempt to avoid the national courts of either party. The parties' choice of the proper law may also reflect a desire to avoid otherwise applicable national laws. In the absence of a specific choice of law by the parties, the application of the tribunals' choice of law rules may result in the designation of a proper law of contract foreign to one or both of the parties. The arbitrator will frequently be forced to decide whether the intent of the parties can be given full effect in the face of arguments by one of the parties that such application would contravene mandatory public laws.[63]

In this context, one problem can be easily disposed of. This is the doubt, occasionally raised in litigation before national courts, whether the parties are free to choose a law to govern their contract which has no rational relationship to the contract or the parties.[64]

Courts have generally recognized that conflict of laws rules give wide discretion to party autonomy as to the choice of law. On those few occasions where national courts have refused to recognize the parties' choice of law, it has almost always been because of the national court's desire to apply its own law, *lex fori*. An international arbitral tribunal, on the other hand, cannot be considered to have a *lex fori*. There is no reason for arbitrators to invalidate such a choice only because the chosen law has no nexus with the contract, the parties, or the dispute. International commercial contracts containing ICC arbitration clauses frequently stipulate a neutral foreign law as the proper law of the contract. The most frequently used laws in such circumstances appear to be those of England, France, and Switzerland. The authors are unaware of

62 As the then General Counsel of the ICC Court of Arbitration wrote in 1986, "by comparison with the number of cases submitted to (ICC) arbitration, *lex mercatoria* appears only rarely . . . one should not come away with the impression that most ICC arbitrations, or even a large proportion of them, refer to *lex mercatoria*," 1986 JDI at 1138. Indeed, an examination of the relevant arbitration clauses in 237 cases submitted to the ICC Court in 1987 revealed that only one provided that disputes should be settled "on the basis of international law," and *none* mentioned *lex mercatoria*, S. Bond, *How to Draft an Arbitration Clause*, paper given at a conference on the validity of arbitral awards (unpublished), Athens, 17 March 1988.

63 P. Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT. 274 (1986); *see also* M. Blessing, *Impact of Mandatory Rule, Sanctions, Competition Laws*, in INTRODUCTION TO ARBITRATION—SWISS AND INTERNATIONAL PERSPECTIVES (Swiss Commercial Law Series, Helbing & Lichtenhahn Verlag AG, Basle, 1999); M. Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 J. INT. ARB. 23 (No. 4, 1997); S. Lazareff, *Mandatory Extraterritorial Application of National Law Rules*, ICCA CONGRESS SERIES No. 7, 538 (Kluwer 1996).

64 In England, *see* Vita Food Products v. Unus Shipping Co., 1939 A. C. 277 at 289; in France, *see* H. Battifol and P. Lagarde, DROIT INTERNATIONAL PRIVÉ, (6th edition) No. 544.

any ICC arbitration where the arbitrators have refused to recognize the parties' contractual choice of law.[65]

However, there may be circumstances in which arguments are raised to the effect that the law chosen by the parties or determined by the arbitrators to be applicable should be partially displaced by mandatory provisions of another law.

The issue is illustrated by a 1974 ICC arbitration award rendered by a sole arbitrator in a case involving the refusal of the National Bank of Pakistan to pay a guarantee in favor of an Indian party.[66] The guarantee was governed by Indian law and was payable in India. The Bank justified its non-payment on the grounds, *inter alia*, that it was forbidden by emergency Pakistani exchange controls from paying the guarantee due to the armed conflict which had broken out between India and Pakistan.

In ordering the Bank to make the payment, the arbitrator relied on the fact that the proper law of the contract was Indian law, which governed the creation, validity, extent, and extinction of the obligation. Under Indian law there was no excuse for non-payment. The defendant had relied on judicial precedents which indicated that an obligation of payment under the proper law of a contract should be disregarded where such payment was forbidden by the *lex loci solutionis*, the law of the place where the Bank had to take the necessary steps to effect payment. The arbitrator questioned this assumption in the award and ruled that, in any event, if the payment were required *both* under the proper law of the contract *and* the law of the contractually stipulated place of payment (India in both cases), such an obligation must be honored. In the award, he reasoned that:

> Sitting at Geneva, as an international arbitrator acting according to the Rules of the ICC, chosen by the parties, I do not consider myself bound by these decisions [reference had been made to English case law] as might be an English judge or arbitrator. Moreover, even if I were sitting in England, I would be reticent to decide that an illegality arising according to a foreign *lex loci solutionis* has any effect whatsoever where the proper law is a foreign law. . . The dominant tendency, however, in the absence of a direct precedent on this question seems clearly in favor of a negative response, that is to say that it is the proper law, and not that of the place of payment, that determines the question of whether a debtor is discharged by law of his contractual obligation.

65 For the proposition that the parties' freedom to choose the substantive law governing their contract is based on general principles of the law of international commerce, *see* ICC Arbitration No. 5865/1989, 1998 JDI 1008, note Dominique Hascher.

66 ICC Case 1512/1971, also discussed in Section 5.01, extracts *in* I YEARBOOK 128 (1976); extracts in French translation *in* 1974 JDI 904. Other awards deferring to laws of public policy in force at the place of performance include ICC Case 1859/1973, cited *in* Yves Derains, *supra* note 38; and ICC Case 3281/1981, extracts *in* 1982 JDI 990.

> . . .Even if the issue of whether the foreign law of the place of performance (foreign in respect to the forum) determines this question, is doubtful, there seems to exist on one point at least unanimity when the contract is valid in virtue of the proper law and when this law is also that of the place of execution . . . However, in the present case the guarantee provides that payment would be made in India. In this case the arbitrator is of the opinion that Pakistan's law, the law of the residence of the debtor, is not to be applied.

The proper law of the contract may thus uphold contractually defined obligations despite alleged impossibility or illegality under the national laws of one of the parties, at least where the contract was not necessarily to be performed in the country whose law was alleged to treat such performance as illegal.

Accordingly, in the *Toprak v. Finagrain* arbitration,[67] Toprak, a Turkish State trading agency agreed, under a contract governed by English law, to purchase wheat at fixed prices and to open an irrevocable letter of credit with a first class United States or West European bank to cover payment. After a substantial drop in world market prices, the Turkish Ministry of Commerce instructed Toprak to renegotiate the contract at a lower price. When such renegotiation attempts failed, the Turkish Government refused to grant an import license to Toprak. Toprak had warranted that it would obtain required import authorizations. It was not contested that without such an import license, the buyer could not import the grain, nor establish a letter of credit.

The arbitral tribunal, sustained on appeal by the English Court of Appeal, found the Turkish state agency liable for breach of contract. The contract at signature was not intended to violate the laws of the country to which the goods were to be shipped. More importantly, the purchaser's obligation to supply a letter of credit, guaranteeing full payment of goods against documents, could have been performed outside of Turkey where no illegality could be claimed.

The power of the arbitrator to give effect to the proper law of the contract either chosen by the parties or indicated by the appropriate rule of conflict is an important factor in the efficacy of international arbitration. By choosing an international tribunal for the settlement of their disputes and by stipulating applicable law, parties seek to avoid the vagaries not only of their national courts, but also of national legislation. By nature a contractual institution, the arbitral tribunal will seek to give full effect to the contract, conceivably even at the risk of imperiling execution of the award in the territory of one of the parties. While Article 35 of the ICC Rules obliges the tribunal to use every

67 Toprak Mahsulleri Ofisi (Turkey) v. Finagrain (Switzerland), arbitration award of the Grain and Feed Trade Association (GAFTA) dated April 29, 1977; the award became a matter of public record in the course of judicial review in the English courts,[1979] 2 LLOYD'S L. REP. 98 (Court of Appeal, 26 January 1979).

effort to make sure that the award is enforceable at law, there may be occasions when this interest must give way to the need to render an award which conforms to the contractual intention of the parties, particularly if the award may be enforced in other jurisdictions.

This discussion should not lead to the easy conclusion that ICC arbitrators invariably apply the proper law of the contract to validate an obligation although performance thereof would be illegal at the intended place of performance. Despite respectable arguments to the contrary,[68] most international arbitral tribunals would in all likelihood be extremely reluctant to require a party to perform—or to pay damages for its failure to perform—when a mandatory national law in effect at the place of performance forbids such performance. The determination of this delicate issue would depend on the specific circumstances of the case (most importantly if there had been a contractual assumption of the risk of the legal impediment), the nature of the mandatory rules, and the consequences of their application.

The issue has arisen in several cases involving the enforceability of contracts where defendants have argued that the agreement is null because it violates the antitrust provisions of the EEC Convention. After finding that the dispute was arbitrable (*see* Section 5.07), the arbitrator in one illustrative ICC case reasoned that he had a duty to determine whether the defense of nullity was valid because he could not enforce a contract that was contrary to public policy. Under the circumstances of that case, he held that the contract was not contrary to public policy, and stated:

> A dispute relating essentially to the validity or to the nullity of a contract in light of Article 85 of the Treaty of Rome would be outside the jurisdic-

68 Professor L. Hjerner, *in Choice of Law Problems in International Arbitration with Particular Reference to Arbitration in Sweden*, 1982 YEARBOOK OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE 18, took the position that the provisions of Article 13(3) [Article 17(1) of the 1998 Rules] confirming the powers of the parties to choose applicable law, and instructing the arbitrator, in the absence of such a choice, to apply the proper law according to such rules as he may "deem appropriate," constitute a mandate to the arbitrators to apply such law to the exclusion of mandatory provisions of other laws. He pointed out that the Swedish National Committee of the ICC has cautioned against the ICC Court's giving any instructions to arbitrators similar to the rule found in Article 7 of the European Economic Community Convention on the Law Applicable to Contractual and Non-Contractual Obligations, which provides:

> (1) In the application of this Convention, effect may be given to the mandatory rules of the law of any country with which the situation has a significant connection, if and insofar as, under the law of that 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 paragraph (1) of this Article 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.

There are at present no ICC directives or guidelines on conflict of law principles to be applied by arbitrators, nor is it expected that there will be any in the near future.

tion of arbitration, and no future disputes clause could substitute a private judge for a public judge in order to resolve a dispute which involves public policy *in se* and *per se*.

On the other hand, in a contractual dispute, if one party raises as a defense the nullity of the agreement upon which the other party bases his suit, the arbitrator has a duty under Article 85 of the Treaty of Rome to determine whether the factual and legal conditions which give rise to the application of the said article are met in the agreement.[69]

The power of the arbitrator to rule on the effect of competition laws at the place of performance even where the parties have agreed that the proper law of the contract is governed by the law of a third country (e.g. Swiss proper law in respect to the competition law of the European Union or the United States) is now beyond doubt. Few ICC tribunals today would deny that they have the power to decide the effect of such mandatory terms of competition law on the rights and obligations of the parties to the contract who have submitted a dispute to them (e.g. nullity, breach, damages, termination).[70] As early as 1975 a Swiss court had confirmed in respect to an ICC arbitration that an arbitrator had jurisdiction to consider whether the alleged violation of Article 85 of the Treaty of Rome by the contract in arbitration rendered that contract null.[71] Moreover, where national courts recognize that the effects of public policy issues defined by mandatory provisions of law are arbitrable the consequences must be taken into account by arbitrators.

The extension of the domain of arbitrable issues (*see generally* Section 5.07) has a direct and complicating effect on the law to be applied by international arbitrators. To put it in its simplest terms, when country A decides that its mandatory laws may be applied by arbitrators deciding a dispute under a contract otherwise governed by the laws of country B, the arbitral tribunal's task takes on an entirely new dimension.

In *Mitsubishi v. Soler Motors*,[72] the U.S. Supreme Court held that a counterclaim in arbitration that raised issues of U.S. antitrust law was subject to the jurisdiction of the arbitrators designated in the contract. The contract (an automobile distributorship agreement) was between a U.S. distributor and a Swiss joint venture subsidiary of Chrysler Motors and Mitsubishi Heavy In-

69 ICC Case 1397/1966, extracts *in* 1974 JDI 878. *See also* ICC Case 2811 of 1978, extracts *in* 1979 JDI 983; *and generally* Section 5.07.

70 *See ICC Awards on Arbitration and European Community Law*, 5 ICC BULL. 44 (November 1994); 6 ICC BULL. 52 (May 1995); Dossiers of the ICC Institute, COMPETITION AND ARBITRATION LAW (1993); *Special Supplement, International Commercial Arbitration in Europe*, ICC Publication Number 537, (1994) pp. 33-57.

71 *Chambre de recours*, Vaud, 28 October 1975, Ampaglas v. Sofia, 129 JOURNAL DES TRIBUNAUX, 1981-III-71.

72 473 U.S. 614 (1985). The *Mitsubishi* decision is discussed in detail in Sections 34.02(vi), and 34.04.

dustries. Swiss law was stipulated as applicable, and arbitration was to be held in Japan. Faced with arbitration in Japan before three Japanese arbitrators, and a claim that it had failed to take contractual deliveries, the distributor counterclaimed by alleging a conspiracy to divide markets and to restrain trade in violation of the Sherman Act. Such a claim, it further argued, could not be decided by arbitrators.

The Supreme Court disagreed. Without going into the details of a much-commented decision, one might simply describe the *Mitsubishi* policy as letting international arbitrators proceed to arbitrate all issues of a dispute even if they involve claims under U.S. law that purport to affect the validity of contractual provisions. This policy sees national courts limiting their involvement to an *a posteriori* control of any awards presented for enforcement in their jurisdiction by the criteria of their public policy.

In a few lines of the majority opinion in *Mitsubishi*, dictum was offered to the effect that the courts would have the opportunity to exercise their control function at the time of enforcement of the award:

> the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed . . . [and] to ascertain that the [arbitral] tribunal took cognizance of the antitrust claims and actually decided them.

The *Mitsubishi* dictum (sometimes called the "second-look doctrine") suggests that it is now understood that international arbitrators have not only the right but the duty to examine the effect of mandatory legislation foreign to the law chosen by the parties and the law of the place of arbitration. This also seems to be what national courts at the seat of arbitration have concluded. For instance, in *G. SA v.SpA*[73] the Swiss Federal Tribunal set aside an award and remitted it to the arbitral tribunal for having failed to exercise its jurisdiction to determine whether the contract in question (a cooperation agreement between Belgian and Italian companies) complied with the obligations of the parties under Articles 85 and 86 of the Treaty of Rome. While in that case the proper law of the contract was the law of Belgium, all indications are that the result would have been the same even if the proper law was the law of Switzerland or one of its cantons.[74] The same duty is recognized in other jurisdictions.[75]

73 *Tribunal fédéral Suisse*, 28 April 1992, ATF 118 II 193.

74 *See* M. Blessing, *Impact of Mandatory Rules, Sanctions, Competition Law in* INTRODUCTION TO ARBITRATION—SWISS AND INTERNATIONAL PERSPECTIVES 247 (Swiss Commercial Law Series, Helbing & Lichtenhahn 1999).

75 *See e.g. Cour d'appel*, Paris, 19 May 1993, Société Labinal c/ Sociétés Mars et Westland Aerospace, note Charles Jarrosson, 1993 REV. ARB. 645.

> tion of arbitration, and no future disputes clause could substitute a private judge for a public judge in order to resolve a dispute which involves public policy *in se* and *per se*.
>
> On the other hand, in a contractual dispute, if one party raises as a defense the nullity of the agreement upon which the other party bases his suit, the arbitrator has a duty under Article 85 of the Treaty of Rome to determine whether the factual and legal conditions which give rise to the application of the said article are met in the agreement.[69]

The power of the arbitrator to rule on the effect of competition laws at the place of performance even where the parties have agreed that the proper law of the contract is governed by the law of a third country (e.g. Swiss proper law in respect to the competition law of the European Union or the United States) is now beyond doubt. Few ICC tribunals today would deny that they have the power to decide the effect of such mandatory terms of competition law on the rights and obligations of the parties to the contract who have submitted a dispute to them (e.g. nullity, breach, damages, termination).[70] As early as 1975 a Swiss court had confirmed in respect to an ICC arbitration that an arbitrator had jurisdiction to consider whether the alleged violation of Article 85 of the Treaty of Rome by the contract in arbitration rendered that contract null.[71] Moreover, where national courts recognize that the effects of public policy issues defined by mandatory provisions of law are arbitrable the consequences must be taken into account by arbitrators.

The extension of the domain of arbitrable issues (*see generally* Section 5.07) has a direct and complicating effect on the law to be applied by international arbitrators. To put it in its simplest terms, when country A decides that its mandatory laws may be applied by arbitrators deciding a dispute under a contract otherwise governed by the laws of country B, the arbitral tribunal's task takes on an entirely new dimension.

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While competition laws may present the most frequent occasions for arbitrators to have to consider the effect of mandatory public laws on a contract which has been specifically agreed by the parties to be governed by another law, there are others. What, for instance, is the effect of the agreement between a foreign manufacturer and its local distributor subjecting their distribution agreement to a third country's laws and a neutral place of arbitration on highly protective local legislation providing substantial indemnities for the distributor upon termination or non-renewal of distribution rights?[76]

Other examples involve exchange controls (as previously noted) and the effect on contracts of import and export restrictions, the United States Trading With The Enemy Act, and the interdiction of commerce and assets freeze orders edicted under United Nations or national (frequently U.S.) authority. In all these cases the arbitrator will have to deal with the contract at hand, the law applicable to the contract, the law of the place of performance and the law of the place of arbitration (*vis* where the award may be subject to judicial review) and the reasonable and legitimate expectations of the parties (they must have intended some consequences of choosing a law which is not that of the place of performance, and a neutral place of arbitration). The arbitrators will also have to take into account notions of international public policy.

As Professor Pierre Mayer has put it:

> Although arbitrators are neither guardians of the public order nor invested by the State with a mission of applying its mandatory rules, they ought nevertheless to have an incentive to do so out of a sense of duty to the survival of international arbitration as an institution.[77]

While in many cases the conflict between public policy considerations and the terms of the parties' agreement poses difficult questions, the issue of bribery is simple. International commercial arbitration may not permit itself to become an instrument of, and accomplice to, bribery. In a well-known ICC award rendered in 1963, a Swedish sole arbitrator sitting in France held that a contract which contemplated the making of illegal payments could not be enforced in international arbitration.[78] In that case, an Argentine national had intervened on behalf of a British company to obtain a contract with the Argentine government by means other than having the best or lowest tender. He was to receive 10% of the contract price for his services, out of which he was to make selected payments to high government officials. After the contract was obtained, the British company denied any obligation to pay, and ICC arbitration ensued. Neither party raised the issue of alleged illegality as a defense and both wished for the arbitration to proceed. Nevertheless, the sole arbitrator determined that he could not take jurisdiction over the case in view of clear violations of good morals and international public policy. His reasoning was, *inter alia*:

> Parties who involve themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their dispute.[79]

More modern arbitral awards do not consider the claim of bribery (or the presence of bribery, even when not raised as a defense) as a jurisdictional issue. Most arbitrators would consider the issue of bribery as a defense to the enforcement of the contract, or a cause for the nullity of the contract. The issue of bribery and of the relevance and application of laws and regulations on commissions on government contracts have been considered in a number of ICC awards.[80] A distinction is made in a number of the cases between bribery, which is surely an infringement of international public policy, and failure to respect foreign procurement regulations, with respect to which the consequences may depend on the circumstances.[81] The issue of whether in-

76 *See* ICC Arbitration No. 6379/1990, 1992 YEARBOOK 212 (award did not apply the Belgian regulation).

77 *Supra* note 63, at 274.

78 ICC Case 1110/1963, excerpted and commented on by J. Lew, *supra* Note 1, at 553-555; *see also* J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110*, 10 ARB. INT. 277 (1994).

79 For a discussion of this and more recent cases, *see* A. El Kosheri and P. Leboulanger, *L'arbitre face à la corruption et aux trafics d'influence*, 1984 REV. ARB. 3. The issue of corruption raises difficult issues of proof; *comp.* ICC Case 3916/1983, extracts in *id.*, at 9-10 (claim for commissions rejected) with ICC Case 4145/1984, extracts *in* XII YEARBOOK 97, at 100-107 (1987) (claim for commissions upheld), *see* José Rosell and Harvey Prager, *Illicit Commissions and International Arbitration: The Question of Proof*, 15 ARB. INT. 329 (1999) (containing a detailed analysis of several ICC awards on the subject).

80 *See e.g.* Westinghouse Electric Corp., Burns & Roe Enterprise, Inc. V. National Power Corp. and The Republic of the Philippines, ICC Arbitration No. 6401, Preliminary Award of 19 December 1991, 7 MEALEY'S INT. ARB. REP.; B1 (January 1992), pp. 721-737; *see generally* LES COMMISSIONS ILLICITES (Paris, ICC Publishing, 1992).

81 The difficulties in the appreciation of these circumstances is illustrated by the OTV v. Hilmarton matter where the award by arbitrators in Switzerland finding a commission agreement unenforceable because contrary to public policy was annulled by Swiss Courts (*Tribunal fédéral suisse*, 17 April 1990, 1993 REV. ARB. 315) but nevertheless recognized in France (*Cour d'appel*, Paris, 19 December 1991, 1993 REV. ARB. 300).

A second arbitration award rendered after the Swiss court's nullification of the first enforced the commission agreement but the award was denied recognition in France (*Cour de cassation*, 10 June 1997, 1997 REV. ARB. 376, note P. Fouchard) while it was recognized in England (Omnium de Traitement et de Valorisation S.A. v. Hilmarton Limited, Q.B. Div., 24 May 1999); *see* P. Lastenouse, *Le contrôle de l'Ordre Public Lors de l'Execution en Angleterre de la Seconde Sentence Hilmarton*, 1999 REV. ARB. 867); *see also* ICC Arbitration No. 8891 (unpublished), and other cases discussed *in* Rosell and Prager, *op. cit.* note 79, at 331; *see also* Northrop Corp. v. Triad International Marketing, 811 F. 2d 1265 (9th Cir. 1987), a decision by the U.S. Ninth Circuit Court of Appeals upholding an AAA award granting commissions under a contract governed by California law, the court refusing to accept that there was a "well-defined and dominant" public policy against enforcement of contracts for commissions in military sales to Saudi Arabia.

ternational public policy trumps the agreement of the parties is particularly difficult where neither of the parties has brought out the possible illegality of the agreement as part of a claim or defense. As an experienced English arbitrator once put it:[82]

> Suppose I have before me a case where an agent is claiming a commission from a supplier, expressed to be payable in the event that the supplier obtains a certain contract in a certain developing country. Suppose I begin to notice that both parties are carefully skating round the area of what the agent was actually supposed to do to earn his commission. Should I press them on it? Could it be that the reason why they have gone to arbitration rather than to law is precisely because that is an area they would prefer not to discuss in public? Of course, if I had positive evidence that the agent was supposed to bribe the Minister—or even just to encase the Minister's wife in expensive furs and jewels—I would be bound to dismiss the proceedings out of hand on the grounds of illegality, which is not at all what either of the parties wants me to do.
>
> In a case like that, is the arbitrator the servant of the parties, or of the truth? Whatever procedures he adopts, that is a question he can only decide for himself.

82 P. Sieghart, *Viewpoint*, 48 ARBITRATION 133, 135 (1982).

CHAPTER 18

"AMIABLE COMPOSITION"

18.01 Definition

Article 17(2) of the Rules requires that the arbitrator take into account the provisions of the contract and relevant trade usages. In the view of many arbitrators, this raises the possibility, where the parties have not otherwise agreed, of applying general principles of law and *lex mercatoria* to determine the contractual obligations of the parties. It certainly gives rise to a procedure significantly liberated from legalistic restraints. Nevertheless, such arbitration remains arbitration at law, and in most cases the tribunal will determine that a national law or laws underlie the obligations of the parties. Reference is made to such laws either as primary or supplementary sources of the tribunal's decision.

A greater divergence from the rule of law may be found when the arbitrator exercises the power of *amiable composition*. According to Article 17(3) of the Rules:

> The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

Such an agreement may either be contained in the original arbitration clause or reached at the time of drafting the Terms of Reference. Irrespective of when the parties have agreed to give the arbitrators powers to act as *amiable compositeurs*, the agreement must be specifically mentioned in the Terms of Reference (Article 18(1)(g) of the Rules).[1] In light of the analysis presented in Section 8.05, only a few general comments will be made to illustrate the concrete practice of *amiable composition* in ICC arbitration.

1 *See* ICC Case 7301/1993, XXIII YEARBOOK 47 (1998), where the arbitral tribunal in a construction dispute case was not given the *amiable composition* power and applied Swiss law in barring a late filed claim for defects. The tribunal stated: "Whether an amiable compositeurs approach might have led to a different solution is a question which must remain open."