"The choice of the applicable law in international commercial arbitration : a study in decided arbitration awards"

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ABSTRACT

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THE CHOICE OF THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

A Study in Decided Arbitration Awards

Vol. II

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CHAPTER II: THE APPLICATION OF A NON-NATIONAL SYSTEM OF PRIVATE INTERNATIONAL LAW

245. The support for the view that arbitrators should always look to a national system of private international law - and in turn to a national law to govern the substance of the dispute as well - is easy to understand. Faced with a conflict of laws, arbitrators find themselves in a vacuum: they do not know what law or other yardstick to apply and they have no clearly developed code or body of conflict of laws rules to which they can look for guidance. So they clutch at the easiest and most obvious support available: the conflict rules of a country with which they are somehow connected. These rules are generally well developed; they can be found in the legislative and/or case law sources of the particular national system looked to; they have the backing of the sovereign through whose organs they have been developed; and where they are unclear there are explanatory texts written by academic authors.

But what relevance has the application of a national conflict of laws system to an international arbitration? True they will frequently prove a useful and satisfactory tool for the resolution of a particular conflict. But national conflict rules are nationally orientated, and even though developed with an internationalist outlook, that outlook is nationally based; the rules are national conflict rules. They are developed for use in national courts of law. They guard, above all, the interest of the State and are developed to help regulate the extra-territorial relations of nationals and corporations of the State. Such conflict of laws rules are neither expected nor particularly appropriate to deal with an international contract, which, either because of its particular character or by virtue of the parties agreement has been removed onto a higher, an international or extra-national, plain. The application of a national system of conflict of laws has the effect of keeping an extra-national relationship on a national level.
At the heart of every international arbitration is the will of the parties. They have agreed to submit a dispute arising out of their contract to an arbitration tribunal. This choice may have been influenced by numerous factors: the unwillingness to submit to the national courts of the other party; the desire for specialist arbitrators; the privacy or informality inherent in arbitration proceedings; the extra flexibility which arbitrators have in determining the parties' rights and obligations under the contract. Whatever the type of arbitration institution or tribunal to which the parties agree to submit, it is obvious they intend to avoid all national courts of law, and - though this is not quite so obvious - with it the restrictive rules of procedure and the conflict of laws which are resorted to by national courts. Rather they aim to place their contract beyond the domestic or ordinary conflict of national laws plain, and on to a different, an extra-national plain. This extra-national plain is independent of the provisions and beyond the jurisdiction of every national legal system. Only the relevant mandatory provisions of a State with an interest in the dispute or the arbitration proceedings can have any direct effect.

246. The international arbitration tribunal, owing allegiance to no one State has no conflict of laws rules. If arbitrators are not to apply national conflict of laws rules, there must be some alternative, non-national, system for resolving conflicts of law.

In 1960 Professor Fragistas argued that "l'arbitrage supra-national ne peut être suspendu en l'air", and only international law could fill the vacuum. So he stated:

"l'arbitrage supra-national doit donc être un arbitrage international, c'est-à-dire, un arbitrage qui échappe à l'emprise de tout droit national pour être soumis directement au droit international."
Professor Fragistas thus argued the substance of the dispute is to be determined either by international law proper — this presumably would include the law of international trade and any relevant customs and usages — or where appropriate, by some national law. In the latter case the question arises how should the arbitrators determine which national law to apply? National rules of private international law are not appropriate; and there are no "international" conflict of laws rules. Fragistas proposed the arbitrator should determine the applicable law "ex aequo et bono, selon les éléments objectifs du cas".

Professor Fragistas did not advocate a totally unlimited freedom for the arbitrators in choice of law. On the contrary, he suggested certain criteria to be considered by the arbitrators: the autonomy of the parties, the law "qui correspond le mieux aux traits caractéristiques du litige" and "the proper law of the arbitration". These criteria were proposed as non-national, sui iuris, conflict of laws rules, available, subject to their discretion, to arbitrators wherever they be sitting, and in any arbitration, whatever the surrounding circumstances.

The sources of non-national private international law

247. We have already noted that it is the relatively easy determination which is the major attraction of the application of a national system of private international law. By contrast, the major difficulty in the application of a non-national system of private international law is to know where to find and how to determine its relevant rules. Just as an international arbitration tribunal can have no "forum" in the conventional sense, so too it has no forum law. There is no legislature to enact legislation for it to follow. As arbitration tribunals sit in many different parts of the world, with arbitrators of different and diverse nationalities and legal backgrounds, and as arbitration awards are generally not publically available, there is little past practice or precedent to which arbitrators can refer for guidance.
Nevertheless, in recent years there has begun to emerge a consensus on the practice which could be, and to an extent which is followed in arbitration proceedings. This has also extended to the realm of the conflict of laws rules to be applied by the arbitrators to determine the law to govern the substance of the disputes before them. These conflict of laws rules have their origin in two domains. Firstly, they are rules developed through international conventions or other similar non-national instruments. Secondly, rules which have attained a general recognition by virtue of a common acceptance or universal practice.

**Rules developed through international or non-national instruments**

248. The most prolific progenitor of non-national private international law rules are international conventions: instruments of public international law concluded by sovereign States. Non-national private international law rules can also be found in draft conventions and in other sets of rules or conditions proposed by some international organisations. These instruments have as their aim the creation of an international regime capable of regulating some specific aspect or area of international relations, and propose conflict of laws rules which could be applied equally by the judge of a national court of law or an arbitrator in an international arbitration.

Such conflict of laws rules have developed either to be applied in particular, predetermined circumstances, or alternatively, by means of a uniform law for the conflict of laws, to be more generally applicable to a specific subject matter. Whatever their purpose, these rules all have one thing in common: they are the result of the concerted efforts of eminent lawyers from different countries and legal systems, all specialists in the area to which they relate. Furthermore, they have invariably been developed under the auspices of some public or private international organisation concerned with facilitating international relations and the harmonisation of laws.
Rules developed through common practice

249. In every system of private international law, conflict of laws rules have been developed piecemeal in answer to a particular problem which the existing national rule - if there was one - was unable to resolve. New and more complicated international relationships have brought about and do continually necessitate a refining and reformulating of national conflict of laws rules. This slow and pragmatic development has proceeded in many legal systems at the same time. Different countries have tried different solutions; the academic writings of scholars from around the world have had their influence; both together have influenced continuing developments. The result of this trial and error approach has been the adoption of the same or similar conflict of laws rules in many private international law systems. The effect is a harmonisation of certain conflict of laws rules, not an international harmonisation as may follow an international convention or uniform law, but rather the factual adoption of the conflict rule preferred at a given time by most private international law systems.

The nature of non-national private international law

250. Whatever be the source of the particular conflict rule applied by an arbitrator, it should be applied as a non-national rule. If it is applied by virtue of it being a rule of the private international law of the "siège d'arbitrage" or as a rule of the lex fori, then it cannot be described as a non-national rule: it is a national conflict rule and is applied as such. If on the otherhand a conflict of laws rule is applied because it is particularly appropriate, or because it was adopted in an international convention or because it has attained a wide or general acceptance, then it is applied as a non-national rule.
The major difference between a national and a non-national conflict of laws rule is the degree to which it is obligatory. In a national court the judge is obliged to apply the national rules of private international law; failure to do so could provide the grounds for appeal. The lex fori binds both judge and court and must be respected. A foreign law can only be applied if the forum private international law rules expressly so authorise. The only way of avoiding the application of a particular conflict rule of the forum is by means of classification.

The arbitrator by contrast has no forum; he can have no forum law; neither substantive nor private international law. He is not restricted by any lex fori; he equally has no forum law on which to fall back. With respect to the choice of law, the arbitrator can follow any rule or practice or system which he considers to be appropriate to the given case. Though this rule be taken from a national system of private international law — perhaps even because of the arbitrators intimate knowledge of that system — the rule is not applied as a national rule. The rule does not have mandatory force. It is applied by the arbitrator and at his volition; but he is not obliged to apply any one particular rule.

The non-national conflict of laws formulae

251. The difficulty of developing international or non-national conflict of laws rules is understandable in the light of the diverse conflict of laws provisions in the various national systems of private international law. The early international arbitration conventions shied away from dealing with the conflict of laws. However, two major recent arbitration conventions have both adopted conflict of laws formulae by which an arbitrator can determine the substantive law or other yardstick to govern a dispute.
In 1961, under the auspices of the United Nations Economic Commission for Europe, the European Convention on International Commercial Arbitration was concluded. This was the first major international convention to specifically consider the choice of law provisions to be applied in an international arbitration. Unable and unwilling to develop rigid conflict of laws rules, the European Convention adopted a liberal and flexible formula for the choice of law. This formula has since then been adopted with certain modifications and simplifications in the Arbitration Rules of the United Nations Economic Commission for Europe (UNECE) 1966, the United Nations Economic Commission for Asia and the Far East (UNECAFE) Rules for International Commercial Arbitration 1966, the UNCITRAL Rules for Optional Use in Ad Hoc Arbitration 1976 and the recently amended Arbitration Rules of the International Chamber of Commerce (1975).

In 1965, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States also laid down guidelines as to what law arbitrators should apply to determine a dispute arising out of an investment dispute, where one party is a sovereign State.

The conflict of laws formulae proposed in these two international conventions differ and will be considered separately.
A. The European Convention and International Commercial Arbitration

1. THEORY:

a) European Convention on International Commercial Arbitration:

Believing it would facilitate the development of European trade and help bring an end to the cold-war, the European Convention on International Commercial Arbitration aimed to establish an acceptable framework within which arbitration between parties from east and west Europe could take place. To minimise the various "difficulties that may impede the organisation and operation of international commercial arbitration in relations between physical or legal persons of different European countries", the Convention adopted a body of rules to regulate every aspect of an arbitration, including the appointment of arbitrators, the procedure and the recognition and enforcement of the award.

With respect to the applicable law, Article VII of the Convention provides:

"1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

2. The arbitrators shall act as amiables compositeurs if the parties so decide and if they may do so under the law applicable to the arbitration". (Emphasis added).

We have already adequately considered the right of parties to choose the law to govern the substance of their contractual relations and to empower the arbitrators to act as "amiables compositeurs." It suffices here to recall that the doctrine of party autonomy has been approved in all the relevant international conventions, and is generally recognised and followed in the practice of both national court judges and international arbitrators. Party autonomy has today become an established rule of the law of international trade.
We are here only concerned with the law to be applied by the arbitrators in the absence of any clear manifestation of the parties' intentions as to the law to be applied. The ensuing discussion therefore revolves around the meaning of the second and third sentences of Article VII.

253. The wording of article VII is unclear and gives rise to as many questions as it was meant to answer.

Firstly, the phrase "rule of conflict" is ambiguous. Does it restrict the arbitrators to choosing a rule of conflict from a system with which the contract is connected (i.e., the systems in force at the places from which the parties and the arbitrators come, and the place where the arbitration is held)? May the arbitrators apply a rule which will result in an outcome different from that which would follow the application of the rules in the countries from which the parties come? Or may they refer to any conflict rule, taken from any private international law system? Could the rule be taken from a non-existing conflict of laws system (e.g., a draft private international law or a rule advocated by an academic writer)? And where there are several questions in issue, may an arbitrator choose rules from different systems for different aspects of the dispute (e.g., the validity of the arbitration agreement, the mode of performance, the money of payment, the measure of damages, the limitation of actions, etc.)? The Convention, perhaps intentionally, gives no answer to these questions.

254. Initially the requirement that the rule of conflict shall be the one "the arbitrators deem applicable" appears to provide the criteria upon which the arbitrators should exercise their discretion. But what is meant by "deem applicable"? Applicable for what? Should the applicable conflict of laws rule be determined on the basis of the subject-matter or the geographic connections of the case? If the former, the arbitrators will choose the conflict rule to apply in accordance with the needs of the particular contract and dispute.
In the latter situation, the arbitrators will attempt objectively to determine the applicable conflict of laws rule by looking to see what system of law is most closely connected to the contract and the arbitration: the proper law of the arbitration.²

A third possible interpretation entitles the arbitrator to choose a conflict rule having first examined the differing outcomes which would result from the application of the various substantive laws pointed to by the different conflict rules. This enables the arbitrators to resort to a result selective approach to the choice of the conflict of laws rule to be applied. To this end the arbitrators will first decide (ex aequo et bono) what they consider the correct solution to the dispute; then they will look to find some substantive law which will uphold their decision; and only then will they look for and apply a conflict of laws rule which deems applicable that particular substantive law.

255. On the otherhand, remembering the role of arbitration in international trade and their responsibilities, perhaps the arbitrators should apply a conflict rule which will give effect to the parties' intentions and expectations, support the customs and practices of the particular business and uphold the interests and needs of international trade. This view can claim support from the instruction in the Convention that the arbitrators "take account of the terms of the contract and trade usages". This provision brought a new dimension to international arbitration: it recognised for the first-time that a contractual relationship could be governed by some "a-national" system of law.¹ The provision with respect to "the terms of the contract" is an instruction to the arbitrators to choose a conflict rule which will enforce the parties' agreement and not allow one of them to escape his contractual obligations through the quirksome working of some system of law.² By the instruction to
the arbitrators to "take account of ... trade usages", the Convention acknowledged
the importance of the customs and practices of international trade and the
rules which have developed to regulate international commerce: these
international trade rules must be respected and given effect, and the
arbitrator must choose a conflict rule accordingly.

A further in clarity arises from the words "take account of the terms of the
contract and trade usages" in Article VII (1). Does this require the arbitrators
to merely take account of these terms and usages to the extent that they are
allowed by or are compatible with the otherwise applicable law? Or must
the arbitrators give effect to the contract terms and trade usages over and above
the provisions of all national laws? In the latter case, this could result in
the arbitrators applying a trans-national legal order or even a non-legal
yardstick. On the other hand, should one infer a more restrictive interpretation
from the use in Article VII (1) of the term "proper law" and the restriction in
Article VII(2) allowing arbitrators to act as "amiables compositeurs" only where
expressly agreed to by the parties and also allowed by the law applicable to the
arbitration.

256. The requirement that the arbitrators apply a conflict rule at all is
itself surprising. The difficulty in attaining internationally acceptable
conflict rules is well understood. In the circumstances, the States party to
the Convention being unable to agree on conflict rules for the arbitrators to
apply, left the arbitrators the liberty to follow the conflict rule which they
considered appropriate in the circumstances. Would it not have been preferable
for the Convention to have left to the arbitrators the discretion to decide, in
good faith and having considered all the facts of the particular case, the
substantive law to apply? By allowing the arbitrators the freedom to choose
the rule of conflict to apply, they may well determine the substantive law which
they consider should be applied, and will then apply a conflict rule which will
give effect to that substantive law. There is surely a strong argument in
favour of avoiding such a complicated procedure in preference to a simpler and
more straightforward choice of the applicable law.
257. But is there any correct interpretation of Article VII? There are certain powerful reasons to explain why the choice of law provision was so widely worded. With the exception of the right of the parties to choose the applicable law, the framers of the European Convention were unable to agree on any conflict of laws code. Instead the European Convention adopted a formula which could be understood in a way which would satisfy almost every contemporary viewpoint.¹

Fouchard argued in favour of leaving the arbitrators free, in each case to choose the conflict of laws system (or rule) to be followed. He said:

"En laissant l'arbitre maître de son système de conflit, on ne lui interdit aucune méthode au profit d'une autre; suivant les circonstances de l'affaire, il adoptera telle règle de conflit, qui lui paraît la plus appropriée; cette règle ne sera d'ailleurs pas nécessairement puisée dans un système de conflit déterminé; l'arbitre pourra au besoin la forger lui-même".²

Following this interpretation, it would appear that the European Convention empowers the arbitrators to freely determine the applicable law in accordance with good faith, common sense and their commercial experience, remembering always their duty to uphold and enforce the agreement of the parties, relevant trade usages and the law of international trade.

b) UNECAFE and UNECE Arbitration Rules

258. During the early 1960s the United Nations Economic Commissions for Europe and for Asia and the Far East worked to develop sets of arbitration rules for their respective areas. Both sets of rules were concluded in 1966 and contain provision for most aspects of arbitration including the appointment and removal of arbitrators, the procedure to be followed, and the making of the award. The rules are not — nor were they intended as — international conventions; they are applicable only when adopted by the parties. However, having been developed by two much respected organisations, with particular reference to the problems and needs of their respective areas, there is much to commend their adoption by parties for the regulation of arbitration proceedings between them.¹
Both sets of arbitration rules make provision for the conflict of laws, and both were clearly influenced by article VII(1) of the European Convention. Indeed, article 38 of the UNECE arbitration rules is identical to the European Convention's conflict of laws formula. Article VII(4)(a) of the ECAFE arbitration rules is however slightly different. It provides:

"The award shall be based upon the law determined by the parties to be applicable to the substance of dispute. Failing any indication by the parties as to the applicable law, the arbitrator/s shall apply the law he/they consider/s applicable in accordance with the rules of conflict of laws. In both cases the arbitrator/s shall take account of the terms of the contract and trade usages."

The main difference between the provisions of these two sets of rules is the absence in the ECAFE rules of the words "that the arbitrators deem applicable". There seems no apparent reason to read any different meaning into these two rules.

c) UNCITRAL Arbitration Rules

259. The UNCITRAL Arbitration Rules for optional use in ad hoc arbitration aim to provide a code which could be relied upon by contracting parties to regulate the conduct and procedure to be followed in any arbitration between them. With respect to the conflict of laws, the UNCITRAL rules adopt a conflict of laws formula similar to, though simpler than, that in the European Convention on International Commercial Arbitration 1961. Article 33 of the rules provides:

"1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."
Here again one notes the provisions obliging the arbitrators to give effect to the legal or non-legal standards expressly chosen by the parties; these have already been adequately considered.

The use in the UNCITRAL rules of the term "conflict of laws" as opposed to "rules of conflict" used in the European Convention does not prima facie suggest any different meaning. The same ambiguities exist for both texts. The only possible difference is that by "conflict of laws" the UNCITRAL rules refer to one definite conflict of laws system. Thus an arbitrator would have to select a system of conflict of laws, and apply the rules of that system to all aspects of the arbitration. However, there seems little practical reason to support this interpretation.

d) Arbitration Rules of the ICC

260. The absence of any conflict of laws provision in the 1955 ICC Rules of Conciliation and Arbitration was frequently noted with regret by arbitrators faced with the difficulty of having to determine the substantive law to govern in a particular case. It was aimed to remedy this weakness in the 1975 Rules for the ICC Court of Arbitration. However, rather than provide a fixed and rigid conflict of laws rule which could be applied in any and every arbitration, it was preferred to leave the arbitrators the liberty to choose in each arbitration the conflict rule they feel appropriate in the circumstances. Thus a formula similar to those in the European Convention and the draft UNCITRAL rules was adopted. Article 13 of the ICC Arbitration Rules now read:

"3. The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.

4. The arbitrator shall assume the powers of an amiable compositeur if the parties are agreed to give him such powers.

5. In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages." (Emphasis added).
Here we note again the right of the parties to choose the legal or non-legal yardstick to apply in an international arbitration. The most significant difference between the text of the new ICC arbitration rules and the formula used in the arbitration instruments just considered, is the use of the word "appropriate" in preference to "applicable". This would appear to add support to the first interpretation suggested with respect to the meaning intended by the drafters of the European Convention to be given to article VII(1).

2. PRACTICE

261. The adoption of the almost identical conflict formula in five different international arbitration instruments within fifteen years is no coincidence. On the contrary, it is an indication of contemporary thinking on how arbitrators should determine the conflict of laws rules to apply. The European Convention on International Commercial Arbitration has been ratified by countries in both east and west Europe; the arbitration rules proposed by the UNECE and the UNECAFE were in both cases drafted by experts on the permanent United Nations staff and from the countries members of those Commissions; the proposed UNCITRAL rules are the joint work of that international organisation and the International Committee for Commercial Arbitration, aided by one of the world's leading arbitration authorities; and the new ICC rules were adopted by an organisation which has, without doubt, more practical experience of international arbitration than any comparable organisation, on the advice of a committee of arbitration experts from all over the world. Whatever the actual practice of arbitration, it is generally agreed the formula adopted by these instruments is best suited to enable the arbitrators to carry out their responsibilities.

262. The failure of the European Convention and the instruments which followed it to provide a clear cut and easily applicable rule is noteworthy. Perhaps this is because it was not possible to attain any international agreement on a
specific conflict of laws rule or rules to be applied in international arbitration. Of course the disputes which come to arbitration are of diverse character and subject-matter, in which the rigid application of a strict predetermined conflict of laws rule would be illogical, and could result in injustice and hardship in many cases. There cannot be any one rule to govern all kinds of contractual relationships, i.e. agency contracts, exclusive sales contracts, straight sale and delivery contracts, employment contracts, licence agreements, joint venture agreements, cooperation and joint production contracts, investment contracts, etc. Furthermore, many disputes submitted to arbitration do not arise out of contractual relationships: they may concern liability for an allegedly tortious act, e.g. an accident of two vessels at sea or an alleged infringement of a copyright or a patent.

The alternative to a fixed rule is the adoption of a body or code of private international law which aims to cover every eventuality and every possible type of dispute. Here again there are difficulties and objections. Bearing in mind the debate - most often without conclusion - that has taken place in most countries which have considered adopting a national private international law code, how much more difficult will it be for all or even the majority of trading nations to agree on a code of private international law for use by international arbitrators? And even if such agreement is possible, is it necessarily advisable? Such a code, containing fixed and rigid rules to be applied in predetermined situations, would be subject to the same criticisms as are levelled against any pre-determined conflict of laws rule.

On the other hand, arbitrators are invariably experienced lawyers and businessmen, appointed because of the parties' confidence in their ability to use their judgement and discretion to resolve the dispute satisfactorily however complicated the particular case. If arbitrators are obliged to follow and apply fixed and rigid conflict of laws rules, there can be no certainty of a satisfactory or commercially sensible result; indeed, the advantage of the flexibility inherent in arbitration will to this extent be removed. So then,
having already placed one's dispute in the hands of the arbitrators, and not
having, for whatever reasons, made an express choice of law, why not further
rely on their integrity, allowing them the freedom to apply the choice of law
rule they consider in the particular case to be most appropriate and most likely
to give a result acceptable to the parties. Arbitrators gave expression to this
view in one award when they stated:

"Les parties sont restées silencieuses dans leur conventions et
correspondances quant au droit national éventuellement applicable,
laissant aux arbitres le soin d'appliquer, dans l'interprétation des
obligations contractuelles des parties, les normes du droit et les
usages commerciaux que commandent les règles du droit international
privé".1

It is this solution which the recent international arbitration instruments have
adopted.

263. In practice arbitrators have somehow to select the appropriate conflict
of laws rule which will lead them to the law to govern the substance of the
dispute.

Coming from diverse backgrounds, it is hardly surprising that many arbitrators
understand and interpret differently the conflict of laws formula in the
European Convention.

We have already suggested several possible interpretations for this formula.
Through a review of the awards and the reasoning of the arbitrators, we shall
consider six different ways in which arbitrators have interpreted the formula
in the European Convention and determined the appropriate conflict of laws
rule.

a) Application of the conflicts system considered appropriate

264. One interpretation of the conflict of laws formula adopted in the
European Convention is for the arbitrators to select at the outset a system of
private international law which for some reason they consider appropriate, and
then to apply the rules of that system to the various problems confronting them. This solution was adopted by three ICC arbitrators who had to determine whether two contracts had been validly concluded and whether one of the parties had capacity to engage in foreign trade. The dispute arose with respect to two alleged contracts under which the defendant, a Bulgarian State enterprise, was said to have undertaken to deliver to the Swiss plaintiff 28,000 tons of Egyptian rice, f.o.b. Alexandria, at the price of $93.00 per ton. The contract was alleged to have been made by telex when the defendant failed to deliver, the plaintiff had to purchase elsewhere at $103.60 per ton to cover his resale obligations. On the difference between the contract price and that which he had to pay, the plaintiff claimed damages of $296,800.00.

In his defence the defendant challenged the existence of the contract. He acknowledged he had made a firm offer by telex but argued that he did not have the capacity to make a foreign trade contract. Furthermore he argued, even if he had capacity, the contract had not been reduced to writing, an essential prerequisite before a Bulgarian enterprise can be contractually bound.

Both parties appointed arbitrators of their own nationality the third arbitrator appointed by the ICC was a distinguished Swedish judge. The arbitrators began their discussion of the applicable law with the following declaration:

"En cette affaire les arbitres estiment qu'il convient d'appliquer le droit international privé suisse".

The arbitrators offered no explanation whatever for their choice of Swiss private international law, but proceeded to resolve the arbitration and determine the appropriate law in accordance with this declaration. Thus the arbitrators found the defendant's right to participate in international commerce to depend upon Bulgarian law stating:

"... conformément au droit international privé suisse, une corporation de droit public étrangère est apte à faire le commerce seulement en vertu de sa loi nationale".

As for the existence of the contract, the arbitrators again found for Bulgarian law, noting that:
"conformément à l'article 2 de l'Ordonnance bulgare concernant les contrats de livraison, d'exécution de travaux et de services, du 18 mai 1950, les entreprises d'État et les coopératives doivent conclure par écrit tous les contrats qu'elles passent dans le domaine de leur activité économique, quelle que soit l'autre partie contractante."

Whilst there can be no doubt that the defendant's capacity to participate in international commerce depended on his national law, it is not quite so clear on what grounds Bulgarian law was held to regulate the formal validity of the contract. Was Bulgarian law the putative "proper law" of the contract or was Bulgaria the place where the contract was concluded (i.e. locus regit actum)? Perhaps it was to facilitate the recognition and enforcement of their award in the countries from which the parties came? To this end it must be remembered that in all socialist countries it is a mandatory rule that a foreign trade contract - whatever the proper law - must be made in writing and be signed by persons specifically authorised is well known.

The initial choice by arbitrators of a conflict of laws system to apply may impose on them unnecessary restrictions which the European Convention aimed to avoid. This is perhaps why arbitrators have invariably preferred to choose a conflict rule for each question rather than limit themselves to the rules of one private international law system.

b) Application of the conflicts rule considered appropriate

265. An alternative and more frequent approach is for arbitrators to choose a conflict of laws rule which is considered the most "appropriate" for the particular case. The arbitrators thus consider all the conflict of laws rules which could be applied, and then follow the one "intrinsiquement la plus justifiée ou la plus opportune." This Fouchard called the "directive qualitative" for the choice of law. So in one arbitration a Greek arbitrator had to determine the effect of the Jordanian defendant's late and defective delivery of orders.
effected by the Italian agent on an agency contract. With respect to the applicable law, the arbitrator held that in the absence of a choice by the parties, he must himself *ex aequo et bono* decide the law to govern the agency contract. Following the conventional connecting factors normally considered appropriate for agency contracts, the arbitrator could apply the law of the place where the principal has his permanent place of business; or the law of the place where the agent has his permanent place of business; or the law of the place where the agency was to take place. Seeing the last two factors coincided, and no doubt gave the result the arbitrators considered desirable, Italian law was held to govern. The arbitrator held:

"Considérant que la convention litigieuse du 14 avril 1956 est un contrat de représentation commerciale; que de ce contrat ne résulte aucune déclaration, expresse ou implicite, de la volonté des parties, quant au droit applicable à leur affaire; qu'il appartient ainsi à l'arbitre de déterminer *ex bono et aequo* la loi qu'il convient d'appliquer audit contrat, en vue de sa qualification en tant que contrat de représentation commerciale; qu'en vertu des principes ci-dessus énoncés et vu les faits retenus, le contrat du 14 avril 1956 est régis par la loi italienne, celle-ci étant la loi du pays dans lequel les actes de représentation de la défenderesse par la demanderesse ont eu lieu et où la demanderesse a son établissement; que par conséquent c'est conformément au droit italien que doivent être tranchées les questions litigieuses résultant de l'exécution dudit contrat".

A similar approach was taken by a Federal German arbitrator with respect to a contract under which the Austrian plaintiff had been appointed the sole agent in Austria for the Swiss defendant's automatic bowling alley machines. As in the previous award, the arbitrator could choose between three connecting factors to determine the applicable law. In this case however, the arbitrator considered the law of the place where the agency was to be carried out to be the appropriate law. Again, the arbitrator did not explain his reason for preferring this particular conflict of laws rule. The arbitrator merely stated:

"En ce qui concerne la question, soulevée par les parties, du droit applicable, il convient d'observer ceci : il est aujourd'hui une conception juridique largement admise que les relations du droit entre le mandant et son agent sont soumises aux lois du pays où l'agent exerce ses activités. Ce qui importe, c'est donc le droit du territoire concédé; cela semble logique du seul fait que le centre de gravité de ces rapports de droit se situe là où l'agent opère"."
On the otherhand, a distinguished Belgian arbitrator also seized of an agency contract determined the applicable law on the basis of the law most closely connected to the contract. In that award, the plaintiff, a Federal German corporation, had been granted the exclusive agency in the German Federal Republic of the perfumes exported by the French defendant. When the contract was terminated by the defendant, the plaintiff wanted to off-load the stock still in his possession. With respect to the applicable law, the arbitrator held:

"... le droit allemand doit recevoir application, motif pris de ce que le centre de gravité du contrat (signé à Cologne et à Paris) et son lieu d'exécution se trouvent en R.F.A."  

Again alas no explanation was given to explain the arbitrator's preference for the "center of gravity" test for determining the applicable law of this agency contrat.

Similarly where a dispute arose out of the (Federal) German defendant's appointment as sole agent for the Swiss plaintiff's swimming pools. The defendant was obliged to sell at least 15 swimming pools per year. The plaintiff claimed for non-payment for goods delivered; the defendant asserted the pools were not up to standard. With respect to the applicable law, the French arbitrator held:

"Le droit allemand est applicable au contrat. A défaut de stipulation expresse dans le contrat, ceci résulte de la volonté présumée des parties et du lieu d'exécution du contrat. De plus, les deux parties d'un commun accord se sont référées au droit allemand".

266. In another award, an arbitrator had to determine the rights and obligations arising out of a licence and exclusive sales agreement made between Italian plaintiffs and Spanish defendants. Under this agreement the plaintiffs were to provide the defendants with certain know-how, and to licence them to use that know-how to manufacture various products for sale in Spain. The defendants undertook to exploit the licences and to use their best endeavours to sell the products made under licence in the Spanish market; the plaintiffs were to be paid a 10% royalty on all such products sold. During the currency of the licence agreement, the defendants were given the exclusive right to purchase the
plaintiffs' products for sale in Spain; the plaintiffs were to receive a commission on all of the goods sold; the contract contained minimum purchase obligations with penalties for failure to execute those obligations.

The plaintiffs claimed damages for the various breaches by the defendants of the agreement. The defendants were alleged not to have exploited the know-how made available to them, and with respect to one particular licence had, in cohorts with another Spanish company, agreed to refrain from manufacturing "sliding doors" in accordance with the plaintiffs know-how, leaving the market to the other Spanish company; naturally the defendants' were receiving a percentage of the sales of these doors, to which the plaintiffs claimed themselves entitled. The defendants had further not made the minimum purchases as required by the contract.

The dispute was submitted to arbitration and the ICC appointed as arbitrator sole Professor Kopelmanas—none other than the person who had been so instrumental in the drafting of the European Convention. With respect to the determination of the applicable law, Professor Kopelmanas distinguished three problems: the validity, execution and rescission of the contract; the defendants' "unfair competition"; and the plaintiffs right to damages, the extent of those damages and the interest payable thereon.

(i) As for the first point, the arbitrator found "les principes généraux du droit italien et du droit espagnol sont pratiquement identiques. Ces question peuvent donc être résolues sans que l'arbitre soit amené à poser à leur égard au préalable le problème du droit applicable."

(ii) The second point was more difficult and of greater interest. The defendants' failure to carry out their obligation to use the know-how made available to them gave the plaintiffs a claim for damages for breach of contract. However the claim in respect of the defendants agreement with a third party not to exploit the plaintiffs' licence to manufacture "sliding doors" was a claim in tort for unfair competition—"concurrence déloyale."
The arbitrator had thus to determine the law to govern a tortious relationship between the parties. He stated:

"Il faut relever à cet égard que la règle de conflit, contenue à l'alinea 2 de l'article 25 des dispositions préliminaires du Code civil italien, ... attribue la compétence législative pour régir les obligations non contractuelles à la loi du lieu où sont survenus les faits dont ces obligations dérivent. Cette solution est également conforme aux principes généraux du droit international privé de l'Espagne. Or, si la défenderesse devait être convaincue de concurrence déloyale, ce serait sur la base de faits qui se seraient produits en Espagne et la situation devrait être appréciée conformément aux dispositions de la loi espagnole sur ce sujet." (Emphasis added).

(iii) The measure of damages payable and the interest thereon was of particular importance because of a devaluation of the Spanish peseta during the currency of the contract. If Italian law was applicable there was no possibility of revaluing certain of the amounts owed; this was possible under the Spanish law. To this particular question the arbitrator considered the "money of the contract" the "appropriate" connecting factor, stating:

"Quant au taux des intérêts moratoires, il s'agit d'une question liée à la monnaie du contrat qui est la Peseta, elle-même soumise aux réglementations en vigueur en Espagne en ce qui concerne les changes étrangers et les transferts. Là encore, il convient donc d'appliquer la loi espagnole."

Thus the arbitrator subsequently concluded:

"...la somme qui sera allouée par l'arbitre à titre de pénalités contractuelles doit être augmentée des intérêts moratoires et de l'actualisation du montant des pénalités afin de tenir compte de la perte de la valeur de la monnaie espagnole. La demande d'intérêts moratoires est parfaitement justifiée et, conformément aux principes généraux du droit qui régissent la matière, il convient d'accorder à la demanderesse, en plus de la somme fixée au point (c) ci-dessus, des intérêts, au taux légal de 4% par an en vigueur en Espagne, à partir de la date de la requête d'arbitrage, c'est-à-dire à partir du 16 octobre 1970, jusqu'au jour de l'exécution de la sentence." (Emphasis added).

Here one sees an example of the choice by an arbitrator of the conflict of laws rules - with explanations - "appropriate" to various aspects of an arbitration. Nevertheless to further explain his actions and to circumvent any possible criticism that his choice of conflict of laws rules were not the most widely accepted
Professor Kopelmanas concluded his discussion of the applicable law by stating:

"Le recours à loi espagnole pour résoudre les questions visées sous les points (c) et (d) ci-dessus, correspond par ailleurs à la tendance que l'on constate dans la très grande majorité des droits européens et qui consiste à soumettre les contrats de concession, dans leur intégralité, à la loi du pays dans lequel se trouve le centre de gravité de l'opération, c'est-à-dire du pays du concessionnaire, une entreprise espagnole dans la présente affaire."

One only wonders here whether the fact that a rule has been adopted in most European countries does in itself make that rule "appropriate" in the sense of article VII (1) of the European Convention?

267. A particularly interesting award arose out of a contract whereby thirteen different French exporters sold to seven different Dutch importers some 3000 tons of powdered milk. The powdered milk was delivered and six of the seven importers paid their share of the price. The seventh defendant did not pay for the goods he received; he went into liquidation. The proceedings were brought by the thirteen exporters against all seven importers claiming payment of the outstanding amount. They alleged there had been only two parties to the contract: the buyers and the sellers; they denied that there had been twenty different parties to the contract. The liability of the seventh importer was not denied; rather the first six defendants vigorously challenged the claim that they were obliged to pay for the seventh importer's goods. The Belgian arbitrator looked first for the applicable law. This he held to be French law

"motif pris de ce que, à défaut pour les parties d'avoir exprimé leur volonté, il échut d'accorder la préférence à la loi du lieu où le contrat a été formé." (Emphasis added).

The arbitrator found for the first six defendants, leaving the French plaintiff's to claim in the seventh defendant's liquidation.
Ad Hoc Award

268. This same approach was taken in the ARAMCO arbitration award. That case centred around the meaning of a 1933 oil concession agreement. Under this agreement the Arabian American Oil Company, ARAMCO, were granted by the Government of Saudi Arabia the exclusive right to explore for oil in certain areas of Saudi Arabia, and, if and when oil was found, to extract and sell it: ARAMCO in return were to pay a royalty to the Saudi Arabian government on all oil sold.

In 1954 the Saudi Arabian Government attempted to grant to the late Aristotle Onassis the right to establish a Saudi Arabian Shipping Line, under the name Saudi Arabian Maritime Tankers Company Ltd. (SATCO). Part of this concession was a 30 year priority given to SATCO for the transport of oil exported from Saudi Arabia. ARAMCO argued that this right of priority given to SATCO was contrary to their concession: it was further commercially unviable and would lessen their competitiveness to oblige all oil purchasers to transport the oil on board SATCO tankers. ARAMCO therefore refused to implement the agreement.

In accordance with their good relations, ARAMCO and the Saudi Arabian Government agreed to submit their dispute to arbitration and to allow the arbitrators to decide the meaning of the 1933 Concession. In their arbitration agreement they provided (article IV):

"The Arbitration Tribunal shall decide this dispute
(a) in accordance with the Saudi Arabian law, as hereinafter defined, in so far as matters within the jurisdiction of Saudi Arabia are concerned;
(b) in accordance with the law deemed by the arbitration tribunal to be applicable in so far as matters beyond the jurisdiction of Saudi Arabia are concerned. (Emphasis added).

Saudi Arabian law, as used herein, is the Moslem law
(a) as taught by the school of Imam Ahmed ibn Hanbal
(b) as applied in Saudi Arabia."

This first half of this choice of law provision caused problems not only in understanding what was meant by "Moslem law" but also in applying it to a highly...
sophisticated 20th century oil concession. The second half gave even greater difficulty: how should the law to govern matters beyond the jurisdiction of Saudi Arabia be determined? The arbitrators acknowledged that having no forum, the international arbitration tribunal could have no forum private international law. Instead they had to choose an "appropriate" conflict rule: in the circumstances they considered the "proper law" to be "appropriate."

Thus the award states:

"It is a principle universally admitted in private international law that the law governing relations which were not established between States is to be determined by resorting to the conflict rules of the lex fori. But, for an arbitration tribunal which is directly subject to public international law as a result of the jurisdictional immunity of States, there is no lex fori to indicate what conflict rules should be used, since general public international law does not contain any such rules.

"The Arbitration Tribunal holds, therefore, that it has to ascertain the law to be applied to the merits according to the indications given by the Parties and, failing adequate indications of the Parties, to determine this law by taking all the circumstances of the case into consideration."

Later the arbitrators continued:

"As for the law to be applied to matters which are not governed by the law expressly chosen by the Parties, according to Article IV of the Arbitration Agreement, the Tribunal adopts the following solution. Influenced by the most progressive teachings in that part of private international law which deals with the autonomy of the will, the Tribunal decides to follow the solutions prevailing in British and Swiss practice and to apply the law which corresponds best to the nature of the legal relationship between the Parties, without looking for the tacit or presumed intention of the contracting parties. This is the law of the country with which the contract has the closest natural and effective connection, unless another law is designated by the conclusive conduct of the parties. Relying on objective considerations, the Tribunal believes that the governing law should coincide with the economic milieu where the operation is to be carried out." (Emphasis added).

The tribunal consequently reached the conclusion that as much of the concession was exercised on the high seas and outside the normal territorial jurisdiction of Saudi Arabia, "some of the effects of the Concession Agreement (could) not be governed by the law of Saudi Arabia, both because of objective considerations and because of the subsequent conduct of the parties." The arbitrators consequently applied the custom and practice prevailing in the international oil business and public international law to govern the international effects of the 1933 Concession.
Indirect application of the "appropriate" conflict rule

269. There are some awards where the arbitrators apply the conflict of laws rule which they consider "appropriate", though they refrain from expressing what rule they are applying. This occurred for example in an award made between an expatriate Hungarian resident in Federal Germany, and a Belgian electrical company. The Hungarian plaintiff was a well-known electrical engineer who was a specialist on spectrometers. The plaintiff assigned the rights of his patented spectrometer to the Belgian defendant. The latter were to manufacture and market the patent and undertook to pay to the plaintiff $1300 for each spectrometer sold. The plaintiff claimed the defendant had sold about 30 spectrometers in Hungary and claimed payment of $39,000. The Swiss arbitrator had to determine whether the agreement related only to Belgium - as alleged by the defendant - or whether it extended to Hungary. The arbitrator began by considering the law applicable and stated:

"Considérant que les parties n'ont pas désigné la loi applicable à leur contrat, mais que le lieu d'exécution principal se situait en Belgique, où de surcroît a été conclu le contrat; que le rattachement est donc établi avec la loi belge, compétente par conséquent pour régir les rapports des parties dans le cadre du contrat."

Though the arbitrator did not make any choice of the conflict of laws rule he considered appropriate, the arbitrator most obviously applied the "proper law" doctrine - the law with which the contract was most closely connected.

Finding the whole contract governed by the law of Belgium, the arbitrator found the Belgian corporation to be in breach of contract and awarded the plaintiff the full $39,000 he had claimed.

An interesting award concerned a contract between a French plaintiff and a Dutch defendant. The Dutch shipbuilders undertook to deliver two motor-vessels to the French shipowners. The arbitration concerned the defendant's obligation under the guarantee clause in the contract to repair and make good latent defects (vices cachés) in the vessels. To determine the applicable law, the Belgian arbitrator appears to have chosen the lex loci contractus as the appropriate conflict of laws rule for the particular arbitration; no
express choice of conflict of laws rule was made. The arbitrator stated:

"Attendu que le lieu de conclusion du contrat et le lieu d'exécution du contrat sont les deux éléments généralement retenus par la doctrine et la jurisprudence pour décider de la loi applicable au contrat - dans le silence des parties - en droit international privé (BATIFFOL - Traité Élémentaire de Droit International Privé - No.586);

Attendu que, selon une doctrine et une jurisprudence dominantes, que l'on retrouve dans la plupart des pays, la loi du lieu du contrat doit être préférée à celle du lieu de l'exécution (cfr. notamment la solution recommandée par l'Institut de Droit International citée dans ; POULLET - Manuel de Droit International Privé Belge - No.300);

Attendu qu'en l'espèce, les contrats étant signés à Paris, il sied de faire application du droit national français completé, si besoin est, à titre supplétif, par les règles et usances de caractère international, régissant les contrats internationaux." (Emphasis added).

The reference to "les règles et usances de caractère international" in the last paragraph cited, appears to recognise the importance given to trade usages in the European Convention.

Another award which shows a similar approach dealt with the interest payable and the right to revalue a debt owed by an Indian defendant for goods and services rendered by the Yugoslav plaintiff. To complicate matters, the Indian rupee, the money of the contract, was devalued subsequent to the debt becoming due. The arbitrators were requested only to determine the interest payable on the debt and the extent to which - if at all, the amount of that debt should be revalued to take account of the devaluation.

The arbitrators decided both questions should be decided in accordance with the law which governed the contract in general. That the arbitrators considered was the law of the place which had the greatest contact with the contract. No express choice of conflict rule was made. The arbitrators merely stated:

"While executed in Yugoslavia the principal contracts concern the supply, construction, erection, and putting into operation of a gas grid project located in India. The works should be carried out mainly by Indian sub-contractors. All payments should be made in Indian Rupees into an account held with the State Bank of India in India. In our opinion the contractual relationship of the parties had its maximum points of contract in India. Therefore, in principle, Indian substantive law should be applied to the present dispute."

The arbitrators subsequently held that 6% interest was payable on the amount due
and that that amount should be revalued by 57.5%; however, the arbitrators did not refer to any Indian legislative or administrative provision on the matters.

270. This same approach can be illustrated by two awards concerning exclusive sales agreements. In one award, three arbitrators held Italian law to be "appropriate" to a general sales agency contract under which the Swiss defendant was to sell and distribute in Mexico and the U.S.A. billiard cues manufactured by the Italia plaintiffs. The defendant was obliged to make minimum annual sales. A dispute arose concerning the exclusiveness of the defendant's US agency. Explaining their choice of the applicable law, the arbitrators stated:

"... dans les circonstances de la cause, le droit italien paraissant le plus approprié, il échut de le déclarer applicable, étant observé que les règles législatives italiennes édictées en matière d'interprétation d'obligations contractuelles et les principes généraux communs aux nations civilisées ne sont nullement contradictoires." (Emphasis added).

Presumably, the law of Italy, the country where the principal had his place of business, was preferred to the law of the place where the agent had his permanent place of business and the laws of the places where the agency was to be effected.

Another award concerned the grant by a Federal German manufacturer of motorcar tyres and parts to an Ohio corporation, suppliers of motor-car accessories to garages and repair-shops, of the exclusive US distributorship of their goods for 5 years. The German defendant's tyres were made to fit European cars; nevertheless he assured the American plaintiff of the feasibility and undertook to produce a larger size of tyre which would go onto the large American motorcars. The defendant failed to keep this undertaking. A distinguished Canadian professor of private international law was appointed the sole arbitrator to determine who was liable to pay for the alterations necessary for the tyres to fit US motorcars. The arbitrator stated:
"I have come to the conclusion that this agreement is governed by the law of Ohio and that the defendant - manufacturer is liable to pay for repairs due to faulty manufacturing and for alterations made to his equipment in order to render them usable by the plaintiff - purchaser for the purpose for which they were bought with the knowledge of the manufacturer, provided, of course, that these repairs or alterations are not made necessary by the purchaser's negligence or abuse. Obviously the equipment sold by the defendant in the U.S., to U.S. customers had to be suitable for use in that country. A warranty that the equipment shall be merchantable was implied in each contract of sale. (Emphasis added).

"... This warranty of merchantability and fitness applies to sales for use as well as to sales for resale and can be invoked by the plaintiff as well as by his customers. The plaintiff is therefore entitled to be reimbursed for the money he spent repairing or altering the defendant's equipment pursuant to an implied warranty of merchantability and fitness."

Again the arbitrator did not expressly determine the conflict of laws rule "appropriate" for the case; he just gave direct application to the law of the place where the exclusive distributorship was effective.

c) Application of a conflicts rule in an international instrument

271. When looking for an "appropriate" conflict of laws rule to apply arbitrators may find some rule developed in an international convention which they consider on point. Many attempts have been made to develop uniform conflict of laws rules which could be applied to many different types of problems whatever the national court seized. Although these uniform laws are in the main meant to unify the conflict rules applied by national courts, they can, by virute of their non-national origins, greatly influence and be of much help to the international arbitrator.

Arbitrators are naturally anxious that their awards are not only acceptable to both parties but, where necessary, susceptible to enforcement. By basing the choice of the applicable substantive law on a conflict rule contained in an appropriate international convention - particularly if the parties come from States which are party to the convention - the arbitrators make it extremely difficult to criticise or challenge the award, at least as far as it concerns the applicable law. However it must be remembered that arbitrators are under no obligation to apply or follow the conflict rules proposed by any international convention.
The International arbitration conventions

There are few awards in which arbitrators have actually looked to a conflict of laws rule in an international arbitration convention to support a particular choice of law. As already seen these Conventions do not provide precise conflict of laws rules. However, in one eastern European award a tribunal in Poland did so when having to determine the validity of an arbitration agreement.

A contract had been concluded between a Polish seller and an Italian buyer. Although the contract was actually concluded in Bologne where the buyer had his main business establishment, it was already provided that Warsaw was to be considered the place of contracting and the place of payment. When a dispute arose between the parties and the plaintiff instituted proceedings at the arbitration tribunal attached to the Polish Chamber of Commerce, the Italian defendant challenged the jurisdiction of the tribunal. He argued that as the contract had actually been concluded in Bologne, Italian law as the lex loci contractus must govern the validity of the arbitration agreement; that by Italian law the agreement was invalid and in consequence the Polish tribunal was not competent to hear the arbitration.

The Polish tribunal held the arbitration agreement to be valid and considered the lex loci arbitri to be the law to govern the validity of the arbitration agreement. Thus the tribunal held:

"en l'absence d'un choix exprès, - ce qui était le cas - de la loi compétente pour apprécier le compromis, contrat autonome à caractère quasi-juridictionnel, doit être reconnue la loi du pays où doit se dérouler la procédure d'arbitrage et où la sentence arbitrale doit être rendue." 2

Then to justify and add support to this choice of applicable law the arbitrators referred to "les opinions contemporaines sur l'arbitrage international" expressed in the New York Convention on the Recognition and Enforcement of Foreign Awards 1958 and the European Convention on International Commercial Arbitration 1961. The arbitrator stated:
"L'opinion théorique que contiennent ces dispositions peut servir, de l'avis du praesidium, d'un indice d'interprétation même dans les pays qui ne sont liés jusqu'à présent par aucune de ces conventions internationales." 3

The law of the place where the agreement to arbitrate was made was quite irrelevant.


273. Uniform conflict of laws rules have been developed relating to many areas of commercial practice. Nevertheless, it is surprising that only the Hague Convention on the Law Applicable to International Sales of Goods 1955 1 has been referred to with any regularity by arbitrators. This Convention aimed "to establish common provisions concerning the law applicable to sales of goods." 2

To this end, article 3 of the Convention provides:

"In default of a law declared applicable by the parties under the conditions provided in the preceding article, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale shall be governed by the domestic law of the country in which the establishment is situated. (Emphasis added).

Nevertheless, a sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the vendor or by his representative, agent or commercial traveller.

In case of a sale at an exchange or at a public auction, the sale shall be governed by the domestic law of the country in which the exchange is situated or the auction takes place."

Although this provision is generally considered to have adopted the *lex venditoris*, the law of the seller, it also provides for certain variations in sales contracts.

The Convention further provides that where a contract for the sale of goods is made subject to inspection, "the domestic law of the country in which inspection of goods delivered pursuant to a sale is to take place shall apply in respect of the form in which and the period within which the inspection must take place, the notifications concerning the inspection and the measures to be taken in case of refusal of the goods." 3
ICC Awards

274. The 1955 Hague Convention was the direct source of conflict of laws rule in an ICC award between an Austrian corporation and a Yugoslav import-export enterprise. The parties had been doing business for some years under an arrangement whereby the Austrian plaintiff manufactured motor-vehicle gear-boxes for the Yugoslav defendant. Delivery was made to the defendant at the plaintiff's place of business in Austria. The dispute arose when the defendant failed to pay for goods delivered alleging they were not up to standard. A Swiss Federal court judge was appointed the sole arbitrator and, in the absence of any agreement of the parties, had to determine the applicable law himself. The arbitrator held:

"D'apres l'article 3 de la Convention de la Haye du 15 juillet 1955 sur la vente internationale, c'est objectivement le droit de l'Etat où le vendeur est egalement valable pour le contrat d'ouvraison et de livraison aux termes duquel l'entreprise livre aussi les matières, comme c'est le cas ici. Les pièces versées au dossier ne montrent pas si c'est le vendeur lui-même qui a reçu la commande en Yougoslavie. Il est vrai que ni l'Autriche ni la Yougoslavie n'ont ratifié la Convention de la Haye.Mais l'opinion générale est qu'un contrat d'ouvraison et de livraison est soumis au droit du pays du domicile du fabricant qui caractérise le contrat d'ouvraison et de livraison. Ainsi c'est le droit autrichien qu'il convient d'appliquer en toute hypothèse ..." (Emphasis added).

The arbitrator applied the 1955 Hague Convention even though it was neither directly on point nor had it been signed or ratified by the countries from which the parties came; Switzerland, the country from which the arbitrator came, had also not signed the Convention. Furthermore, the Convention had not even come into force at the time when the award was made. Nevertheless, conflict of laws rules proposed by the Hague Conference on Private International Law carry sufficient weight per se to be applied in international arbitration even though the convention in which they were developed had not become effective. Of course it is also noteworthy that the arbitrator covered himself by arguing the conflict rule in the Hague Convention was supported by "l'opinion générale."
More frequently however, arbitrators have referred to the Hague Convention as supporting a conflict of laws rule already applied, as if to say, "anyway, this rule is supported by the Hague Convention on Sales of Goods." This is well illustrated by an award made by a Swiss arbitrator in a dispute concerning liability for a latent defect in woollen goods sold by the Australian plaintiff to the Belgian defendant. The arbitrator began by looking "to the Swiss rules concerning the conflict of laws which have been developed recently by the Swiss Federal Court, especially with regard to the sales contract." In the absence of any express agreement, the arbitrator found:

"the law of that country is applied with which the legal relationship has the closest spatial relationship. In this connection the place where the contract is to be fulfilled has outstanding importance. In general, the law of that country is therefore applicable. In the present case, this would seem to speak for the application of Belgian law. The applicable law is, in general, to be applied uniformly to the entire contractual relation. The theory whereby the contract may be split up and each part be governed by another law is generally rejected by the Federal court. However, an exception is made in the case of sales contracts, in that all questions relating to claims arising out of the nature or quantity of the goods shall be governed by the law of the country in which the goods are located at the time at which such claims had to be notified. In otherwords, all questions which relate to the formalities of the claim regarding the nature or quantity of the goods are to be judged according to Australian law. The Federal Courts opinion is thus in agreement with the legal theory which is at the base of the Hague Convention of the 15th June 1965 relating to the purchase of movable goods. Article 4 of this Convention lays down that the form and the time-limits for the examination of the goods as well as for the notification of the claim shall be governed by the law of the place where the goods purchased are to be examined." (Emphasis added).

Yugoslav Awards

In one award, the Yugoslav foreign trade arbitration court, also referred to the Hague Convention on the Law Applicable to International Sales of Goods when applying the lex venditoris, as the law most appropriate according to article VII of the European Convention on International Commercial Arbitration. The German plaintiff had contracted to purchase from the Yugoslav defendant 200 tons of Dalmatian marasca, at 1600 DM per ton. Unfortunately, due to exceptionally bad weather, the defendant was unable to deliver at the agreed price: indeed he requested the plaintiff to pay almost double. Having contracted to resell the marasca juice to a Swedish party, the plaintiff was forced to purchase frozen
marasca at 2.55 DM per kilo to satisfy his obligations. The plaintiff came to arbitration claiming, *inter alia*, 46,201 DM, the difference between what he had to pay and the contract price. The defendant argued the contract had been vitiated by *force majeure* - the bad weather. When discussing the law to govern the contract, the arbitrators noted that "by article VII of the European Convention on International Commercial Arbitration, the tribunal can apply the law most adapted to regulate this matter where the parties have not stipulated for the application of a concrete national law." The arbitrators then continued:

"Considering this point, it is clear, where determining the obligations of the seller in the realisation of the contract, it is normally carried out within the juridical and economic milieu of his country and in this matter the points of attachment are most often with this country. These are the reasons which one sees adopted by the Convention on the Law Applicable to International Sales of Goods of 15 June 1955, by which, if there is no choice by the parties, the law of the seller's normal siege at the time of his obtaining his obligations is to apply." (Emphasis added).

In consequence the arbitrators found Yugoslav law applicable to the contract.

**Hungarian Awards**

277. The arbitration tribunal attached to the Hungarian Chamber of Commerce has similarly referred to the 1955 Hague Convention to support a choice of law. This is well illustrated by an award made in 1962 between the plaintiff, a Hungarian foreign trade enterprise, and the defendant, a Pakistan corporation. The Hungarian enterprise had contracted to purchase from the Pakistan company 1500 bales of jute F.O.B. Chittakong. A ship with freightage space chartered by the plaintiff, was in the port of Chittakong from the 28th September 1960 to the 3rd October and sailed for Europe on October 4. At the date of sailing however, only 1048 bales of jute had been loaded. Although the plaintiff was prepared to take freightage on another vessel to carry the remaining goods, the seller declined to deliver the remaining goods. During the currency of the contract the market price of jute had risen enormously. Nevertheless, in the circumstances of the defendant refusing to deliver jute as per the contract, the plaintiff had to purchase the missing jute elsewhere, at the current market price, to enable him to satisfy his resale obligations. The defendant explained his refusal to deliver the outstanding jute on the ground that the plaintiff was in breach of
contract having failed to open letters of credit as had been agreed; the arbitrators found this allegation to be totally without foundation. The plaintiff came to arbitration to recover the difference between the price paid and the contract price. To support their finding that the law of Pakistan should apply, the tribunal stated:

"D'ailleurs, la lex domicili venditoris aurait conduit au même résultat. Or, ce dernier principe de rattachement connaît un succès grandissant et il a été adopté notamment par le projet de loi international sur la vente, préparé par le Gouvernement Hollandais. Le Tribunal Arbitral a donc décidé d'appliquer le droit commun du Pakistan, le droit anglo-saxon du Common Law." (Emphasis added).

(iii) Other international commercial conventions

278. Though this study has not found awards which have applied such rules, there certainly are other international conventions and uniform laws which provide private international law rules which could be of assistance to arbitrators. For example, could the conflict of laws rules proposed in the Hague Convention on the Law Applicable to the Transfer of Title in International Sales of Goods 1958 not be applied by arbitrators to determine whether title has been transferred to the buyer, the rights of an unpaid seller against creditors of the buyer and the rights of a buyer against third parties claiming title?

If a dispute necessitated determining the law to govern a bill of exchange or a promissory note or a cheque, an arbitrator might find it helpful to apply a conflict of laws rule contained in the Convention for the Settlement of Certain Conflict of Laws in Connection with Bills of Exchange and Promissory Notes 1930 or the Convention for the Settlement of Certain Conflict of Laws in Connection with Cheques 1931. These Conventions respectively aimed to provide what law should govern the validity, effects, rights and obligations arising out of bills of exchange, promissory notes and cheques drawn in one country and indorsed or to be honoured in another country. Conventions with the same aim, though with different provision, have recently been adopted by the Inter-American Conference on Private International Law.
One of the most successful attempts to develop internationally acceptable private international law rules is the Bustamante Code on Private International Law 1928, which contained extensive provisions to facilitate the determination of the applicable law by a judge seized of a dispute arising out of a commercial agreement. To date, this Code has been ratified by some sixteen different south and central American States. The existence of a particular conflict of laws rule in the Bustamante Code is a useful authority and certainly a weighty support for the application of that conflict rule by an arbitrator, especially where the parties are from countries which are party to the Code.

(iv) General Conditions of the ECE

279. The United Nations Economic Commission for Europe have developed various "general conditions" for certain types of international trade contracts. These sales conditions and standard contracts, some of which are widely used in international practice are considered by governments to have practical value in facilitating international trade by simplifying the conclusion of contracts, by avoiding conflicts of law between different national systems, by reducing misunderstandings and litigation, and by providing a balance between the interests of buyers and sellers." The general conditions provide not only the terms to govern the validity and performance of the contract, but also contain a provision for arbitration and for the law to apply.

The General Conditions for the Supply of Plant and Machinery for Export (No.574) 1955, provides in paragraph 13.2:

"Unless otherwise agreed, the contract shall be governed by the law of the vendor's country."

The General Conditions for the Supply and Erection of Plant and Machinery for Import and Export (No.574A) 1957 provides in paragraph 28.2:

"Unless otherwise agreed, the Contract shall, so far as is permissible under the law of the country where the works are carried out, be governed by the law of the Contractor's country."
If adopted by the parties as the general form for their contract, the choice of law provision would be binding on the arbitrator: in fact, this would be a choice of the conflict of laws rules to apply. However, in practice, even where the general conditions are adopted, the choice of law clause is invariably altered: the law of a specific country is mentioned. Nevertheless having been adopted in a "contract-type" of such an international character, the choice of law provisions "prend le caractère d'une véritable règle coutumière internationale de rattachement; elle constitue bien dès lors une composante d'un droit international privé commun."

280. The application of these conflict rules can be seen from decided awards. In one case a Swiss arbitrator had to determine the law to govern a contract under which the Austrian plaintiff had agreed to deliver certain paper and printing materials to the Italian defendant. The defendant had failed to pay the contract price. The contract had been based on the ECE General Conditions for the Supply of Plant and Machinery for Export. The arbitrator therefore held:

"Etant donné que les parties ont convenu, dans la confirmation de commande du 12 décembre 1963, de se référer aux conditions générales pour la fourniture à l'exportation des matériaux d'équipement établie sous les auspices de la Commission Économique pour l'Europe de l'Organisation des Nations Unies, cette question doit être examinée à la lumière de ces conditions, lesquelles stipulent à l'article 13.2 que le contrat est régie par la loi du vendeur, à moins que les parties n'en aient stipulé autrement."

"En l'espèce le droit applicable est donc le droit autrichien dont les principes généraux en matière de vente se référaient d'abord à la convention des parties et à titre supplétif seulement aux dispositions légales."

Austrian law was applied to supplement the General Conditions.
Another award arose out of a contract under which the Dutch plaintiff contracted to sell a patented machine and the secrets necessary to use it to the (Federal) German defendant for 61,000 DM. Payments were to be made in three equal instalments: at the time of the order, at the time of delivery, and after the machine had begun to function. The machine was sold with a guarantee for itself and for its products, provided of course it was used according to instructions. The defendant refused to make the final payment alleging not only late delivery but also that the machine's products were below standard. The contract had been made on the ECE General Conditions for the Supply of Plant and Machinery for Export, and the award was based on these terms. As for the national law to apply the French arbitrator found Dutch law to apply on the basis of the seller having Dutch nationality in accordance with article 13.2 of the General Conditions.

In another award arising out of the late and defective delivery of goods, the arbitrators having expressed the view that there was no real conflict, added that the law of the seller would govern if any conflict was to arise. This choice of law rule was preferred by virtue of its existence in the ECE conditions of delivery. Thus the arbitrators stated:

"... s'il se présentait néanmoins, pour des questions de fond, des divergences entre les droits allemand et suisse, il faudrait, selon les arbitres, tenir compte de l'évolution de la pratique européenne du droit commercial international, telle qu'elle s'exprime, par exemple, dans les Conditions générales de livraison de la Commission des Nations Unies pour l'Europe, à Genève, et se reporter au droit du pays du vendeur."

(v) General Conditions of the CMEA

281. Uniform conflict of laws rules have been adopted by the State members of the CMEA and are always resorted to in disputes arising out of inter-CMEA trade. So e.g. article 110(1) of the General Conditions of Delivery of Goods between Organisations of the Member Countries of CMEA 1968 provides:

"Relations of the parties concerning delivery of goods, in so far as they are not regulated or not fully regulated by contracts or by the present General Conditions of Delivery, shall be governed by the substantive law of the seller's country." (Emphasis added).
Article 39 of the General Conditions for Technical Servicing of Machinery, Equipment and Other Items 1973 also provides for the law of the seller's country to apply. Similarly, article 68 of the General Conditions of Assembly and Provision of Other Technical Services in Connection with the Delivery of Machinery and Equipment 1973 provides that where these conditions are insufficient "the substantive law of the supplier's country shall apply." It will be recalled that arbitration is the "obligatory" method for dealing with inter-CMEA disputes, the national court of the CMEA member countries having been expressly declared incompetent.

282. There are many awards in which socialist arbitration tribunals have applied the choice of law provisions of the CMEA conditions. For example, in an award brought by a Hungarian purchaser against a Soviet export enterprise for damages for non-delivery of goods, the Soviet FTAC had to determine the seller's obligation to pay damages for delay in delivery and to decide whether the buyer could still demand delivery. The first question was resolved under the substantive provisions of the General Conditions of Sale. As to the second question the arbitration tribunal stated:

"Referring to the claim that the respondent is under duty to deliver the said two pipe-threading machines, the FTAC holds that this claim must also be met.

Under para. 74 of the General Conditions, CMEA, 1958, all matters with regard to delivery of goods on which the contract between the parties and the said General Conditions are silent are to be governed by the law of the seller's country, i.e., Soviet law in the present case. Under the terms of the Fundamentals of Civil Law of the USSR and of the Soviet Constituent Republics adopted at the 7th Session of the Supreme Soviet of the USSR (fifth convocation), December, 1961, payment of damages (fine) for delay in, or other improper performance of, a contract does not discharge the party at fault from the duty of specific performance (Article 36). In accordance with this provision and in view of the respondent's statement that the pipe-threading machines in question have been completed and are ready for early shipment and delivery the FTAC believes it proper to direct the respondent to deliver the said machines to the claimant one month after the date of the present Award."

In another award a German Democratic buyer alleged that caviar he had purchased from the Soviet defendant was of sub-standard quality. The seller denied this
and retorted the sub-standard condition was due to the buyer's unsatisfactory refrigeration of the caviar and also that any proceedings begun by the buyers were barred by effluxion of time. With respect to the law to govern the period of limitation, the FTAC stated:

"The FTAC notes that the contract from which the dispute arose does not fix any time-limits for the examination of caviar by the buyers, and finds that in virtue of the contractual provision that 'in respect of any points not covered by this contract the 1958 General Conditions for Deliveries of Goods, CMEA, shall apply', and in virtue of Para. 74 of the said General Conditions the present case must be governed by the law of the seller's country."³

Similarly, where German Democratic sellers began arbitration proceedings for payment of goods delivered to but not paid for by the Soviet buyers and the latter submitted, inter alia, the sellers' claim to be statute-barred, ⁶ the Soviet FTAC again looked to the law of the seller, stating:

"In virtue of Para. 74 of the General Conditions for Delivery of Goods, CMEA, 1958, referred to in the contract of August 23, 1961, the relations of the parties connected with the delivery of nitro-enamel are - in so far as the limitation period is concerned - governed by the substantive law of the sellers' country i.e. the German Civil Code."⁷

The Romanian arbitration commission has also applied the choice of law provision in the General Conditions. In one award ⁸ brought by a Czechoslovak buyer to recover money paid for goods which the Romanian seller had failed to deliver, the plaintiff argued that Czechoslovak law - as the law of the place where payment was made - should apply; the Romanian defendant argued Romanian law should apply. Though they found Romanian law to apply, the arbitrators still held the seller liable to refund the money received. The arbitrators found that the refund was

"a consequence of non-fulfillment by the seller of his delivery obligation resulting from the contract, so that the relations could be considered as referring to the delivery covenanted by the parties, a condition prescribed by 874 of the CMEA General Terms of Delivery."⁹

Similar application of the choice of law provisions in the General Conditions have been made by the arbitration tribunals in the other CMEA member-States. ¹⁰
d) Application of a generally accepted conflicts rule

283. In some awards arbitrators have determined the "appropriate" conflict of laws rule by means of a "directive quantitative": they applied the rule "qui leur parait la plus communément admise dans les différents systèmes nationaux." Such general acceptance might relate to contracts in general or to a particular type of contract. The general or universal recognition of a particular conflicts rule justifies per se the application of that rule in an international arbitration. So e.g., it will be recalled Professor Lalive in the India-Pakistan award explained and justified his application of the law chosen by the parties to the merits of the dispute by saying:

"There are few principles more universally admitted in private international law than that referred to by the standard terms of the "proper law of the contract" - according to which the law governing the contract is that which has been chosen by the parties, whether expressly or (with certain differences or variations according to the various systems) tacitly." (Emphasis added).

What is the universally or generally accepted conflict of laws rule in the absence of any choice by the parties? It is submitted no rule has attained any genuine international recognition. Several conflict rules have attained a wide acceptance in many sovereign private international law systems, and as such have been applied as rules generally accepted. However, as will be seen, in certain awards the conflicts rule applied can in no way be accurately described as having attained any general acceptance but the rule was applied because it was convenient to the arbitrator in the particular case.

284. In one case a Swiss arbitrator, sitting in Switzerland, had to determine (initially) the law to govern the various objections to the arbitration proceedings raised by the Bolivian defendants. The dispute arose out of a contract made in 1952 under which the (Federal) German plaintiff undertook to construct in Bolivia an explosives factory for $4,200,000. The first defendant was to pay 10% of the contract price when the agreement was finally concluded, the remainder to be paid
in instalments at the completion of various stages of the construction. The agreement further provided that any disputes arising with respect to the contract were to be resolved by ICC arbitration in Switzerland. The first defendant was a Bolivian State corporation created in 1950 for the purpose of handling the national explosives industry; the second defendant, a Bolivian national organisation, was appointed liquidator of the first defendant corporation in 1957, shortly after the arbitration proceedings began.

The plaintiff's action was to recover the 10% of the contract price payable when the contract was concluded but never actually paid. Initially the defendants challenged the jurisdiction of the arbitrator arguing inter alia that the first defendant did not have capacity to agree to submit future disputes to arbitration and that the second defendant was not obliged to participate in arbitration proceedings begun against the first defendants before the latter went into liquidation. The arbitrator had to determine the law to govern these questions. With respect to the first defendant's capacity to submit to arbitration the arbitrator found:

"Selon un principe de droit international privé généralement admis, les questions touchant la capacité d'une société pour s'engager contractuellement relèvent de sa loi nationale."

As for the defendants' second contention, the arbitrator stated:

"Selon les principes généraux du droit international privé, cette question se résout conformément à la loi nationale de la société en cause, car elle relève, au moins par analogie, du statut personnel."

To both question the substantive law of Bolivia was held to be applicable. Nevertheless, in accordance with the law of Bolivia, both contentions of the defendants as to the competence of the arbitrators was rejected.

It will be recalled that to determine the law to govern the substance of the dispute, the arbitrator applied Swiss private international law on the basis that Switzerland was the "siège d'arbitrage". Nevertheless the arbitrator added:
"L'application du droit international privé suisse aboutit du reste au même résultat que celle des principes généralement reçus en cette matière dans les différents pays."

Then again to support his finding that Swiss substantive law should govern the dispute on the basis of qui elegit iudicem elegit ius the arbitrator held:

"On admet en général comme un indice significatif pour le rattachement d'un contrat à la loi de tel pays la clause par laquelle les parties soumettent leurs litiges issus dudit contrat à la juridiction de ce pays ou à un arbitrage qu'elles y localisent. La jurisprudence du Tribunal fédéral suisse, précitée, se réfère du reste à cet indice."3 (Emphasis added).

In another case a dispute arose out of a contract under which the Belgian defendant - a travel company - had chartered the Italian plaintiff's vessel for a 15 day Mediterranean cruise. The plaintiff cancelled the charterparty just 3 months before the date of the contract. He accepted he was in breach of contract and offered to pay the defendant 10% of the contract price (50-70,000 F.Fr ). The defendant however claimed 500,000 F.Fr. to cover damage to his commercial reputation, loss of profit and defrayed expenses (e.g. advertising), and an indemnity against suit by those people who had booked before the cancellation to take the cruise.

The parties agreed to submit the question of the quantum of compensation payable to ICC arbitration. When the first hearing was held in Switzerland, the plaintiff challenged the competence of the arbitrators on the grounds that he, an Italian, was not allowed to submit to arbitration outside Italy. As for the law to govern the validity of the submission to arbitration, the arbitrators stated:

"Attendu qu'en regard au silence existant en l'occurrence, il échêt d'examiner selon la doctrine la plus généralement répandue, quel est le lieu ou le contrat fut conclu."

Finding it impossible to determine where the arbitration agreement was concluded - it was made by telex and letter - resolved the question in accordance with the rules and usages generally followed. Anyway, the arbitrators found there to be no real conflict between the content of the conflicting substantive law:
"Attendu que de surcroît les arbitres ont constaté que les règles et usages internationaux précisés coïncident avec les normes inscrites aussi bien dans le droit italien que dans les législations française et belge."

The arbitrators found the arbitration agreement valid and awarded the defendant 267,573.75 F.Fr. damages.

In another award, three ICC arbitrators wanted to determine the applicable law to govern an agency contract. The Italian defendant granted a 3 year, renewable triannually, exclusive sales agency of his goods to the (Federal) German plaintiff. When the defendant terminated the contract after 8 years, the plaintiff argued he could only terminate the contract at the end of a 3 year period. The plaintiff claimed damages for wrongful breach of contract. Holding the substantive law of Germany to apply the arbitrators stated:

"Attendu à cet égard, qu'une juridiction arbitrale internationale, ne relevant du droit international privé d'aucun Etat, détermine elle-même, à défaut de choix par les parties de la loi applicable à leurs rapports contractuels - ses propres règles de conflit en fonction des données essentielles du litige qui lui est connu : que s'agissant, en l'espèce, d'une convention commerciale de représentation et distribution (pour laquelle les parties n'ont ni expressément, ni implicitement désigné la loi applicable) il est conforme à la tendance généralement admise qu'une semblable convention et les rapports entre parties qui en découlent soient régis par le droit du pays où s'exerce l'activité de représentation et de distribution qui en est l'élément essentiel et caractéristique, c'est-à-dire, dans la présente affaire par le droit allemand."

Again, when faced with a question as to the application of public policy in international arbitration, a Swedish arbitrator fell back on to the general principles recognised to govern public policy. Thus the arbitrator stated:

"... there exists a general principle of law recognised by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators. This principle is especially apt for use before international arbitration tribunals that lack a "law of the forum" in the ordinary sense of the terms."
In three interesting awards different Belgian arbitrators relied on a similar contention that the *lex loci contractus* supplemented in certain circumstances by the *lex loci solutions* is a generally accepted rule of private international law. In the earliest case, a Belgian arbitrator wished to determine the law to govern the dispute before him. The Italian plaintiff had granted to the French defendant the exclusive rights of manufacture and sale of his goods in France. As to the law to apply the arbitrator stated:

"Attendu que l'application de la règle classique de droit international privé qui porte référence pour vider l'incertitude quant au droit national applicable à la lex loci contractus, c'est-à-dire, à la loi du lieu ou du pays où le contrat a été formé, ne peut fournir de solution puisque le contrat peut être considéré comme né dans les deux villes précitées;

"Attendu qu'en revanche il est constaté que le contrat devait recevoir son exécution en France et partant, que le conflit de lois peut être ainsi résolu par la règle subsidiaire de référence à la lex loci solutions, c'est-à-dire, à la loi française."

To support his choice of law the arbitrator then added, that both parties were agreed that French law should be applied.

In a second award, a different Belgian arbitrator was seized of a dispute between a French plaintiff and five defendant corporations, all part of the same group of companies. The first defendant, a Swiss corporation, had contracted "for and on behalf of" the other four defendants, all Israeli corporations, for the plaintiff to represent the latter in France. The plaintiff brought these proceedings to recover payment of commissions to which they claimed to be entitled. When discussing the applicable law the arbitrator held:

"Attendu que la demanderesse fait ... observer, à bon droit, qu'en l'occurrence la loi française doit recevoir application, motif pris de ce que conformément à une doctrine et à une jurisprudence constantes concernant les conflits de lois en droit international privé, à défaut pour les parties d'user de l'autonomie de leurs volontés, il échet d'accorder la préférence à la loi du lieu ou le contrat a été formé et, subsidiairement à celle où il doit recevoir son exécution; " (Emphasis added).

"Attendu que la convention litigieuse présente un caractère 'sui generis' qui la fait participer à la fois du contrat de mandat et du contrat d'entreprise d'ouvrage et que son lieu d'exécution caractéristique est celui où le mandataire accomplit les actes et les opérations dont il a la mission."
To strengthen further his finding that French law should be applied, the arbitrator tried to show that France was the country with which the agency contract was most closely connected stating:

"Attendu que s'il est vrai que la convention litigieuse du 1er décembre 1963, résultant de conversations menées à Genève, New York, Tel Aviv et Paris, entre les mandataires des parties signataires, peut malaisément recevoir quant à son lieu de naissance, une domiciliation dans une ville ou un pays déterminé, en revanche, il est manifeste qu'elle devait être exécutée partiellement en Suisse, où le prix des billets vendus était payable, mais principalement en France puisque le contrat d'agence y était organisé:

Attendu que le lieu d'exécution principal étant la ville de Paris, il échet donc de faire application du droit national français completé, s'il échet, à titre supplétif, les règles et usages de caractère international régissant les contrats internationaux." (Emphasis added).

Again, where the English plaintiff licensed the French defendant to manufacture and exploit her trade mark and patent in France, another Belgian arbitrator discussing the applicable law stated:

"Attendu que la défendresse fait observer, à bon droit, qu'en l'occurrence la loi française doit recevoir application, motif pris de ce que, conformément à une doctrine et à une jurisprudence constante concernant les conflits de loi en droit international privé, a défaut pour les parties d'user de l'autonomie de leur volontés, il échet d'accorder la préférence à la loi du lieu où les contrats ont été formés et, subsidiairement, à celle ou ils doivent recevoir leur exécution;"

"Attendu que le lieu d'exécution principal étant la ville de Paris, il échet donc de faire application du droit national français completé si besoin est, à titre supplétif, par les règles et usages de caractère international régissant les contrats internationaux." (Emphasis added).

Ad Hoc Award

286. In the Aramco arbitration award, though the arbitrators appeared to express a preference for the "proper law" as the "appropriate" conflict rule, there were several references to the generally or universally admitted principles of private international law. So when discussing the classification of a concession agreement (i.e. an act sui generis as in French law or a lease as in English law), the arbitrators held:
"According to the most generally accepted doctrine in private international law, since the time of the works of Kahn and Bartin, the characterization or classification i.e. the determination of the legal nature of a juridical relationship, is governed by the lex fori. As the Arbitration Tribunal does not have a lex fori, it considers as decisive - according to an exception to the lex fori principle which is universally admitted in classical private international law - the legal notions of the lex situs. This is because the Tribunal is concerned here with legal relations involving immovable property situated in Saudi Arabia. The tribunal is thus led to examine the law of Saudi Arabia in order to ascertain whether an oil concession, granted by the Government with respect to the subsoil of its territory, should be characterized as a unilateral act of public law, or as a public or administrative contract, or as a contract of private law, or as a lease, or as a profit à prendre, or as an institution sui generis, partly public and partly private."\(^3\) (Emphasis added).

When discussing what law should apply to the concession agreement, the arbitrators found different laws to govern different aspects of the concession. In support of their finding Saudi Arabian law to govern the effects of the concession in Saudi Arabia, the arbitrators stated:

"The law in force in Saudi Arabia should also be applied to the content of the Concession because this State is a Party to the Agreement, as grantor, and because it is generally admitted, in private international law, that a sovereign State is presumed, unless the contrary is proved, to have subjected its undertakings to its own legal system. This principle was mentioned by the Permanent Court of International Justice in its Judgements of July 12th, 1929 concerning the Serbian and Brazilian Loans."\(^4\)

Again, as we have already seen\(^5\), when considering what conflict of laws rules to apply, the tribunal referred to the "principle universally admitted in private international law that the law governing relations which were not established between States, is to be determined by resorting to the conflict rules of the lex fori."\(^6\)

e) **Application of a "cumulative" conflicts rule: accumulation of relevant conflict of laws rules**

287. The "appropriate" conflict rule can be determined through a cumulative application of the conflict rules in the private international law systems connected with the case. So if under the conflict of laws systems of the places from which the parties come or in which they have their main business establishment and/or where the arbitration is held the same rule is adopted,
that rule may be considered "appropriate" to the particular case. This can most frequently be seen by the application of a conflict rule "common" to the disputing parties. The fact that the conflict systems with which they are connected adopt the same solution gives that solution a special character for the non-national plain.

288. This type of choice can be seen in several awards. In one case, arbitrators were asked to annul a contract and to give effect to a penalty clause in the contract. The parties, a French company and a private (Federal) German individual, agreed to jointly purchase the shares in a (Federal) German company; the French plaintiff was to provide 150 million French francs, and the German defendant was to provide 153 million French francs. The defendant failed to provide his contribution as promised. The level of the penalty clause depended on whether or not the defendant was a merchant. The arbitrators held:

"De plus, il est à noter qu'il n'y a pas eu d'accord entre les parties en ce qui concerne la loi applicable L'affirmation du défendeur qu'il n'était pas commerçant n'a pas été contestée de même qu'il n'y avait pas de contestation que la clause du domicile n'impliquait pas le choix de la loi française."

"En ce qu'il s'agit d'abord de la loi applicable, le Tribunal Arbitral est de l'avis que c'est la loi sarroise, c'est-à-dire, la loi allemande. Cette loi est indiquée par le lieu d'exécution du contrat. La loi du lieu d'exécution d'un contrat est la loi préférable d'après le droit international privé allemand et français. De plus, il s'agit ici d'une entreprise sarroise, ce qui est aussi une indication pour la loi sarroise."  

(Emphasis added).

As the defendant was found not to be a merchant as defined by article 343 of the German Civil Code, he was held not liable to the penalty clause but still subject to pay damages.

In another case the French plaintiff company had concluded an agreement with the managing director of the Australian defendant company, whereby the Australian company was to represent and sell the plaintiff's products in Australia. When a dispute arose a Swiss arbitrator was called upon to determine the right of a managing director to bind his company. The arbitrator stated:
"The valid doctrine of continental private international law is that the personal law of a corporation determines whether the undertakings of a managing director - who is an "organ" of the corporate body and not a mere agent - is binding on the entity. This corresponds with the doctrine of the Common Law countries.

In France the personal law of a corporation is that of the State in which it has its centre or 'domicile' (sise social). In the common law countries, a corporation lives under the law under which it has been created or "incorporated". The Respondent has its central office in the country where it has been incorporated, i.e. in the State of Victoria, Australia. The law of that State determines therefore the capacity of D.C. as managing director of the Respondent to contract on its behalf.

(Emphasis added).

And again, in another aspect of the India-Pakistan case, Professor Lalive was asked to determine the relevance of emergency legislation adopted by the Government of Pakistan during the armed conflict with India. The arbitrator held:

"The very nature and neutrality of arbitration proceedings necessarily involve the disregarding by the arbitrators of some factors which are or may appear obligatory in regard to a particular national jurisdiction, such as local political considerations which are sometimes reflected in the concept of "public policy."

To show that this principle was common to both India and Pakistan, and for that reason could not override an express choice of Indian law, the arbitrator stated:

"The above principles have been recognised by Court decisions and authors' opinions in Britain, the common law system of which, as the parties in the present proceedings have admitted, has been adopted by the legal systems of both India and Pakistan." 6

289. The clearest application of the "cumulative" conflict rule can be seen in an award made between (Federal) German and Greek parties in which for two different disputes the arbitrators followed the same approach. The German sellers had brought the proceedings alleging a total breach of contract by the Greek defendants and claiming damages of $17,000. To every aspect of the case the Swiss arbitrator looked to the conflict solutions of German, Greek and Swiss law (i.e. the laws of the parties and of the place of the arbitration). As the Greek party refused to participate in the proceedings the arbitrator began by considering the validity of the arbitration agreement. He looked at
the problem from several angles and found the agreement to be valid. He explained this, inter alia, in this way:

"Le résultat est le même, si l'on applique les règles de conflit des lois semblables d'Allemagne... et de Grèce sur la forme des actes juridiques, même si le compromis, en tant que contrat procédural, se distingue d'un acte juridique civil. Aussi bien le droit national plus exigant, que le lieu de l'exécution par l'acceptant et le contrat principal, dont la validité de la clause dépend également, conduisent à l'application du droit grec."

Greece, like Germany and Switzerland, was party to the Geneva Protocol on Arbitration Clauses of 1923 and under Greek law the arbitration agreement was valid.

With respect to the law to govern the substance of the dispute, the arbitrator again held it to be Greek law. The arbitrator explained his choice of law as follows:

"Pour trancher au fond si la demande est justifiée, il y a lieu de déterminer tout d'abord le droit matériel applicable au litige. Comme la convention des parties ne s'explique pas à ce sujet, il faut rechercher en premier lieu ou prendre les règles de conflit des lois pour résoudre la question. La réponse à la question est sensiblement facilitée par le fait que les principes de droit international privé développés en droit allemand, comme en droit grec (et en droit suisse aussi), aboutissent au même résultat. Un tribunal international, à défaut d'entente des parties, doit précisément et avant tout appliquer les règles de conflit des lois concordantes du lieu du domicile des deux parties.

"Toutes les règles de rattachement reconnus en droit suisse et en droit allemand conduisent donc à l'application du droit grec, a quoi il faut ajouter que la conclusion valable du contrat ne peut être mise en doute objectivement et n'a jamais été contestée et que dans tous les cas, selon la jurisprudence allemande, pour les effets du contrat le lieu de l'exécution est décisif. La règle déterminante est conçue en termes très généraux du droit grec, à savoir l'article 26 C.C.Gr. selon lequel en l'absence de convention des parties il faut appliquer le droit qui au regard de toutes les circonstances, apparaît le plus conforme au contrat conduit nécessairement au même résultat".

"Il est dès lors indifférent de déterminer si l'on doit appliquer le droit par ailleurs guère décisif, du lieu de conclusion ou celui du lieu d'exécution, c'est-à-dire, celui qui d'une manière générale a les rapports les plus étroits de lieu et de fait avec le contrat, puisque les règles de rattachement du droit allemand et du droit grec, comme aussi du droit suisse, conduisent clairement à l'application du droit privé grec pour l'appréciation de la présente demande. A ce propos, on peut simplement faire remarquer que la sentence arbitrale, même en cas d'application du droit allemand, ne serait guère différente, ceci d'autant moins que le code civil grec de 1940 qui fournit seul les règles légales utiles à la solution du litige a été largement influencé par le droit privé allemand".
In some cases reference to the conflict rule being "common" or to the other countries' rule leading to the same result is made even where a particular conflict rule has been applied per se. So in an award\(^1\) between (Federal) German and Austrian parties, the Swiss arbitrator having held German law applicable by virtue of the expressed intentions of the parties still added:

"...il faut se rappeler que l'opinion dominante en Allemagne, en Autriche et en Suisse reconnaît aux parties le droit de choisir le droit applicable."

It will also be recalled that Monsieur Mezger in an award\(^2\) between Canadian and (Federal) German parties, though ostensibly applying the private international law rules of the "siège d'arbitrage" (France), felt constrained to add: "this arbitrator is satisfied that the same rule prevails in German and in Canadian private international law."

Equally, in another award\(^3\) to support their application of the conflict of laws rule in the ECE general conditions, the arbitrators noted that:

"Ce renvoi fait partie de la pratique courante des tribunaux suisses. Les tribunaux allemands se reportent eux aussi au droit du pays du vendeur quand il s'agit de déterminer les obligations du vendeur. Le comportement des parties dans le présent litige plaide également en faveur de l'application du droit matériel allemand pour résoudre les points litigieux touchant au droit de la vente qui les opposent."

Another interesting award\(^4\) where reference was made to the other party's system of private international law, concerned a dispute arising out of an exclusive agency contract between the French plaintiff and the Austrian defendant. The plaintiff had appointed the defendant the sole agent for his goods in Austria. The defendant was to collect orders for the plaintiff's goods and send them on to the plaintiff in France; the plaintiff would dispatch the goods direct to the purchasers. The defendant was also to collect all payments, submit periodical accounts and send to the plaintiff his share. The defendant rescinded the contract alleging the plaintiff had delivered goods in defective condition, had
failed to send the technicians promised and had not provided the defendant with the technical information required to competently carry out their agency. The plaintiff challenged the defendant's right to rescind the contract, and claimed damages for wrongful termination of the contract and a statement of account of all orders effected under the agency.

Despite the fact that the arbitrator was a (Federal) German, he determined the applicable law on the basis of the French private international law. He stated:

"Il faut en premier lieu examiner quelle loi sera applicable. D'après le droit international privé français: Les parties au contrat peuvent stipuler la loi qui doit régir les rapports des contractants. ... A défaut d'une stipulation, le juge, d'après une décision récente de la Cour de Cassation devra rechercher quelle est la loi qui doit régir les rapports des contractants, d'après les termes du contrat et les données de l'affaire."

"Par conséquent dans le cas de contrat avec des agents commerciaux, il faut supposer que sera applicable la loi du pays où l'agent commercial a son siège. Toutefois, il faut également prendre en considération la loi de l'endroit où l'agent commercial a été conclu."

"Si l'on prend en considération ces points de vue exposés en matière d'agence commerciale pour le cas présent qui est semblable, bien qu'il s'agisse d'un concessionnaire et non pas d'un agent commercial, la loi autrichienne sera applicable, étant donné que le concessionnaire a son siège en Autriche, et y exerce son activité. En outre, ce contrat doit être considéré comme un contrat conclu en Autriche étant donné que c'est la que la dernière signature, à savoir celle du concessionnaire a été donnée."

Then to conclude his discussion on the applicable law, the arbitrator said:

"Si l'on prend pour base la loi autrichienne, on arrive au même résultat. D'après le droit international privé autrichien, la situation n'est pas la même si le contrat a été conclu à l'étranger. Dans le premier cas, et sauf stipulation contraire, seule la loi autrichienne doit régir les rapports des contractants." (Emphasis added).

f) Application of the "proper" conflicts rule: accumulation of relevant connecting factors

291. In all the cases so far discussed the arbitrators have relied on a specific rule of the conflict of laws. One other interpretation which can be attributed to article VII of the European Convention is the application of the substantive law pointed to by the preponderant number of, or what the arbitrators consider the most important, connecting factors. So, rather than follow a rigid conflict of laws rule and apply the law of the place of contracting, or the law of the place
of payment, or the law of the place where the principal has his main business establishment, the arbitrators consider all the factors of the case and look to see to which country most connecting factors point; they then apply the law of that country. This of course is closely akin to the English "proper law" test,\(^1\) variously described elsewhere as the localisation test\(^2\) or the centre of gravity test.\(^3\) However, the weight to be attributed to any particular connecting factor differs from case to case and depends upon the arbitrators; unlike some national private international law systems which give a predetermined importance to certain connecting factors.\(^4\) This development is due to the world-wide movement away from rigid conflict of laws presumptions towards a more flexible and realistic conflict of laws methodology.\(^5\)

292. In one award\(^1\) the validity of the arbitration agreement necessitated the determination of the applicable law. The arbitrator stated:

"Le contrat consiste en une promesse de vente passée en France entre les héritiers Z (Romains) et Madame S.L. (Française), relativement à un fonds de commerce sis à Paris... Il s'agit donc d'un contrat nécessairement soumis à la loi française en raison même de la situation de son objet (lex rei sitae)."

"D'autres considérations entrent en jeu également pour confirmer qu'il s'agit d'un contrat soumis exclusivement à la loi française, notamment le lieu de sa conclusion et le lieu où il était prévu qu'il devait recevoir exécution." (Emphasis added).

Here all the major connecting factors pointed to the law of France: the places of contracting and of performance; the sale was to take place in France; the defendant was a French citizen (though resident in Morocco) who carried on business in France. Only the residence of the defendant and nationality of the plaintiffs (Romanian) had a connection with a territory other than France.

Similarly in an award\(^2\) made between Monrovian and Panamanian shipowners and two French ship-builders. The dispute concerned the obligations of the builders under the guarantee clause. The arbitrators applied French law, France being the place of arbitration, the place of contracting, the place of payment and the place where the vessels were to be delivered; the contract had also been made in the French language and in French form.
Again in an award between three American plaintiffs (two from New York, the third from Maryland), and a French defendant, where the Dutch arbitrator had to determine the locus standi of the various plaintiffs in the arbitration proceedings. The arbitrator held French law to be applicable on the ground that the contract was concluded in France, was largely to be performed in France and that the defendant, the principal in the agency agreement, had his main place of business in France. That the contract was written in the English language was held to be of little relevance.

293. In other awards arbitrators have based their choice of the applicable substantive law on the two or three connecting factors which they consider particularly poignant and which point in the same direction. So where one French company granted a licence to exploit their patent throughout the world to another French company, the Belgian arbitrator, not surprisingly, held French law applicable stating:

"Attendu qu'il appert de façon suffisante de la nationalité des parties litigantes, du domicile du contrat, des circonstances de la cause et de l'accord des parties, qu'application de la loi nationale française doit être faite." 2

In one award, the Spanish defendant had undertaken to transport the plaintiff's goods from Belgium to Venezuela, for $8.25 per ton; he failed to do so. The Belgian plaintiff had to make other shipping arrangements at a cost of $10.30 per ton. The plaintiff's action was for extra freight paid because of the defendant's breach of contract. The defendants argued Spanish law applied to the contract, and in accordance with that law, they, a Spanish trading company, could not submit to arbitration proceedings outside Spain. With respect to the applicable law the French arbitrator found:

"Attendu que, s'agissant d'une matière commerciale, c'est essentiellement au lieu du domicile de la conclusion et de l'exécution des accords qu'il faut se reporter d'autant que les deux parties sont de nationalité différente, faute d'exister une stipulation contraire précisant la volonté desdites parties".
"Et, attendu que les accords ayant été conclus par correspondance, ils doivent être réputés conformément aux principes qui régissent cette matière, au lieu du domicile de celle des parties qui a engagé les négociations commerciales, c'est-à-dire (le demandeur)...; que (le demandeur) ayant ainsi procédé à en effet "posé implicitement la loi de son centre d'affaire comme devant régir le contrat"...; que cette règle doit d'autant plus être appliquée que la loi du domicile (du demandeur), est aussi celle du lieu d'exécution du contrat, les marchandises ayant été chargées à Anvers".

The arbitrator held Belgian law to apply and found his jurisdiction well based.

In another case the Lebanese plaintiff had been granted for a period of ten years the exclusive right to sell the Dutch defendant's goods in Lebanon. The plaintiff undertook to sell £25,000 worth of the defendant's goods annually.

After two years the defendant renounced the contract due, inter alia, to the plaintiff's failure to satisfy the minimum sales requirement. With respect to the applicable law the arbitrator stated:

"Les parties n'ont fait choix ni expressément ni tacitement d'une loi nationale déterminée. Le contrat litigieux a été conclu et signé aux Pays-Bas et le lieu d'exécution de l'obligation caractéristique qu'il comporte, la fourniture des produits stipulés, s'y trouvent également, lesdits produits devant être livrés F.O.B., le droit hollandais est donc applicable en l'espèce". (Emphasis added).

As the place of contracting and the place where the defendant had to deliver the goods to the plaintiff (F.O.B. Rotterdam) both pointed to Holland, Dutch law was held applicable.

Where the American plaintiff found the French defendant's goods being sold in the US market by other people, in contravention of his exclusive sales concession, he claimed damages for breach of contract. The Swiss arbitrator found French law applicable, stating:

"Le contrat dont l'inexécution est invoquée a été passé en France entre une société française et une société des Etats-Unis dont le représentant et Président est toute fois domicilié en France. Rien n'indique que les parties ont voulu l'application d'une autre loi française et tant la demandresse que la défendresse ont confirmé vouloir l'application de la loi française; c'est donc bien la loi française qui doit être appliquée au présent litige." 

Again where a French company granted the exclusive world-wide sales rights of its goods to a Swiss company, the arbitrators held in the absence of any choice of applicable law by the parties...
"que compte tenu du lieu où les contrats ont été établis, du lieu où la commande a été faite, et du lieu où celle-ci a subi à tout le moins un commencement d'exécution le droit français doit être appliqué."

(Emphasis added).

The place of contracting, the place where the order was affected and the place where performance was initially to be made were sufficient connection to justify the application of French substantive law.

A Swiss arbitrator wanting to determine the law to govern an agency contract between a Federal German principal and an Austrian agent showed that the place of contracting, the place where the agency was to be exercised and "the country most closely connected", all favoured Austrian law.\(^7\) The arbitrator stated:

"En ce qui concerne le droit applicable, il convient de s'en tenir à la loi autrichienne. S'agissant d'un contrat de représentation, la loi du pays dans lequel le représentant exerce son activité correspond le mieux à la volonté probable des parties. De toute façon, les questions juridiques qui se posent ont, avec cette loi, les rapports les plus étroits sur le plan territorial. En outre, le fait que le contrat a été conclu à Vienne milite également en faveur de l'application de cette loi."\(^8\)

And again, in a dispute between the government of a sovereign African State and a Belgian citizen,\(^9\) the Swiss arbitrator chose the law of the African State to apply following the presumption that, except where the contrary is expressly provided, no State can be assumed to have submitted to the law of some other State, and that the territory of the African State was itself the locus executionis. The arbitrator stated:

"Le contrat dont l'inexécution est invoquée a été passé en France entre une société française et une société des États-Unis dont le représentant et président est toutefois domicilié en France. Rien n'indique que les parties ont voulu l'application d'une autre loi française et tant la demanderesse que la défendresse ont confirmé vouloir l'application de la loi française; c'est donc bien la loi française qui doit être appliquée au présent litige." (Emphasis added).
In two awards on almost identical facts, the arbitrators relied on different and contrasting connecting factors to determine the law to govern two licence agreements. In one case a licence agreement was held to be governed by French law where France was the both the place of execution and the place of arbitration. The plaintiff, a New York corporation, had granted to the French defendant the exclusive right to exploit in France his patented system for producing records. The plaintiff was "to make every effort in furthering the sales of the defendant's records in Europe", and the defendant was to pay the plaintiff a royalty of 3/10% per record, and a minimum of $1500 per annum for the first three years. Both parties claimed the other party to be in breach of the agreement. As for the applicable law the Dutch arbitrator held:

"It follows from the foregoing that the agreement was in the first place to be executed in France and that differences between the parties have to be decided by arbitration in Paris. For these reasons the proper law of the contract is French law."

On the other hand, in another award, France being the place of contracting and of arbitration were considered to justify the application of French substantive law. The two French plaintiffs, the inventor and the joint owner of a patented invention for a transmission system for motor vehicles, licensed the American defendant, a New York corporation, to manufacture and exploit the invention in the USA. The licensee was further authorised to grant sub-licenses in the USA. The agreement provided for the percentage profit to be paid as a royalty to the licensors with a minimum guaranteed annual amount. The plaintiffs terminated the license alleging the defendant had not adequately exploited the invention and wanted compensation for loss of earnings of $500,000. The defendant rejected the plaintiff's contentions and argued he had adequately carried out his obligations under the agreement. He argued the arbitrator should make his award 'ex aequo et bono' and order the plaintiffs to pay him 20,000 French francs damages for bringing a vexatious and abusive litigation. The arbitrator rejected the contention that he had the right to act as "amiable compositeur". Instead he held French law to apply stating:
"Attendu q'en effect, que le contrat donnant lieu au present arbitrage a été signé à Paris et que les parties ont fait élection au siège de CCI à Paris".5

Eastern European Awards

295. Though they generally follow their own private international law rules the socialist arbitration tribunal have also when seized of a dispute resorted to collecting connecting factors. So e.g., in the award1 of the Arbitration Court at the Hungarian Chamber of Commerce discussed above2, the arbitrators held that as the contract was made and was to be (at least partially) executed in Pakistan, one of the parties was a Pakistani national and payment was to be made in Pakistan, the law of Pakistan should apply. Thus the arbitrators held:

"Les faits ayant été ainsi précisés, le Tribunal Arbitral a recherché quel était le droit applicable. Le contrat ne contenait aucune indication à ce sujet. Le Tribunal Arbitral a donc dû rechercher la volonté présumée des parties. Le contrat était conclu dans une ville du Pakistan où la défenderesse avait une de ses Entreprises. Le lieu d'exécution était également au Pakistan d'où la marchandise devait être embarquée et le prix était payable au Pakistan. En conséquence, conformément aux règles admises en droit international au sujet du rattachement il convenait d'appliquer le droit pakistanais. D'ailleurs, la lex domicili venditoris aurait conduit au même résultat. Or, ce dernier principe de rattachement connaît un succès grandissant et il a été adopté notamment par le projet de loi internationale sur la vente, préparé par le Gouvernement Hollandais. Le Tribunal Arbitral a donc décidé d'appliquer le droit commun du Pakistan, le droit anglo-saxon de la Common Law."3

Similarly, the International Court of Arbitration for Maritime and Shipping Matters at Gdynia found the fact that the arbitration tribunal chosen was in Poland, that the shipowner was a Polish enterprise with his main place of business in Poland and that the ship flew the Polish flag was enough to justify the application of Polish law4. The action was for indemnity in respect of insurance monies paid out for cargo damaged whilst being carried in the defendant's ship. The tribunal explained the application of Polish law as the law which the parties presumably intended would apply.

"compte étant tenu du fait que la procédure se déroule en Pologne, que l'armateur en tant qu'entrepreneur est un sujet de droit polonais, et qu'il a son siège en Pologne et enfin que le navire bat pavillon polonais".5
Summary

296. From the morass of the awards discussed above and the various possible interpretations which could be given to article VII(1) of the European Convention, it is hardly possible to deduce any simple and definite choice of law rules. However what is clear from the awards is that "l'usage d'un droit international privé étatique n'est plus considéré comme indispensable, et qu'allant plus loin, certains arbitres l'excluent délibérément comme incompatible avec le mode international de règlement de litiges eux-mêmes internationaux". In their desire to avoid the application of national private international law rules, arbitrators will choose either a conflicts system or a simple conflicts rule which can be applied to a particular case. This choice will be made in a judicious way attempting to avoid or at least limit the "real" conflict of laws, and where that is not possible by "l'application cumulative des systèmes de conflit de lois intéressés au litige".

B. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States

297. The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States adopted a conflict of laws formula different from that in the European Convention. This is hardly surprising seeing the Washington Convention created the ICSID as an international forum specifically competent to deal with disputes arising on the nationalisation or confiscation of foreign owned property by sovereign States. Article 42 of the Washington Convention, provides the conflict of laws formula to be followed by the ICSID to determine the law and/or rules according to which it should reach its decision. It states:
"(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

(3) The provisions of paragraph (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree."

This provision contains two basic and over-riding rules. Firstly, the first sentence of article 42(1) and article 42(3) declare the intention of the parties to be the starting point from which every search for the applicable law or body of rules or other yardstick must begin. This we have already adequately discussed.

Secondly, article 42(2) denies the arbitrators the right to "escape from the responsibility of giving the award on the rules of law", where the law of the State and international law are different, or where "the case may be inter-related with new issues of national and international law which are not yet settled by any international convention". This however seems obvious: once appointed arbitrators cannot make an award of non liquet. In the unlikely event of the obscurity envisaged by this article occurring, arbitrators will base the award upon the spirit of the Convention, on the general principles of law and on the acknowledged rules of international law.

298. In the absence of any agreement between the parties on the law or yardstick for the arbitrators to follow, the Washington Convention adopts the traditional rule where a sovereign State is involved: the law of that State. So where the ICSID is requested to consider a dispute arising out of an investment contract, there is a prima facie presumption that the law of the State of investment should govern the rights and responsibilities of the parties. The presumption is however subject to two limitations: a contrary agreement of the parties and the rules of international law.
That there should be a heavy presumption in favour of the law of the host State is not surprising. In international law, it is beyond question that a sovereign State is entitled to regulate the rights pertaining to and the conditions of investment within its territory. A person investing in a foreign country does so knowing he is subject to the laws of that country; he accepts the laws of the country of investment as regulating the taxation payable and his right to remit to his own country the benefits of his investment; he also accepts the risk — as he does in his own country — of changes which may occur in government and the policy towards foreign investors and their property.

299. When a dispute arises due to the confiscation or nationalisation of a foreign private investment and the dispute is submitted to the ICSID, the question is whether the arbitrators should apply the national law of the country of investment as it was at the time when the investment was made or as it is post-confiscation and nationalisation. To apply the laws of the host State which were responsible for the nationalisation of the foreign property would totally justify and uphold the actions of the host government. Indeed, it is rare that governments nationalise or confiscate property — especially if it belongs to foreign persons — without ensuring that their actions are legally valid by their own law. On the otherhand, to apply the laws of the host State as they were when the investment was made and when no doubt there were adequate safeguards for the investor, would be to deny the sovereign State's right to alter its law and to act as it considers at any particular time in the interests of the State.

It would appear that it was to circumvent this difficulty that the Convention tempered the law of the State of investment with "such rules of international law as may be applicable." Thus the law of the host State is to be recognised as having a sovereign power within its territory, subject to the principles and rules of public international law relevant to the nationalisation and confiscation of foreign owned property.
But what are these principles and rules of international law? These are, in general, the normal rules of public international law as defined by Article 38 of the Statute of the International Court of Justice\(^4\), and more particularly, the principles *pacta sunt servanda* and that expropriation, confiscation and nationalisation must be accompanied by fair and adequate compensation\(^5\). It is further submitted, the rules of the law of international trade must, where appropriate, also be applied.

300. The introduction of a renvoi situation by the requirement that arbitrators apply the law, "including its rules on the conflict of laws", of the host State is difficult to understand. It is generally accepted that renvoi does not apply in the area of contracts\(^1\). If it is to apply where the parties have not expressed any choice of law, is it also to apply where they have expressly selected a national law to govern their contract\(^2\)? It is unclear what can be gained in this type of situation from the application of conflict of laws rules.

It is true that the national private international law system of one country may theoretically point to the substantive law of some other country. However, this is highly unlikely with respect to something as important as investment within the territory of the State. Even if the national rules of conflict of laws were to require the application of some foreign substantive law, those rules are unlikely to be followed with respect to the confiscation or nationalisation of foreign owned property. When a government takes over foreign private property it does so either as a result of a sudden change in government policy or in answer to an urgent economic crisis necessitating extreme measures. In both of these cases the laws giving effect to the confiscation or nationalisation are mandatory laws, and have a public policy (ordre public) character. As it is a general principle accepted by every system of private international law that both mandatory legislation and public policy justifies the refusal to follow the otherwise applicable foreign law, there is very
little possibility to any foreign law being considered to over-ride the
confiscatory and nationalisation legislation. However, the State's
obligation to respect international law over-rides all national principles of
public policy and will be applied by an ICSID tribunal.

301. During the first six years of its existence, the ICSID was not called
upon to flex its muscles. Regrettably, though there are at present 5 disputes
pending, the ICSID has still not made any award\(^1\). In consequence there are
no decided awards to which one can refer to see how in practice article 42 of
the Washington Convention is actually interpreted. Any view expressed on the
matter can be no more than conjecture. Nevertheless, it is submitted the
straight application of national law can be of only minimal use. Rather the
ICSID, if it wishes its award to be enforced in the country of the State
party\(^2\), will have carefully to tread the tight-rope between the right of a
sovereign State to regulate everything which occurs within its jurisdiction,
and the rule of public international law which prevents the nationalisation
or confiscation of private property without fair and adequate compensation.
SECTION II. DIRECT APPLICATION OF THE SUBSTANTIVE MEASURING STANDARD

302. We have so far considered the conflict of laws rules applied by arbitrators in disputes arising out of international trade relations. However, it is often unnecessary and inconvenient for arbitrators to apply a system of conflict of laws and/or make a positive determination of the substantive law to govern a particular transaction. Indeed, many arbitrators find the practical workings of private international law cumbersome and complicated. They do not wish to become involved in peripheral matters not directly relevant to their charge. The choice of applicable law is for many arbitrators a matter to be avoided if at all possible. Naturally where the conflict of laws is itself a source of dispute, the arbitrators must deal with it, but even then only to the extent necessary for their award. Furthermore, as pointed out by one commentator, if arbitrators must always apply private international law rules and substantive rules drawn from a national system of law there will be no difference between and little reason for business to prefer arbitration and normal court proceedings.

Many cases are particularly appropriate for settlement without any determination of the applicable law. These are cases which present no traditional conflict of laws problems or which can be resolved by resort to other non-legal methods of interpretation. This may enable an award to be based on a relevant principle common to the conflicting (and other) national legal systems, appropriate non-national and international provisions or practices, the terms of the contract itself, or some other non-legal criteria which the arbitrator deems relevant to the particular case. We shall consider these various standards individually.
A. THEORY

303. The major difficulty in applying a national legal standard to the substance of a dispute is deciding which to apply: the lex loci contractus, the lex loci solutionis, the law of the place of arbitration, the law of the place where the plaintiff or the defendant has his habitual residence or main place of business, etc. In the national court this question is decided according to the forum conflict of laws rules. The international arbitration tribunal however has no forum private international law rules: we have already seen the alternative systems to which arbitrators can resort when in need of an applicable rule.

The necessity to make a choice of the national legal order to apply, presupposes that the conflicting laws differ and that the final outcome depends on which law is held to govern. However often the substance of the conflicting laws do not differ: indeed they contain the same or similar provision for the same problem. Failure on the part of American courts to identify this "actual conflict" has been criticised by American writers. Leflar wrote:

"...if the laws of both States relevant to the set of facts are the same or would produce the same decision in the lawsuit, there is no real conflict of laws and the case ought to be decided under the law that is common to both States. Some of the strangest decisions with some of the lengthiest and most convoluted opinions in the books could have been handled simply and easily if this false conflict analysis had been accepted and employed."

Arbitrators are equally subject to this criticism. Nevertheless, increasingly they have tried to base or justify their awards on a common denominator either on the basis of the conflicting laws containing identical provisions or provisions which effectively lead to the same result (i.e. "common" legal provisions), or by relying on the general principles of law accepted by the conflicting and other legal systems.

We shall consider separately awards in which these two formulae have, to
B. PRACTICE

1. No "Actual" Conflict: "Common" Legal Provisions:

304. In some cases arbitrators state at the very outset of their award that there is no need for them to make any choice as to the law to apply. They note that the relevant provisions in the conflicting legal systems are the same. This can be illustrated by one award concerning the obligation to repay a loan made before the second World War. The plaintiff, a Swiss national, had lent £26,200 to the defendant, a German national, for the purpose of constructing a vessel. To protect his loan, the plaintiff insisted the vessel be insured in London and retained for himself certain rights against the insurers. During the war the vessel was taken by the Germans, and in 1946, having been recovered by the British, was ceded to the USSR. Alleging this to frustrate the contract, the defendant declined to repay the loan. The parties submitted to ICC arbitration the question of the defendant's continuing liability to repay the loan. The question of the applicable law the arbitrators considered a non-event stating:

"Attendu que ce qui précède est conforme non seulement aux termes des accords intervenus entre les parties et aux circonstances de la cause, mais encore aux règles tant du droit allemand que du droit anglais:

"Que, dès lors, la question du droit applicable paraît être sans intérêt, les conventions passées ne pouvant par ailleurs être rattachées à aucune législation autre que les législations allemandes et anglaises." (Emphasis added).

The arbitrators enforced the loan contract, but on the basis of the terms of the contract.

When determining his own competence as arbitrator, Professor P. Sanders of the Netherlands found, on the same basis, no need to consider which law governed. The dispute arose out of a contract under which the English defendant ordered woollen sweaters from the French plaintiff. The contract provided for any dispute arising out of the contract to be dealt with by ICC arbitration. The defendant, for no given reason, declined to pay for the
goods. The plaintiff brought proceedings under the ICC arbitration rules claiming the money owed, 2,728,606\(^3\) French francs, plus an indemnity of 30% of the contract price (935,483 F. fr.) as provided for in the contract. The defendant did not deny he owed the plaintiff money; he argued that under English law he was not entitled to submit to arbitration.\(^4\) With respect to the applicable law governing the defendant's capacity to participate in the arbitration proceedings, Professor Sanders said:

"L'arbitre doit dans ce cas se prononcer selon les règles du droit. La question se pose: quel droit est applicable dans notre cas, le droit anglais ou le droit français? Comme en ce qui concerne sa compétence, l'arbitre a examiné les autres questions qui se posaient en tenant compte des deux systèmes de droit qui viennent d'être mentionnés et est arrivé à la conclusion que dans le cas présent les deux systèmes mènent à la même conclusion." (Emphasis added).

Needless to say on the merits the arbitrator found for the plaintiff.

One award\(^5\) concerned a contract under which the Federal German defendant had granted to the Austrian plaintiff, for a period of five years, the exclusive right of sale in Austria of his pharmaceutical products. The defendant further undertook to pay for the cost of advertising his products in Austria; this he failed to do. At the hearing the parties were unable to agree on the law to apply: whilst the Austrian plaintiff was content that German law should govern, the defendant argued Austrian law was applicable the contract being totally performable in Austria. The arbitrator considered the matter of minor importance as the effect, whichever law was applied, would be the same. Thus the arbitrator stated:

"Que cette discussion ne présente cependant pas d'intérêts majeurs, les articles du Code Civil allemand invoqués par la défendressa n'étant pas en contradiction avec le Code Civil autrichien à partir du moment où, par suite de la dénonciation du contrat par la défendresse, la demandressa a, en cours d'audience, renoncé à la première partie de ses conclusions tendant à l'exécution du contrat, droit que lui reconnaissaient les articles 918 et suivants du Code Civil autrichien, alors que cette possibilité lui est refusée par l'article 326 du Code Civil allemand". (Emphasis added).
The arbitrator later noted that the award was in accordance with "des principes généraux du droit qui régissent toutes les législations européennes."

Similarly in a dispute arising through late and defective delivery of goods between Swiss and German parties. The parties respectively argued for the application of Swiss and German law. The arbitrators found it unnecessary to make a choice of law: both in attitude and in substance Swiss and German law were the same. The arbitrators stated:

"Il faut souligner dès le départ que la question du droit applicable n'a d'intérêt que s'il existe entre les systèmes de droit auxquels les parties sont soumises de véritable conflit de lois. S'agissant des droits allemand et suisse qui imposent des solutions semblables en matière de droit des obligations et de droit commercial, on peut donc, en règle générale, renoncer à rechercher le droit applicable."

In the first aspect of the India-Pakistan case, the Pakistani defendant challenged the validity of the arbitration agreement. He argued, there being a "state of war" between India and Pakistan the contract was terminated, and with it, the validity of the arbitration agreement. The arbitrator examined the meaning of "state of war" and looked to international law, as well as the common law of England, India and Pakistan. He held the arbitration agreement valid: as understood in the legal systems referred to there was no "state of war" between the two countries, though there certainly was a "state of dispute".

Similarly, in an award arising out of a contract for the sale of 10,000 tons of steel between the Belgian plaintiff and the Federal German defendant. The defendant undertook to deliver the steel, in two equal lots, in Greece, the steel having been transported via Bulgaria. The defendant failed to deliver and the plaintiff had to purchase elsewhere and at a higher price. The French arbitrator rejected the application of Bulgarian and Greek law; as
for Belgian and German law, there was no need to make a choice. The arbitrator stated:

"Attendu qu'il est inutile de rechercher quel serait en l'absence de tout disposition contractuelle le droit applicable, les parties étant d'accord pour reconnaître qu'aucune des questions soulevées par elles ne comporte une solution différente en droit français et en droit allemand." (Emphasis added).

305. In one award arbitrators used the existence of a "common" legal provision to save them the difficulty of applying the conflict rule they had found applicable. The dispute arose out of a contract under which a Bulgarian State enterprise undertook to deliver to a Swiss plaintiff 28,000 tons of Egyptian rice, f.o.b. Alexandria, at the price of $93.00 per ton. The Bulgarian failed to deliver with the effect that the buyer had to purchase elsewhere at $103.60 per ton. The buyer claimed the excess he had to pay. The arbitrators meeting in Switzerland decided to apply the rules of Swiss private international law. The appropriate conflict rule of that system was "the law with which the contract was most closely connected". However, having got this far, the arbitrators felt it unnecessary to apply the Swiss rule stating:

"Pour ce qui concerne le formation et l'exécution des contrats en cause, seul est donc applicable le droit bulgare ou le droit suisse. Mais pour juger cette affaire, il n'est pas nécessaire de choisir entre ces deux droits, car de toute manière, le résultat obtenu sera le même." (Emphasis added).

Polish Award

306. The arbitration tribunal at the Polish Chamber of Commerce took a similar attitude in respect of a contract which the plaintiff, acting in bad faith, had first tried to avoid and subsequently tried to enforce. The contract was for 100 machines; the plaintiff seller only delivered 15. He wrote to the buyer saying he did not intend to deliver the rest. The defendant buyer did not reply; he just considered the contract a bad loss. Some eight months later the plaintiff tried to enforce the contract arguing the defendant had not confirmed the "modified contract" in writing as required by the law
governing their relations. The arbitrators held the plaintiff's contention to be contrary to the rules of good faith and rejected his claim stating:

"Cela résulte de la prééminence absolue de ce principe primordial et fondamental des systèmes juridiques des deux pays auxquels ressortissaient les deux parties, sur toute disposition légale ou contractuelle."  

2. No "Actual" Conflict: "General Principles" of Law

307. An alternative method by which arbitrators can avoid having to make a choice of the applicable national law is to base their award on the "general principles of law". This standard is prima facie wider than the conflicting legal systems and entitles the arbitrators to look to their own systems of law, other well-developed systems of law and - to what extent it may contain concrete rules - international law. However in some cases arbitrators use the expression to refer to principles common to the conflicting systems of law.

One ICC award in which the arbitrator relied, inter alia, on general principles was the India-Pakistan case. The arbitrator, Professor Lalive, was confronted with conflicting choice of law provisions and had to decide which should be relied on to interpret a clause in the contract. The arbitrator found there to be no need to make a positive choice.

"In my view, it is not useful to discuss this kind of problem here and to decide on the question of the law applicable, (a question to be examined later), for the reason that, simply, the general principles of interpretation of contract should be applied as well as the rules of common sense, which are common to the principal legal systems of civilised countries, and especially to the English common law and to the legal systems of India and Pakistan". (Emphasis added).

Yugoslav Arbitration Award

308. The Yugoslav arbitration tribunal similarly avoided making a clear choice of law and instead based their award on the general principles of the conflicting laws and a uniform law. The dispute arose out of two contracts under which the French buyer had ordered cloth sacks from the Yugoslav seller.
The goods ordered under both contracts were delivered late: one month and ten days respectively. The delivery was also short by 14,500 sacks. They buyer protested about both the late and the short delivery and notified the seller that he would be held responsible for any loss or damage resulting from the foregoing.

The buyer who had resold a large quantity of the sacks hastened to dispatch what he could to his various customers. However several refused to accept delivery and returned the goods on the grounds that they were not up to standard. Those who accepted the goods demanded a reduction in price. The buyer consequently notified the seller that the goods were not of a satisfactory quality and that they were unwilling to pay the agreed contract price. The buyer proposed the value of the contract be determined by an independant expert appointed by the Yugoslav ATFEC. The seller instituted the proceedings claiming the contract price of 91,000 French francs. With respect to the buyer's duty to inspect the goods delivered and notify the seller of any defects "as soon as possible" or "without delay", the arbitrators, (two Yugoslavs and a Frenchman), looked to articles 137 and 150 of the Yugoslav General Usages of Trade, article 1648 of the French Civil Code and articles 38 and 39 of the Uniform Law on International Sales of Goods. The arbitrator found that the buyers behaviour after he accepted delivery of the goods "a été contraire aux règles de droit et aux usages généralement admis en cette matière". The buyer argued that because of the seller's various breaches he was entitled to treat the contract as at an end. The arbitrators rejected the buyer's contention because, inter alia, of his inability to affect complete restitution. The arbitrators stated:

"Suivant une règle généralement admise dans toutes les législations et qui se trouve énoncée dans l'article 79 de la loi uniforme sur la vente internationale, l'acheteur perd son droit de déclarer la résolution lorsqu'il lui est impossible de restituer la chose dans l'état où il l'a recue." (Emphasis added).
Though not a conventional award, the decision of the Administrative Tribunal of the International Labour Office (ILO) in re Sharma is an excellent example of the application of general principles. This case arose when Mr. Sharma, a "secretary" at the New Delhi branch of the ILO from 1945-1956 was designated "Administrative Assistant" and his post of "secretary" was indicated vacant. In his new position Mr. Sharma was to do the same work and receive the same salary as previously. This change in title was decided by the Director of the New Delhi Branch, but was in accordance with ILO hierarchy of scales.

Mr. Sharma instituted proceedings before the ILO administrative tribunal requesting that the title of "Secretary" be substituted for "Administrative Assistant", with retrospective effect as of the date of the decision, and that "his salary, hierarchy and status as the official ranking immediately below the Director of the Branch Office" be confirmed. The claimant supported his claim with the argument that in the Indian Civil Service "Secretary" was a high rank, whilst "assistant" was reserved for lower grades. Thus he argued his new designation "conveyed the impression of a demotion", and demotion could only be followed upon disciplinary proceedings.

The Indian ILO Branch argued that they had not violated the terms of the complainant's contract nor the ILO Staff Regulations. The position in the ILO Office had never corresponded with those in the Indian Civil Service. "In so far as the complainant ceased to act as a personal assistant of the Director of the New Delhi Branch Office, he lost his claim to the title of "Secretary", whereas the title of "Administrative Assistant" was conferred upon him by virtue of the fact that it had been used in other Branch Offices to designate the official ranking immediately after the Director."^2

The tribunal had to act in the dark. The contract of employment expressed no choice as to the national law to govern and there was no international agreement on this specific issue.
standard for employment contracts. As a general statement of the yardstick to regulate the employment of ILO officials the tribunal held in

"... the absence of regulations laying down conditions of employment of such officials... the conditions of employment... are governed primarily by general decisions of the Director-General and rules resulting from the partial assimilation of the conditions of service of such officials to those of public servants in the country where the branch office is located and, in a subsidiary way, by general principles of law, in particular, administrative law." (Emphasis added).

On this basis the tribunal held:

"The decision to change the complaint's title unjustifiably modified a former decision which had been in the nature of a personal reward." 4

Nevertheless, Sharma's request that his position as ranking immediately below the Branch Director was refused on the basis that "there can be no acquired rights as regards the relative position of an official within the administrative hierarchy". 5

3. Award Supported by Conflicting Law and and/or General Principles of Law

310. As has been seen throughout this study, arbitrators frequently determine, at the very outset of their award, the law which they consider applicable and upon which they intend to base their decision. Nevertheless, in many awards, they subsequently point out - perhaps to forstall criticism of their choice of law and/or their ultimate decision that the result would have been the same had they chosen the other conflicting law(s) to apply. In an award 1 concerning a contract under which the Federal German plaintiff had granted the French defendant an almost exclusive right to sell his products in France, the Swiss arbitrator discussed the law to govern and held the German commercial code applicable 2. Then he added:

"Par ailleurs, même en appliquant le droit français aux rapports contractuels dont il s'agit, ceci ne ferait guère de différence étant donné la similitude des normes du droit français relatives à l'obligation de l'acheteur de payer le prix stipulé".
In another award, made between an Austrian plaintiff and a Yugoslav defendant, the Swiss arbitrator decided to apply Swiss law, the law of the place of the arbitration. The contract concerned the sale by the plaintiff to the defendant of 1000 tons of pork. The defendant failed to open letters of credit as agreed and the contract was rescinded. The plaintiff claimed damages for loss of profit. The arbitrator stated:

"A défaut d'une stipulation des parties à ce sujet en application des principes généralement reconnus du droit suisse, l'arbitre a considéré comme droit applicable celui du siège du Tribunal Arbitral. Les parties après que la défenderesse ait également fait des objections au début, n'ont pas contesté ceci tant et si bien que des explications plus amples ne paraissent pas nécessaires. Par ailleurs, le résultat aurait été le même si le droit autrichien avait été reconnu applicable".

One dispute arose out of the purchase by the Swiss plaintiff of machines from the Dutch defendant. The contract was on the UNECE General Conditions for the Supply of Plant and Machinery. The plaintiff brought his action for damages claiming that the machines did not work satisfactorily. The defendant maintained that the machines had been delivered in perfect condition and any faults which had since developed were due to the incompetence of the plaintiff. In accordance with article 13.2 of the aforementioned General Conditions, the Federal German arbitrator held Dutch law, as the law of the seller, to be applicable. The arbitrator rejected the plaintiff's claim but felt constrained to add:

"Si nous examinons le problème sous l'angle du droit suisse, le résultat est le même."
This same system was used by a distinguished Belgian arbitrator, seized of a dispute between Federal German and Indian parties, in support of his application of "international custom and practice". The contract was for the import into India of machines manufactured by the German defendant. Both parties argued for the application of their own national law. When avoiding marking a choice of law the arbitrator stated:

"This case submitted to arbitration can indeed be solved on this basis and, in any way, would not receive another settlement in the case of application of German or Indian law."

311. This system of looking for support from the conflicting laws is particularly well illustrated in an award where three arbitrators were requested to determine the damages payable by a shipowner who, three months before the due date, notified the charterer that he was unwilling to deliver the vessel. The Italian shipowner, admitted his liability and made an offer to pay 10% of the contract price. The Belgian charterer however claimed greater damages to cover cruises already sold, expenses incurred for advertising and for loss of reputation. The arbitrators relying on the general principles of private international law, held the applicable law to be that with which the contract was most closely connected. However to determine this the arbitrators found difficult; hence, with the permission of the parties, they decided to rely on the rules and usages of the international maritime business. However they still felt it noteworthy that the conflicting laws both adhered to and acknowledged the rules and usages of maritime commerce. The award states:
"Attendu qu’en égard au circonstances décrites ci-dessus, dans lesquelles le contrat litigieux fut conclu, il serait extrêmement arbitraire de décider que le lieu où le contrat fut signé serait soit Paris, soit Gênes, et partant, que la loi nationale qui serait applicable à ce contrat serait tantôt la loi française, tantôt la loi italienne; que, certes, en faveur de la première peut être avancée certaine jurisprudence française en vertu de laquelle c'est le lieu de départ de la dernière lettre – celle de la défendresse du 13 janvier 1964 – exprimant la volonté nécessaire pour que l'accord soit conclu – qui détermine le tribunal compétent et la loi applicable; qu'en faveur de la loi italienne, en revanche, on peut relever que les lettres susmentionnées constituaient la confirmation de l'accord intervenu entre les parties, accord qui semble avoir été réalisé en bonne partie lors des pourparlers qui eurent lieu à Gênes les 3 et 11 septembre 1963, et que c'est à Gênes qu'a été reçue la confirmation de l'accord donné par la défendresse.

"Attendu qu'en égard à la perplexité existant à ce propos, les parties ont, d'un commun accord, consenti à voir le différend arbitré selon les règles et usages internationaux, sans référence à un droit national déterminé.

"Attendu que de surcroît les arbitres ont constaté que les règles et usages internationaux précités coïncident avec les normes inscrites aussi bien dans le droit italien que dans les législations française et belge. (Emphasis added).

"Attendu en conclusion que les arbitres entendent l'agrément donné par les parties à voir le contrat interprété selon les principes généraux du droit."

312. A reliance on "general principles" to support a choice of law was made by a Swiss arbitrator in a dispute between Austrian and Yugoslav parties. The contract concerned the sale of auto-parts by the Austrian plaintiff to the Yugoslav defendant. Relying on article 3 of the Hague Convention on the Law Applicable to International Sales of Goods 1955, the arbitrator held the law of the seller, Austrian law to apply. The arbitrator added to his reasoning relating to choice of law:

"Ainsi c'est le droit autrichien qu'il convient d'appliquer en toute hypothèse... Au demeurant il faut ajouter que la question du choix du droit ne joue pas en l'espèce un rôle bien significatif. Les normes des pays Européens de haute civilisation en matière de droit contractuel, sont analogues dans leurs dispositions fondamentales, ce qu'explique déjà en partie le fond commun du droit romain. Ces analogies se rencontrent surtout en matière de règles applicables à la formation des contrats, aux engagements contractuels, à leurs exécution et à des sujets similaires." (Emphasis added).
313. The view of many arbitrators that they must make a positive choice of the national law to apply, even where there is no real difference in the substantive provisions of the conflicting laws, is well illustrated by this award. The Federal German defendant terminated the French plaintiff's agency on the ground that the agency had been made with the father and head of the plaintiff firm and the father had now died. The Swiss arbitrator began by noting that the conflicting laws were the same; nevertheless he felt constrained — for what reason it is unclear — to make a choice of law. As the arbitrator stated:

"Cette appréciation et cette interprétation du contrat s'appuient sur les principes généraux du droit contractuel, communs aux droits allemand et français. Aussi pourrait-on, au fond, se dispenser de rechercher à quel droit se trouvent soumises les relations entre les parties. Cependant il est nécessaire de rechercher le droit applicable puisque la sentence doit se fonder sur un système de droit déterminé."

The arbitrator then proceeded to choose French law as the law applicable — ignoring a choice of German law "en cas de doute". Nevertheless, having done so, the arbitrator added again:

"Ajoutons à cela, d'ailleurs, que la présente sentence ne se présenterait pas autrement si elle se fondait sur le droit allemand."

Eastern European Awards

314. Despite the practice on the part of arbitration tribunals in the socialist countries to determine the applicable law in accordance with their private international law rules, they too point out on occasions the absence of truly conflicting laws. For example in an award concerning the refusal of a Pakistani seller to complete delivery of a quantity of jute he had agreed to sell to a Hungarian buyer, the Hungarian Arbitration Tribunal held, on the basis of various reasonings, that the law of Pakistan was applicable. The arbitrator concluded his reasoning on the choice of law stating:

D'après les règles de la Common Law comme d'après le droit hongrois, la partie qui a rompu le contrat doit indemniser l'autre partie pour la totalité du préjudice cause par la rupture injustifiée. Le dédommagement doit être intégral."
It is noteworthy that in their award the arbitrators made no reference to any substantive provision in either the law of Pakistan or the law of Hungary.

A similar approach was taken by the Bulgarian arbitration tribunal when it held Bulgarian law to apply, as most of the relevant connecting factors pointed in its favour. The arbitrators added:

"Il importe de noter, en dernier lieu, que les dispositions du droit bulgare ne s'écartent pas de celles du droit libanais de façon à provoquer une solution différente du litige en raison du droit appliqué."

This process can again be illustrated by an award of the Bulgarian arbitration tribunal. A Bulgarian enterprise claimed 11,008 French francs from a French corporation. The question for the arbitrators was whether or not to reduce the amount claimed by 1,318 F. Fr., the price of a sample purchased from the French defendant but not paid for by the Bulgarian plaintiff. On the applicable law the arbitrators reasoned:

L'entreprise "F" n'a formé - il est vrai - ni demande réconventionnelle pour cette somme, ni opposé une exception de compensation à la demande principale. Mais cela n'est pas nécessaire. Car la compensation s'est opérée déjà antérieurement à l'introduction de la demande principale.À ce moment déjà la créance du demandeur ne s'élevait plus qu'à 9 689 francs et c'est à tort qu'il poursuit le défendeur en paiement de 11 008 francs.

Il importe de noter qu'en droit international privé bulgare, le droit matériel applicable en matière de compensation n'est pas celui qui régît la créance avec laquelle on veut compenser, mais le droit matériel qui gouverne la créance contre laquelle la compensation aura à s'opérer. L'entreprise "B" déclare dans sa lettre du 21 janvier 1964 que le montant de 1,318 francs qu'elle doit à "F" serait à déduire de sa créance de 11,008 francs. Elle a manifesté ainsi sa volonté d'opérer compensation contre "F"; il faudra appliquer à la compensation le droit civil français, la créance de "F" étant soumise à la loi française. Or, en droit français (article 1290 du Code civil), la compensation s'opère "de plein droit par la seule force de la loi, même à l'insu des débiteurs". Ce qui revient à dire qu'antérieurement même à l'introduction de la demande, la créance de "B" ne s'éleverait plus à 11 008 francs, mais seulement à 9 689 francs. On aboutira au même résultat par l'application du droit bulgare. En droit bulgare la compensation ne s'opère pas de plein droit. Une déclaration, en compensation de la part de l'un des débiteurs, adressée à l'autre est nécessaire pour que l'effet extinctif se produise. Cette déclaration, le demandeur l'a faite dans sa lettre du 24 janvier 1964. Donc la compensation s'est opérée et les deux dettes sont censées rétroactivement éteintes jusqu'à concurrence de la plus faible du jour où la compensation est devenue possible. Or cette compensation était possible avant la poursuite judiciaire...
In Romulus Films Ltd. v Sovexportfilm\textsuperscript{10} the Soviet FTAC also noted that the result would have been the same had they held some other law applicable.

The Soviet enterprise had sold to the English firm to exclusive right to distribute in the UK and Ireland the Soviet film "Sleeping Beauty". However, due to the negligence of the Sovexportfilm a 15 minute section of the negative of the film was lost when it fell off a lorry en route to being processed in the USA. This made it impossible for the complete film to be delivered to Romulus. At the end of 1969 when the period for performance had passed and Sovexportfilm were still unable to deliver a satisfactory film, Romulus instituted proceedings at the FTAC in Moscow claiming £47,687.

The arbitrators had to determine, \textit{inter alia}, whether the loss of the negative frustrated the contract – as alleged by Sovexportfilm – and brought the contract to an end and with it Romulus' right to damages. In accordance with Soviet private international law, the tribunal held English law, as the \textit{lex loci contractus}, to govern the contract\textsuperscript{11}. Nevertheless the arbitrators, when considering the meaning of the doctrine of frustration in English law, still pointed out that the answer would have been the same had Soviet or any other system of law been applied. The tribunal stated:

"En droit anglais (comme dans tout autre système de droit), semblable impossibilité de fait ne met fin à l'obligation que si cette impossibilité survient sans la "faute d'aucune des parties" et "si une partie a causé l'impossibilité, elle est responsable pour rupture de contrat."\textsuperscript{12}

And again, a Yugoslav tribunal, seized of a dispute between Federal German and Yugoslav parties, noted that their award based on Yugoslav law was in accordance with the relevant provisions of several legal systems\textsuperscript{13}. The dispute arose when, due to an unprecedentedly severe winter, the Yugoslav seller was unable to deliver to the German buyer the 200 tons of Dalmation marasca as agreed. The Yugoslav defendant argued that the exceptionally severe weather was a "force majeure" event vitiating the contract and ending all rights which the buyer may have had – including the right to damages –
in the contract. The Belgrade ATFEC held the Yugoslav General Usages of Trade applicable to the contract. In accordance with articles 55-57 thereof, the bad weather was held to be a "force majeure" occurrence. To support their conclusion, the arbitrators looked at the rules on "force majeure" in English, French and German law and also in the Uniform Law on International Sales of Goods and argued that they all would have led to the same conclusion. On this basis the tribunal held the contract was vitiated and the plaintiff was not entitled to claim damages.

4. Award Based on Provisions of Several Legal Systems

Another method by which arbitrators have illustrated the absence of genuinely conflicting laws and/or shown the irrelevance of their choice of law, is by referring in the award to the appropriate provisions in the various legal systems. This occurred in an award made in respect of a dispute between an Austrian agent and his Federal German principal. The Swiss arbitrator held Austrian law to govern the agency contract. He concluded his discussion of the applicable law by noting:

"L'application du droit autrichien ne soulève pas de difficultés sur le plan pratique puisque les législations autrichienne, allemande et suisse posent des principes relativement concordants en ce qui concerne l'appréciation des questions qu'il convient de trancher."

Subsequently, in the substantive part of the award, the arbitrator referred to the provisions of not only Austrian law, but also to German and/or Swiss law. For example, at one point the award states:

"La demanderesse réclame l'intégralité de la provision à titre de dommages - intérêts pour rupture de contrat (préjudice positif et manque à gagner) et invoque à l'appui les [articles] 1293 et 1294 du Code Civil autrichien, [l'article] 252 du Code Civil allemand et [l'article] 8 de la loi autrichienne sur les représentants commerciaux."

Further on when discussing the type of damages to which the plaintiff was entitled, the award states:
"Les articles 1293 (Code Civil autrichien), 252, (Code Civil allemand) portent sur le quantum de préjudice à réparer; l'article 1294 se réfère apparemment à la responsabilité dite délictuelle comparable en cela à l'article 41 du Code des Obligations suisse."

And again with respect to the exact amount of damages to be awarded the arbitrator stated:

"Quant au montant dommages-intérêts, il convient de se référer au S. 1325 du Code Civil autrichien qui renvoie subsidiairement à la "valeur d'estimation". Le Code des Obligations suisse pose en outre à l'article 42, al. 2 un principe spécial qui peut sans doute prétendre à être reconnu généralement:

"Lorsque le montant exact du dommage ne peut être établi, le juge le détermine équitablement en considération du cours ordinaire des choses et des mesures prises par la partie lésée".

Ainsi une certaine latitude est ici encore assurée au pouvoir discrétionnaire du juge quant à la fixation de la valeur d'estimation. En tenant compte de toutes les circonstances mentionnées, l'arbitre considère qu'un montant de 7½% de la somme donnant droit à une commission représente des dommages-intérêts équitables au titre du manque à gagner probable. Cette détermination tient compte également du fait que l'infraction au contrat constitue une faute de la défenderesse qui, au premier abord, a tenté de nier toute infraction, puis a essayé de la présenter comme le fait d'une simple inattention."

In this award the arbitrators choice of law certainly appears to have been superfluous. It would have surely have been easier for him to have based his award on general principles of law or merely to have noted at the outset that there was no real conflict between the substantive legal provisions and then to have just made his award on the facts.

316. In another award concerning the liability of the Bolivian liquidator bank the arbitrator, Judge Panchaud, in several aspects of the case, felt it unnecessary to make a choice of law. Hence, with regard to the capacity of the liquidator under the arbitration agreement made with the liquidated company, the arbitrator stated:

"En tant qu'associé confondateur de la Fabrica S.J., et que l'on applique le droit bolivien (Código mercantil, article 238), le droit allemand (S.128 HGB) ou le droit suisse (article 568 CO), le Banco Minero apparaît responsable des engagements sociaux."
Subsequently, when dealing with the Bolivian bank's liability to pay money owed by the liquidated company, the arbitrator held:

"Le Banco M répond, de plus, en sa qualité propre et solidairement, des engagements pris par la société en nom collectif Fabrics S.J., dont il est l'associé. Si l'on applique le droit bolivien en tant que loi nationale de la société, cela résulte de l'article 238 du Code de Commerce; on a déjà montré plus haut que l'article 16 de l'acte constitutif de la société n'est pas opposable à la demandresse. Si l'on applique le droit suisse en tant que loi du contrat, la même conclusion s'impose de par l'article 568 du Code des obligations de la Confédération suisse." (Emphasis added).

Judge Panchaud used this same system in two awards arising out of the cancellation of precious mineral concessions by a central African government. Both concessions had been granted to Belgian citizens. The arbitrator discussed the question of the applicable law which he held to be the law of the sovereign State. Nevertheless, in the substantive part of the award, the arbitrator referred regularly to Belgian — this was natural, the African country being a former Belgian mandate and consequently its law had been greatly influenced by Belgian law — and French law, and also made reference to Swiss and international law. For example, when considering the liability of the State to pay damages, the arbitrator stated:

"La doctrine et la jurisprudence sont à cet égard sans ambiguïté. Ainsi, en droit français et en droit international, on peut tenir pour établi que la rupture d'un contrat administratif est sanctionnée par des dommages-intérêts (Laubadère, Contrats administratifs nos. 451, tome II p. 40, no. 651, 3° p. 196, no. 914, tome III p. 29 et suiv.; Battiffol, Revue Critique 1964, p. 662, avec les références à la jurisprudence de la Cour permanente de justice internationale; de même sentence arbitrale Arabie Séoudite c. Aramco, dans Revue Critique 1963, p. 272 et suiv.). Il n'en est pas autrement en droit belge, alors même que la notion du contrat de droit administratif y est plus floue, relevant à la fois du droit public et du droit civil. C'est ainsi que la Cour de cassation de Belgique affirme que la concession de service public fait naître des droits civils au profit du concessionnaire lorsque le concédant et lui-même ont recouru à une convention par laquelle il se sont assurés des obligations synallagmatiques; en cas d'inexécution de ses obligations, le concédant doit, sauf disposition contraire de l'acte de concession, réparer le préjudice causé au concessionnaire par la lésion de son droit (cass. 4 septembre 1956, Etat c. Smets-Use). De même selon Buttgenbach (op. cit. no. 382 quinques p. 365): "La principale caractéristique du régime de l'exécution des contrats administratifs réside dans le droit pour l'administration de résilier unilatéralement le contrat lorsque l'intérêt général le requiert si le contractant ne peut exiger le respect de la convention - en effet il n'y a pas d'exécution forcée contre les personnes publiques - il a cependant droit à des dommages-intérêts... en cas de résiliation avant terme..."."
En l'espèce, l'obligation du gouvernement de réparer les conséquences de la rupture unilatérale du contrat est encore soulignée par l'art. 10 du contrat, qui prévoit limitativement les cas de dénonciation unilatérale tant par le "pouvoir concédant" (al.1) que par le "concessionnaire" (al.2). Seuls ces cas, contractuellement prévus, échappent à l'obligation de dédommagement. Et ils ne sont pas réalisés dans les circonstances qui nous occupent.

Enfin il est manifesté - et cela ressort en particulier de l'acte de résiliation - que le retrait de la concession n'était en rien la conséquence de la faute du concessionnaire ou de ses sous-traitants ou préposés.4

Again,5 Monsieur Mezger, having found German law to govern an agency agreement between German and Canadian parties,6 noted the absence of a conflicting law.

"Under German law, contracts are to be construed in good faith, due account being taken of general commercial usage (article 157 of the German Civil Code).

"This arbitrator thinks that this is also a principle of Canadian, especially Ontario, law."

Czechoslovak Awards.

317. Two awards of the Czechoslovak arbitration tribunal also illustrate the tendency to look to other respected legal systems to support the provisions of the applicable law. One award, Čechofracht c/. La Compagnie de Navigation Maritime Tchecoslovaque,1 concerned the delivery in Czechoslovakia of 6000 bales of cotton: 1600 of superior quality; 4400 bales of inferior quality. The carrier -defendant signed the bill of lading stating that the foregoing had been delivered without checking the numbers of each. The plaintiff -buyer claimed (and the defendant did not contest this) that the total delivery was short 42 bales of superior cotton and there were 42 bales of inferior cotton instead. The plaintiff claimed damages.

By signing the bill of lading acknowledging that the correct quantities of inferior and superior cotton had been delivered to the vessel, was the carrier liable to the buyer for the difference in price of the 42 bales of inferior cotton delivered instead of superior cotton? The tribunal applied the Czechoslovak law No.160/1956 relating to the carriage of goods by sea: this law corresponds closely with the Hague Rules. For the arbitrators the dispute
involved one major question: was the cargo of cotton clearly marked as superior and inferior to have enabled the carrier to easily check the numbers of each quality? This the arbitrators answered in the affirmative and consequently held the carrier liable to the plaintiff for the difference in price.

To support their discussion of the law, the arbitrators referred to English, French and German authorities. With respect to the absence of adequate marking the arbitrators stated:

"L'ordonnance prévoit les modes et conditions des réserves que le transporteur peut se faire relativement aux marques. Mais en l'occurrence le transporteur n'en a pas fait. La clause imprimée sur le colis, discant "marks unknown" n'exprime pas positivement que le transporteur n'ait pas vérifié les marques et il n'en mentionne point les raisons (par ex. leur manque d'être lisibles, voir Wastendorfer, Neuzeitliches Seehandelsrecht, page 303; Ripert, Droit maritime, 40 Ed., tome II, page 660)."

And again later:

Les arbitres considèrent comme juste l'interprétation "relative" des obligations imposées au transporteur en matière de marques; cette interprétation semble être en accord avec les principes préconisés par la jurisprudence anglaise et française (cf. Carver, Carriage of Goods by Sea, 10th Ed., pages 63 a 65, 747; Ripert, Droit maritime, 40 ed, tome II, nos.1776,1779, pages 660-664).

The second Czechoslovak award concerned the unilateral termination by a Czechoslovak buyer of a contract under which he had ordered machinery from a (Democratic) German seller. The arbitrators relied primarily on the CMEA General Conditions of Sale and Delivery, and on that basis alone they found for the seller. Nevertheless the arbitrator added:

"Aussi bien les conditions générales mentionnées (quoi qu'elles n'interprètent pas cette question formellement) que - et surtout - la législation du droit civil en vigueur en République Démocratique Allemande, législation qui, suivant l'art. 74 desdites conditions générales, est subsidiairement applicable, préconise que (sauf disposition contraire légale) les obligations conventionnelles des parties ne peuvent être modifiées ou annulées que par accord mutuel. Ce principe de "pacta sunt servanda" représente un principe fondamental gouvernant aussi bien le droit civil de la République Démocratique Allemande que celui de la République Socialiste Tchécoslovaque. Aux deux systèmes de droit précités est étranger le principe qui autorise une des parties à annuler unilatéralement une obligation conventionnelle avec l'effet de ne réserver à l'autre partie par principe que de réclamer des dommages-intérêts. Quand donc en l'espèce la demanderesse n'eut pas marqué, pour quelques motifs que c'eût été, son accord à annuler les contrats, les deux parties au contrat gardèrent tous les droits et obligations résultant de leurs conventions, et la demanderesse est dans son droit de les faire valoir."
Ad Hoc Award.

318. In the Alsing Case, the arbitrator was concerned with the interdependance of the loan and the exclusive supply/concession agreement. Applying Greek private international law, the arbitrator held Greek law to govern. Nevertheless, with respect to almost every major question the arbitrator looked for support from French and/or Swiss law. So, with respect to the character and effect of the supply/concession contract the arbitrator stated:

"(a) In spite of the terms of Article 1 ("Le Gouvernement concède..."), the contract concluded by the Greek State with Alsing is not a concession in the sense of administrative law. The State did not entrust to the plaintiff the management of a public service, to be run at the plaintiff's expense, risk and peril (cf. Waline, Manuel Elémentaire de Droit Administratif, 6th ed., 1950, page 380; Duez and Debeyre, Traité de droit administratif, 1952, page 554). Nor did it give it a contract to operate a State monopoly in matches which could also have constituted a concession. Alsing undertook the delivery of matches with the aim of the State itself operating its own monopoly.

"The contract of 30th June, 1926, may be either a contract in private law or a supply agreement coming under administrative law. The plaintiff does not deny that... Greek jurisprudence and doctrine admit the distinction made in France between administrative contracts and contracts in private law.

"A supply contract is an administrative contract whose object is the delivery of movables for a certain period of time to an administrative person in conditions different from private law, against pecuniary remuneration, and at the risk and peril of the supplier (cf. Waline, op.cit., page 565; Berthélémy, Traité Elémentaire de Droit Administratif, 13th ed., 1933, page 593; Duez et Debeyre, op.cit., p.890). The administration can also provide for the consumption required for its services by concluding private agreements with suppliers. The fact that it does not intend to enter into a contract of civil law or of commercial law is indicated by the presence in the contract of clauses imposing on the supplier obligations or penalties which fall outside the orbit of common law. The indicia of a supply contract are: the stipulation of special conditions for carrying it out, the existence of specifications, the more or less prolonged participation of the supplier in the execution of a public service (Waline, op.cit., pp.620-621)."

When considering the duration of the contract and the quantity of matches which the Greek government had agreed to purchase, the arbitrator referred extensively to Swiss authorities and then held "the length of the period granted is more important than the quantity required." The arbitrator again referred to Swiss law when dealing with whether the supply contract should continue until the loan plus interest was repaid. The arbitrator found against Alsing stating:
"Furthermore, if it were to be recognised that Alsing had the right to supply matches until full repayment of the loans, the State would be saddled with the obligation to take delivery for an indefinite period. In view of the financial difficulties with which Greece is contending, particularly after the Second World War as a result of post-war difficulties, the Greek State will not for a long time be in a position to repay fully the principal and interest on the loans (not to mention the interest on overdue payments). In its former statute law the Swiss Federal Court had admitted that obligations to take delivery of merchandise under contract for an indefinite period are contrary to custom and therefore null (ATF 25 II 450 et seq. and 473 et seq., 26 II 120). At the present time the Federal Court holds that they are immoral when there is reason to admit, with reference to the particular circumstances of the case, that by this engagement the buyer restrains his freedom of economic action in a manner contrary to morality (ATF 67 II 225; cf. Staudinger, Kommentar zum deutschen B.G.B., 10th ed., I, p.708). This condition has certainly been fulfilled in the case in question, if the particular character of the supply contract is taken into account, since good operation of the public service demands that, as far as possible, the authorities have freedom of action. Undoubtedly the Treasury must in any case acquire matches and is able to obtain them from the plaintiff at a price slightly lower than the world price in a certain number of countries. But it follows from the indications given by the plaintiff itself that East European countries are in a position to supply Greece with much cheaper matches. The extension of the supply contract would therefore entail great disadvantages for the defendant."  

Again, when considering whether the contract was initiated by the impossibility of performance during World War II, the arbitrator referred to "what German doctrine calls 'Bedarfsvertrag' (contract aiming at satisfying given requirements..." and held "the State's obligation to fulfill the contract was abolished for the period under consideration by reason of the impossibility of taking delivery." The arbitrator confirmed his conclusions on this point by noting: "These principles are those of common law springing from Roman law... Greek jurisprudence is based on these grounds (Decrees of the Supreme Court of Appeal No.134/1940, 178/1948, 366/1949, 263/1951."  

And finally, when considering the effect of the Rebus Sic Stantibus doctrine in Greek law, the arbitrator referred to French, German and Swiss authorities: "This provision, which is based on Windscheid's theory of presupposition (Die Lehre des Romischen Rechts von der Voraussetzung, 1950) corresponds to the pronouncement of Swiss doctrine and jurisprudence on the conditions and effects of the 'clausula rebus sic stantibus.' According to von Tuhr/Siegwart... the remedy must be incorporated in bilateral contracts when, as a result of a radical and unforeseeable change in circumstances, the relationship between the two sets of obligations is altered to such and extent that the obligations of one of the parties can no longer be reasonably considered as the equivalent of the obligations binding on the other; the principle of contractual fidelity is limited by principle of good faith, which is of a higher order."
"Inspired by these ideas, the Federal Court allows a bilateral contract to be rescinded when, as a result of unforeseeable circumstances, the relationship between the obligations and the counter-obligations has altered so radically that the fulfilment of the contract could not be imposed on one of the parties (A.F.C. 60 II 213, 61 II 261). Jurisprudence has even permitted the contract, according to the circumstances, to be modified by reducing or increasing the obligations, in order to re-establish an equitable relationship, when the value of the counter-obligations has diminished or increased to an extraordinary degree (A.F.C. 59 II 374, 47 II 318). German doctrine and jurisprudence broadly apply the same criteria (cf. Enneccerus/Lehmann, Das Recht der Schulderverhältnisse, 1954, Section 41). Defining the conditions of application of the theory of unforeseeable circumstances, if it had to be admitted in French civil law, Esmein declares that 'the change in the value of the obligations carried out must far exceed the provisions which could reasonably be made at the time of the agreement' and adds: 'The contract must be observed as long as the injustice of it does not become intolerable' (Planiol-Ripert-Esmein, Traité pratique de droit civil français, 2e édit., VII, 1954, No.397, p.537)."
CHAPTER IV. THE APPLICATION OF A NON-NATIONAL LEGAL STANDARD

319. Alternative to a national legal standard, is the application of a non-national legal standard. This could be either where the contractual relationship fell within the confines of a particular non-national legal order, or where such relationship is better or more appropriately governed by a non-national legal order. So e.g., certain contractual relationships, though not between sovereign States, can only, best or most effectively be regulated or understood by public international law: in such cases arbitrators may resort to public international law. Where the contracting parties are from sovereign States between whom there is an agreement (bilateral, multilateral, or by virtue of being members of a community of States) providing for a specific body of rules to govern their relations (e.g. the substantive provisions of the CMEA general conditions, the laws of the EEC), that body of rules can be directly applied without any need to resort to a national system of law.

And again, where there is a code of behaviour accepted as having binding force in international commercial relations (i.e. the acknowledged rules of the law of international trade, the lex mercatoria), these rules too may be directly applicable.

A. Public International Law

1. THEORY

320. Public international law "is the body of legal rules which apply between sovereign States and such other entities as have been granted international personality." By corollary, public international law does not apply to persons or entities which are not subjects of international law. Indeed, public international law neither aims nor is equipped to regulate the commercial relations and activities of private individuals and organisations in the international arena i.e. extending across national frontiers. This has traditionally fallen within the compass of some national system of law or, particularly in recent times, of the "autonomous law of international trade."
Are there any rules of public international law which can be applied to international contracts of a private character? Public international law is concerned with regulating the activities of and the relations between sovereign States and international organisations. Contracts between States are regulated by the law of treaties. Can the law of treaties be applied to contracts made between private persons? And what of the other rules of public international law: e.g. the rules relating to sovereign immunity, human rights, law of the sea, etc? To what extent can they be referred to and applied in an international arbitration?

321. With respect to State contracts (i.e. contracts between a State or State organ or State corporation and a private individual) the authorities are divided as to the feasibility of applying the rules of public international law. Some argue the rules applicable are those which otherwise apply to international treaties. It has also been suggested that the "general principles of international law" as understood by article 38 of the Statute of the International Court of Justice could govern.

On the other hand it is argued these rules - if they exist at all - are uncertain and unclear. There are no concrete international rules for the formation, execution, discharge, etc., of contracts. Neither the contracting parties nor a judge or arbitrator has any precise rules according to which to measure the contract terms. Thus one commentator recently wrote:

"... 'assujettir' le contrat au droit des gens paraît présentement impossible, a défaut précisément de règles qui régissent les rapports contractuels des États et particuliers."

When considering the application of international law to economic development agreements, Delaume pointed out that

"... international law has not matured to the point of supplying an answer to specific legal issues which, in the process of adjudication, may require a definite and positive answer."
The debate as to the applicability of public international law to private commercial relations is equally inconclusive. In this case there is the added factor that neither party has international personality. How then can they be subjected to public international law? Hence, relying still on the 1928 PCIJ decision in the Serbian and Brazilian Loans cases, many authorities still argue only a national law can be applied.

However, investment disputes between States and foreign nationals are, as we have already noted, of a quasi-public international law character. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966 provides in the last line of Article 42(1) that the ICSID "shall apply ... such rules of international law as may be applicable". This refers equally to public international law and the "law of international trade". As for public international law, the Convention envisages the principle of no confiscation without fair and adequate compensation.

There are not many cases where arbitrators have needed to refer to public international law. Indeed, no award has been found where arbitrators have actually applied a positive rule of public international law to the substance of a private commercial contract. This is due in part to the inapplicability of public international law to private relations. What has been applied in the name of international law has been certain "principes élémentaires" such as pacta sunt servanda, principles of good will and good faith and force majeure, or the application of "general principles of law" - the application of several internal laws instead of one single internal law.

On the other hand, there have been cases where arbitrators have needed to refer to the law and practice of public international law. This has been for the purpose of determining the existence of a particular situation or the recognition and effect to be given to a given occurrence. We shall look at a few examples in which arbitrators have looked to public international law in the reasoning of their award.
2. **PRACTICE**

**ICC Awards**

323. Once again the award of Professor Pierre Lalive in the India-Pakistan dispute is a good starting point.\(^1\) That dispute arose from an involved contractual relationship concluded in 1964, under which a Pakistani cement manufacturer, PPCI, undertook to repay a debt owed to the plaintiff, an Indian corporation, by delivering, over a period of years, certain predetermined quantities of cement. This agreement was concluded together with a separate but adjacent contract between the plaintiff and the defendant, a Pakistani Bank, under which the latter guaranteed to pay to the plaintiff 94 Pakistani rupees in respect of every ton of cement not delivered by PPCI during the currency of the two agreements.

In 1965, after a period of increasing tension, hostilities broke out between India and Pakistan. This naturally resulted in both countries adopting certain legislative provisions restricting commercial intercourse between their nationals. The hostilities ceased after a short but very violent period and tensions were finally eased by the Tashkent Declaration on the 10th January 1966.

PPCI failed to make any of the deliveries required for the first three years (1965-75,000 tons; 1966-100,000 tons; 1967-140,000 tons). The plaintiff hence gave effect to the ICC arbitration clause in the guarantee contract and claimed from the defendant damages in respect of PPCI's failure to deliver the required cement.

The defendant put forward various defences all of which appear to be based on the following premise. The hostilities of 1965 resulted in a "state of war" between India and Pakistan, the effect of which was to bring to an end all contractual relations and any outstanding obligations under such contracts between the parties. Thus PPCI's obligations to deliver cement were
terminated; equally the defendant's obligations under the guarantee contract.

In one aspect of the case the defendant even challenged the arbitrator's jurisdiction on the grounds that as the guarantee contract was at an end, so too was the ICC arbitration clause in the contract.

The first question for the arbitrator's decision was whether there existed a "state of war" between India and Pakistan. As we have already seen, when considering his jurisdiction, Professor Lalive looked to English, Indian, Pakistani and international law to determine the exact situation between India and Pakistan. A "state of war" is a concept most appropriately determined by public international law. The arbitrator's reference to the laws of England, India and Pakistan was only to show that they were, on this matter, in accord with international law and there was hence no "actual" conflict.

The arbitrator continued his discussion in public international law to consider whether, if there had been a "state of war", the guarantee contract would have been terminated. He found it would only have been suspended and would have revived when the "state of war" ended. Professor Lalive stated:

"However, even assuming that a "state of war" had existed in September 1965 between India and Pakistan, then any debt of money that might be or become contractually due to the Claimant by the Defendant on the strength of the guarantee executed on 30th September 1964 would survive the outbreak of war. To quote a leading work on the subject (McNair on "The Legal Effects of War" 1966, page 128):

"The effect of the outbreak of war upon contracts legally affected by it, is to abrogate or destroy any subsisting right to further performance, other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war."

The same author said further (page 228):

"The decision of the House of Lords in the Arab Bank case was made easier by the decision in Schering v/ Stockholms Enskilda Bank in 1945, of which the particular relevance is the point therein established that an accrued right, namely, the right to receive payment of a debt, is none the less an accrued right because the parties have agreed that the debt shall be paid by instalments spread over a period of many years."

"In the opinion of the undersigned Arbitrator, the above pronouncements hold good whether the debt of money became due and payable before or during the state of war, as in both cases the subject matter of the debt would be
a liquidated sum of money, the right to the recovery of which would only be suspended during the "war", but would "revive" at the termination thereof.

"This view is borne out by the English Court decision in Biedermann v/ Allahu sen & Co. (1921) confirming that bills of exchange held by a German resident and accepted in England before the outbreak of war, which could not be presented for payment on maturity date during the war, are payable after the end of the war (McNair, P.143, note 5).

"A fortiori, liquidated debts of money which become due after the termination of "war" are payable and remain wholly unaffected by the previous "state of war".

"The debts of the Defendant which are the subject-matter of the present arbitration proceedings became subject to the decision on the merits, due by the Defendant respectively on 2nd January 1967 and on 2nd January 1968. On the assumption that a "state of war" existed in September 1965, the Tashkent Declaration signed on 10th January 1966 has, on the plane of international law as stated in the preceding paragraph, terminated any such "war" on that date.

"Relying on the finding that liquidated debts of money which fell due after the termination of war, are unaffected by the previous state of war and remain fully binding, the undersigned Arbitrator is led to the conclusion that, even if a "war" is assumed to have broken out, the debt of the Defendant, if any, in respect of the second contract year which became due on 2nd January 1967, and the debt of the Defendant, if any, in respect of the third contract year which became due on 2nd January 1968, have remained unaffected by the assumed "state of war", since they fell due subsequent to the Tashkent Declaration of 10th January 1966 which terminated the "war".

"The undersigned Arbitrator, accordingly, finds that the debts, if any, of the Defendant under the bank guarantee executed on 30th September 1964, have not been abrogated under any interpretation of the circumstances surrounding the present case no.1664, and continue to constitute binding legal obligations, subject to the Arbitrator's findings on the merits."

Professor Lalive did not apply public international law to this aspect of the case. Rather he looked to it to determine the existence of a certain status quo and to measure the effect of that situation.

324. In another aspect of the case, Professor Lalive rejected the defendant's attempt to rely on the provisions of an international treaty. The defendant contended that to enforce the guarantee contract would require him to make payment out of Pakistan contrary to Pakistani currency legislation. This would not only violate the public policy of Pakistan, but would also be contrary to article VIII of the Agreement on the International Monetary Fund which provided that sovereign States would respect the exchange controls of other States. This last contention the arbitrator rejected because only a
State could invoke the provisions of an international agreement. The arbitrator stated:

"The undersigned Arbitrator has in his Award of 1st March 1971 in Case No.1512, pages 50 and ff., dealt with the Defendant's argument drawn from the common membership of India and Pakistan in the International Monetary Fund, and these considerations are incorporated to the present Award by reference. The Agreement on the International Monetary Fund is an international treaty which is only binding on States. Private persons or legal entities are not admitted to invoke the provisions of a treaty between States. The Defendant cannot rely in the present proceedings on an alleged or intended violation by the State of India of Pakistani Exchange Control Regulations because:

(i) ...

(ii) any such intended violation would be directed against the provisions of a treaty between States, provisions which are not directly applicable in regard to either of the Defendant or the Claimant."

(Emphasis added).

325. In one award an arbitrator held the principles of international law as they concerned sovereign immunity not to apply to an international arbitration. The case arose out of a dispute between two Israeli corporations and the government of an African State. The latter had guaranteed the performance of a commercial agreement made with a State corporation.

The African State challenged the arbitrator's jurisdiction. They argued that it was a fundamental principle of international law that a sovereign State was immune from all foreign jurisdictions except where it waived its immunity.

The Swedish arbitrator looked to see whether sovereign immunity extended to arbitral jurisdiction. Developed in international law, the meaning and extent of sovereign immunity differed from country to country. The purpose of the doctrine was clear: to prevent the courts of one State from exercising jurisdiction over the activities or property of some other sovereign State. The arbitrator held:
"La doctrine de l'immunité concernant les poursuites judiciaires ou les mesures d'exécution est reconnue par les tribunaux du monde entier, bien qu'elles ne soient pas uniformément appliquée dans tous les pays. Le terrain de l'entente cependant, est le Droit international, tel que pratiqué par les États, et l'idée de l'égalité entre les États. L'effet de la règle de l'immunité est que les tribunaux et autres autorités d'un État donné n'entreprennent pas d'action, même sur leur propre territoire, contre les organes ou les représentants d'un autre État, ou ses biens, tout au moins aussi longtemps que les activités de cet autre État restent confinées aux res jure imperii.

However, the arbitrator found the doctrine to be relevant only to national courts. It did not restrict the jurisdiction of arbitrators: they were not national institutions and were not subject to this rule of international law. The arbitrator held:

"Il est par conséquent clair pour moi que la doctrine de l'immunité de souveraineté ne s'applique que dans les relations entre les tribunaux et autres autorités d'un côté, et un autre État, ses représentants ou ses biens, de l'autre. En tant qu'arbitre, je ne suis moi-même ni le représentant ni l'organe d'un État quelconque. Mon autorité d'arbitre repose sur un accord entre les parties au litige et par mes activités, je n'engage pas, comme le font les juges étatiques ou les autres représentants de l'État, la responsabilité de l'État suédois. De plus, les tribunaux et les autres autorités suédoises ne peuvent en aucune manière interférer dans mes activités d'arbitre, ni m'ordonner de faire ce que je pense ne pas devoir faire, ni m'ordonner de m'abstenir de faire ce que je pense devoir faire...".

The arbitrator's reasoning was both logical and correct. The African State had agreed to submit to arbitration: it is probable that without this agreement the Israeli parties would not have made the original contract. Furthermore, this decision is in line with the contemporary restrictive interpretation of the sovereign immunity doctrine. However, in circumstances such as these, if the award is not voluntarily carried out by the defendant State, the problem may well arise again when the successful party wishes to enforce the award.
Ad Hoc Awards

326. Emerging international law was the only available yardstick in two oil arbitrations where disputes arose as to whether particular concession agreements included the right to exploit the "continental shelf" adjacent to the concession territory. It was during World War II that the technology necessary to mine and bring out minerals (particularly oil) not too deeply embedded below the sea-bed was developed. This led, after the war, to a rush on the part of oil companies to obtain the right to prospect for oil in "the subsoil of that zone of the sea-bed which lies between the limit of the territorial waters and the point at which its gently shelving character gives place to an abrupt descent."¹

In Petroleum Development (Qatar) Limited v. Ruler of Qatar,² Lord Radcliffe as third arbitrator was asked, in 1949, to determine whether the right granted by the Ruler of Qatar "to prospect, to drill for and to extract" oil from the "whole area over which the Sheikh rules" included the sea-bed and sub-soil beneath the high seas of the Persian Gulf contiguous with such territorial waters...". When the concession was granted in 1935 neither party considered nor envisaged the possibility of exploiting the terrain below the sea whether within or beyond the territorial waters of Qatar. Lord Radcliffe held the concession to extend only over the territory and territorial waters over which the Sheikh exercised his normal jurisdiction. Regrettably, as already noted, Lord Radcliffe neither explained the reasoning behind his award³ nor did he make any reference to the then nascent international law doctrine of the "continental shelf."

By contrast, in the Abu Dhabi Arbitration⁴ Lord Asquith of Bishopstone not only looked extensively into the "continental shelf" doctrine, but also held international law to be the law governing the contract. The arbitration concerned the question whether a 1939 concession agreement giving an "exclusive right to drill for and win mineral oil within a certain area of Abu Dhabi" included "all underwater areas over which the Ruler has or may have sovereignty,
jurisdiction, control or mineral oil rights." As in Petroleum Development (Qatar) Limited v. Ruler of Qatar, the problem arose after the second World War when the Sheikh of Abu Dhabi wished to be granted a further concession over "his" "continental shelf".

Lord Asquith began by confirming the traditional international law rule that: "Every State is owner and sovereign in respect of its territorial waters, their bed and sub-soil..." However the arbitrator then went on to consider the substance and history of the "continental shelf" doctrine. At that time, the doctrine was in an indefinite and uncertain state. The arbitrator found:

"Neither the practice of nations nor the pronouncements of learned jurists give any certain or consistent answer to many - perhaps most - of these questions. I am of opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law."

The arbitrator found that even at the time of the award (1951) the doctrine of the "continental shelf" was not "part of the corpus of international law"; it consequently could not have been within the Ruler's normal jurisdiction in 1939. In reaching this conclusion, Lord Asquith rejected the draft code on the "continental shelf" in the Report of the third session of the International Law Commission as being a project for codifying international law and not as evidence of the law as it then existed.

327. In the Aramco Award, Professor Sauser-Hall divided up the contract and held the law of Saudi Arabia, "world wide custom and practice in the oil business" and public international law to apply to different aspects of the concession. That case it will be recalled was concerned with whether an oil concession granted by the King of Saudi Arabia to Arabian American Oil Company also included the right to control or at least the freedom to determine itself the method by which petrol was transported from Saudi Arabia.
neither Saudi Arabian law nor the customs and practices of the oil business were competent to regulate certain aspects of the case, then public international law became applicable. Thus the arbitrator stated:

"Public International Law should be applied to the effects of the Concession, when objective reasons lead it to conclude that certain matters cannot be governed by any rule of the municipal law of any State, as is the case in all matters relating to transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of States for the violation of its international obligations." 3

Then at various stages throughout the award the tribunal referred to international case law and doctrine. For example: the Saudi Arabian government argued that in accordance with international law and practice a concession agreement granted by a sovereign State to be exercised on its territory was always restrictively interpreted. The tribunal distinguished between a concession granted to another sovereign State and one granted to private individual. The Saudi Arabian government's contention only held good in respect of the former category of concession. To emphasise this point the tribunal referred to and discussed the Radio of America v. China and the Radio of America v. Czechoslovakia cases and the Abu Dhabi arbitration award. 4 The tribunal concluded with the finding "that international tribunals, in disputes bearing a fairly close resemblance to the present one, have not applied the theory that, in case of doubt, a concession should be interpreted in favour of the State." 5

With respect to whether they could look at the conduct of the parties subsequent to the conclusion of the contract, the arbitrators again referred to international practice.

"It has been admitted on several occasions by doctrine and judicial practice alike that, to use the words of the Permanent Court of International Justice, one may "resort to the manner of performance in order to ascertain the intention of the Parties" (Case of Brazilian Federal Loans issued in France, Judgment No. 15 of July 12th, 1929, P.C.I.J., Series A, No. 21, pp. 117-119. In this manner, the notion of "practical and quasi-authentic interpretation", also known as "contemporary practical interpretation", has been evolved.
Rather than a means of interpretation of agreements, the manner in which
the Parties have actually conducted themselves in carrying out the contract
is, in the Tribunal's opinion, a mode of proof permitting to ascertain the
true intention of the Parties at the time the contract was entered into and
the real meaning they have given and still give to its provisions by their
actual behaviour. This principle has frequently been applied by the
Permanent Court of International Justice and by the International Court of
Justice, in particular in the Advisory Opinions on the competence of the
International Labour Organisations, of August 12th, 1922 (P.C.I.J., Series
B, No.2, pp.30-41), on the Frontier between Turkey and Iraq, of November
of South-West Africa, of July 11th, 1950 (I.C.J., Reports 1950, pp.135-
136), as well as in the Judgment of April 9th, 1949, in the Corfu Channel
case (Merits), (I.C.J., Reports 1949, p.25).

And again the tribunal referred to public international law when considering
whether the later agreement with Onassis could affect the earlier Aramco
agreement. The Onassis agreement was held to be "a res inter alias acta which
can neither diminish nor increase its rights." The award continued:

"In its capacity as first concessionaire, Aramco enjoys indeed exclusive
rights which have the character of acquired or "vested" rights and which
cannot be taken away from it by the Government by means of a contract
concluded with a second concessionaire, even if that contract were equal to
its own contract from a legal point of view. The principle of respect
for acquired rights is one of the fundamental principles both of Public
International Law and of the municipal law of most civilized States.
It has been affirmed by a wealth of judicial decisions: Permanent Court of
International Justice, Judgment of May 25th, 1926, in the case of German
interests in Polish Upper Silesia (Merits) (P.C.I.J., Series A, No.7, pp.22
and 44); Advisory Opinion of September 10th, 1923, concerning German settlers
in Poland (P.C.I.J., Series B, No.6, p.36). It was also proclaimed in the
following precedents, which are very characteristic and which relate to
disputes between a State and private individuals; Arbitration Tribunal of
Upper Silesia, award of 6 June 1931, in the case Niederstrasser v. Poland
(Schiedsgericht fur Oberschlesien, vol.11, Nos.3-4, p.156); Special
Arbitration Tribunal between Germany and Rumania, award of 27 September
1938, in the case Goldenberg and Son v. Germany (U.B.T.I.A.A., vol.II,
p.909); Arbitration Tribunal established by the Council of the League of
Nations and presided by Mr Guerrero, award of 18. June 1929 in the case of
the concession of the Sopron-Koszeg- Local Railway Company, which was once
a subject of the late Austro-Hungarian Monarchy (Annual Digest and Reports
of Public International Law Cases, 1929-1930, No.34)."

It is here again noteworthy that public international law was not applied to
measure the respective obligations of the Saudi Arabian government and Aramco.
It was rather looked to as a standard which indicated a certain given situation
or as an international and impartial yardstick, which applied in relations
between sovereign States and which, by analogy, could be adapted for application
to such a transnational contractual dispute.
328. Though concerned with a dispute between two sovereign States, the Diverted Cargoes arbitration clearly illustrates that there are public international law rules which can be adapted to a commercial dispute. The case, between the governments of Greece and Great Britain arose out of the war-time agreement under which the British government took over all cargoes destined for Greece "to use them in the best interests of the Allied war effort."

It was further agreed, inter alia, that the British Government would credit the Greek Government "in respect of the cargoes taken over and disposed of upon the basis of the f.o.b. cost of the goods plus a sum equal to the cost of effecting marine insurance on the London market and war risk insurance ..."

After the war the British and Greek governments agreed, inter alia, the "value of goods purchased f.o.b. ... in dollars $4,051,401, for each of which there was an accounting conversion into pounds sterling at the parity then prevailing of 4.027 or a total of £1,012,850." Before payment was made, the British pound was devalued from its pre-war parity of $4.03 to $2.80. Professor Rene Cassin was appointed sole arbitrator to determine whether payment in £ sterling should be ascertained against the agreed dollar debt at the exchange parity prevailing at the date of the agreement or at the date payment was actually made.

The arbitrator held the agreement to be subject to international law. As for the relevant rules he stated:

"The principles of international law governing the interpretation of international treaties or agreements and the manner of proof have been evolved by legal writers and more particularly by international case-law in close conformity with the rules for the interpretation of contracts adopted among civilised nations (see E. Hambro, The Case Law of the International Court, 1952, pp.26 to 56, and, for France, Articles 1134, 1156 et seq. and 1315 of the Code Civil)."

Of these rules of interpretation those which must be particularly borne in mind are: the fundamental principle of good faith which governs both the interpretation and the performance of agreements and which leads to an enquiry as to the common intention of the contracting States (P.C.I.J., 11th August 1932, Statute of Memel); the consideration of the object of the agreement and of the time when, and the circumstances in which, it was concluded (P.C.I.J., 25th April 1928, Minorities in Upper Silesia);
the principle of effectiveness which raises the presumption that the
draftsmen of a clause intended it to have a specific meaning and a
practical effect (P.C.I.J., Acquisition of Polish Nationality, 15th
September 1923 - Opinions, Series E, pp.16-17); and lastly, the rule
that clauses that are clear and unambiguous do not require to be
interpreted (see, in particular, P.C.I.J., 7th September 1927, Lotus,
decree No.9, Series A, No.10, p.16; Ch.Rousseau, Principes de droit
international public, Vol.I, pp.676-764; Droit international public,
1953, No.55; Dalbez, Le droit international public positif, Vol.II,
pp.90 et seq.)."2

As for the rate of exchange, the arbitrator referred to national laws, the
provisions of a relevant international convention and two decisions of the
Permanent Court of International Justice. On this basis he the £ - $
parity to be determined at the actual date of payment. Professor Cassin
stated:

"The international practice in legislation, agreements and cases, as
well as the practice of the great majority of nations, recognises that
the rate of conversion from the money of account into the money of
payment is that prevailing at the date on which the debt is settled.

As far as practice in legislation and agreements is concerned, Article 49,
cited above, of the Uniform Law adopted by the signatory nations of the
Geneva Conventions of June 7, 1930, regarding Bills of Exchange and
Negotiable Instruments provides one of the most striking instances of
the great importance attached to 'the rate of conversion at the date
of the payment of the debt.'

By its two decisions of the 12th of July 1929 (P.C.I.J., Series A, Nos.20
and 21, Serbian Loans and Brazilian Loans, Dalloz, 1930, 2.45; E. Hambro,
The Case Law of the International Court, Nos.178-197) the Permanent Court
of International Justice of The Hague has given international authority
to the case law of the highest national courts, by recognising, on the
one hand, the validity of the choice made by a State raising a foreign
loan and by the French lenders, of a money of account (the gold franc
in that instance) as a unit of measure for the settlement of
capital in another currency (French in that instance) and on the other
hand by compelling the debtor State to pay on the basis of that standard
of value at the rate of exchange on the day of payment despite the
depreciation that had taken place, not only of the currency of the debtor
State, against which the lenders had sought to protect themselves, but
also of the currency of payment, a depreciation which the lenders had
not foreseen. The Court laid down, expressis verbis, that 'this standard
of value having been adopted by the parties, it cannot be alleged that it
does not apply to the payment because the depreciation of the French
currency was not, or as it was contended could not have been, even
foreseen at the time the contracts were concluded. It is not a question
of what the parties actually did foresee or could have foreseen but of
the means they chose to protect themselves. To secure repayment of the
loans they provided for payment in gold value, by reference to an accepted
standard, as has been said above.' (Emphasis added).
After reference to so decisive a monument of international case law it is unnecessary to add either the long list of decisions of courts of many countries in support of the principle of conversion on the day of actual payment (see for example the reasons given in support of this thesis by Nussbaum, op. cit., p.361, et seq.) nor an analysis of the cases of the Common Law countries which, starting from a different conception, that of 'conversion on the day of the breach of the contract' frequently arrive in practice at conclusions very similar to those of other systems of law (see criticism by Nussbaum, op.cit., p.370, et seq.).

8. Supra-National Law

329. There are some situations where, by virtue of an agreement between two or more sovereign States, a "supra-national" law becomes applicable to relations between their citizens. This is most obviously the case where the two sovereign States formulate a code or set of rules to apply to given situations. Such code or set of rules is "supra-national" in that it is directly applicable in the prescribed circumstances over and above the normal domestic rules.

Supra-national law exists most clearly within the two European economic blocks: the Council for Mutual Economic Assistance (CMEA) and the European Economic Communities (EEC). In both cases certain conditions and regulations have been developed and they are directly applicable to the commercial relations between parties from the respective blocks. These conditions and regulations are generally applicable by national courts. However, to what extent - if at all - are arbitrators obliged to take cognisance and/or to apply the provisions of such supra-national laws? We shall consider the case with respect to each block separately.

1. CMEA Regulations

a) THEORY

330. We have already noted that the States members of CMEA have adopted "General Conditions" to apply to the commercial relations between their national enterprises. These "General Conditions" are meant to be all embracing codes
capable of regulating every aspect of the commercial relationships which fall within their purports. Initially developed on a bilateral State-to-State basis, the "General Conditions" are today the most successful uniform law anywhere. There are three sets of "General Conditions" applying to different areas of commerce; each has been painstakingly drafted and amended to take account of contemporary developments and the needs of experience.

When their authority lay on some bilateral agreement, the "general conditions" only applied when expressly chosen by the parties. However, now that they have been adopted on a bilateral basis, the "general conditions" are automatically applicable in all inter-CMEA trade to which they relate. They apply in deference to the national laws of the conflicting parties even where one of the States may have a code specifically for international commercial relations.

In form the "General Conditions" are a mixture between a contract type and a uniform law. Thus certain clauses are so widely drafted as to be applicable to any contract with respect to performance, non-performance and the effect of some unforeseen occurrence. These provisions can be varied or amended to take account of the characteristics of the particular contract relationship. On the other hand, the "General Conditions" also contain rules relating to the conclusion and performance of all contracts; equally the arbitration and conflict of laws provisions aim at creating a uniform standard for inter-CMEA trade. These provision are mandatory and cannot be varied.

The juridical character of the "General Conditions" is a debatable question. They have not been adopted in either an international convention or as a statute in any socialist State. Their authority comes originally from a "recommendation" of the CMEA Commission. However such recommendations do not have direct affect; they must first be ratified by and adopted into the general law of the individual CMEA member States. In fact, the "General Conditions" claim legal effect from their adoption, invariably by ministerial decree, in each State. Hence their status in both domestic and international law is disputed. What is clear from the view of the majority of socialist jurists and from accepted practice, the "General Conditions" are mandatorily applicable in inter-CMEA trade.
332. The character and effect of the CMEA "General Conditions" were recently described by one socialist commentator as follows:

"... les Conditions générales constituent le droit commun des pays du CAEM. Elles contiennent en grande partie des règles de droit matériel qui sont applicables seulement aux rapports de commerce extérieur entre les entreprises des pays membres. Non seulement elles règlent les droits et devoirs reciproques des parties, mais contiennent des dispositions concernant la conclusion du contrat".1

Whilst one hesitates before terming the "General Conditions" supra-national or even CMEA laws, it is clear where relevant, they are automatically applicable to the trading relations between foreign trade enterprises for CMEA member States.

Any socialist arbitration tribunal seized of a dispute between CMEA countries will look first to see whether the contract in dispute falls within the compass of one of the "General Conditions". If one of the "General Conditions" is found to be applicable, those conditions will be applied to the dispute. There will be no need to apply any rules of conflict of laws as the various national laws will be absolutely irrelevant. Only where the relevant "General Conditions" do not make provision for some eventuality or some special aspect of the contract need the tribunal look for any national legal system for support; and even in this case, as we have seen,2 the "General Conditions" provide conflict of laws provisions to lead to the national law to be applied.

b) PRACTICE

333. There are innumerable awards, of all the arbitration tribunals in the socialist countries, in which the"General Conditions" have found the basis upon which the arbitrators have reasoned.1 It will suffice here to merely refer to a few examples.
An award of the Czechoslovak arbitration tribunal concerned an obligation of a buyer to pay for expensive — though appropriate for the goods: motor vehicle parts — packaging used by the seller. The packaging added 4% to the price. The buyer argued the packaging used was excessive and began proceedings for the price to be reduced. The contract was silent as to the matter of the packaging. In the circumstances the arbitrators looked to the General Conditions of Delivery and held:

"... l'application de l'art. 14 des Conditions générales des délivrances de marchandises entre les organisations pour le commerce extérieur des États membres du C.A.E.M. entrait en ligne de compte dans le cas en question. Cette disposition prévoit qu'en l'absence d'une stipulation contractuelle spéciale relative à l'empaquetage, le vendeur est tenu d'expédier la marchandise dans l'empaquetage utilisé dans le pays du vendeur pour les marchandises d'exportation, empaquetage qui assure l'intégrité de la marchandise lors du transport, compte tenu d'un transbordement possible et en observant le traitement normal de la charge; en même temps, il y a lieu de prendre en considération la durée et le mode de transport. Le demandeur n'a même pas prétendu qu'un empaquetage autre que celui dans lequel les envois à lui destinés avaient été expédiés soit employé dans le pays du vendeur, et il ne se réclamait pas non plus de ce que les envois auraient été détériorés lors du transport par suite de l'empaquetage utilisé ou selon les circonstances, du fait que les pièces de rechange à lui vendues n'avaient pas été empaquetées. L'opinion du demandeur selon laquelle toutes les sortes de pièces de rechange devraient être empaquetées dans des caisses, est irrationnelle parce que ce sont les containers qui ont pris une grande expansion à cause de leur sécurité plus entière que celle des autres espèces d'empaquetage. Aussi, l'art. 14 cité des Conditions générales n'exige-t-il pas l'empaquetage dans des caisses et ne parle que de l'empaquetage utilisé dans le pays du vendeur. Les termes «empaquetage» et «emballage» ne sont pas identiques en ce qui concerne leur contenu. Une marchandise peut être bien protégée contre les risques du transport même si elle n'est pas empaquetée dans des caisses. Par contre, le simple empaquetage de la marchandise et sa mise dans des caisses pourraient se trouver complètement insuffisants. Les pièces électriques ou en verre d'automobiles exigeront une sorte d'empaquetage autre que — par exemple — les garde-boue ou les portes d'automobiles. Pour cette raison, les arbitres ne regardaient pas le mode d'empaquetage, employé lors du transport des pièces de rechange vendues par le défendeur comme contravention aux contrats conclus par cette partie avec le demandeur".

The plaintiff's claim was rejected.

A Bulgarian arbitration tribunal applied the rules of prescription in the "General Conditions" in preference to those of Bulgarian law in a dispute between Bulgarian and German (Democratic) parties. The tribunal stated:
Les délais établis aux paragraphes 43 et 46 des conditions générales sont obligatoires pour les contractants non qu'ils aient été stipulés entre eux, mais par l'effet des conditions générales elles-mêmes. Il faut déduire du préambule des conditions générales que celles-ci sont applicables aux ventes formées entre les entreprises bulgares et celles de la République démocratique allemande, si les contractants n'ont pas convenu d'une clause qui s'en écarte. Les conditions générales ne peuvent donc être assimilées quant à leurs effets aux règles facultatives du droit interne, qui ne trouvent application qu'à défaut de stipulation contraire des parties. Toute règle facultative est appliquée indépendamment de la volonté des parties à moins qu'elles ne s'en soient écartées. Il est de même des règles des conditions générales, qui, elles aussi, seraient à appliquer aux rapports des contractants, à moins qu'il n'en ait été convenu différemment. Les paragraphes 43 et 46 des conditions générales ne constituent pas des clauses contractuelles mais des éléments d'un acte normatif qui émane des représentants des ministères du commerce extérieur de la Bulgarie et de la R.D.A. Il a pour but de règlementer les rapports qui découlent des contrats, intervenus entre les entreprises des deux États.

A further example of the application of the CMEA General Conditions of Delivery can be seen from an award of the Soviet FTAC. The dispute, between German (Democratic) and Soviet enterprises arose out of the late and short delivery of 50,000 tons of maize by the Soviet seller to the German buyer. The latter claimed an indemnity in respect of a quantity of the maize he had re-sold to a Czechoslovak enterprise and which, because of the sellers' delay, he was unable to deliver. The FTAC, having found the facts, held:

"Proceeding from the calculations and data on the maize deliveries, drawn up on basis of export reports from border stations and of bills of lading, submitted by V/O Exportkhleb and not disputed by the claimant the FTAC finds that in the second quarter of 1963, the amount of maize delivered in two directions, with the consignment of seed maize delivered ahead of time taken into account, constituted 43,200 tons instead of the 50,000 tons stipulated in the contract. Thus, the amount of delayed maize delivery constituted 6,800 tons, and the penalty to be exacted in the claimant's favour in keeping with Para. 59 of the General Conditions for Delivery of Goods, CMEA, 1958, was Rubles 20,258.69."

In one award, between German (Democratic) and Soviet enterprises, the FTAC based their decision on the provisions of both the CMEA General Conditions of Delivery of Goods 1958 and the CMEA General Conditions of Technical Servicing 1962. The dispute arose out of the late delivery of an "autograder" which proved to be defective. The German buyer claimed damages in the form of a penalty allowed by both sets of General Conditions. The FTAC equally based their award on both sets of Conditions. Having found the "autograder" to have 17 different defects, the FTAC held:
"Under the circumstances, the Foreign Trade Arbitration Commission holds that, in compliance with Paras. 51 and 59, General Conditions of Delivery of Goods, CMEA, the respondent is obliged to pay the buyer a penalty, amounting to 8 per cent of the cost of autograder, namely Rubles 777.40, and to compensate the claimant's expenses incurred in repairing the defected autograder to the amount of DM322.31 (GDR)."

... "According to Para.51, CMEA General Conditions, the seller was obliged to eliminate the defects in the autograder and in this case the buyer had a right to demand payment of a penalty as for failure to deliver in time in the amounts envisaged in Para.59, beginning from the date the complaint was presented to the day the defects were eliminated.

The buyer is entitled to a penalty also in the case when, in compliance with the General Provisions for Technical Service, the defects are eliminated by the buyer in lieu of the seller and at the latter's expense."

..."The respondent's statement to the effect that the expenses stemming from the elimination of the defects in the autograder should be borne by the claimant is inconsistent with para. 24, CMEA General Conditions, and Para. 19, General Provisions for Technical Service, CMEA, 1962, and hence is overruled. Also unfounded is the respondent's reference to Item 5 of the Supplementary Protocol to the General Provisions of CMEA, since in the case under consideration the buyer's demand concerns compensation of expenses incurred by the latter in repairing the autograder, which repairs were carried out at the seller's expense, rather than the compensation of losses.""
National courts in EEC countries are obliged to apply appropriate rules of community law. If a national "court or tribunal" is uncertain as to the meaning of a provision or the validity or applicability of some EEC rule or regulation, it may and in certain cases must refer the question to the European Court of Justice for decision (article 177, Treaty of Rome).

Do these obligations only exist in respect of national courts? Or do they also extend to non-national arbitration tribunals?

336. The relevance of the foregoing question can be most clearly illustrated with reference to those aspects of EEC law which are directly applicable and which reserve for some Community organ the exclusive right to interpret or enforce certain EEC provisions. This is the case with the EEC competition laws i.e. articles 85 and 86 Treaty of Rome; article 65 Treaty of Paris.

For the purposes of the ensuing discussion it is convenient to summarise certain provisions relating to article 85 of the Treaty of Rome. Article 85(1) describes the categories of agreement which are considered to prevent, restrict or distort competition within the Community and which are consequently "automatically void" (article 85(2)). Article 85(3) however makes provision for waiving article 85(1) where the agreements concerned are to the overall benefit of the whole Community. The machinery for applying article 85(3) is contained in EEC Regulation 17 which provides, inter alia, that subject to the overriding power of review of the European Court of Justice (ECJ), "the Commission shall have sole power to declare article 85(1) inapplicable pursuant to article 85(3) of the Treaty." Until the Commission has initiated proceedings under this provision, "the authorities of the Member States shall remain competent to apply article 85(1) in accordance with article 88 of the Treaty."
Questions of the arbitrators' "competence" and their right to consider and apply EEC law will arise where one party

(i) alleges the contract is void, being for a purpose contrary to article 85(1); and

(ii) relying on this contention, maintains the arbitration agreement falls with the contract depriving the arbitrators of their source of jurisdiction; and/or

(iii) argues that the determination of the character of the agreement is reserved for the EEC Commission; and

(iv) relying on this contention, declares the arbitrators to be "incompetent" to deal with the contract in dispute; and/or

(v) requests the arbitration tribunal, should it find against him on the previous four points, to submit the question of its jurisdiction to the ECJ.

337. Take the last question first. Article 177 of the Treaty of Rome provides the circumstance when a "court or tribunal of a Member State" may or must refer a question of EEC law to the ECJ. However, does an international arbitration tribunal fall within this definition? Can arbitrators appointed under the rules of the ICC, or acting under the auspices of e.g. Breman Coffee Association, the Chambre Maritime de Paris, the Italian Arbitration Association, the London Court of Arbitration, the Rotterdam Chamber of Commerce and Industry, or seized in an ad hoc arbitration, stay proceedings before them and refer a question to the ECJ? And if they did would the ECJ deal with the matter?

At present there is no certain answer to this problem. An administrative arbitration tribunal established by the State has been held competent to refer questions of EEC law to the ECJ. However no decision was taken with respect to the competence of an ordinary arbitration tribunal. Bearing in mind the independant and non-national character of arbitration tribunals in EEC countries, there seems little legal ground on which they could be classified as a "court or tribunal of a Member State."
338. The effect of a rule of "ordre public communautaire" on an arbitration is unclear. Must an arbitrator stay the proceedings before him when one party alleges the contract to be void as contrary to article 85 or 86 of the Treaty of Rome? Or may he himself investigate the pertinence of the provision to the dispute?

Here again there is no clear answer. As for the application of the Community competition laws, the authorities are divided. The Second International Arbitration Congress, held in Rotterdam in 1966, approved a resolution that, except where the question in issue is reserved for the exclusive jurisdiction of some Community organ, arbitrators have the right to consider for themselves their own competence and to determine the effect of the Community public policy legislation. On the other hand, Jean Robert argued - at that same conference - that whether or not the contract infringed articles 85 and 86, the dispute touched "l'ordre public communautaire", and was reserved for the Commission or the national courts of Community members.

b) PRACTICE

339. The European Coal and Steel Community having been established since 1952 and the European Economic Community since 1957, it is surprising that there have been very few awards which actually dealt with the various aspects of EEC law discussed above. This is due in part to what was for long the generally accepted view that arbitrators were not competent to act where a matter of "ordre public" was involved i.e. directly applicable EEC provisions. Furthermore it was considered that as arbitrators were not a "court or tribunal" as understood by article 177 and hence could not refer matters to the ECJ, they should decline jurisdiction in any arbitration involving a question of EEC law.

This attitude can be well seen from an award of a Dutch arbitration tribunal which declined jurisdiction when one of the parties pleaded article 85 of the EEC Treaty. The contract there concerned an involved contract for purchasing goods,
through an agent and importing them into Holland, and then, through another agent, selling them on the Dutch market. The validity of the arbitration agreement was challenged on the grounds that as the contract infringed article 85 it was absolutely void and the arbitration clause fell with it. Furthermore, the tribunal were asked to refer this matter to the European court. The arbitration tribunal declined to even consider the merits of these arguments; the case involved a question of imperative law which was reserved for the ordinary judge. The arbitration tribunal held:

"...meme s'ils sont dans cette affaire des arbitres ou des amiables compositeurs, ils ne constituent pas une juridiction au sens de l'article 177 du Traité, de sort qu'ils ne peuvent pas poser une question à la Cour de Justice des Communautés Européennes au sujet de l'interprétation d'une disposition du Traité ou prise en vertu du Traité, comme peut le faire le juge ordinaire".

340. A far more open minded attitude was taken by three ICC arbitrators when their "compétence" was challenged on the grounds that the dispute arose out of a contract which was void, contrary to article 85(1) of the EEC Treaty.¹ The Italian defendants had granted the exclusive rights of sale and distribution of their goods in Germany to the (Federal) German plaintiff. The contract, concluded in 1954, was for three years, thereafter renewable triannually (i.e. 1954-1957; 1957-1960; 1960-1963, etc). The contract could be terminated on one years notice in writing. On 28 March 1961 the defendant renounced the contract effectively as of 31 March 1962.

The plaintiff instituted arbitration proceedings under the rules of the ICC claiming damages for unlawful termination of the contract and arguing that the defendant was only entitled to terminate the contract at the end of a specific three year period. In his defence the defendant argued, at the very outset, that the original contract was void as it violated the EEC competition laws. As these laws were of an imperative character they were outside the jurisdiction of the ICC and the arbitrators must declare themselves "incompetent".
The arbitrators did not automatically decline jurisdiction. They conceded that if the contract was truly contrary to article 85(1) then they would have to decline jurisdiction. They stated:

"Attendu que dans l'espece, il n'y aurait nullite du compromis et incompentence des arbitres que si de l'examen des donnees de la cause, il apparaissait que le contrat litigieux serait en lui-meme vicié d'une nullité d'ordre public comme tombant sous le coup des dispositions de l'art. 85, al. ler du Traité".

However, the arbitrators considered that first they had a duty and the power to investigate the terms and conditions of the agreement as well as the market involved, and then to determine themselves the exact character of the contract. Having done so the arbitrators found that the contract did not in any way restrict or limit the freedom of competition within the Community. The arbitrators stated:

"Or, attendu qu'il n'en est rien; attendu que l'art. 85, al. ler du Traité de Rome n'est pas applicable au contrat en question, qui ne répond en aucune maniere aux critères définis par ce texte, et n'a ni pour objet ni pour effet d'empêcher, de restreindre ou de fausser la concurrence à l'intérieur du Marché Commun, ni n'est susceptible d'acter défavorablement le commerce entre les Etats membres".

Having investigated the contract provisions the arbitrators concluded:

"... qu'il convient enfin de tenir compte de ce que s'agissant en l'occurrence de produits, non pas de nature unique, mais au contraire de produits fort répandus sur le marché sous des formes très voisines(.et qui n'ont d'aileurs rien de produits de première nécessité), le public ne pouvait en aucune maniere souffrir d'un accord qui, loin de tendre à la constitution, à son dètriment, d'un monopole, et à une restriction de la concurrence, favorisait au contraire, dans des conditions favorables aux consommateurs, la diffusion des marchandises en question;

"Attendu que dans ces conditions, un accord comme le contrat litigieux qui répond à un besoin général dans le commerce international, ne saurait être raisonnablement regardé comme tombant sous le coup de la nullité édictée par l'art. 85, al. ler du Traité susvisé".

On this basis the arbitrators found they did have jurisdiction and they continued to make an award on the merits.
In one other ICC award, several aspects of EEC law were brought up before and discussed extensively by the Belgian arbitrator. The case centred on the validity of an agreement under which the French plaintiff and the Italian defendant granted each other exclusive sales rights in their respective countries of the goods manufactured by the other. The plaintiff who was particularly anxious to conclude the agreement initiated the negotiations and in certain respects steam-rolled a preliminary agreement. The defendant, though he initialled the original contract providing for commission at 15%, was unwilling to agree to anything over 10%. The plaintiff came to arbitration claiming damages due to the defendant's failure to continue with the contract: the plaintiff had sent in orders worth 25 million lire.

The defendant however argued that the arbitration agreement, like the contract, was invalid. The contract, he alleged, was, inter alia, contrary to article 85(1) of the Treaty of Rome. The plaintiff thus maintained the arbitrator to have two possible ways of proceeding: either he should decline jurisdiction totally and send the matter to the EEC Commission, or he should stay the arbitration proceedings until the Commission had reached a decision on the compatibility of the contract with article 85(1). (The Commission had in fact already been seized of the matter at the request of the defendant). The arbitrator considered these two alternatives separately.

The arbitrator began by finding that he did not have the power to refer the matter to the EEC Commission. He stated:

"Attendu d'abord que l'arbitre, juge privé, ne trouve ni dans la loi française déclarée applicable au litige ni même dans le traité de Rome(Art. 177), l'obligation ou la faculté de renvoyer d'office le litige à la Commission de la C.E.E."

On the basis that Regulation 17 did not extend to arbitration proceedings, the arbitrator refused to stay the proceedings before him pending a decision from the Commission. He stated:
"Attendu qu'ayant librement accepté le devoir de juger dont la Cour d'Arbitrage de la C.C.I. l'a investi en exécution de la volonté des parties, l'arbitre ne peut, sans déni de justice, différer l'accomplissement de cet office que s'il y est contraint par d'impérieuses raisons de droit;

a) Le Règlement N° 17.

"Attendu d'abord que le seul fait que la défenderesse ait introduit une demande en constatation d'infraction à l'article 85 du traité dans les termes de l'article 3 du Règlement n° 17 du Conseil de la C.E.E. n'a pas comme conséquence nécessaire que l'arbitre doive surseoir à statuer;

"Attendu que l'article 9, §§ 1 dudit Règlement ne réserve à la Commission de la C.E.E. une compétence exclusive que pour déclarer les dispositions de l'article 85, §§ 1 du traité de Rome inapplicables en vertu de l'article 85, §§ 3 du même traité;

"Attendu certes que, appliquant l'article 9, §§ 3 du Règlement susdit, les tribunaux français décident généralement de surseoir à statuer dès lors qu'ils sont informés de la saisine de la Commission;

"Attendu cependant que l'article 9, §§ 3 ne semble devoir s'imposer qu'aux tribunaux de l'ordre judiciaire; qu'il paraît difficile en effet d'assimiler un arbitre à ce que le texte appelle les "autorités des États membres";

..."Attendu surtout que ledit article 9, §§ 3, n'est applicable qu'autant que la Commission ait engagé une procédure en vertu de l'article 3 du même Règlement(V. note Robert, sous Paris, 26 janvier 1963 : D. 1963, 189);

"Attendu donc que l'arbitre ne trouve pas dans le Règlement N° 17 du Conseil de la C.E.E. une prescription lui imposant de surseoir à statuer".

The arbitrator then proceeded to consider in detail his obligations and his powers in the light of article 85. He concluded:

"Attendu certes qu'un litige portant essentiellement sur la validité ou sur la nullité d'un contrat au regard de l'article 85 du Traité de Rome serait en dehors de la compétence d'un arbitre et qu'aucune clause compromissoire ne pourrait avoir pour effet de substituer un juge privé à un juge public pour trancher un litige intéressant in se et per se l'ordre public;

"Attendu en revanche que, dans un litige de droit privé, si une partie invoque comme moyen de défense que la convention dont se réclame l'autre partie est nulle pour un motif d'ordre public et singulièrement pour violation de l'article 85 du Traité de Rome, l'arbitre a le devoir d'examiner si se rencontrent dans la Convention les conditions matérielles et juridiques dont la réunion entraînerait l'application dudit article".

As for the extent to which the contract infringed article 85, the arbitrator considered three aspects of the contract in particular:

a) the mutual exclusivity of the contract, b) the effect of the mutual transfer of "know-how", and c) whether in fact the contract affected free competition within the Common Market. The arbitrator reasoned:
"a) Attendu qu'il faut cependant relever qu'à l'analyse, cette double exclusivité est fortement mitigée, le contrat prévoyant en termes non équivoques la possibilité pour chaque partie de demander et d'obtenir des dérogations à cette règle;

... 

"Attendu que, sans adopter cette interprétation, l'arbitre doit cependant constater qu'en définitive le régime créé par le contrat est plutôt un mécanisme de concurrence organisée et tempérée qu'un système rigide d'exclusivité;

"Attendu que cette constatation est confortée par la circonstance que, parmi les amendements adoptés le 10 et le 11 juillet 1964 à Vérone, figure l'obligation pour la défenderesse de faire bénéficier la demanderesse des prix les plus bas qu'elle accorde à ses clients italiens;

"b) Attendu qu'il ressort des débats des documents produits par les parties que ce mécanisme de concurrence tempérée est la contrepartie de l'apport technique que la demanderesse faisait à la défenderesse et de celui que, par suite de la collaboration projetée entre les parties, la défenderesse devait faire à la demanderesse;

... 

"Attendu que la concession de Know-how, tout de même que la concession de brevet, s'analyse juridiquement comme une renonciation totale ou partielle à des droits exclusifs; que lors même qu'elle prévoit en faveur du donneur de licence la rétention d'une partie plus ou moins étendue de ses droits exclusifs sur son patrimoine intellectuel, la concession de Know-how représente, dans son essence, non pas une restriction de la concurrence mais un élargissement de celle-ci;

"Attendu qu'en ce qui concerne les licences de brevets, la Commission de la C.E.E. a fait une application non équivoque du principe sus-énoncé lorsque, le 24 décembre 1962, elle a publié une "Communication relative aux accords de licence de brevets" contenant une liste de clauses déclarées licites a priori au regard de l'article 85 du Traité;

"Attendu que parmi ces clauses figurent les limitations d'exploitation dans l'espace et quant à la personne;

"Attendu que, plus encore peut-être que la licence de brevet, la concession de Know-how met effectivement le concessionnaire en mesure de participer à la concurrence; qu'elle le fait, d'autre part, de manière irrévocable puisque le Know-how est protégé principalement par son caractère secret et confidentiel et que la licence s'accompagne nécessairement d'une divulgation;

"Attendu, d'autre part, que le règlement N° 17 exemptant de la notification certains types de contrats met sur le même pied licences de brevet et licences de Know-how;

... 

"Attendu que cette assimilation entraîne normalement le bénéfice de la communication du 24 décembre 1962 en ce qui concerne la déclaration de licéité des clauses limitant l'exploitation du Know-how dans l'espace et quant à la personne;

"Attendu donc que le contrat du 11 juillet 1964 et singulièrement les articles 1, 3, 4 et 5 de celui-ci apparaissent licites au regard de l'article 85 du Traité de Rome;
"c) Attendu d'autre part que l'article 85 du Traité de Rome ne frappe
de nullité que les contrats qui sont susceptibles d'affecter le commerce
entre les États membres et qui ont pour objet ou pour effet d'empêcher,
de restreindre ou de fausser le jeu de la concurrence à l'intérieur
du Marché commun;

... 

"Attendu que la convention porte en définitive sur un chiffre de vente
inférieur à 1,5 % au minimum et à 2,5% au maximum de la seule produc-
tion italienne; que, par rapport au chiffre de la production ou, a
fortiori, de la consommation dans le Marché Commun, ce chiffre repré-
rente un pourcentage proprement infime;

"Attendu que, manifestement, les clauses supposées restrictives du
contrat du 11 juillet 1964, ne pouvaient revêtir avant longtemps une
influence perceptible;

"Attendu qu'à cet égard aussi le contrat ne tombe pas sous le coup des
interdictions de l'article 85 du Traité de Rome".

Finally, with respect to the effect of the mutual grant of exclusive rights,
the arbitrator stated:

"Attendu de surcroît que, selon que l'a rappelé la Cour de Justice
des Communautés Européennes dans un récent arrêt(Aff.56 et 58/64 -
Ets Consten et Gründig- Verkaufs - G.m.b.h., c/ Commission de la C.E.E.),
la circonstance que soient écrites dans un contrat des clauses suscep-
tibles d'être visées par l'article 85 du Traité de Rome, voire que
ces clauses soient déclarées nulles par les autorités et les juridic-
tions compétentes n'a point pour conséquence nécessaire que le contrat
soit nul dans l'ensemble de ses clauses;

"Attendu qu'il y a lieu, dans un cas de l'espèce, à appliquer les
principes généraux du droit des obligations et singulièrement ce qui
a trait à la cause des contrats;

"Attendu qu'à supposer même contre toute raison, que les clauses réputées
restrictives du contrat du 11 juillet 1964 soient visées par l'article
85 du Traité de Rome, la nullité qui frapperait ces clauses serait
sans effet sur la validité des autres dispositions contractuelles;"

Having found the agreement not to contravene article 85, the arbitrator held
the defendant in breach of contract and awarded damages to the plaintiff.

342. On the basis of only three awards dealing with EEC law, and in the
pregnant silence of the ECJ and the Commission, it is difficult to state any
general conclusions. From the views of the writers and the practice of the
arbitrators, there is support for almost every opinion.
This uncertainty is regrettable. However until the ECJ clearly declares what
an arbitrator should do when faced with a question of EEC law, the dilemma for
arbitrators remains. It is submitted an arbitrator should not decline
jurisdiction. Arbitration is the preferred method of dispute settlement in
inter-EEC trade and there can be no justifiable reason to deprive businessmen
within the Community of their chosen forum. If a question of EEC law is brought
up, the arbitrators should attempt to interpret and apply any appropriate
provisions. After all, it is beyond doubt that EEC law forms part of the
domestic law of member States. Arbitrators are obliged to apply applicable
national rules; equally they must apply the EEC provisions which are part of
that applicable national law. An aggrieved or dissatisfied party could
attempt to impeach the award, challenge the award in the enforcing court or
ask the Commission to over-rule the arbitrators.

An overriding consideration of every arbitrator is that his award be enforceable
within the jurisdiction in which enforcement is most likely to be sought. If
a relevant provision of EEC law has either been ignored or has been misapplied,
the award may be impeached. This is especially so if the EEC provisions are
directly applicable and hence are evidence of "ordre public communautaire". Where
a case concerns articles 85 or 86 and the Commission is already seized
by virtue of Regulation 17, the arbitrator should decline or at least stay his
jurisdiction pending the Commission's decision. On the other hand, if the
arbitrator is merely uncertain as to the meaning or effect of a particular
EEC provision, or if he considers it to be of exceptional importance, he could
refer the matter to the ECJ: that would certainly settle the question of
whether or not an arbitration tribunal falls within article 177.
C. The Law of International Trade

343. In recent times, there have been few subjects more widely discussed, with more diverse opinions, than the existence and character of the "law of international trade" or the lex mercatoria. This system of law comprises the rules which have been developed to regulate and facilitate international trade relations and the customs and practices which have attained universal (or at least very extensive) recognition in international trade. Some of these rules are general; others are for specific areas of commerce.

Much of the discussion concerning the "law of international trade" surrounds its source, its content and its force. It is difficult to comprehend the existence of a system of law which is not created by some sovereign State or some other internationally recognised authority. Can there be a system of law in which it is not possible to point to any concrete, directly applicable or mandatory rules of law? Furthermore, there is no forum in which the law of international trade is supreme and applies as lex fori; equally there is no forum to which a party to an international transaction can, as of right, address himself when the other party has broken some rule of the "law of international trade."

However despite the foregoing, there certainly has developed a body of rules, practices and customs which convenience has recognised as having a special character in international trade. Whether or not one accepts and acknowledges the lex mercatoria as a viable and effective system of law, the existence of these rules and customs cannot be denied. The controversy in fact is only concerned with the actual character of these rules and customs.
If the many rules, practices and customs which are adhered to, followed and accepted in international trade do comprise in their totality or in part a genuine international law to govern commercial relations between persons from different countries, i.e. a real modern *lex mercatoria*, is such law directly applicable to all international commercial arrangements? We have already seen that if expressly chosen arbitrators will recognise and apply the "law of international trade". In the absence of any expressed intention of the parties, the arbitrators have to decide themselves whether to apply some national legal rule or, if there is an appropriate rule of the "law of international trade", whether to apply that international legal rule. So when faced with a particular type of transaction or relationship arbitrators will look to see whether there is a rule recognised and appropriate, or some practice adhered to or some custom followed in that particular commercial area. If there is an appropriate rule, practice or custom, then as a provision of the "law of international trade", it is directly applicable to the commercial arrangement.

Even if the "law of international trade" does not exist as a cohesive body of rules appropriate for application in international commerce, there is no reason why the rules, practices and customs of international trade cannot individually and *per se* be applied, where relevant, to particular commercial arrangements. The substantive rules created in the *Hague Conventions* and other uniform laws provide neutral and widely acceptable standards for certain types of situation; where such uniform law has been adopted by the conflicting legal systems, there will be no "actual" conflict. Similarly, where there exists a practice or custom followed in a particular area of commercial relations, that standard, rather than a national legal standard - which may have no relevant provision - can be used to measure and determine the respective rights and obligations of the parties. Whilst in this situation the provisions of the "law of international trade" may not have binding force, they provide a convenient and useful standard to follow. By applying these "non-national" provisions arbitrators can evade
the conflict of laws hurdle. More importantly, these provisions will lead to a result in conformity with the parties' expectations, in accordance with the normal practices in international trade relations, and more often than not, will be exactly the same as would have followed had the conflicting national laws been applied.

346. Whatever the true character of the rules, practices, usages and customs followed in international trade, the right, indeed the duty, of arbitrators to consider, refer to and base their award upon them is well established. This has been one of the most consistent provisions in the choice of law formulae in the international conventions and other instruments concluded in recent years. The rules of many permanent arbitration institutions make similar provision.

Thus article VII(1) of the European Convention on International Commercial Arbitration 1961, which makes provision for the arbitrators' determination of the applicable law, states in its last line:

"... the arbitrators shall take account of the terms of the contract and trade usages."

The wording here is quite clear. Arbitrators are obliged to consider any relevant trade usages and to apply them irrespective of the applicable law. The provision is couched in imperative terms: it does not give the arbitrators a discretion; it instructs them to apply any appropriate trade usages. Where there is some trade usage which can be directly applied to a given dispute, there need be no reference to any national law. Only the existence of some imperative rule of the applicable law would appear to justify the arbitrators' not applying an appropriate trade usage.

Article 38 (last line) of the Arbitration Rules of the UNECE 1966 and Article VII(4) (a) (last line) of the Rules for International Commercial Arbitration of ECAFE 1966 are identical to the provision above in the European Convention. The comment made there is equally appropriate here.
Article 33(3) of the Uncitral Arbitration Rules 1976 makes similar provision. It states:

"In all cases, the arbitration tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Despite the different wording here, the effect is still to give trade customs and usages a priority over the otherwise applicable national legal rules.

A similar provision is made in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966. Of course that Convention deals with a "quasi" - public international law situation. Hence article 42(1) (last line), describes the obligation of the ICSID in wider terms requiring the tribunals to apply "such rules of international law as may be applicable". Here "rules of international law" refer not only to public international law rules but also to those practices, customs and usages which may have developed with respect to the duty of a nationalising State to pay compensation to foreign private persons in respect of their property nationalised by that State.

The Uniform Law on the Sale of Goods 1966, despite establishing a general code for regulating sale contracts, recognises an over-riding effect for customs and usages of the trade. Article 9 of the Uniform Law provides:

"1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties.

3. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned."

The effect of this article is clear. Not only do appropriate trade practices and usages apply when expressly chosen, but they are ordinarily to be implied and will prevail even where they contradict the provisions of the Uniform Law.
However, as noted by one writer, despite the pre-eminence of trade practices and usages when the Uniform Law applies, where its application is excluded by the parties, "la légitimité de la référence à des usages et coutumes internationaux doit être appréciée à la lumière du droit national déclaré applicable en vertu des règles de conflit du juge saisi." Thus a national judge will apply the applicable national law over and above the appropriate practices and usages. It is of course unlikely that any national judge would decline to give effect to any expressly chosen practices and usages except where they violated imperative principles or the public policy of the lex fori. The arbitrator who has no lex fori will give effect to any appropriate trade practice irrespective of the applicable national law, and subject only to international public policy and the policy of the State in which enforcement is most likely to be sought.

Rules of institutional arbitration tribunals

347. The 1975 ICC Rules for Arbitration contains in Article 13(5) the same provision as the last line of the European Convention. The arbitrator's duty to apply trade rules, practices, usages and customs is equally mandatory here.

A different word order is adopted in article 8(a) of the Arbitration Rules of the Bradford Chamber of Commerce 1971.

"The arbitrators shall consider the statements of the parties, and such other materials as the parties may have been required or permitted to deliver; and shall in whatever manner they consider appropriate and from whatever sources they consider appropriate, and either together or individually as they think proper, obtain any additional information they require as to customs of the trade, the course of trade or of dealing between the parties and others, and otherwise as to facts and matters relevant to the case; and shall further inspect such goods, samples and other materials as shall seem expedient; and may then call upon any party to make any further statement or comment upon information so collected that may seem advisable; and then they shall, before proceeding to any formal arbitration upon any part of the dispute, endeavour to reach agreement as to the proper award to be given." (Emphasis added).
This provision clearly empowers an arbitrator to refer to and apply the relevant "customs of the trade" pertaining to the case before him. This is separate and independent from the provision as to the law to apply. The emphasis placed on trade custom is indicative of the recognised importance of all the non-legal rules, practices, usages and customs which have developed with respect to specific areas of trading relations. These standards are to be the basis of any decision except where there is a conflicting mandatory provision of the applicable law.

348. The rules of several eastern European arbitration institutions also contain provision for the application of relevant trade practices and usages. This is not surprising: after all, the eastern European socialist States have all ratified the 1961 European Convention on International Commercial Arbitration and participated in developing the UNECE arbitration rules. However, these rules expressly limit the application of trade customs to the extent that they do not conflict with and are recognised by the otherwise applicable law. Thus e.g. article 27-II of the Rules of the Court of Arbitration attached to the Chamber of Foreign Trade of the German Democratic Republic states:

"The Court of Arbitration shall take into consideration the trade customs covered by the matter in dispute in particular as far as the recognition of these customs has been argued upon by the parties, or where the governing law mentioned in para. I provides for their legality." (Emphasis added).

Similarly article 29(1) of the Rules of the Court of Arbitration at the Polish Chamber of Foreign Trade provides:

"The Tribunal shall apply that country's law, which has been chosen by agreement of the parties, and in absence of such choice, the law which in the opinion of the Tribunal is most closely connected with the relation of parties in the litigation. The Tribunal shall take into consideration the principles of equity and of customs in so far as they are permitted by the proper law." (Emphasis added).

And again, article 28 of the Rules of the International Court of Arbitration for Marine and Inland Navigation at Gdynia:

"The arbitration commission applies the laws of the state, which is most closely connected with the issue and regards, when doing so, above all the party will. It follows the principles of good faith and the commercial, marine and mariners' customs and habits concerning the issue, inasmuch as the laws to be applied allow of it." (Emphasis added).
Equally, the rules of several other eastern European arbitration institutions acknowledge the right of arbitrators to apply relevant trade customs and usages. However they give no indication as to the limits within which these customs and usages can be applied.

349. It is not here intended to enter the debate as to existence of an independent or autonomous "law of international trade". Rather the ensuing discussion will consider the various forms in which the lex mercatoria and its sources can be and have been applied. However it may here be recalled that in two awards dealing with the peremptory termination of concessions granted by an African government, Judge Panchaud referred, inter alia, to "international law". There the distinguished arbitrator considered the appropriate international law precedent to be the ARAMCO award. It will be convenient to consider separately the application of

(i) the substantive rules of international trade;
(ii) the codes of practice for international trade; and
(iii) the customs and usages of international trade.

1. The substantive rules of international trade

a) THEORY

350. Substantive rules capable of application in different types of international commercial relations have been developed through multi-lateral conventions and uniform laws. These instruments have been referred to as "international legislation" even though they are only binding within a sovereign State after and to the extent that they have been expressly adopted in such a State. Their individual purpose is to establish internationally acceptable rules to regulate the various aspects of commercial relations to which they relate; together they comprise the framework of the law of international trade.
Where a multi-lateral convention has entered into force in or where a uniform 
law has been adopted by a particular sovereign State, the rules contained 
therein will become part of the national law of that country. They may be 
applicable equally as rules of the national law of the States concerned by 
national courts and as rules of international trade law by a non-national 
arbitration tribunal. These rules could be applied in this situation as 
manifesting no "actual" conflict.

An instrument which has not come into force or which has not been adopted by 
some sovereign States, cannot claim effect within these States. However, 
they do provide a neutral, non-national standard which by virtue of its source 
may be appropriate for certain types of commercial relations. In a particular 
case an arbitrator may apply the standard of such an international instrument 
which he considers relevant to the circumstances before him. Obviously the 
more prestigious the organisation responsible for drafting and developing the 
instrument, and the greater the number of States that have signed and/or 
ratified it, the stronger the persuasive force upon the arbitrators to rely on 
the rules contained therein.

351. The most often discussed body of rules are those in the Uniform Law on 
the International Sale of Goods. Though restricted to contracts for sale of 
goods between "parties whose places of business are in the territories of 
different States," the Uniform Law provides detailed provisions relating to 
the seller's obligation to deliver goods purchased, the buyer's obligation to 
pay for them, the right of the parties to terminate the contract and the measure 
of damages. In a dispute arising out of a contract for the sale of goods, 
arbitrators not owing allegiance to any national legal system, may well consider 
it appropriate to look to the rules of the Uniform Law rather than consider the 
problem of the applicable law. Alternatively, (and this is perhaps more likely
where the Uniform Law has not been adopted by the conflicting national laws) arbitrators may merely refer to the relevant provisions of the Uniform Law to indicate that that "non-national" standard would have lead to the same results as the law actually applied. This we have already seen from an award of the Yugoslav ATFC where the Uniform Law was referred to although the Yugoslav General Conditions were held applicable.

352. A convention creating a general commercial standard is the Bustamante Code. This Code, which makes provisions relating to most aspects of private commercial relations, restricted its purport to South America. Whilst ostensibly it is only applicable to relations between parties from the South American continent, an arbitrator could also refer to it as evidence of a rule followed in several legal systems.

With respect to payments, arbitrators could equally refer to the Uniform Law for Bills of Exchange and Promissory Notes 1930 and the Uniform Law for Cheques, rather than the domestic legal provisions of some State. These uniform laws, though only in force between those States which have ratified them, provide a neutral and developed code capable of being applied to obligations relating to negotiable instruments.

No awards have been found where these instruments have been relied upon or referred to.

353. The area of transport law is particularly rich in international instruments which have been developed to unify the laws relating to various aspects of travelling and consignment of goods between one territory and another. So with respect to maritime law there are e.g.: Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels 1910; Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea 1910; International Convention for

The various aspects of transport law are generally dealt with in specialised arbitration, not being specifically considered here. However to illustrate the application of these instruments, a few examples from maritime arbitration will suffice.

b) PRACTICE

(i) The Brussels Convention on Salvage at Sea 1910

The Soviet Maritime Arbitration Commission (MAC) has frequently relied on the provisions of the Brussels Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea 1910. Article 2 of this Convention deals with the right to recover for salvage:

"Every act of assistance or salvage which has had a useful result gives a right to equitable remuneration. No remuneration is due if the services rendered have no beneficial result. In no case shall the sum to be paid exceed the value of the property salved."

Hence where two vessels participated in salvaging a third and both claimed the right to remuneration the MAC looked to the Brussels Convention on Salvage at Sea. The Soviet ship "Chernogorsk" had gone to the assistance of the Greek ship "Moschula" when the latter was drifting out of control in
the Ionic Sea, its engines, rudder and wireless having broken down. After
the "Moschula" signed a salvage contract, the "Chernogorsk" agreed to tow
her to the port of Patras. In the meantime, a Greek salvage vessel, the
"Nisos Andros", having heard the "Moschula's" distress signal left Piraeus
to see if it could help. When the "Nicos Andros" met the "Chernogorsk"
with the "Moschula" in tow, they were already outside Patras port. It was
agreed the "Nisos Andros" would take over the tow and see the "Moschula" to
a safe mooring.

The owners of both the "Chernogorsk" and the "Nisos Andros" began proceedings
in the Soviet MAC for salvage remuneration. As for their right to recover
salvage the tribunal held:

"Considering mentioned actions as a unit salvage operation the MAC
thinks that the operation had an unquestionable positive result in the
sense of Article 164, the Merchant Shipping Code of the USSR, 1929 and
Article 2 of the International convention for unification of certain rules
concerning rendering assistance and salvage at sea 1910, which in
connection with mentioned articles of the Code and convention giving a
right to get salvage remuneration both the owners of the m/s "Chernogorsk"
and the owners of the tow boat "Nisos Andros"."

The same process was followed where the Soviet vessel "Khorol" helped to salvage
the Indonesian ship "Indarung". The "Indarung" developed a hole and began
taking water while carrying a cargo of logs in the South - China Sea. Being in
danger of going down the "Indarung" issued an SOS which was answered by the
"Khorol". After the MAC salvage agreement was signed the "Khorol" towed the
"Indarung" to the edge of Taiwan's territorial waters. The owners of the "Khorol"
claimed $8000 for salvage. The defendant declined to participate in the
arbitration proceedings. Nevertheless the MAC met and found him liable to pay
salvage stating:

"Maritime Arbitration Commission acknowledged to be established facts that
on April 5, 1969, m/s "Indarung" because of the hole in the shipbody and
filling the holds with water happened to be in the dangerous position;
therefore the help of the m/v "Khorol" which arrived to the place of the
wreckage, was caused by the actual and urgent necessity. The salvage
operation consisted in conveying the wrecking ship to the territorial
waters of the port of Gaoejun on Taiwan and was completed by doubtless
success in the meaning of Art. 261 of M.S.C. of USSR and Art. 2 of
"International convention for uniting some rules regarding rendering
salvage services on sea of 1910", which gives to the salvors the right
for recompensation."
Articles 6 and 8 of the *Brussels Convention on Salvage at Sea* 1910 provide a mechanism for determining the measure of salvage remuneration.

**Article 6** states:

"The amount of remuneration is fixed by agreement between the parties, and, failing agreement by the court. The proportion in which the remuneration is to be distributed among the salvors is fixed in the same manner. The apportionment of the remuneration among the owner, master, and other persons in the service of each salving vessel is determined by the law of the vessel's flag."

**Article 8** states:

"The remuneration is fixed by the court, according to the circumstances of each case, on the basis of the following considerations: (a) First, the measure of success obtained, the efforts and the deserts of the salvors, the danger run by the salved vessel, by her passengers, crew and cargo, by the salvors and by the salving vessel, the time expended, the expenses incurred and losses suffered, and the risks of liability and other risks run by the salvors, and also the value of the property exposed to such risks, due regard being had, the case arising, to the special adaptation of the salver's vessel; (b) second, the value of the property salved. The same provisions apply to the apportionment provided for by the second paragraph of article 6. The court may reduce or deny remuneration if it appears that the salvors have by their fault rendered the salvage or assistance necessary, or have been guilty of theft, receiving stolen goods, or other acts of fraud."

So in the dispute between the Soviet ship "Chernogorsk", the Greek tow boat "Nisos Andros" and the salvaged Greek ship "Moschula", the MAC had to determine the remuneration payable and the division of that amount between the two salvors. The tribunal held:

"With regard for mentioned circumstances and also for the cost of the m/s "Moschula", estimated approximately at £50,000, the MAC, ruled by Articles 171-173, the Merchant Shipping Code of the USSR, 1929 and Articles 6 and 8 of the International Convention, 1910, determined salvage remuneration, including actual expenditures and losses of salvors, at £7,000, from which the owners of the m/s "Chernogorsk" get £4,000, the owners of the rescue boat "Nisos Andros" - £3,000."

Again in the dispute between the Soviet vessel "Khorol" and the Indonesian ship "Indarung", salvage remuneration was determined with the aid of the *Brussels Convention on Salvage at Sea*. The award states:

"Determining the amount of the salvage reward the Commission found that though the wrecking ship was in the danger of being lost, the salvors themselves did not undergo any real danger. Taking into account the
value of the salved property (134,123 US dollars), all the above circumstances and following Arts 261, 266, 267 and 268 of M.S.C. and Arts 2, 6 and 8 of "International Convention for uniting some rules regarding rendering salvage services on sea of 1910", MAC considers it to be just to determine the reward for salvage of m/s "Indarung" (and her cargo) in the amount of 5,000 roubles including into this sum the expenses of the salvors. Besides, the owners of m/s "Indarung" are obliged to pay 100 US dollars to compensate the arbitration fee. The rest of the claim was rejected.4

In another award5 the MAC was only concerned with the amount of remuneration. The Soviet vessel "Afanasij Nikitin" had answered the distress signal of the Somali ship "Dimitrakis" which had gone aground in shallow waters near the port of Oshakov. After taking the necessary soundings and making the relevant calculations, the "Dimitrakis" was refloated by washing the ground below the vessel and simultaneously pulling off in the direction of the washed channel. The Black Sea Shipping Company, owners of the "Afanasij Nikitin" claimed 45,000 roubles salvage remuneration; the insurers of the "Dimitrakis" accepted remuneration was payable but thought 30,000 roubles a more reasonable amount. The MAC determined the salvage remuneration payable in accordance with the criteria in article 8 of the Brussels Convention on Salvage at Sea:6

"The Commission hold that the salvage operations were performed under complicated conditions, due to the shoal, great ripple, strong coastal current; that is, in real danger to the salved ship and to the salvors. Despite the difficult hydrometeorological and navigation conditions the salvage was performed quickly and at a high professional level. Taking into account the success and salvors have the right for getting the salvage remuneration in accordance with Art. 261 of M.S.C. of USSR and Art. 8 of International Convention for uniting some rules regarding rendering assistance and salvage in the sea of 1910.

Taking into consideration the degree of the danger to the salved ship; the work and deserts of the salvors, the danger threatened to the salving ship; the time spent for the salvation and the value of the salved property, the Commission found it just to determine the salvage reward in the amount of 37,000 roubles."
(ii) Brussels Convention on Collisions at Sea 1910

356. The MAC has also referred to the Brussels Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels 1910 when determining the damages payable where vessels are in collision. In one case the Sea Port of Arkhangelsk brought an action against the German (Democratic) firm "Egon Oldendorf" in respect of damage to the tug "Molotoboets" (owned by the Port) caused in a collision with the latter's vessel "Ilsabe Oldendorf". To determine damages the MAC referred to article 4 of the Brussels Convention on Collisions at Sea which provides inter alia:

"If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed."

The MAC found "the collision was a result of serious violation of the International Regulations for Preventing Collisions at Sea, of the Port Regulations, and neglect of good seamanship on the part of both the Masters." Blame was apportioned 70 - 30 respectively for the "Molotoboets" and the "Ilsabe Oldendorf". Both vessels were held liable for the damage to the other vessel to the extent their responsibility. However, as the "Ilsabe Oldendorf" suffered no real damage and the "Molotoboets" was seriously damaged, only the owners of the "Ilsabe Oldendorf" had to make any payment. The award states:

"The Maritime Arbitration Commission arrived at the following apportionment of blame: the tug "Molotoboets", 70 per cent; the m/s "Ilsabe Oldendorf", 30 per cent. The Commission, therefore proceeding from Art.4 of the International Convention for Unification of Certain Rules Relating to Collisions of Ships, signed in Brussels, September 23, 1910, and from Art.158 of the USSR Merchant Shipping Code, 1929, as well as taking cognizance of the fact that the amount of damages was disputed neither by the Plaintiffs, nor by the Respondents, resolved that the Owners of the sea-going tug "Molotoboets" shall reimburse 70 per cent of the damages sustained by the Owners of the m/s "Ilsabe Oldendorf", i.e., Roubles 3,207, whereas the latter shall pay 30 per cent of the damages sustained by the tug's Owners, i.e., Roubles 20,149."  

Again in a dispute arising out of a collision between the Greek tanker "Akmeon" and the Soviet vessel "Egorlik" in the port of Batumi in which the latter vessel suffered damage. The owners of the "Akmeon" did not deny liability.
However, by repeatedly asking for the repair documents, they managed to avoid making payment to the Soviet Shipping company for over two years. When the Soviet plaintiff began proceedings in the MAC for damages, the Greek shipowners relied on article 7-1 of the Brussels Convention on Collisions at Sea. That article provides:

"Actions for recovery of damages are barred after an interval of two years from the date of the casualty."

However article 7-3 did leave it to every court to suspend or delay the period of limitation in accordance with their own criteria. By virtue of the defendant's mala fides the MAC decided not to apply article 7-1 and treat the action as barred by effluxion of time. The award states:

"The Maritime Arbitration Commission considered, in the instance, the matter of limitation of actions by the Plaintiffs, proceeding from Art.82 of the RSFSR Civil Code stipulating that limitation of actions is applied by a court, arbitration court, or Umpire regardless of the side's claim. According to Art.7 of the International Convention of 1910, for Unification of Certain Rules Concerning Collisions of Ships, to which both the USSR and Greece were signatories, "claims for damages are limited in action by two years as from the date of casualty". The Commission stated that limitation of actions had expired. Proceeding from Art.7 of the Convention of 1910 making allowances for possible suspension of the limitation period through reasons defined by the law of the court considering the case, reference was made to Art.16 of the Basic Civil Law of the USSR and Union Republics stipulating that in case a court, arbitration court, or Umpire found the reasons for missing dates of limitation valid, infringement on rights shall be accorded defence. In the light of the above legal regulations the Commission considered that actual evidence in the case and ascertained that up to the month of April, 1968, the Steamship Company kept receiving letters from the Greek Owners who, while not disputing their liability, requested that the Steamship Company should furnish them with copies of the documents already mailed to them. The Owners therefore let the Steamship Company expect satisfaction in respect of their claim fairly soon. In these circumstances the Commission held it justified to renew limitation of actions in this case."
relate to the prevention of collisions at sea. As the Convention applies to 80% of the world's sea traffic, the regulations for preventing collisions at sea establish a truly international code for sea navigation. These regulations have been referred to by the MAC when determining responsibility for collisions at sea.

One dispute arose out of a collision between the Polish vessel "Ojcow" and the Soviet tanker "Preily" when both vessels were sailing westward along the axial line in the Baltic Sea. To avoid collision with a third and unidentified vessel steering to cross their courses, the "Ojcow" and the "Preily" were obliged to manoeuvre and alter course. These manoeuvres resulted in the "Preily" overtaking the "Ojcow"; the "Ojcow" putting slightly to starboard; and the "Preily" then putting to port and sounding an attention signal. When the "Preily" took the last action she crossed into the path of "Ojcow" and a collision followed. Both vessels were damaged. The Polish insurers of the "Ojcow" claimed indemnity from the Latvian Steamship Company, the owners of the "Preily" for: the cost of repairs and for reloading cargo - DM 153,534; agency and survey fees - Bfr. 3,300; crew effects lost or damaged - £35.00; ship's stores lost or damaged - Polish ZL 131,477; loss of profit whilst lying idle - US $ 7,362. The Latvian Shipping Company denied liability.

The MAC, to whom the parties submitted their dispute, looked to the Regulations for Preventing Collisions at Sea to determine responsibility for the collision. The MAC found:

"In deciding upon the extent of the two ships' fault in the collision the Commission proceeded from the following findings. The tanker "Preily" which commenced putting to port at 22.50 hrs to cross the course of the "Ojcow", made a wrong manoeuvre, thus violating Rule 24(a) (RPCS): "each vessel overtaking another vessel should give way to the overtaken vessel". When exercising the erroneous manoeuvre of putting helm to port, the tanker "Preily" was also in breach of Rule 28(a) failing to signal her putting to port and erroneously signalling to attract attention, which was in neglect of Rule 28(b) obliging a ship to declare her actions by sounding respective signals."
In the course of the three minutes directly before the ships collided, the "Ojcow" took no steps to avoid the collision, with the Ojcow's stopping distance being equal to 3 cables, and the distance between the two ships 6 cables, after the signal was heard from the "Preily" about her steering astern; Officers of the "Ojcow" were really in a position to avoid the collision by proceeding astern. That the course and speed were maintained by the Polish vessel after the tanker "Preily" had given her signal at 22.50 hrs, was a violation of good seamanship practices and of Rule 29. The m/v "Ojcow" was steering along the fairway's port side before collision which was breach of Rule 25(a). Although the collision occurred after the "Ojcow" had move to her starboard side of the fairway which fact had no direct causal connection with her violation of Rule 25(a) of the Regulations, there was nevertheless indirect causal connection between this particular violation and the collision. The position of the "Ojcow" and the "Preily" in respect of each other by the time the situation grew dangerous, should to a certain extent be attributed to the said violation. In the absence of the same violation the situation could be different from the actual one.8

Being in breach of the standards of goods seamanship, both vessels were held responsible for the collision. Blame was apportioned two-thirds to the "Preily" and one-third to the "Ojcow".8

(iv) The Hague Rules

358. Two English arbitrators relied on the Hague Rules when determining liability for water entering the hold and damaging cargo. The vessel, carrying a cargo of 1235 tons of super phosphate rock from Setubal, Portugal, berthed at the Seabright Wharf, Barking, England. The cargo was found to be in good condition and 70 tons was unloaded. The vessel was then put off berth by the tide. When the vessel next berthed it was found that water had entered and damaged the cargo in number 2 hold. It was found that 330 tons of the cargo had been damaged. The charterers and cargo owners claimed £3,545 damages from the ship's owner.

The questions for the arbitrators were how the water had got into the hold and who was responsible for the damage caused by the water. As for the first question the arbitrators accepted the surveyor's report that probably one of the bilge pumps had jammed open and water had seeped in that way; the dry dock report confirmed the vessel's hull to be in perfect condition.
Who was responsible for the damage caused by the jammed bilge pumps? Despite the shipowner being German (Federal) there was no choice of law. The arbitrators referred directly to Article IV, Rule 2(a) of the Hague Rules. This provides:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from delay, act, neglect or default of the Master, mariner pilot or the servants of the carrier in the navigation or in the management of the ship."

What is meant by "management of the ship"? Does it comprise the normal use of the ship's mechanical instruments? The arbitrators referred to Scrutton on Charter-Parties, a major English reference book on the subject, and to several decisions of the English courts which had discussed the meaning of Article IV Rule 2(a). The arbitrators found the use of the bilge pumps to be an act "necessarily done in the proper handling of the vessel, ... done for the safety of the ship herself, and ... not primarily done at all in connection with the cargo...." As such the use of the bilge pumps was held to be within the description "management of the vessel" and fell within the Hague Rules' exception. The arbitrators hence rejected the plaintiff's claim for damages.

2. The codes of practice for international trade

a) THEORY

359. To facilitate international trade various public and private international organisations have attempted to define and develop clearly ascertainable rules for application to specific forms of trade. To this end contract-types, standard-clauses, uniform rules and general definitions have been proposed for all aspects of international commerce. The purpose of these "codes of practice" is to avoid or at least limit the conflicts of law which could result from different national legal provisions. These "international commercial customs" are the very essence of "a new, autonomous law... being developed in practice."
The UN Economic Commission for Europe have developed numerous different sets of conditions for use in contracts for the sale of cereals, citrus, sawn softwood, solid fuels, potatoes and steel products, and for the supply and/or erection of plant and machinery for export and import. In form these conditions are a cross between a normal contract-type and a code relating to international contracts. Whilst these conditions cannot be considered in themselves evidence of international custom, they are indicative of a general consensus as to the rights and obligations, practices and usages in the various commercial areas to which they relate.

The International Chamber of Commerce has also been active in this area of codification. Their best known work is the INCOTERMS, international rules for the interpretation of trade terms. The use of abbreviations or trade terms to refer to certain general contract conditions has for long been normal; however the terms used and the interpretations given to them varied greatly. Soon after its creation in 1919 the ICC began to work to develop internationally acceptable trade terms. The first INCOTERMS were adopted in 1935 with a modicum of success. They were revised in 1953 and are today extensively used in international trade and recognised and uniformly interpreted throughout the world.

Of equal importance are the ICC rules on documentary credits and collection of commercial papers. As the banks of many countries followed different practices relating to granting credits, etc., the ICC considered it important that they develop a code of practice which could be followed by banks all over the world. Hence the Uniform Customs and Practice for Documentary Credits were adopted in 1933, and revised in 1951 and 1962. These rules are widely followed today. This work of the ICC has been described - and this description is equally appropriate to the other ICC rules - as "une véritable codification, de portée quasi-universelle, de la pratique internationale en ce domaine". Similarly, though with less success, the ICC adopted in 1966 Uniform Rules for the Collection of Commercial Paper.
361. A further prolific source of the lex mercatoria are the standard regulations and contract-forms which many private, commercial and trading organisations (e.g. the London Corn Trade Association or the Chambre syndicale des Grains et Farines et de la Meunerie de Paris) have developed for the use of their members. This is well illustrated in the shipping trade where certain charter-types (e.g. Gencon Charter) have been established. Whilst these standard regulations and contract forms are not per se necessarily indicative of the practices in the industry or trade area to which they relate, they do make it possible to "dégager constantes de la pratique d'une branche professionelle". It is these "constantes" which form the code of practice for the particular trade area.

b) PRACTICE

(i) UNECE Conditions of Sale:

362. We have already considered the choice of law provisions contained in the UNECE Conditions of Sale. They only apply where the General Conditions adopted do not contain an appropriate substantive term or condition to regulate the situation or question in issue. As a general rule, where a contract is based on a UNECE General Condition the terms thereof will be applied per se. This can be seen from two ICC arbitration awards.

In one case, the defendant, an Haitian corporation, agreed to purchase machinery for manufacturing shoes from the Swedish plaintiff. The contract was based on the UNECE General Conditions for the Supply of Plant and Machinery for Export. The defendant failed to make payment on the set dates as agreed in the contract. The plaintiff notified the defendant that the due dates had passed, requested payment and threatened to rescind the contract if payment was not forthcoming. The (Federal) German arbitrator found no need to consider the applicable law; the terms of the General Conditions were themselves sufficient to resolve the parties' dispute. The arbitrator held the Plaintiff's right to terminate the contract was clear from article 8.7. As for the level of damages, the plaintiff
was awarded the amount outstanding under the contract plus an amount calculated in accordance with article 11.1 of the General Conditions i.e. what the defendant "could reasonably have foreseen at the time of the formation of the contract."

In another case a dispute arose out of a contract under which a Dutch corporation sold to a Federal German corporation a machine to manufacture "finger-stalls". The contract price of 61000 DM was payable in three equal instalments: when the order was made, on delivery and when the machine was working satisfactorily. The UNECE General Conditions for the Supply of Plant and Machinery for Export were incorporated into the contract. In accordance with article 9.2 of the Conditions the machine was guaranteed for a period of 6 months from the date of delivery provided it was used in accordance with instructions.

The defendant paid the first and second instalments; however he declined to make the final payment. The plaintiff began proceedings claiming the amount unpaid. If the machine was defective it was argued the defendant had no remedy as he had allowed the six month period of guarantee to expire. The defendant argued that under article 7.3 he was entitled to a reduction of the contract price commensurate with the loss he had suffered due to the plaintiff's late delivery. Furthermore, the defendant alleged that the machine was faulty and did not function properly entitling him to damages.

The French arbitrator upheld both the defendant's contentions. On inspection the machine was found to be missing a part (value 1000 DM) and hence defective; the "finger-stalls" manufactured by the machine were of an inferior quality equal to 1200 DM; to repair the machine would cost 2290 DM. These amounts the defendant was held entitled to deduct from the price of the machine. As for the effect of the delay, the arbitrator found it to have caused the defendant a loss of 2400 DM; that amount was also to be deducted from the contract price. After calculating the effect of interest the arbitrator held the defendant owed the plaintiff only 14,422 DM in respect of the third and last payment.
Though the arbitrator held Dutch law to apply - i.e. law of the seller in accordance with article 13.2 of the General Conditions - there was no reference to any Dutch legal provisions. Rather the arbitrator based his conclusions on the provisions of the UNECE General Conditions themselves.

(ii) Incoterms

363. The application of the INCOTERMS and the meanings which they are acknowledged to have is so well established that it is difficult to find actual examples. However, in one case a dispute arose out of damage caused to a cargo of skins, shipped from New York to Rotterdam. The goods had not been insured and the question was upon whom the loss should fall: the buyer or the seller? The dispute came before the arbitration tribunal of the Netherlands Skins and Leather Exchange in Rotterdam. The contract had been concluded "C. & F. Rotterdam". The arbitrators began by looking to the INCOTERMS to see upon whom the risk of loss fell. Paragraph B.3 of the INCOTERMS provides that the buyer must: "Bear all risks of the goods from the time when they shall have effectively passed the ship's rail at the port of shipment". Thus the tribunal held:

"The buyer, knowing of the C. & F. contract should have realised that none of the parties had an obligation to insure the skins due to the fact that this was his, the buyer's, responsibility."

In a case before the Soviet FTAC, arbitrators had to determine the obligations of the parties under three contracts concluded on terms "CIF-FIO an European port". Under these conditions the defendant, a Soviet foreign trade enterprise, undertook to sell and deliver various quantities of fish to the plaintiff, a (Federal) German corporation. The case was further complicated by the provision in article 4 of the seller's standard sale contract (on the back of their invoice) that "the discharge of the goods at the port of destination including the unloading of the vessel, lighterage and wharfage, must be made certain by the buyers, to their exclusive cost and risk."

The goods were delivered to the port of Hamburg as agreed. The cost of discharge, 108,728 DM, was paid by the purchaser who instituted arbitration proceedings.
to recover from the Soviet seller those costs which, he maintained, were the responsibility of the seller under "CIF-FIO" terms. The tribunal had first to determine the meaning of these terms. "CIF" being an INCOTERM they resorted to that accepted definition and held:

"Selon la signification générale admise des termes "CIF" ainsi qu'il résulte en particulier des "Incoterms 1953", dans les transactions "CIF" le vendeur doit prendre à sa charge le transport des marchandises au port de destination et payer le fret et "tous frais de déchargement au port de destination qui peuvent être perçus par les compagnies maritimes régulières" (CIF A.2). L'acheteur, dans les transactions "CIF" doit recevoir les marchandises au port de destination agréé et supporter, à l'exception du fret et de l'assurance, tous les frais et charges supportés pour les marchandises durant leur transit par mer jusqu'à leur arrivée au port de destination, aussi bien "les frais et charges relatifs aux "marchandises durant leur transit par mer jusqu'à leur arrivée au port de destination, les frais de déchargement incluant dans la même mesure les frais de transport par chaland et les frais de quayage", à moins que de tels frais et charges soient inclus dans le fret, ou soient perçus par la compagnie maritime en même temps que le fret (CIF B.2)."

As for "FIO", the arbitrators looked to the generally accepted meaning of the term. They stated:

"Quant aux termes "FIO", qui signifient "free in and out" ils concernent, suivant la signification généralement admise, les relations des parties au contrat de transport par mer, signifiant que les transporteurs sont déchargés des frais de chargement au port de départ et des frais de déchargement au port de destination."

Then to reconcile these apparently contradictory provisions, and article 4 of the seller's conditions, the arbitrators continued:

"La Commission estime que la réunion des termes "CIF" et "FIO" sur un contrat de vente, à moins que les parties n'en aient convenu autrement, signifie que leurs droits et charges réciproques de vendeur et d'acheteur sont déterminées par les dispositions habituelles mentionnées ci-dessus de transactions "CIF", le vendeur ayant le droit de charger le navire selon la clause "FIO".

Le Commission considère qu'une telle interprétation des termes "CIF-FIO" doit être totalement applicable au premier contrat 32/6-3015 conclu entre les parties dans cette affaire. Concernant ce contrat, rien dans les faits ne met en évidence un arrangement quelconque entre les parties pour une interprétation différente des termes "CIF-FIO". En effet, la clause 4 des Conditions Générales de livraison et de paiement figurant au dos du contrat et mettant à la charge de l'acquéreur les frais de déchargement, est en total accord avec l'interprétation donnée ci-dessus."

Having distinguished the various contracts and the conditions applying to them, the tribunal held against the plaintiff on one contract but upheld his claim on the other two contracts. The arbitrators thus held the defendant obliged to repay the plaintiff 65,543 DM.
Similarly, the arbitration court of the Chamber of Commerce of Czechoslovakia applied the INCOTERMS when determining the parties' obligations under a contract. The Czechoslovak plaintiff had purchased from the Sudanese defendant 170 tons of Sudanese ground-nuts, "C. & F. Hamburg" at the price of 68.00 Sudanese pounds per ton. The goods were delivered to Hamburg at which time the plaintiff paid the purchase price of 11,478.00 Sudanese pounds, the plaintiff then transferred the ground-nuts to Czechoslovakia. When the ground-nuts were delivered to various sub-purchasers in Czechoslovakia they were found to be worm-eaten, damaged and unfit for human consumption; the ground-nuts were thus not accepted by the various sub-purchasers.

Having already paid for the goods the plaintiffs informed the sellers that the ground-nuts were not acceptable, that they would be held for the sellers to repossess at their expense, and that they requested repayment of the purchase price. The sellers denied that the goods were not fit for consumption, declined to repossess them, and refused to repay the purchase price. The plaintiff thus began arbitration proceedings at the Czechoslovak Chamber of Commerce claiming repayment of the price paid. The seller's duties were determined in accordance with the INCOTERMS. The tribunal held:

"The Plaintiffs have fulfilled their duties and the purchase price was paid after presentation of documents and the Plaintiffs took the goods after their discharge. The duty of the seller, i.e. of the Defendants, was first of all to deliver the goods to the buyer, but at the same time when the goods were sold according to the sample, the quality of the goods must comply with the quality of the sample agreed in accordance with SS 296 of the Code of International Trade. This duty is imposed upon the seller also by the provisions of Incoterms, when the conditions C & F are convened, in accordance with the comments to the clause/item 5, No 1, according to which the seller is obliged to deliver the goods in conformity with the conditions of the contract. The Defendants have delivered the goods to the Plaintiffs, but the quality of the delivered and handed over goods did not at all comply with the quality of the sample."

The arbitrators then determined the lower value of the ground-nuts by virtue of their poor quality, and ordered the defendants to repay the plaintiffs 4,820.93 Sudanese pounds.

An ICC arbitrator also referred to the INCOTERMS to determine whether, under a sales contract concluded on FOB terms, the French buyer or the Yugoslav seller was responsible for demurrage. The arbitrator held:
"(c) En vertu des règles internationales pour l'interprétation des termes commerciaux (INCOTERMS 1953, p.26 ch.3), l'acheteur doit, dans une vente FOB, si le navire désigné par lui, soit ne se présente pas à la date convenue ou avant la fin du délai prévu, soit ne peut charger la marchandise, soit termine son chargement avant la date convenue ou avant la fin du délai prévu, supporter tous les frais supplémentaires ainsi occasionnés et tous les risques que peut courir la marchandise à partir de la date d'expiration du délai convenu à condition cependant que la marchandise soit individualisée de façon appropriée c'est-à-dire nettement mise à part ou identifiée de toute autre façon comme étant la marchandise faisant l'objet du contrat.

"Étant donné que le navire affrété par la défenderesse ne s'est pas présenté à la date convenue du 30 novembre, voire même quelques jours plus tard ...(elle) doit supporter tous les frais occasionnés par le retard du navire. Elle est donc responsable du paiement des frais de sûrestaries provenant du stationnement à quai des wagons jusqu'à leur déchargement et l'embarquement du minerai sur le navire".

Again in the ad hoc ARAMCO award\textsuperscript{12} when the arbitrator looked to see whether the concessionaire had exceeded his rights, he gave the term "FOB" the meaning given to it in the INCOTERMS – though without expressly referring to them. The arbitrator stated:

"In sales f.o.b. (free on board), the buyer chooses the vessel which transports the goods he has purchased. These goods are at the risk of the seller until they are delivered on board. Responsibility for taking delivery and loading are assumed by the buyer; the latter is also responsible for the cost of transport and insurance. He bears the risks of transportation. In case the vessel is chartered, the buyer likewise pays the cost of freight. The relations between buyer and seller come to an end at the moment when maritime transport starts, since the obligation assumed by the seller consists merely in bringing the goods free on board vessel. The buyer takes delivery thereof at the moment of loading. Thus the moment when the transfer of ownership and risk takes place is determined by the act of placing the goods on board."\textsuperscript{13}

(iii) ICC Uniform Customs and Practice for Documentary Credits:

364. Where appropriate arbitrators have been willing to follow the provisions of the ICC Uniform Customs and Practice for Documentary Credits. In one case\textsuperscript{1} a dispute arose between a (Federal) German (West Berlin) Bank and a Bank from Saudi Arabia with respect to a credit arrangement between them. Three arbitrators (one Dutch, one German and one English), sitting in Amsterdam, considered there to be no need or purpose for them to determine the national law to apply; the ICC rules were directly applicable. The tribunal held:
"The ICC Uniform Customs and Practice apply to this credit; the question in what respect German laws apply to this credit is not taken into consideration as the answer to this question is not relevant to the decision in hand".

In another award the arbitrators were seized of a dispute arising out of a contract of affreightment. The parties had expressed a choice of French law to apply to their relations; this choice the arbitrators recognised. However with respect to that aspect of the case concerning credit arrangement for the shipping of goods, the arbitrators preferred to apply the standards accepted in international trade i.e. the ICC rules. The arbitrators held:

"Il est normal, et conforme aux usages du commerce international que les documents soient accompagnés d'une traite à vue. Les risques du tireur sont pratiquement exclus par le fait que dans le cadre d'un crédit documentaire confirmé, comme c'était le cas en l'occurrence, un pareil traite n'est negociable que "sans recours contre le tireur". (cf. article 5(3) des Règles et usances uniformes relatives aux crédit documentaires de la CCI Revision 1957). Dans ces conditions C ne pouvait pretendre que la condition due tirage à vue dans le crédit en sa faveur constituait un défaut d'exécution du contrat de la part de la C.M.M."

Similarly, where arbitrators had to determine the effect of a credit arrangement between Swiss and Iranian parties the arbitrators applied the ICC Rules stating:

"Au surplus, cet accreditif confirmé, stipulé au contrat, était conforme aux règles et usances uniformes relatives aux crédits documentaire, telles qu' établies par la Chambre de Commerce Internationale et sur lesquelles [la défendresse] a donné son accord".

(iv) **Standard-Form Charter Party**

365. The arbitration tribunal at the Czechoslovak Chamber of Commerce was asked in one case to determine whether the charterer was liable to pay certain penalties for lay-time. The shipowner chartered the ship to the Czechoslovak defendant to carry a quantity of coal from Szczeczin in Poland to various ports in Italy. The charterparty made on the GENCON standard-form, provided penalties for delay. The vessel arrived on time but due to "port administration" loading was interrupted and the vessel delayed. The shipowners debited the charterers with the relevant penalties for the delay. The charterers in turn denied liability arguing the delay was caused by a "force majeure" occurrence for which they could not be held responsible.
The Czechoslovak tribunal began by looking for the applicable law. The appropriate Czechoslovak private international law was applied and the Czechoslovak law No. 61/52 on maritime navigation was found to be applicable. However, this law made no provision as to what should occur in the circumstances of the particular case. So the arbitrators looked to the charter-party itself to see if it contained any provision; there too there was no assistance. So the arbitrators looked finally to the usages generally acknowledged to appertain to the standard-form charterparty. The tribunal held:

"... les arbitres n'ignorent pas que le modèle standardisé de la charte-partie, GENCON, appliqué par les parties, se trouve généralement interprété de façon que le retard survenu à l'embarquement (ou au débarquement) incombe toujours à l'affréteur, sauf toutefois lorsque le retard est survenu par la faute de l'armateur. Les deux parties ont eu connaissance de cette interprétation et le demandeur la prit pour point de départ de ses conclusions. Les arbitres adoptèrent l'opinion que les parties avaient entendu inclure dans leur contrat ce principe de la responsabilité de l'affréteur pour le retard survenu. Suivant l'article 38 du Code civil la volonté peut être déclarée non seulement expressément, mais de toute autre manière, pourvu que la déclaration ne prête pas à confusion. Le fait que les parties ont adopté un modèle défini de contrat permet d'affirmer qu'elles avaient entendu conclure un contrat aux termes standardisés et correspondant à la règle générale ou plutôt aux usages internationaux, ceci non seulement pour ce qui est de ses clauses expresses, mais aussi en ce qui concerne les suppléments coutumiers à y apporter ou, s'il y a lieu, les lacunes de libelle du contrat: en l'occurrence, il faut ajouter la clause retenant la responsabilité de l'affréteur pour le retard survenu dans l'embarquement ou le débarquement. Dans cet ordre d'idées, l'armateur est en principe en droit de réclamer le paiement du montant des pénalités pour le retard occasionné par l'intervention de l'administration du port à Szczecin."

The defendant was consequently held obliged to pay the penalties provided for in the charter-party.

3. The customs and usages of international trade

a) THEORY

366. The third source of the lex mercatoria is custom and usage, both in commerce generally and with respect to specific commercial areas e.g. commodities, industries, professions, trades. This is equally recognised in most legal systems as a source of law. These customs and usages are rarely documented though their existence is well known, they having developed through practice over the years. Participants in particular areas of commerce know the customs and usages relevant to them; they presume their application and give them effect automatically. When contracting, parties rarely discuss the application of
particular customs or usages nor do they reduce them to writing in the contract; they just take them for granted.

Generally a judge, seized of a dispute arising out of a contract, will resort to relevant customs and usages to fill lacunae which may exist in his law. More accurately, he will give effect to customs or usages because they form an integral part of the contract; indeed, frequently performance or meaning will depend largely on customs and usages. Hence the judge will aim to interpret the contract in the light of the applicable law and the determinable intention of the parties. As most legal systems so allow, there is little possibility of a relevant custom or usage not being applied.

For the international arbitrator, the situation is even clearer. He is not the representative or official of any State; he also has no lex fori. As we have seen, arbitrators must determine, without any "forum" private international law rules, the law or other standard to apply. If there is a custom or usage relevant to the transaction or relationship before him, it is logical that it should be applied. That such custom or usage is not recorded in any instrument of international trade, code of practice or contract-type does not detract from its applicability; the sole question is whether it is accepted and acknowledged in the particular trade. As has been seen, the international instruments and the rules of the major arbitration institutions recognise the right and/or duty of an arbitrator to apply appropriate customs and usages; as will be seen, arbitrators do apply relevant customs and usages.

b) PRACTICE

367. There are few awards which have been totally based on the amorphous standards of commercial usage and trade customs. More frequently customs and usages are looked to as support for an otherwise reached conclusion (i.e. to show the absence of any genuine conflict) or to facilitate the determining of what the parties actually meant by their agreement. In other cases customs and usages have been used as the applicable standard to certain specific aspects of a dispute.
Ad hoc award

Perhaps the best known case in which customs and usages were applied by arbitrators is the ARAMCO award. There the law of Saudi Arabia, the concessionary State, was held to apply, but only as interpreted and refined by the general principles of law, public international law, and "the custom and practice in the oil business". As the arbitrator stated when considering the law applicable:

"The Tribunal will be led, in the case of gaps in the Law of Saudi Arabia, of which the Concession Agreement is a part, to ascertain the applicable principles by resorting to the world-wide custom and practice in the oil business and industry; failing such custom and practice, the Tribunal will be influenced by the solutions recognised by the world case law and doctrine and by pure jurisprudence.

"As regards the international effects of the Concession, such as the effects of the sale and transport of the oil and oil products to foreign countries, and in particular the F.O.B. sales, the Tribunal holds that these effects are governed by the custom and practice prevailing in maritime law and in the international oil business." (Emphasis added).

The fundamental question in this arbitration was whether the concession agreement entitled Aramco to negotiate freely for the export of the oil or whether the Saudi Arabian government had the right to impose upon them a specific method of exporting the oil. This necessitated a careful analysis of the agreement, a review of the practice over the years and consideration of the customs and usages of the oil industry which may have been pertinent.

Article 1 of the concession agreement gave the company exclusive right to, inter alia, "transport, deal with, carry away and export" oil and oil products. The Saudi Arabian government argued this term to refer to transport within and export from Saudi Arabia; but not to refer to maritime transport nor the form and method of exporting the oil. At the very outset the arbitrators noted:

"... the Parties cannot have intended to ascribe to each of the verbs they used a specific territorial meaning. This would have been contrary both to common sense and to the technical requirements of the proposed industrial operations. The production of crude oil is not a result of its 'manufacture', as was shown at some length in Aramco's Final Memorial ...; it follows that the manufacturing process cannot be localized at the place where oil is extracted. The terms 'treat' and 'manufacture'
relate to the refining of petroleum in the port of Ras Tanura. Moreover one of the modalities of oil development consists in sending crude oil abroad, to consuming countries, where it is refined outside Saudi Arabia; in such case the term 'transport' necessarily implies sending oil abroad either by land or by sea. The term 'deal with' does not refer to physical handling but to the conclusion of contracts which, in fact, are not concluded or performed solely within the Concession area, and, in law, cannot be limited territorially.  

The arbitrators considered at length the practices of Aramco, and the circumstances of the particular case, and looked at the terms of the concession agreement "in their plain, ordinary and usual sense, which is the sense accepted in the oil industry".  

The arbitrators found that:

"... the exclusive right granted by Article 1 necessarily implies the right for the concessionaire to conclude all the commercial arrangements needed for export, and in particular the arrangements which are customary in the international oil business, such as F.O.B. sales".  

Finally, to illustrate the importance of commercial custom and usage to this case the arbitrators added:

"The Arbitration Tribunal cannot overlook the practices and usage of commerce, known by both Parties at the time the Agreement was signed, unless it be prepared to content itself with abstract reasoning and to lose sight of reality and of the requirements of the oil industry".  

369. Similarly an arbitration tribunal of the Coffee Trade based their award on accepted customs. The contract in dispute was made on 7 January 1971, for coffee to be shipped February/March 1971 from Indonesia to Holland. The seller involved article 4 of the applicable Conditions for Trade in Indonesian Coffee, which provided that freight increased or reduced after the conclusion of the contract would be for the benefit or account of the buyer. At the end of December 1970, the Europe - Indonesia Freight Conference informed interested parties by circular letter that as of 1st February 1971 all onward freights would be increased by 5%. The arbitrators rejected the seller's claim for increased freight on the grounds that "it is customary in the coffee trade that sellers already include in the price any freight increase known to become applicable at the time of shipment". 
In a dispute between a Danish plaintiff and Bulgarian and Ethiopian defendants, the three arbitrators referred to commercial usages to support their award reached from an analysis of the parties' agreement. This was despite the fact that the arbitrators made a specific choice of Swiss law as the proper law of the contract. The first and second defendants were engaged in the construction and development of a fish processing and freezing plant in Ethiopia. Having negotiated credit terms, the defendants' ordered a refrigeration installation from the Danish plaintiff. The dispute arose out of their subsequent revocation of this order. The plaintiff claimed damages for breach of contract plus interest on the amount due.

It was the "amount due" which was the crux of the dispute. Did this include the total capital amount plus interest on the whole amount? Or was it to be calculated on the interest due at the date when each instalment became payable?

The arbitrators looked initially to what the parties had actually agreed with respect to the interest payable. Credit was granted for five years; payment was to be made by bill of exchange, in five equal annual instalments. Each amount would include 5% on the total contract price. The credit agreement providing no answer, the arbitrators looked to the defendants' bank guarantee provided by the Bulgarian Foreign Trade Bank. This stated:

"on calculera des intérêts de 5% par an à compter de la livraison correspondante, les intérêts étant, payables avec le capital à chacune de ces dates".

The arbitrators found their answer in the words "à chacune de ces dates". This they considered to clearly manifest the parties' intention that the amount payable be determined at the date of payment. Then to support this finding the arbitrators added:

"On en arrive à la même conclusion par la voie d'une interprétation moins grammaticale, fondée plutôt sur les usages commerciaux. Dans l'offre,
il a d'abord été question de lettre de change et il est conforme aux usages internationaux que si l'on prévoit des paiements partiels les intérêts convenus ne portent que sur le paiement visé, puisque seul le montant du paiement partiel en question entre dans la lettre de change. Selon le droit cambiaire toute autre solution serait impossible, à moins que la somme correspondante due à titre d'intérêts ne fut déjà incorporée pour une valeur absolue, dans la somme figurant le capital".

In another case custom was the standard by which three arbitrators determined whether one party's behaviour was sufficient to justify the other party rescinding the contract. The Swedish plaintiff agreed in 1948 to sell and deliver to the (Federal) German defendant 250 prefabricated houses. The defendant repudiated the contract because of late delivery due to the difficulty in obtaining an import licence from the occupying authorities. The plaintiff brought these arbitration proceedings claiming damages for wrongful repudiation of the contract. After lengthy discussion the arbitrators held German law to apply.

One defence put forward by the buyer was that the plaintiff was guilty of fraud as he sold the goods as his own manufacture when in fact they had actually been made for him by a third corporation. The arbitrators found this not to be fraudulent; on the contrary this type of arrangement, either through subsidiary or sister-companies or under licence, was increasingly common in international business. The arbitrators stated:

"Nous venons de dire qu'il est d'usage courant dans le commerce international, que les maisons d'exportation ne produisent pas elles-mêmes les marchandises qu'elles vendent. La défendresse n'avait donc aucun raison de supposer, même si la demandresse promettait la livraison en grandes quantités, que celle-ci fabriquait les maisons de bois dans ses propres entreprises ou, au moins dans des entreprises se trouvant sous son contrôle économique". (Emphasis added).
371. A clear application of "commercial usages" can be seen in an award concerned with the validity and effect of a bank guarantee. The contract between Swiss and Iranian parties was a straight sales contract, supported by a credit arrangement and a bank guarantee. The buyer failed to effect the bank guarantee as required. The arbitrators considered the legal character of both the credit and guarantee contracts. Despite having made a positive determination of Swiss law to govern the relations between the parties, the arbitrators applied the supra-national standard of banking usages rather than Swiss law when determining the effect of the bank guarantee. The arbitrators stated:

"En s'abstenant de la faire et ne le précisant pas, il apparait manifeste que la garantie "acceptable" pour une banque doit s'interpréter comme une garantie valable et conforme aux usages bancaires". 2

Similarly in another case where a dispute arose out of an agreement between (Federal) German and French publishing houses whereby the German had been granted the exclusive right to market and sell in German speaking countries the French companies' French-German, German-French, dictionaries. It was agreed that the German publisher could print the dictionaries himself in Germany, for which the French publisher would reimburse him his costs. What was uncertain was upon whom the risk of the dictionaries not being sold fell. There was no dispute on the facts or in law. The parties submitted to arbitration the questions of what had they decided and their respective obligations arising therefrom. The three arbitrators looked to the customs of the publishing business and held that the risk fell on the German publisher. The arbitrators stated:

"Que l'absence de toute précision à cet égard dans le contrat intervenu entre les parties, deux grandes maisons d'édition, parfaitement au courant de ces usages et de ces nécessités pratiques ou qui doivent être censées l'être, corrobo re pleinement cette interprétation selon laquelle les parties ont entendu que les frais de composition restent à la charge de [Société O.B]".

Again ICC arbitrators resorted to the practices and usages of international trade when they found it not possible to choose a national system of law to apply. The dispute arose out of a contract between a Japanese seller and a Lebanese buyer and the effect of the law of the place of importation. Each party argued his own national law to be applicable. The arbitrators resolved the problem by persuading the parties to accept their applying the relevant international commercial usages. They stated:

"Les parties ne se sont pas mises d'accord dans le silence du contrat, sur une loi dont elles revendiquaient l'application pour régler la difficulté d'exécution à laquelle a donné lieu le contrat ... mais au contraire, elles ont demandé l'application de leur droit national.

Le contrat devant être exécuté au Liban en Syrie et en Jordanie, il est certain que l'importateur libanais était obligé de respecter les lois de police des pays d'importation et que la partie japonaise ne saurait venir prétendre que ces lois ne lui sont pas opposables.

Tout commerçant d'un pays, qui cherche à vendre ses produits dans un autre pays, est tenu de respecter les lois de police du pays d'accueil de sa marchandise et ne saurait prétendre ignorer ou ne pas se soumettre aux lois de police ou à la réglementation relative à l'importation de ses marchandises, surtout lorsque cette loi ou reglementation existait à l'époque de la signature du contrat.

Le contrat devait être exécuté dans trois pays différents. La fixation, pour son application, d'une loi particulière présenterait quelques difficultés. Les parties ont cependant manifestement entendu se référer aux principes généraux et aux usages du commerce international dans le cas de l'espèce".

Eastern European Awards

372. Despite their more rigid framework, references to custom and usage have also been made in awards of the eastern European arbitration tribunals. For example, in one award the Soviet FTAC did not even bother to consider the question of the applicable law; they based their award entirely on the "established international trade practice". An Argentinian corporation accepted goods sent to them by a Soviet foreign trade enterprise for sale on the Argentinian market. Due to political upheavals in Argentina, the Argentinian corporation suddenly ceased trading, went into liquidation, dismissed their staff and left all property in their possession, including that belonging to the Soviet enterprise, unprotected and free for anyone to help themselves. This resulted in a total
loss of the Soviet owned property, valued at $120,500.00. The Soviet enterprise claimed damages. The FTAC began their award stating:

"According to the established international trade practice, the duties of the consignee are that he must exercise utmost care in selling the other party's goods in his possession and protect the interests of the consignor in all respects. The consignee is, therefore, under a duty to have custody of the goods entrusted to him for sale in such a way as to prevent the consignor from suffering any losses due to improper safekeeping; to inform the consignor of the market conditions; to inquire of the consignor about instructions in connection with a change of market situation; to secure prices most profitable for the consignor, etc."²

These basic duties the Argentinian corporation had clearly not performed. The claim of force majeure, that the internal affairs in Argentina made it impossible for the consignee to take adequate care of the Soviet enterprise's property, was not substantiated. Thus the award states:

"... in accordance with the prevailing practice in international trade ..., the Foreign Trade Arbitration Commission finds that the consignee is liable to the consignor for all losses inflicted by him on the latter through his non-taking measures to protect the consignor's interests as aforesaid".³

An interesting award⁴ of the Czechoslovak arbitration tribunal concerned the failure of the Turkish defendant to deliver 650 tons of lemons as agreed. The defendants claimed variously that the contract had been cancelled, that the negotiated price was too low and that they were unable to obtain the necessary export licence. They declined to acknowledge or to participate in the arbitration proceedings. The arbitrators considered the question of the applicable law, which following the parties' contract was Czechoslovak law, as the law of the buyer. However, after finding for the Czechoslovak plaintiff, the tribunal considered the interest payable on the damages. The arbitrators looked to commercial usage; reference to Czechoslovak law - despite it being the law of the contract and of the forum - was subsidiary. The arbitrators stated:

"The moratory interest at the rate of 6 per cent per annum is a current rate prevailing in the trade, and it corresponds to the interest usually required in cases of business transactions; this otherwise follows both from the deposition of the witness, Jan Sucan, as well as from the provision of Section 231, par. 2 of the Act No. 101/63, C. of L."⁵
CHAPTER V. APPLICATION OF AN EXTRA-LEGAL STANDARD

373. In many cases no question of law is involved. The dispute concerns the meaning of a particular term in the contract, and/or the existence of certain factual circumstances, and/or whether the parties have adequately performed the contract, the effect of a failure to perform their obligations under the contract, and/or the effect of a supervening occurrence or some extraneous but fundamental and relevant event. In resolving these questions, arbitrators may have no need to refer to any legal standard.

The particular character of international arbitration and its role in international trade, enable arbitrators to apply non- or extra-legal yardsticks to disputes before them. Such yardsticks differ from case to case, and depend upon the contract terms, the arbitrators and the particular facts of the case. These extra-legal standards can be discussed in two parts: (i) the contract per se; (ii) socio-commercial criteria.

A. The Contract Per Se

1. THEORY

374. Every contract has a specific object; this object is its very essence, its "raison d'être". To ensure that the contract's object is realised, parties will attempt to stipulate in clear and unambiguous language how and when the contract is to be performed. To this end contracts are invariably carefully drafted to describe expressly, inter alia: the respective obligations of the parties; the times and mode of performance; the effect of late, defective or non-performance (e.g. penalties payable, the right to terminate the contract); the circumstances which justify non or varied performance of the contract (e.g. some supervening force majeure event); the amount, mode, time and place of payment; the rendering of periodic accounts (where relevant); the national law applicable; the forum in which any dispute shall be brought. Detailed drafting of this kind is particularly prevalent in international contracts and, needless to say, the more involved its object the greater the need for detailed contract provisions.
However carefully and extensively a contract may be drafted disputes and disagreements will still occur. The arbitrator — like the judge — asked to rule on a contract dispute will look first to the contract itself, its object, its terms and the surrounding circumstances. From his objective stand-point, an arbitrator will invariably try to give effect to and enforce the contract as it was agreed between the parties. The law, whatever system is applicable, is a secondary matter; the actual terms of the contract, as evidence of what the parties intended, is the yardstick applied.

The actual contract provisions provide the essential ingredients necessary to resolve any dispute between contracting parties. We have seen the pre-eminence of party autonomy in the determination of the system of law to govern the contract. However, except where of an imperative character, rules of law only apply to fill lacunae left by the parties in the contract. Thus in a dispute between Italian and Spanish parties, a Swiss arbitrator noted at the outset of his discussion of the law to be applied:

"Dans la mesure où les questions litigieuses se trouvent réglées par les parties dans le contrat et où cette réglementation contractuelle ne contrevient pas aux dispositions impératives des deux droits en présence, il en effet, permis de les résoudre sur la base du contrat".

Where the contract contains clear and express provisions, the doctrine of party autonomy requires, once again, that those provisions should be respected and enforced. Hence arbitrators seized of a dispute will try to determine what the parties actually intended by their wording in the contract and will give effect thereto.

International arbitration instruments

The importance of arbitrators giving effect to the actual terms of the contract is recognised in the major international arbitration instruments. The last line of article VII(1) of the European Convention on International Commercial Arbitration 1961 provides:
"... the arbitrators shall take account of the terms of the contract and trade usages".¹

The last lines of article 38 of the UNECE Arbitration Rules and article VII (4)(a) of the UNECE Rules for Commercial Arbitration are in identical form.²

The provisions impose an obligation upon the arbitrators to keep in mind the contract terms when applying the law chosen by the parties or determining the law otherwise applicable.³ The "terms of the contract" are autonomous in themselves and alone describe the character and content of the contract. The applicable law will only supplement the contract where the terms are ambiguous or incomplete or where the law is of a mandatory character.

The recent UNCITRAL Arbitration Rules 1976 are in clearer terms than the foregoing rules. Article 33(3) provides:

"In all cases, the arbitration tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction".

This provision is quite unambiguous. The actual terms of the contract are the yardstick which the arbitrator must use to resolve any dispute arising out of a contract. Appropriate trade usages and the rules of the applicable law are aids to which the arbitrators may refer; however the contract terms remain the main instrument for the arbitrators decision.

Rules of institutional arbitration tribunals

377. The amended Rules for the ICC Court of Arbitration 1975 provides in Article 13(5) that the contract terms must be applied by the arbitrators.

The rules provide:

"In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages".

The Arbitration Rules of the Bradford Chamber of Commerce aim to give a clear and prima facie importance to the contract terms. Hence the rules require (article 8(a)) the arbitrators to "consider statements of the parties, and such other materials as the parties may have been required or permitted to
Thus the arbitrators must not only look at the written contract and at any correspondence between the parties but also at what the parties actually intended.

2. **PRACTICE**

378. In many awards the reader can sense a definite, a clear desire on the part of the arbitrators to interpret the contract as the parties intended it and to give effect to the contract terms. However this feeling can rarely be substantiated from the actual expressed reasoning of the arbitrators in the award. Indeed, the true reasoning is often obscured by the arbitrators discussions as to the applicable law and customs and even by a positive application of a particular legal provision.

In some cases arbitrators do give expression to the extra-legal influences which have induced them to enforce the contract. A few examples will suffice.

a) **Enforce contract**: Pacta Sunt Servanda

379. The desire to enforce the parties agreement is based on the latin maxim, fundamental to every system of law and justice, PACTA SUNT SERVANDA: agreements must be performed. By their contract the parties have given certain undertakings as to performance; the arbitrators will hold them to their respective undertakings. A party who has not performed his part of the contract will be obliged to do so; or he may be ordered to make monetary compensation for his non-performance. Equally he will not be allowed to complain about the other party's failure to perform. This will rarely necessitate any question of law: the contract has or has not been performed. Arbitrators will be reluctant to allow a quirksome legal provision in an appropriate legal system to justify non-performance of the contract.
There are of course certain occurrences which may justify non-performance of a contract e.g. force majeure, supervening illegality. What these occurrences are is a question of law and will necessitate the arbitrators making a positive choice of law.

380. One simple but clear example of an arbitrator enforcing the contract can be seen from an award between (Federal) German and (Oklahoma) American parties. The American defendant agreed to sell to the German plaintiff magnesium of a certain quality. The buyer made it clear that the quality of the magnesium was of fundamental importance. When the magnesium arrived it was inspected and accepted. When melted down however it was found to be below the contracted standard. The buyer claimed damages; the lower grade magnesium was of no use to him. The seller argued that as the goods had been accepted it was too late to complain even though only by melting the magnesium - a process not possible at the time the goods were inspected - was it possible to establish the quality of the consignment. The Norwegian arbitrator took a realistic view of the contract and held that it had not been adequately performed. The arbitrator found:

"By receiving raw magnesium of a quality inferior to the one ordered [the buyer] has suffered a loss for which [the seller] must be liable. It is the obligation of a seller to deliver the goods exactly as contracted for and failing to do so, to indemnify the buyer for any loss caused thereby. This obligation is well established in the legal systems of all civilised nations and is of particular importance in international trade. It needs no further explanation to point out the impossibility of promoting international trade if a buyer should be left to the mercy of the seller's fulfillment of contractual obligations agreed to".

(Emphasis added).

Eastern Europe

381. Though relying on Czechoslovak law, the Czechoslovak arbitration tribunal expressly applied the pacta sunt servanda principle to a contract between a Czechoslovak foreign trade enterprise and a Turkish export corporation. The foreign trade enterprise had purchased from the Turkish defendant 650 tons of
lemons. The defendant failed to deliver with the result that the plaintiff who had resold the lemons became liable to a penalty of 333216 Czechoslovak crowns by virtue of his inability to deliver the lemons. The plaintiff claimed to be indemnified in this amount by the defendant. The arbitrator rejected the defendant's purported explanations for non-delivery and held:

"... the defendants did neither within the said terms nor later on effect the delivery of the contracted goods.

"The principle, pacta sunt servanda (the contracts must be fulfilled), is also observed under Czechoslovak law, whose application has been agreed between the Parties under Article 16 of the said General Terms of Sale of the Plaintiffs. Thus, if the Defendants made a valid agreement in respect of the purchase price, i.e. that under Article 5 of the same contract this purchase price will be one hundred and twenty one clearing USA dollars (Cl.USA $121 -) per one (1) ton of lemons, they cannot contest later on this purchase price and refuse to deliver the contracted goods, alleging that the purchase price is low".

CMEA Arbitration

382. Despite the direct applicability of the General Conditions in inter-CMEA trade, arbitrators still aim where possible to enforce the contract per se. For example, in one case a Hungarian foreign trade enterprise sold lorry chasses to a Bulgarian enterprise. Delivery was to be to barges provided by the buyer. The seller failed to deliver the chasses to the barges within the required time and the Bulgarian buyer claimed damages for delay. The defendant argued his late delivery was excused or at least ameliorated because the barges were not available at the required date. The Hungarian arbitration tribunal rejected this argument: the defendant's late delivery was due to his tardiness and not the late arrival of the barges. The award states:

"... c'est en vain que la partie hongroise prétendant que le retard était aggravé du fait de l'arrivée tardive des péniches. Du moment que la partie hongroise livrait tardivement, il était inutile de rechercher d'après le Tribunal Arbitral si les péniches étaient fournies en temps voulu".

Similarly it will be recalled that in a dispute before the Czechoslovak arbitration tribunal, the arbitrators applied the doctrine of pacta sunt servanda on the basis that it was fundamental to both systems of law to which the parties were normally subject. There the Czechoslovak defendant cancelled a contract
for certain mechanical devices when the re-export contracts he had anticipated did not materialise. The German (Democratic) seller claimed damages for breach of contract. The arbitration tribunal found for the plaintiff and held inter alia:

"Ce principe de "pacta sunt servanda" représente un principe fondamental gouvernant aussi bien le droit civil de la République Democratique Allemande que celui de la République Socialiste Tchecoslovaque".

b) Quality and technical standard arbitration

383. Obvious cases in which an award can only be based on the contract terms are quality and technical standard arbitration. Where a contract for the sale of goods is based on a sample, the question for the arbitrators will be whether or not the goods delivered are of the same quality as the sample. This will require only a simple comparison.

Similarly where a contract is for the sale of a particular commodity (e.g. corn, oil, olives, nuts, silk, cotton, leather, etc.) of a specified quality or grade, the arbitrators' role is relatively straightforward. He need determine only (i) what grade or quality goods the contract requires be delivered, and (ii) what grade or quality goods were actually delivered or made ready for delivery. By comparing the two findings the answer will be obvious. Here, as with a dispute arising out of a sale by sample, the determination of whether the quality of the goods corresponds with the contract involves absolutely no question of law.

A dispute over the quality of iron ore was the subject of an ICC award between a mine in Portuguese Goa and a Dutch iron ore dealer. The Dutch buyers had agreed to buy from the Goan mine 40,000 tons of iron ore. As the ore was for resale they specified certain chemical contents and in particular 1.15% manganous oxide. When the first quantity of ore was delivered it was found to have only .32% manganous oxide. The seller notified the buyer that the remainder of the ore would contain between .187% and .487% manganous oxide.
As this was unacceptable to their customer, the buyers cancelled the contract. The sellers brought arbitration proceedings claiming damages for wrongful breach of contract. The buyer contended that the defendant was in breach of contract by not delivering goods as per the contract and he counter-claimed for his loss of profit i.e. the difference between the purchase price and his resale price.

The general principle the arbitrators stated as follows:

"Where the seller contracts to sell ore of a certain description, then, as a general rule, the buyer is entitled to reject any ore which does not comply with that description, and to cancel the contract if it is reasonably certain that future deliveries also will not comply with the description."

Then, on the facts, the arbitrator held:

"We find that the Claimant's ore did not comply with the description given in the contract. A manganese content of less than .5% is not "approximately" the same as one of 1.15% : an ore containing less than .5% manganese is not "approximately" the same as one containing 1.15%. The use of the word "approximately" permits some deviation from the prescribed percentages, but not so great a deviation as in this case.

"We are therefore of the opinion that the Respondents were entitled to cancel their contract with the Claimant on the ground that his ore did not comply with the contract description.

"The Respondents have counterclaimed damages for the Claimant's breach of contract, limiting their claim to the sum of £2,500. In our opinion they are entitled to recover this sum. The Claimant's breaches justified them in cancelling the contract. The German buyers' justifiable refusal to accept further deliveries gave the Respondents no option but to cancel. If the contract had not been cancelled the Respondents would have made a profit of at least 7/- a ton, being the difference between the price of 125/6d at which they had agreed to resell to their German customers. On the undelivered tonnage of 37,050 tons the Respondents' profit would have exceeded £2,500. The Claimant's breaches of contract were the direct cause of the Respondents' losing this profit. It was a loss foreseeable by the Claimant when he made his contract with the Respondents, for he knew that they were buying for resale."

Equally, though intrinsically far more difficult to resolve with technical standard arbitration, the arbitrators will need only determine (i) what was the
capacity or output or speed promised and (ii) what in fact is the capacity or output or speed of the actual plant or machine delivered. The arbitrator need only look to see whether the latter fact corresponds with the former undertaking. Here again no question of law is involved.

c) Meaning of contract: objective interpretation

384. In many cases arbitrators need only determine what the parties intended and what they understood by the terms used in their contract at the time of contracting. This can be clearly seen from several of the well known ad hoc arbitration awards, where despite the frequent discussions of the law and customs to apply, the major task of the arbitrators was to investigate and uphold the actual agreement of the parties. In the Abu Dhabi award Lord Asquith tried to construe the contract as it was understood when concluded in 1939, before the "continental shelf" doctrine had emerged. In Ruler of Qatar v. International Marine Oil Company 1953, Sir Alfred Bucknill as referee tried to determine what the parties actually intended to be the effect of the first payment: was it a gratuitous payment to the Sheikh or was it rent in advance for the concession area. In the Aramco award again Professor Sauser-Hall had the task of determining whether the concession agreement granted by the Saudi Arabian government included the right to arrange freely and by any means of transport the export of petrol and petroleum products from Saudia Arabia. In all these cases the arbitrators tried to look objectively at the contract, the surrounding circumstances and the subsequent performance of the contract to establish what the parties intended. By their awards they tried to give effect to the parties' agreement.

d) Meaning of contract: subjective interpretation

385. In some cases arbitrators try not only to determine objectively what the parties intended but also to support that finding from the actions of the parties. Thus the arbitrators look at the written documents, memoranda,
letters and the contract itself, together with the parties' performance of the contract up to the time of the dispute. So for example, in one dispute between a Belgian manufacturer of bicycle parts and a Dutch bicycle dealer, an arbitrator had to determine whether in fact any contract existed. The Dutch defendant ordered on 20 September 1950 5000 bicycle ball-bearing units and 1500 chrome pedal units from the Belgian plaintiff. The latter confirmed the order on 16 October 1950. In January 1951 the Belgian factory notified the Dutch corporation that they were ready to deliver the first instalment and the bulk of the goods ordered. The Dutch company refused to accept delivery and denied the existence of any contract with the plaintiff. Later in that same year the defendant accepted delivery and paid for goods similar to those in the disputed order. The arbitrator had to determine at the outset whether the order of September 1950 created any contract between the plaintiff and the defendant. He looked at the facts of the parties' agreement and held:

"L'accord de vendre est manifesté et consigné d'une façon parfaite dans la confirmation de vente du demandeur au défendeur du 16 octobre 1950, confirmation contenant par ailleurs tous les éléments indispensables caractérisant une opération de vente.

L'accord d'acheter de la part [du défendeur] résulte:
1. du fait qu'il n'y a pas eu d'objection de la part [du défendeur] à la confirmation de vente [du demandeur] du 16 octobre 1950. Le dossier ne contient aucune pièce que [le défendeur] pourrait invoquer prouvant une manifestation de volonté contraire à celle manifestée par [le demandeur]. La pièce prouvant l'accord de vendre prouve donc en même temps, par le manque de toute autre pièce en sens contraire, la volonté d'acheter de la contrepartie;


There was a binding agreement between the parties, supported not only by the facts but also by the subsequent conduct of the parties.
Again when a dispute arose as to whether a certain type of work was included under a contract to convert a troopship into a passenger ship, the arbitrator looked to the parties agreement. The three plaintiffs, English, Panamanian and Liberian corporations, were respectively the owners and charterers of the ship; the defendant was a Dutch ship builder. The defendant undertook to convert the ship so that it would be "ready to go into passenger operation". When the conversion work on the ship was almost complete the defendant began installing a solid ballast. After about half the required ballast (estimated to be about 1850 tons) had been installed, the defendant notified the owners that they would complete the ballast subject to the owners undertaking to pay 1900 Dutch florins per ton of ballast. This was five times the then current market price for solid ballast. The arbitrators had to determine whether ballast was included in the parties agreement. They began by describing the nature of their mission:

"...it is necessary to analyse the agreement and to search for the real intention of the contracting parties in order to determine whether or not the ballasting must be considered as an additional work for which the price had to be agreed upon prior to such work being taken in hand."

The arbitrators then looked at the documents which indicated the parties' intentions. They stated:

"The basic intention of the parties is clearly indicated in the defendant's bid of the 7th May, 1963, in the Memorandum of the meeting of the 9th/10th May, 1963, and in the agreement of the 18th May, 1963: at the latest on a fixed date (postponed until the 29th February, 1964) [the defendant] had to deliver, undocked, a vessel ready for commencing the carriage of passengers."

The arbitrators construed the agreement in accordance with its normal meaning. The dispute was concerned with whether or not the fitting of solid ballast was an integral part of the agreement. If delivered without the solid ballast the ship would not have been "a complete vessel ready to go into passenger operation". Furthermore, that the defendant "commenced installing about half the solid ballast required before having even quoted a price" was support for the claimants' contention that ballast was naturally included in the original contract. The
The arbitrators held the shipbuilders not entitled to extra-payment for the ballast.

e) Meaning of contract: commercial interpretation

It is implied that whatever the nature or object of a commercial arrangement, the parties will do all they can to fully and effectively perform their obligations under the contract. By corollary it is equally implied that parties will do nothing to sabotage or render impossible performance of the contract by the other party. These two implied undertakings are so fundamental to all commercial relations that they are often forgotten. They form part of the mass of unwritten commercial rules which are the basis of modern economics.

There are cases where quite clearly and intentionally one party does not perform his obligations finding some reason to explain his non-performance, or does all he can to undermine the contract and make impossible or pointless performance by the other party. In these circumstances arbitrators will interpret and enforce the contract in accordance with these generally accepted commercial standards.
A positive failure to perform or attempt to perform a contract was the subject of one ICC award. There a Belgian arbitrator had to determine the obligations of a concessionaire under a licence agreement in the light of accepted commercial understanding. The two plaintiffs, French and Lichtenstein corporations, were respectively the owners of several patented "bottle-stop" processes in France and Lichtenstein. The defendant, a German corporation, was the manufacturer and owner of a patented machine for making plastic containers. The plaintiffs granted to the defendant an exclusive right to manufacture and sell their machine capable of exploiting their "bottle-stop" processes. The defendant was to pay a licence fee of 7500 Swiss francs plus a slowly reducing royalty in respect of each machine sold. In fact the defendant failed to use the plaintiffs' processes claiming they were not commercially viable; there being other less expensive and similar processes available. The plaintiff instituted arbitration proceedings claiming damages for breach of the licence agreement and loss of revenue. The defendant argued that he was under no obligation to sell the plaintiffs' patent - only if he sold it he was obliged to pay a certain royalty. The arbitrator held the defendant to have an obligation, not merely a right, to exploit the plaintiffs' patents - especially where royalties were dependant upon the level of sales. Indeed, a concessionaire had a duty to use his best efforts to sell the licensed processes. The arbitrator stated.

"Attendu qu'en dehors de l'obligation légale d'exploiter, qui en cas de licence est à charge du licencié, celui-ci a aussi envers le cédant l'obligation de faire fructifier l'invention.

En général, il en sera ainsi surtout si la rémunération du brevet consiste en une part de bénéfices. Même, abstraction faite de cette hypothèse, on peut dire que si le breveté concède une licence, c'est précisément en vue d'assumer l'exploitation et la diffusion de son invention.

Attendu que les conventions doivent être exécutées de bonne foi; qu'il a de la sorte été jugé que le caractère essentiel de la convention de licence est que le concessionnaire se met, en quelque sorte, à la place du cédant; il doit exploiter avec les mêmes soins, la même diligence le même zèle que le breveté lui-même; il doit s'efforcer en tous cas de propager le brevet et d'en étendre l'application comme s'il exploitait son propre brevet; de ce principe découle, pour le cessionnaire, l'obligation de s'appliquer à prôner le système et à le faire prévaloir sur les systèmes concurrents et à s'abstenir d'employer ou de recommander ceux-ci tout comme s'abstenirait le breveté lui-même."
Common commercial understanding was here the yardstick which the arbitrator relied on to interpret the parties' license agreement. The plaintiffs were unlikely to have granted an exclusive licence of their patented processes without at least some undertaking by the licensee that he would make a positive effort to exploit and sell these processes. The defendant did not advertise or otherwise attempt to promote the sale of the machines containing the patented processes; a sign that he did not intend to develop or produce the machine. In fact the defendant did not develop one machine capable of using any of the plaintiffs' processes. This total failure to perform or attempt to perform the contract was a breach of all commercial norms and standards. 2

388. In the Lena Goldfields Arbitration 1 the Soviet government's attitude and policy was found to have made continued performance of the contract impossible. That case arose out of a 1923 Concession agreement under which Lena had been granted for a period of upward of 30 years exclusive rights of exploration and mining in several regions of the USSR. Lena was obliged to make a minimum capital investment within the first 7 years of the concession and to pay certain royalties on production; Lena was entitled to sell the minerals recovered both within and without the Soviet Union; Lena was entitled to employ Soviet staff and labour, but Soviet trade unions were not to have the right to interfere in the "administrative economical activities of Lena"; Lena undertook to give the government complete information as to their explorations and the company's conclusions therefrom; Lena's property was to have the protection of the Soviet police and military authorities where necessary. This agreement was based on the Soviet policy to encourage development and promote employment in the USSR.
In 1929 Soviet government policy and the cooperative attitude of the Soviet authorities radically altered. Indeed they did all they could to obstruct Lena from carrying out her concession. The Soviet government paid Lena for gold bought at an unfavourable and totally unrealistic rate of exchange for the rouble against the pound sterling; the government failed to provide police protection resulting in losses through theft in excess of £1m; the government refused to allow Lena access to certain areas within the concession agreement; the government denied Lena the right to freely sell the minerals mined as agreed; the government caused Lena workmen and employees to resign from Lena establishments in different parts of the Soviet Union resulting in damage to property, seizure of confidential documents and the arrest of over 130 Lena employees.

The effect of the Soviet government's policy was found by the arbitrators to result in "a total impossibility for Lena of either performing the Concession Agreement or enjoying its benefits". The Arbitrator thus held:

"...the conduct of the Government was a breach of the contract going to the root of it. In consequence Lena is entitled to be relieved from the burden of further obligations thereunder and to be compensated in money for the value of the benefits of which it had been wrongfully deprived".

The arbitrators attempted to determine what the parties had agreed and gave effect to that agreement. The contemptuous attitude of the Soviet Government with respect to the concession agreement was a flagrant and intentional breach of the contract.

B. Socio - Commercial Criteria

1. THEORY

389. As a general rule arbitrators are obliged to reach their decision in accordance with the appropriate rules of law. They are not free to depart totally from the base of legal rules and to decide according to their own notions of what, in the circumstances, they consider the best, the fairest
or the most desirable result. Even when invested with the power of "amiables compositeurs" or to decide *ex aequo et bono* arbitrators are not left totally to their own inclinations. They are still obliged to respect the fundamental rules of the *lex mercatoria*, and in the view of most authorities, the imperative rules and public policy of the "otherwise applicable law." 2 To allow otherwise it is argued could lead to total anarchy.

390. If this rule was followed strictly there would be little, if any, advantage in going to arbitration in preference to normal State courts. Arbitration proceedings can be distinguished from courts of law by two factors. Firstly, as we have already seen, the diversity of reasoning by arbitrators in reaching their awards — all on the basis of law. This is not surprising particularly with arbitrators coming from all around the world, being of varied backgrounds and qualifications and having greatly differing views towards commerce, economics, law and politics. The common denominator binding most arbitrators — and resulting in some degree of stability in international commercial adjudication — is their general responsibility as the judges of international trade.

Secondly, though it is rarely admitted or verbally expressed, is the fact that arbitrators are influenced by certain criteria extraneous to the contract. It is not possible nor would it be politic for arbitrators to acknowledge the role played by certain socio-commercial factors. Whilst to admit their influences would certainly undermine confidence in arbitration, their very presence, albeit unofficial, is one of the major strengths of international arbitration. Nevertheless, it often appears from the simple reading of an arbitration award that the arbitrators have been influenced by socio-commercial criteria — justice between the parties, commercial *bona fides* and the needs of international trade. Needless to say, except where the arbitrators are authorised to decide as "amiables compositeurs" or the award is made *ex aequo et bono*, these factors are rarely expressly mentioned in the award itself; their influence is manifested in the actual award.
The extra informality and flexibility inherent in arbitration proceedings, enables arbitrators to take account in their award of the attitude and behaviour of the parties. It is rare in any dispute that everything can be classified as black or white. Even where the law applicable attributes the blame totally to one party, that does not mean the conduct of the other party will have been beyond reproach. So arbitrators, whilst deciding in accordance with the law applicable, may in the interests of justice in the particular case, make an award which effectively takes account of the conduct of the parties, i.e. by computing the measure of damages accordingly.

This arbitrary exercise of discretion when determining the measure of monetary compensation payable is particularly valuable in awards concerning contracts between parties who have been doing business together for some time and who, despite their existing differences, would mutually benefit if their commercial relations were to continue. This is even more important where the dispute arises out of a contract of a continuing or long term character, i.e. a concession for mineral exploration and exploitation, an economic development contract, a cooperation or joint-venture agreement, etc. These are contracts in which mutual trust, goodwill and understanding are essential. That a dispute has arisen will invariably mean one of the foregoing ingredients is lacking. It is the arbitrators' duty not only to resolve legally the dispute submitted to them, but, if necessary, to help repair any breach of trust, reconcile any breach of goodwill and iron-out any misunderstanding between the parties. If one party is dissatisfied with or feels aggrieved at the award, the future relations between the parties may be jeopardised and in a long-term contract irreparably harmed. Arbitrators hence use their discretion to assuage grievances and eliminate harboured grudges; their weapon for this task is in the break down of damages in the actual award. Most frequently this is manifested by the arbitrator determining the actual measure of damages payable from a discretionary and equitable angle rather than by strictly following the rules of the applicable law. Where the loss cannot
be honestly attributed to the conduct of either party (e.g. some force-majeure or other event beyond the control of the parties), arbitrators do, on occasion, whatever the legal position, require the parties to share the loss. Thus the cause of the break-down or frustration of the contract is treated as a common-hazard to be faced and the ensuant loss a common loss to be borne by both parties jointly rather than by one party alone. This policy may not only prevent the bankruptcy of one party but it also creates a bond between the parties which will strengthen their understanding and their business relations.

2. PRACTICE

a) Amiable Composition

392. Ad Hoc Award

Although the arbitrators drew their authority from the parties' agreement, it will be helpful at the outset to look at two awards decided by "amiables compositeurs". In Société Européene d'Etudes et d'Entreprises v. the Popular Federative Republic of Yugoslavia two arbitrators, Dean Georges Ripert and Judge André Panchaud, had to decide whether a contract price should be revalued to take account of a devaluation in the money of account. In 1932, the plaintiff, SEEE, undertook to build a railway in Yugoslavia and to provide certain necessary rolling stock. Payment was made by various Yugoslav government bonds and securities. These bonds and securities fell due during and immediately after World War II when the Yugoslav government were suffering from an acute shortage of cash and were unable to make any of the necessary payments. Some years after the war the parties agreed the amount owed by the Yugoslav government, including interest, calculated according to the original contract value, amounted to 266,000,000 French francs. However due to the franc no longer being indexed to gold it had effectively been devalued. SEEE consequently claimed 8,336,060,075 French francs, the agreed outstanding debt, plus interest, revalued.
Expressly deciding as "amiables compositeurs" the arbitrators held the contract price should be revalued. The reasoning was simple: the need for revaluation was envisaged by the provision for arbitrators to act as "amiables compositeurs"; the previous dealings between the parties supporting this conclusion; the refusal to revalue by the Yugoslav government would be an act of mala fides as they had already received the benefit of the contract and were themselves responsible for an unreasonable delay in payment. The arbitrators stated:

"Considering that the arbitrators must decide if this difference (value of 1932) ought to be paid to Plaintiff, according to their claim, or if, on the contrary, Defendant is entitled to profit by it owing to the engagements which are binding the parties, and although latter paid in partly depreciated francs a prestation the economic value of which was full and entire; that, in order to determine this point, the arbitrators are intending to decide as "amiables compositeurs", as provided for in the arbitration clause (Art.XVII of the contract):

"Considering that, when expounding the contract, the arbitrators note first of all that, if it does not expressly give a guaranty to Plaintiff as concerns the risks of devaluation of the franc, it has nevertheless attempted, by the terms of Art.VIII, to palliate the damageable consequences which might result for the parties from the variations of the respective value of the dinar and of the franc; that, taken as a whole, the contract of January 3, 1932 is not at all aleatory, but aims to secure, on the one hand, to Defendant certain works and certain supplies and, on the other hand, to Plaintiff the value corresponding to the value of said works and supplies; that the intention of the parties, at the moment they concluded the contract, was manifestly to stipulate economically equivalent prestations; that, besides, it is consistent with equity that the payment having been delayed during a rather great number of years corresponds to the actual value of the prestations by which the Yugoslav Government benefitted; that the flagrant confirmation of the intention of the parties as concerns this point is to be found in the role of "amiables compositeurs" with which the arbitrators have been entrusted in case of disagreement between said parties;

"Considering that the attitude of the parties after the conclusion of the contract proves it also; that, as a matter of fact, when a depreciation of the dinar occurred in 1933/1934, the Yugoslav Government requested by letter of October 25, 1934, compensations for the perturbation said fall had given rise to, which compensations were amably granted by Plaintiff pursuant to clauses of which the arbitrators have besides not to take cognizance; that furthermore, the parties agreed, at the beginning of the year 1936, that a certain number of the bonds delivered by the Government in French Francs according to the equivalence established by Art.VIII of the contract be converted into dinars by reason of the difficulty the Yugoslav Government met with to obtain sufficient quantities of currency in order to meet their labilities concerning the issued bonds; that the reconversion had to be made according to the same parity, being however specified that the amount would be paid in dinars representing the value of the primitive bond made payable in French francs, value calculated in dinars "on the basis of the Stock Exchange rate with the premium of the date of payment;
"Considering furthermore that, as regards an international contract concluded without speculative intention, it ought to be admitted, as it has been judged, that the devaluation guarantee was meant by the parties, save express convention; that furthermore it would be contrary to good faith that the Government of a State who has ordered and received prestations would refuse to pay the actual value and should intend to derive a profit from the considerable devaluation of the payment currency;

"Considering finally that the losses resulting from the devaluation arise for a notable part from the fact that the Yugoslav Government was in the situation of the delaying debtor and that, according to common law, this Government is obliged, in addition to the moratory interest, to pay damages for the prejudice caused by its delay;

"Considering that, as results from the foregoing, the totality of the contractual prestations received by the Yugoslav Government would be paid only when said Government would remit to Plaintiff the balance between the economic value of its payments and the economic value of the received prestations, drawn up, according to the contract, in French currency of 1932."

The Yugoslav government was thus ordered to pay to SEE 6,184,528,521 French francs (the arbitrators calculations).

ICC Award

393. Of course in many cases an "amiable compositeur" will have no need to resort to equity and will just rely on the contract itself. For example one dispute arose from a licence agreement under which a Luxemburg corporation had granted an exclusive license to the Belgian defendant to exploit in Belgium a special plastic which he had developed and patented and which could be used to insulate a building against fire, noise and the weather. The Belgian defendant was to pay 3 million Belgian francs to the plaintiff: 750,000 to be paid when the defendant created the corporation he intended would exploit the patent (that to occur within 6 months of the contract being concluded); the rest to follow in six equal parts in the months following the creation of the corporation. The question for the arbitrator was whether the clause only required the defendant to pay the plaintiff if he created a corporation and began to exploit the patent, or whether that the 3 million was payable whatever the state of execution of the contract. The French arbitrator, acting as an "amiable compositeur" began his award by stating:

"Attendu, au fond, que le litige portant essentiellement sur l'interprétation de l'article 3 de la convention intervenue, il importe de rechercher, avant toutes choses, quelle a été la volonté des parties à la signature de celle-ci"
The arbitrator continued and analysed the contract terms. He concluded that the defendant having not performed any of his obligations under the contract was in breach of the licence agreement. The defendant was consequently obliged to pay to the plaintiff the 3 million Belgian francs as the minimum contract price.

The arbitrator stated:

"Attendu que, de tout ce qui précède, il ressort que [le défendeur] n'a exécuté aucune des obligations mises à charge par le contrat de licence d'exploitation du 7 décembre 1967, et ce, malgré deux mises en demeure de la demanderesse, par lettre recommandée avec accusé de réception, des 30 juillet 1968 et 15 octobre 1968, qu'il reconnaît avoir reçues;

"Attendu qu'il convient de déclarer résilié à ses torts et griefs exclusifs le contrat litigieux, et de le condamner au paiement de la somme de 3 millions de francs belges fixée à l'article 3 dudit contrat; et ce, avec intérêts au taux de 6% à dater du jour de la demande, ainsi qu'à tous les frais d'arbitrage, évalués à.."

Despite the arbitrator having the powers of "amiable compositeur" there was no reference to equity or justice. Equally no law was discussed. The arbitrator just interpreted the contract and based his award on what he found the parties to have agreed.

b) Justice in the particular case

ICC Awards

394. In some awards where there has been no question of law involved, arbitrators have allowed their notions of justice to influence the content of the award. This can be well seen in one award arising out of a contract for the construction of a breakwater and a quay in the harbour at Straumsvik in Iceland. The plaintiffs who were awarded the contract after tender, were obliged to complete the work within a predetermined period and to work together with the defendant's engineer. The contractor began arbitration proceedings for payment of the contract price; the defendant argued the contractor had not completed the work with the required period. The arbitrators began their award by stating:

"... neither party was blameless in the performance of its obligations and, in addition, there were intervening conditions, including two labour strikes, which interrupted the progress of the works, and the Arab-Israeli War, which blocked a vital piece of the Contractor's equipment in the Suez Canal. There were also physical conditions which could not have reasonably been foreseen by the Contractor in view of definite representations in the tender drawings which proved to be misleading and inaccurate both with respect to the elevation of sound hard rock and to the quantities of material to be removed."
From this starting point the arbitrators analysed the contract terms and the supervening occurrences and finally held:

"However, we do not award the entire amount sought. We believe that initially there was fault on the part of the Contractor in mobilization and early direction of the project and further, we realize that there has not been an auditing of the books of account. For these reasons, we will only award approximately two-thirds of the amount claimed with, of course, full deduction for all sums already paid to the Contractor. We are convinced that there was damage and while this amount probably will not fully compensate the Contractor, we feel that the award as made is the only logical and equitable method of adjustment. We therefore, award the Contractor I.Kr.136,600,000."

A similar approach was taken in a dispute arising from the early termination of an agency contract. The plaintiff, a Brazilian corporation, had been the agent for the German defendant's textile machines in Brazil. Dissatisfied with the plaintiff's representation, the defendant rescinded the contract on the basis that the plaintiff was asking too high prices, not offering an after sales service, giving no guarantee, not keeping adequate stocks, etc.; all factors which contributed to the rather poor sales of the defendant's machines. The plaintiff argued, even if the foregoing were true, the contract was for three years and the defendant could not terminate it before the expiration of that period. The arbitrator took account of both arguments in his award. He stated:

"Attendu que si la résiliation des rapports contractuels paraît justifiée par la nécessité pour [le défendeur] d'avoir dans un territoire important comme celui du Bresil un agent-concessionnaire actif et régulier, il n'en reste pas moins que [le défendeur] a agi brusquement et que, de ce fait, une certaine indemnité s'avère équitablement due [au demandeur]."

Then, having calculated the plaintiff's lost commission at 65,000 DM., the arbitrator felt it only right damages be divided between the parties. Thus the arbitrator stated:

"Attendu qu'il résulte de ce qui précède que les deux parties portent chacune une part de responsabilité dans la rupture du contrat."

In neither of these two awards was there reference to the applicable or any law. The arbitrators were not "amiables compositeurs"; nor had they been empowered to decide ex aequo et bono. Still these awards were clearly determined
outside strictly legal confines. The arbitrator considered the contract terms, the characteristics of each contract, the commercial realities of the situation and the other facts thought relevant. Then, with the foregoing in mind, the arbitrators were able to reach an award which they felt in the circumstances was just and appropriate.

Czechoslovak Award

395. The same approach can be seen in one award of the Czechoslovak arbitration tribunal.¹ The Czechoslovak plaintiff purchased a quantity of cotton from the Syrian defendant. Delivery was to be at the Yugoslav port of Rijeka where the cotton would be inspected as to quality, weight and humidity by the appropriate Yugoslav agency, Jugoinspect. However, at the request of the plaintiff, the cotton was delivered to Gdnya, Poland. When the goods arrived the plaintiff requested Polcargo, the appropriate Polish agency, to inspect the goods. Polcargo's inspection certificate stated that the cotton exceeded both the humidity and weight provided for in the contract. The defendant, in defending himself against the plaintiff's claim for damages, denied the goods were too humid or too heavy, argued that Polcargo's certificate was inadmissible as under the contract only Jugoinspect were entitled to inspect the cotton, and countered that in fact the plaintiff was in breach of contract for allowing the Polish agency to inspect the cargo.

The Czechoslovak tribunal made no reference to law. On the strict terms of the contract the plaintiff was in breach of contract for allowing Polcargo to the goods. However, this was not sufficient justification to refuse to recognise Polcargo's certificate as to the condition of the cotton; after all, had the plaintiff requested Jugoinspect to inspect the cotton they would have asked Polcargo, their agents in Poland, to do it for them. However, weighing up the factors surrounding the case and the nominal breach of contract by the plaintiff, the arbitrators, "appliquant plutot l'esprit d'équité qu'un raisonnement purement juridique",² reduced the damages by one quarter (1).
c) The needs of international trade

396. The fact that a dispute arises out of an international contract will, in some cases, influence the content of the arbitrator's award. In one case the international character of the contract was held sufficient justification for an arbitrator to reject the application of what he held to be the applicable national law. The arbitration was concerned with a dispute between three American plaintiffs, two from New York and one from Maryland, who claimed damages from the French defendants, their agent in France. The defendant challenged the arbitrator's jurisdiction on the grounds that by French law, the law of the contract, the plaintiffs were all not competent to submit to arbitration. The arbitrator found French law to be applicable to the agency contract. Nevertheless he rejected the application of French law to the question in issue on the basis that it was not meant to apply to foreign parties who, while entitled by their personal law to submit to arbitration, were party to a contract the proper law of which was French law. The arbitrator stated:

"I am therefore of the opinion that French law is applicable to the contract but that nevertheless a reliance on article 631 of the Commercial Code is unavailing. French law, unlike many other legal systems, is manifestly not favourably disposed towards arbitration, since it allows it in principle only between merchants. The intention is clearly to protect the non-merchant from arbitration, but this can only apply to French parties. For it is difficult to see why French law should wish to protect an alien from the consequences of arbitration if his own national law allows him to go to arbitration. Moreover, in many States, including New York, no distinction is made at law between merchants and non-merchants; nor is there any obvious reason why the French criterion for a merchant should be applied to aliens whose national law knows no such concept. I am therefore of the opinion that article 631 of the Commercial Code does not invalidate an arbitration clause in a contract between a Frenchman and an alien provided the French party is a merchant, even if the contract is governed by French law. We are dealing here, moreover, with an international contract, to which, in my opinion, article 631 is not applicable."

Whilst here the arbitrator was concerned with the question of the parties' right to submit to arbitration, it is the choice of law reasoning which is particularly interesting. The method used here is reminiscent of the "state interest" theory of the American Currie; except of course the arbitrator has no lex fori and therefore no basic standard from which he sets out. Nevertheless
the arbitrator considered the relevance of French law to the question before him: did article 631 of the French Commercial Code purport to cover such situations? The arbitrator thought not: article 631 applied to domestic commerce; it did not apply in international commerce and certainly not to businessmen who were neither citizens of nor resident in France. While French law was the law applicable to the contract, it was equally clear that to determine the right of the three American plaintiffs to submit to arbitration by French law would be an unintended extra-territorial application of French law, and an unwarranted interference in international trade relations. 4

397. Where the disputing parties have an existing or continuing business relationship arbitrators will invariably be anxious that their award not only resolve the question in dispute but also re-establish the harmonious and working relationship between the parties. In one award this was the influencing factor on arbitrators adopting in their award a compromise offered by the plaintiff during hearings. The Belgian plaintiff sold to the Romanian defendant an installation capable of producing 100 tons of acetylene per day. The parties had been doing business together for some time and had ongoing business. The defendant declined to pay for the installation on the grounds that the pipes were rusty and hence not working effectively; this the defendant argued was because the plaintiff used ordinary steel instead of inoxidizable steel. The plaintiff maintained this was not the fault of the material used but rather because the defendant did not filter the water as instructed. The plaintiff began the arbitration proceedings claiming 951,653 Belgian francs. The three arbitrators held:

"La proposition faite par le vendeur de partager par moitié les frais occasionnés par le remplacement des faisceaux tubulaires constitue une solution en équité propre à éliminer la contestation. Le tribunal arbitral adopte cette situation et condamne le défendeur, au conséquence, à payer au demandeur la somme de 475,826 francs belges."

On the dispute the arbitrators found for the plaintiff. Nevertheless, to encourage their further and existing relations, the arbitrators made an award which divided the loss between the two parties rather than lay the blame on either party.
The Yugoslav ATFEC similarly apportioned loss between contracting parties where exceptionally severe weather conditions and not the parties were responsible for the inability to perform the contract. The (Federal) German plaintiff ordered 200 tons of Dalmatian marasca from the Yugoslav defendant. The contract price was 1600 DM per ton, delivery 3½ months. Soon after contracting the defendant notified the plaintiff that the winter having been excessively severe and run over into the spring the marasca crop was very poor and it might not be possible for him to deliver at the agreed price. The plaintiff replied that he had resold the juice to a Swedish customer and had to insist on performance. Ultimately the defendant said he was unable to deliver the marasca as 95% of the crop had been damaged. To keep his resale obligations the plaintiff purchased frozen marasca at 2.55 DM per kilo. He then instituted arbitration proceedings claiming the extra he had to pay, loss of profit, plus damages. The defendant denied liability and explained his inability to perform on the force majeure weather conditions.

The arbitrators found Yugoslav law to be the proper law of the contract. Articles 55-59 of the Yugoslav General Usages were held to excuse non-performance due to excessive weather conditions. The arbitrators then went on to show that the solution would have been the same had English, German, French or the Uniform sales law been applied. Thus the arbitrators found that the defendant could not be held in breach of contract for his non-performance; equally, the arbitrators felt it unfair that the loss should be totally born by the plaintiff. So the arbitrators held:

"Ayant en vue les conséquences des événements, des dispositions, des usages [art.56(3)] ainsi que le fait qu'on ne pourrait pas imputer au comportement des parties, après le commencement de ces événements, une responsabilité (exclusive) plus grande à l'une d'entre elles, le collège arbitral est arrivé à la conclusion que les pertes et le dommage créés par ces événements, y compris les frais créés par la charge de couverture, doivent être assumés par les deux parties en parts (portions) égales."

This award is eminently fair and just. The contract was a joint agreement, a mutually beneficial venture. The loss, due to bad weather conditions, could not be attributable to either party. Hence the award to share the loss
between the parties. In an award decided by "amiables compositeurs" this award would hardly raise an eyebrow; but it was an award at law. Hence the arbitrators had considered the law applicable and compared its effect to that of various other laws. To then, despite the legal finding, share the loss between the parties, negatives the very legal basis of the award. However if the effect of this kind of award is to create an atmosphere of common loss, to maintain the hitherto amicable working relations, to remove all misunderstanding and ill-feeling and hence facilitate future business between the parties, then such autonomy exercised by arbitrators is to be welcomed.

d) Measure of damages

398. Although occasionally arbitrators may be requested to interpret the meaning of a contract term or the respective obligation of the parties thereunder, most often they are asked to determine the damages payable following the peremptory rescission or the unjustifiable termination or the non-performance or the imperfect performance of the contract. Having found one party to be at fault, the question remaining for the arbitrators is the measure of damages. In national courts damages are calculated in accordance with the appropriate rules of either the lex contractus or the lex fori: it is the forum's private international law rules which provide the answer. The international arbitration has no forum private international law rules. Hence arbitrators must decide for themselves according to which measuring standard to quantify damages: this could be the law of the contract, the lex contractus, the law of the place of the arbitration, the "loi du siège d'arbitrage", the law governing the arbitration procedure (assuming it is other than that of the "siège d'arbitrage"), the lex arbitri, or some non-legal, equitable standard, personal to the arbitrator. It is particularly interesting how often the last possibility is adopted.
399. This type of situation can be well illustrated by an award\textsuperscript{1} made in respect of a contract whereby the Swiss plaintiff undertook to sell a "Buta" gas installation to the French defendant. The latter failed to make any payment – or offer any explanation for his non-payment – for the installation. The plaintiff instituted arbitration proceedings claiming damages for non-payment of goods delivered; the defendant declined to participate in the arbitration. In the absence of any express law the arbitrator held Swiss law, the law of the seller to apply. However in determining damages he did not look to any law, rather he held:

"que les montants réclamés ne paraissent pas excessifs eu égard au temps écoulé et à l'insuccès de la demanderesse de vendre l'installation à un tiers;"

"que l'arbitre estime cependant d'avoir faire masse (sic) de toutes les prétentions formulées et de fixer ex aequo et bono à DM 125,000 l'indemnité due par [le défendeur] tant du fait de la diminuation que de la perte d'intérets et les divers frais encourus, cette somme portant intérêts de 5% jusqu'au jour du paiement".

Again in an award\textsuperscript{2} arising out of a contract by which a Hong Kong corporation sold to a New York corporation 100,000 spectacle frames. The contract price was $100,000. The defendant failed to deliver as promised and hence the arbitration. In the absence of any express choice the arbitrator held the law of New York to apply. However there was no further discussion of law. The arbitrator found that the plaintiff's loss amounted to $142,560; nevertheless his actual award was for half of that amount. The arbitrator held:

"Qu'en l'absence de toute précision sur ces frais, il paraît équitable de les fixer à environ 50% et de réduire le préjudice demandé de ce chef par la [demanderesse] à la somme de $70,000".

A similar approach can be seen in an award\textsuperscript{3} between Chilean and French parties. The Chilean plaintiff was appointed the defendant's exclusive agent in Chile. A dispute arose as to the commission to which the plaintiff was entitled. The contract contained an express choice of French law. The plaintiff claimed 50,000 Fr. francs damages for wrongful breach of contract. The arbitrator
found for the defendant on the facts; as for damages he held:

"De l'ensemble des éléments de la cause, nous évaluons ex aequo et
bono cette compensation à F. 10,000".

As for commission the plaintiff claimed to be entitled to 5% - he claimed
127,409 French francs; the defendant said he was only entitled to 1%. The
arbitrator held:

"Nous estimons, en équité, que le taux de la commission devrait être
de 2%. Ce taux appliqué au montant du marché (prix de base), soit
F. 2,183,336 donne une commission totale de F. 43,666".

400. This same approach can be seen in a large number of awards, made over
a period of years, by a distinguished Belgian arbitrator, Paul van
Reepinghen. In an arbitration concerned with commission owed by a Swiss
and four Israeli corporations to their French agent, the arbitrator, despite
having found French law to apply, stated:

"Attendu que l'évaluation d'un tel préjudice ne peut être, de toute
evidence, faite qu'en équité; que la demandresse postule de ce chef
une somme, qu'elle considère raisonnable, de 440,000 dollars U.S.; que
cette montant paraît toutefois excessif et qu'il convient, dans les
circonstances de la cause, de le ramener à 1/3 environ, soit
150,000 dollars U.S."

Again when dealing with the counter-claim of a French licensor in respect of
an exclusive sales and licence agreement with the (Federal) German plaintiff, the arbitrator having held German law to be the proper law of the contract, held with respect to damages:

"Attendu qu'il échêt dès lors, dans les circonstances de la cause de
fixer en équité le montant du manque à gagner éprouvé par la défendresse
tous de 5000 DM et de condamner la demandresse à lui payer la
dite somme par compensation".

And again, in a dispute arising between a Belgian employer and an Italian
employee, despite an express choice by the parties for Belgian law to apply and
the application by the arbitrator of the Belgian Law on Employment of
12 July 1955, the arbitrator did not look to any law to determine the quantum
of damages. The arbitrator stated:
"Attendu qu'il appert toutefois que l'on ne saurait néanmoins encourager ces moratoires abusifs et qui ont porté itérativement sur les règlements d'indemnités notamment d'expatriation, que ces retards inconsiderés à un agent dont le contrat est résilié et l'expose à des préjudices et à des frais onéreux pour le recouvrement des sommes qui lui reviennent.

"Que dans les circonstances de la cause, il échet de dedommager le demandeur des conséquences préjudiciales de ce retard et de lui allouer 'ex aequo et bono' des dommages et intérêts forfaitairements évalués à la somme de $250.00 - ou leur contre-valeur en francs belges"."
SECTION III  
RESTRICTIONS ON THE ARBITRATORS CHOICE OF APPLICABLE LEGAL STANDARD

CHAPTER VI  
INTERNATIONAL PUBLIC POLICY

401. It remains finally to consider the role, if any, of the doctrine of public policy in international commercial arbitration and to see to what extent, if at all, it restricts an arbitrator's choice of the applicable law or otherwise influences his ultimate award.

Must an arbitrator who, to determine the substantive law applicable, resorts to a national system of private international law, respect the public policy of that system? What public policy is envisaged by the conflict of laws formula in the European Convention? Does the same public policy accompany all the various applications of article VII(1) of the European Convention or will the public policy vary depending upon the interpretation adopted? What where no private international law is considered, i.e. where the parties have chosen the law to apply or the arbitrator has just applied the substantive measuring standard he considers appropriate? Is there a public policy applicable to this situation and what are its effects? Is an international arbitrator restricted by the public policy of the place where the arbitration has its seat? And, bearing in mind that the award may ultimately need to be enforced, to what extent need the public policy of the probable place of enforcement be respected?

We shall consider briefly the meaning and traditional roles of public policy and the public policy which affects international arbitration. Then we shall look at several awards in which arbitrators have been confronted by conflicting policies and at a few court judgements to see how and to what extent national public policies limit the freedom of arbitrators.
A. THEORY

1. The Meaning of Public Policy

402. The uncertainty and ambiguity as to its actual content "is one of the essential characteristics of public policy". No totally comprehensive definition has ever been preferred. However it is clear that public policy reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. Naturally public policy differs according to the character and structure of the State or community to which it appertains, and covers those principles and standards which are "so sacrosanct as to require [their] maintenance at all costs and without exception".

Though difficult to actually identify the various principles and standards which comprise public policy are invariably clear when in issue. They are found not "in mass opinion" but in "the opinion of the healthy elements of the community", those guardians of ancient tradition, which has proved itself, and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal disinterested spirit to make radical alterations to the organisation of existing society". In national courts it is the judge who must determine and uphold this public policy.

2. The Role of Public Policy

403. As the guardian of the "fundamental moral convictions or policies of the forum" the doctrine of public policy provides "une sorte de barrière fermant le passage du droit étranger". Before any national court will apply a foreign law or recognise a foreign judgment, it must pass the "barrière" of the national jurisdiction concerned. This "barrière" functions just like at the frontier of every State: no persons or goods are allowed to pass the frontier if they are considered undesirable or hostile or dangerous to the host State.
The officials responsible for manning the public policy "barrière" are the national court judges; they determine whether a foreign law, concept or judgment should be allowed to pass. Only where the foreign law or foreign judgment is "inconsistent with the fundamental public policy" or "outrages [the] sense of justice and decency" or "heurtent [les] conceptions sociales ou juridiques" of the forum are they respectively refused application or recognition. Where public policy intervenes to exclude the application of a foreign law normally applicable the judge falls back on to the lex fori which he applies in its place.

3. The Levels of Public Policy

Public policy is not a constant concept. Not only is it continually changing and developing but it varies from State to State, and community to community. The wider the community the larger the number of ingredients to be considered when determining the character of public policy. Hence the public policy of a sovereign State differs and is narrower from that of a multi-national community (e.g. the EEC) or the international community. What is a fundamental policy in international law and in international relations will invariably also be part of the public policy of most national and multi-national communities. Equally, what is a fundamental law or policy of a multi-national community will also be part of the national public policies of the member States of that community. The opposite however is not the case. Public policy can conveniently be divided into three levels:

a) national public policy

b) community public policy

c) international public policy.
a) National public policy

405. National public policy is made up of internal or domestic public policy (ordre public interne) and external public policy (ordre public externe or ordre public international). Internal public policy comprises both national policies recognised in customary law (e.g. to uphold moral standards, discourage gambling, facilitate unrestricted trade)¹ and legislation promulgated to regulate certain situations and which cannot be avoided or by-passed by the parties (e.g. contract formalities, credit legislation, right to submit to arbitration).² However these principles and laws are only of relevance where municipal law is applicable: i.e. in domestic relations or where deemed applicable by the forum's conflict of laws rules.³

External public policy is that relevant to private international law.⁴ The frequently used description "international" is a misnomer: although it contains certain truly international elements it is a national policy though concerned with international relations. External public policy comprises legislation either of an imperative character (e.g. employment conditions, currency controls), or giving effect to fundamental policies and standards of the State (e.g. sexual equality, central economic planning).⁵ It also comprises certain laws and standards from the international law plain and where appropriate community laws and policies. So where a case has an international character a normally applicable foreign law and an otherwise enforceable foreign judgment will respectively not be applied and enforced where to do so would infringe the forum's external public policy. This policy is so fundamental that it cannot be avoided or by-passed; it is supreme and will be upheld within the forum.

b) Community public policy

406. Where several sovereign States join together and establish a multinational community with a specific declared purpose, such community will have
a public policy reflecting its purpose. So e.g. the Treaty of Rome establishing
the EEC declares in article 2 that it will attain its objectives "by establishing
a common market and progressively approximating the economic policies of Member
States". Similarly, article 1 (1) of the Charter of the Council of Mutual
Economic Assistance declares its objectives to be attainable "by uniting and
coordinating the [economic] efforts of the member countries". In fulfillment
of their respective objectives both communities have laws and regulations
(e.g. articles 85 and 86, Treaty of Rome; CMEA General Conditions of Sale and
Delivery) which are of fundamental importance and directly applicable in member
countries. These laws and regulations cannot be avoided by parties from the
respective communities. They have a public policy character within the
community to which they relate. Equally (and respectively) they form part of
the national public policy of the various member States.

c) International public policy

every national system of public policy comprises certain genuinely
international concepts or rules. These truly international or "pluri-national" criteria are drawn from the fundamental rules of natural law, the principles
of "justice universelle", ius cogens in public international law and the
general principles of morality and public policy accepted by civilised
countries. Though the terminology used by the various national courts and
academic writers differs, they all refer to the existence of an "ordre public réellement international". This doctrine of international public policy
includes an abhorrence of slavery, racial, religious and sexual discrimination,
kidnapping, murder, piracy, terrorism; opposes any effort to subvert or evade
the imperative laws of a sovereign State; upholds fundamental human rights
(as declared in the UN Universal Declaration on Human Rights) and the basic
standards of honesty and bona fides; and endorses certain rules and practices
contained in the major and widely accepted uniform laws and international codes
of practice. Both national and international courts consider essential that these basic standards of international public policy are respected in every relationship. So e.g. a contract to kidnap or murder would not be enforced as contrary to international public policy; equally, an agreement to commit an act of terrorism or to violate the laws or independence of some sovereign State. So too, a contract which ignores the basic standards generally acknowledged as fundamental in international contracts will not be enforced.

4. Public Policy and International Commercial Arbitration

The foregoing discussion relates mainly to the application of public policy by national courts. Judges apply public policy as the minimum standard acceptable to their _lex fori_, the national legal system to which they owe allegiance. The refusal to apply a normally applicable foreign law or to recognise a foreign judgement because it infringes the forum's public policy is a direct application of the _lex fori_; it is not a question of discretion for the judge: he is obliged to uphold the forum's doctrine of public policy.

By contrast an international arbitration tribunal is a non-national institution; it owes no allegiance to any sovereign State; it has no _lex fori_ in the conventional sense. Retaking the metaphor used by Niboyet, in international commercial arbitration there can be no "barrière": there is neither territory nor forum law to protect. The arbitrator is not the agent nor is he under any obligation to uphold the public policy of any sovereign State.

This does not mean that public policy has no place in international arbitration. An arbitrator has a responsibility to the arbitramts in particular and to international commerce in general. With these responsibilities in mind an arbitrator must take into account, to the extent necessary, the various levels of public policy.
a) **National public policy**

409. When determining the legal or other standard to apply to a commercial dispute, the international arbitrator is not obliged to respect any national public policy. However from a practical viewpoint an arbitrator should take account of certain national public policies. 

Firstly an arbitrator should keep a wary eye on the national public policy of the place of arbitration. This is particularly important in respect of the right to submit to arbitration, the subject-matters which may be referred to arbitration, the arbitration procedure and the powers of the arbitrators. If certain provisions in the law of the place of arbitration have an imperative character they must be followed; not even the express agreement of the parties will allow an arbitrator to avoid them. So for example, arbitration proceedings which are held in England and Wales are subject to the **Arbitration Act 1950** which reserves by means of the **case stated procedure** questions of law for the English courts. An arbitrator of his own volition or on the request of either party may, or when ordered by the courts must, state a case to the English courts. This provision applies even where both parties and the arbitrators are foreign nationals and resident outside England, and the contract is to be performed elsewhere than in England, i.e. where England as the place of arbitration is chosen because of its neutrality or geographic convenience. Failure of an arbitrator to state a case could result in his being disseized or his award being overturned by the court. In both cases the award would be unenforceable and the intentions of the parties defeated.

Similarly, if the law of a relevant State expressly deprives certain types of persons (e.g. the State, public corporations) from submitting to arbitration or reserves for the exclusive jurisdiction of the State courts disputes of a certain nature. Failure to respect such imperative laws would result in
national courts accepting jurisdiction (even where arbitration proceedings were in progress) and refusing to stay their proceedings pending the arbitration. Furthermore the award could subsequently be refused enforcement on the ground that it involves a person or a subject-matter excluded by the public policy of the enforcing court from being dealt with by arbitration.

410. Secondly, an arbitrator must ensure that his award does not offend the national public policy of the place where enforcement is sought. Article 1(e) of the Geneva Convention for the Execution of Foreign Arbitral Awards 1927 provides that an award should be enforced if it can be shown that it "is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon". The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 makes similar provision - though it places the burden of proof on the person opposing enforcement. Article V(2)(b) provides that:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country".

The award is the "raison d'être" of every arbitration; if the award is unenforceable the whole arbitration proceeding will have been a waste of time and energy. If an arbitrator's award is not enforceable because it violates the public policy of the place of performance, the arbitrator will have failed the responsibility vested in him.

Arbitration tribunals in the socialist countries

411. The arbitration tribunals in the socialist countries present an interesting dilemma. Structurally they bear a close resemblance to national courts; however their competence for and impartiality in international trade disputes is generally acknowledged. As national tribunals
they relate to a specific national territory; they do have a national public policy to protect. As we have already seen arbitration tribunals in socialist countries invariably apply their "forum" private international law rules. The question thus arises whether a socialist arbitration tribunal can refuse to apply a foreign law deemed applicable by its own private international law rules, if that foreign law per se or its effect were to violate the external public policy of the forum.

The answer would appear to vary according to the question actually in issue. In the socialist countries matters of capacity and authority are considered to have a public policy content. Only enterprises specifically created to participate in foreign trade (and the few private persons occasionally authorised) may participate in international trade; even when so authorised, a foreign trade enterprise will only be bound to a contract signed on its behalf by two persons specifically so empowered. Whatever the law applicable and wherever the contract has been concluded, all questions relating to the capacity of an enterprise and the power to bind the enterprise, at least to the extent that they affect the socialist party, are governed by the law of the tribunal.

As for matters of substance, socialist tribunals are a little more flexible. There could be no justification and there is little likelihood that an arbitration tribunal in a socialist country would refuse to apply a normally applicable foreign law purely because it was promulgated by a capitalist government, was capitalist orientated and was hence contrary to socialist public policy. Nothing would more quickly or more effectively vitiate all western confidence in the arbitration tribunals at the socialist chambers of commerce. On the other hand, the imperative laws and regulations of the socialist forum will, where relevant, be upheld and applied in deference to the otherwise applicable foreign law.
b) Community public policy

412. It is necessary to distinguish between CMEA public policy and that of the EEC.

Public policy of CMEA: We have already noted that arbitration is the accepted method of dispute settlement in inter-CMEA trade. The jurisdiction of the national courts of the CMEA member States is excluded where either one of the General Conditions apply or where the dispute arises out of an economic cooperation arrangement. CMEA laws have a public policy character and are directly applicable; hence the national arbitration tribunal seized always applies CMEA laws. It is unclear what would occur in the highly unlikely eventuality of a conflict between CMEA public policy and the national public policy of the arbitration tribunal seized.

Public policy of the EEC: Certain laws of the EEC have a public policy character; they are directly applicable without any express acceptance by member States. They must be respected and applied by all national courts in EEC member countries. Arbitration remains a very popular method of dispute settlement in inter-EEC trade. Is an arbitrator in such a dispute subject— as is a judge—to EEC public policy? Logically, if there is an EEC law relevant to the particular circumstances, the arbitrator should apply it; however he should do so because it is relevant to the case and not because it reflects the public policy of the EEC.

Arbitrators in commercial disputes between parties from EEC member States draw their authority entirely from the submission of the parties. The form of arbitration, ad hoc or institutional, if institutional the particular institution, and the venue of the arbitration proceedings (not to mention the procedural and substantive laws applicable) equally depend on the wishes of the parties. Neither the arbitrators nor the tribunal itself owe any
allegiance to the EEC; they are under no obligation to uphold the public policy of the EEC. However, as with national public policy, arbitrators should for practical and enforcement reasons respect the relevant EEC policies.

c) International public policy

413. Every international and non-national court and tribunal must respect and uphold the principles of "ordre public réellement international".\(^1\) International public policy does not aim to replace or displace the law deemed applicable; after all in many cases arbitrators do not make a clear choice of the law to be applied.\(^2\) Rather its effect is to directly influence the arbitrators' award within the confines of the "ordre public propre aux rapports internationaux".\(^3\) There is of course no method by which adherence to international public policy can be regulated or enforced. However, failure to adhere to the minimum standards laid down will result in anarchy in international commerce and a collapse in the structure of contemporary international commercial intercourse.

The difficulty is to determine what exactly is the content of this "ordre public réellement international". No doubt the international law principles of ius cogens, respect for the laws of other sovereign States, and the fundamental liberties of man are \textit{prima facie} rules of international public policy. Professor Goldman has suggested that rules of international public policy have emerged with respect to the value of monetary obligations in international relations\(^4\), and, in western countries at least, based on the doctrine \textit{pacta sunt servanda}, to refuse any recognition to the nationalisation or confiscation of property by a foreign State unless it is accompanied by fair and adequate compensation.\(^5\) Whilst the reasoning of Professor Goldman is not totally convincing, these two principles do in some way form a part of the international public policy relevant to international commercial arbitration.
Increasingly in recent years arbitration has become the established method for resolving disputes arising out of international commerce. The arbitration tribunals have become the courts of international trade; arbitrators are the judges. As a consequence of this special position, the institution of arbitration, its various tribunals and the arbitrators who man them have a special responsibility to international commerce. They are the guardians of the international commercial order: they must protect the rights of participants in international trade; give effect to the parties' respective obligations under the contract; imply the presence of commercial bona fides in every transaction; respect the customs followed in international trade practice and the rules developed in relevant international treaties; uphold the commonly accepted views of the international commercial community and the policies expressed and adopted by appropriate international organisations; and enforce the fundamental moral and ethical values which underlie every level of commercial activity.

B. PRACTICE

414. In practice public policy is only relevant to international commercial arbitration to the extent that it affects or influences the ultimate award. Where there is an agreement to submit existing or future disputes to arbitration, public policy legislation may deny the agreement any effect (e.g. where the subject-matter is one which cannot be submitted to arbitration, or where one of the parties is denied the capacity to submit to arbitration). Furthermore, even where an award has been made, public policy may result in its being denied effect and refused enforcement.

The influence of public policy can be felt on two planes. Firstly, as it affects the international arbitrator: not only must he consider international public policy, but he must also consider the various national public policies which may subsequently be relevant to an action to enforce or set aside his
award. Secondly, the public policy of national courts which may be asked to stay their proceedings in favour of arbitration or to enforce an award. We shall consider separately:

1. the influence of public policy on international arbitrators; and
2. the application of public policy by the courts.

1. The Influence of Public Policy on International Arbitrators

415. National public policy, at least to the extent that it is evidenced by imperative legislation, has been considered for different reasons and with varying results by arbitrators. However in only one award has such public policy actually been upheld by the arbitrator. In the other awards national public policy has been considered and rejected, either because it was not relevant to the particular circumstances of the case or because it was not relevant to international arbitration generally. We shall consider all these in turn.

a) Apply National Public Policy

Public policy of the place of registration

416. In one award a Belgian arbitrator considered himself bound to respect the imperative (ordre public) legislation relating to a patented process in France. The dispute between the plaintiffs, Lichtenstein and French firms, and the defendant, a (Federal) German corporation, arose out of their mutual grant of licences to exploit the other's patent. The plaintiffs had been granted letters of patent in France. Under French law any licence in respect of a French patent had to be notified to the Public Ministry. This had not been done. The question for the arbitrator was the validity of the licence to exploit the French patent. The matter was further complicated by the French law which expressly reserved all litigation relating to French patents for the French courts.
The arbitrator found that he did have jurisdiction to deal with the case. However he recognised the imperative character of the French law and the object of reserving for the French courts exclusive jurisdiction over all questions relating to French patents. He held he was bound to respect the imperative French legislation. The arbitrator's award stated:

"Attendu que, bien que l'arbitrage se déroule à Bruxelles, l'arbitre ne saurait se prononcer sur la validité de brevets déposés en France, sans appliquer le droit français pour le motif que cette matière est réservée expressément par l'alinéa 2 de la loi française du 5 juillet 1844 à la connaissance exclusive et absolue des tribunaux civils;

"Attendu de surcroît que cette attribution de compétence, tant en droit français, est d'ordre public étant donné notamment que la loi prévoit la communication obligatoire au Ministère Public;

"Attendu que, conformément à l'article 1004 du C.P.C. français, une sentence arbitrale ne saurait être rendue sur une matière communicable au Ministère Public."

Public policy of the place of performance

417. In another award the arbitrator held himself bound to respect the national public policy of the place where the contract was to be performed. The Swiss plaintiff purchased 6,000 goatskins which he planned to treat and sell at a profit. The two defendant corporations respectively French and Austrian, undertook to treat the skins. They were then to sell the skins to a third party for a price to be determined at the time of delivery. The defendants were to pay the contract price directly into the plaintiff's bank account in Switzerland and were themselves to receive a commission of 2%. It was further expressly provided that the contract was to be performed within nine months and that time was of the essence.

The defendants totally failed to perform the contracts and the plaintiff claimed damages of 21,640 Swiss francs in respect of the money he paid out for the skins and for loss of anticipated profits. The first defendant alleged, without denying the breach of contract, that in accordance with article 1133 of the French Civil Code the contract was contrary to public policy and void.
The Belgian arbitrator had initially to determine whether French public policy had any relevance in a contract between Swiss, French and Austrian parties. As the contract was in fact to be performed in France, French public policy was held relevant at least to the extent that it conformed to international public policy. However in the circumstances of the particular case the arbitrator found the contract not to contravene article 1133. The award states:

"attendu qu'il est effectivement de jurisprudence, en droit international privé, que les règles de l'ordre public du pays dont la loi régit le contrat s'imposant au juge ou à l'arbitre saisi, pour autant que ces mêmes règles ne contreviennent pas à l'ordre public international qui régit notre civilisation traditionnelle; qu'assurément la réglementation nationale sur les changes et le trafic des devises ont un caractère imperatif dont le respect s'impose à la juridiction saisie; qu'en admettant qu'en l'espèce, la loi applicable au contrat soit celle du lieu de son exécution, c'est-à-dire, la loi française, les pièces produites par le première défendresse ne font pas apparaître à suffisance de quelle façon la clause incriminée du contrat aurait blessé les dispositions de la réglementation française."

b) Consider National Public Policy.

Public policy of the place of enforcement

418. We have noted the importance of an arbitrator considering the public policy of the country in which the enforcement of his award will most likely be sought. This actually occurred in one award arising out of a contract under which the (Federal) German plaintiff sold the Greek defendant goods valued at $17,000. The defendant refused to accept delivery of the goods or to pay the contract price. The agreement to arbitrate was contained in correspondence between the parties. Nevertheless the defendant declined to honour the arbitration agreement, alleging, inter alia, that the arbitration agreement infringed Greek public policy legislation which prevented a Greek national submitting to arbitration outside Greece.

The arbitrator realised the importance of his award being enforceable. Hence he looked first to Greek law - the law of the place where the defendant had his main business establishment and under which enforcement of the award would be determined. The arbitrator took note of the fact that Greece, (like
Germany and Switzerland), was party to the Geneva Protocol on Arbitration Clauses 1923; this imposed an obligation on Greece to recognise a submission to arbitration in any State party to the Protocol. Furthermore, the fact that but for the arbitration agreement the Greek courts would have been the appropriate forum, and that the exclusion of a national courts' jurisdiction invariably raises a question of public policy, was added reason to consider the attitude of Greek law. The arbitrator stated:

"Il convient tout d'abord d'examiner quel droit national est applicable. .... Il est certainement juste de se laisser guider avant tout par des considérations pratiques et de s'en tenir au droit que le juge normalement compétent devrait appliquer. Le for ordinaire de compétence en l'espèce serait en Grèce puisque la défendesse a sans aucun doute son siège dans ce pays. De même, le sentence arbitrale qui protégerait la demande devrait être exécutée en Grèce et ferait donc l'objet d'une demande d'exequatur, au cours de laquelle le juge d'exécution examinerait à son tour la validité de la clause arbitrale. Ces seules considérations démontrent que l'on tient mieux compte des circonstances en tranchant selon le droit grec la question de la validité formelle de la clause arbitrale, respectivement du compromis.

"C'est assurément un principe général que la forme par laquelle les parties peuvent contractuellement exclure la compétence de la juridiction nationale ordinaire fait partie de l'ordre public du pays dont les tribunaux sont écartés".

The arbitrator held the arbitration agreement valid in accordance with Greek law. Nevertheless he was quick to point out that the agreement to submit to arbitration was also valid according to the relevant German law.3

c) Reject National Public Policy

419. The most categoric and uncompromising rejection of any application of national public policy was made by Professor Pierre Lalive in the India-Pakistan award1. There he considered at great length the relevance of national public policy in international arbitration. He concluded unequivocally that an arbitrator was only obliged to respect truly international public policy.
In that case, it will be recalled, the Indian plaintiff demanded, inter alia, the execution of a bank guarantee given by the defendant Pakistan bank in respect of the contractual obligations of a Pakistani corporation. The defendant resorted to a varied assortment of defences to justify his non-payment of the guarantee. One defence put forward was that performance had been rendered illegal by supervening imperative legislation adopted by the Government of Pakistan at the time of the hostilities with India; this legislation was of a public policy character and could be neither ignored nor by-passed.

Professor Lalive was a Swiss national, sitting in Switzerland, under the rules of the ICC: was he obliged to respect the Pakistani imperative legislation? He clearly held he was not: as a neutral or international arbitrator he was not obliged to take cognisance of local and politically inspired public policies. He stated:

"The very nature and neutrality of arbitration proceedings necessarily involve the disregarding by the arbitrator of some factors which are or may appear obligatory in regard to a particular national jurisdiction, such as local political considerations which are sometimes reflected in the concept of "public policy".

"It is a well known principle that when a foreign law is applied by the Courts of another country such application stops short of considerations of public policy which are, in each instance, specific to the country where the Court sits. In other words, the applicable rule of law is set aside when its application would offend the general feeling of what is and what is not acceptable in the country concerned.

"But a Court or an Arbitrator sitting in a country other than the one in which the application of foreign law would be contrary to that country's public policy, is not bound by the same limitations; it could and indeed should apply objectively the applicable foreign law, irrespective of subjective "public policy" considerations which are and must remain inoperative insofar as a neutral Court or an international arbitrator are concerned." (Emphasis added).
"Again, the definition of "enemy" is a subjective national notion, which applies as regards the specific relationship under particular circumstances between one or more countries, but, by the nature of things, is of no relevance in regard to a neutral Court or an international arbitrator sitting in a neutral country."

To support his contention Professor Lalive referred to Lord McNair's *Legal Effects of War* and concluded:

"... subjective or local considerations which legitimately do not disturb public policy in one country can constitute an offence in regard to "public policy" in another country. Applying the same line of reasoning, considerations relating to public policy in Pakistan or India are specific to the jurisdictions of each country, but cannot be operative in regard to the undersigned Arbitrator sitting as he does in Geneva, Switzerland and acting under the ICC Rules of Arbitration."

The arbitrator then referred to the following passage in Lord McNair's book:

"Apart from any such possible action under the Trading with the Enemy Act, 1939, and in the absence of any special enactments, it would seem that no prohibition on trading with the enemy would apply in an armed conflict. The common law rules would seem to be dependent upon there being a war stricto sensu. However, we must not underestimate the capacity of the common law to develop in such a way as to be able to deal appropriately with the various problems associated with armed conflicts. Many acts of the kind associated with trading with the enemy would be likely to become illegal on the ground that their performance during the armed conflict would be contrary to public policy."

Applying this principle to the case before him, Professor Lalive commented:

"... while in an armed conflict not amounting to war stricto sensu, no prohibition on trading with the enemy would apply in principle, yet local or national "public policy" considerations which are particular to Britain could make an act illegal, though such trading would not violate any legislative or regulatory provision. A neutral Arbitrator sitting in a neutral country, however, would not in the same circumstances be bound to take into consideration English public policy requirements which would be in conflict with the normal and objective application of the governing law."

The arbitrator took further support from the statement elsewhere in the *Legal Effects of War* that "the enemy with whom intercourse is illegal must be a person regarded as an enemy by the court which has to determine illegality."

Finally territorial remoteness justified a court making "an independant appraisal" of the foreign legislation defining "who is an 'enemy' and what is 'illegality'". Professor Lalive held this principle to
... apply a fortiori in regard to the undersigned Arbitrator sitting in an independent neutral country such as is Switzerland, when he is called upon to examine within the scope of the I.C.C. international system, whether the terms "enemy" and "illegality" as defined by Pakistani Regulations can be upheld or used in regard to contractual relationship with the Claimant. Accordingly, the undersigned Arbitrator is led to the conclusion that considerations arising from the qualification of "enemy" or "illegality" resulting from Emergency Regulations of questions of "public policy" relating specifically to the particularities at a given moment of the Pakistani or Indian environments, should be disregarded insofar as the present arbitration proceedings and the undersigned Arbitrator are concerned. The only applicable criteria are the legal rules resulting from the choice of law provision in the arbitration clause inserted by the Parties in the bank guarantee of 30th September 1964. Indian laws having been specifically chosen by the two parties, it is in the light of these laws, interpreted objectively, that the undersigned Arbitrator shall examine the present case.

Capacity to submit to arbitration

420. A national public policy affecting the capacity of one party to submit to arbitration was held by one arbitrator to have no relevance to an international contract submitted to an international arbitrator. \(^1\) By a contract made in 1967, the Italian plaintiff corporation undertook to construct for the defendant Ethiopian city corporation a reservoir and aqueduct. The defendant failed to honour payment certificates leading the plaintiff to stop work. The plaintiff was persuaded to recommence working by the defendant's agreement to submit their dispute to ICC arbitration in Lausanne, Switzerland. The parties further agreed that their contract should be governed by the law of Ethiopia. Swiss Federal Judge André Panchaud was appointed sole arbitrator.

The Ethiopian city corporation declined to sign the ICC "acte de mission", or to attend and participate in the arbitration hearings. They were not opposed to arbitration in principle but thought the particular dispute could be resolved amicably. The arbitrator began by considering the validity of the arbitration agreement and the effect of an Ethiopian provision which prevented the State or public bodies submitting to arbitration. While this provision had a public policy character, the distinguished Swiss arbitrator did not consider it binding on an international arbitration tribunal. He held:
"En effet, si certaines législations d'inspirations française (cf. article 1004 CPC française et article 315 CPC Éthiopian) interdisent à l'État ou à une autre collectivité publique de compromettre, il est admis que cette interdiction est sans portée pour les contrats internationaux. En effet, en tant qu'il s'agit là d'une règle d'ordre public, cette interdiction ne peut se situer que dans l'ordre public interne. Tel est le sens de la jurisprudence française maintenant bien établie et indiscutée. Il n'y a pas bien d'interpréter autrement l'article 315 du Code de procédure civile Éthiopian dans l'éventualité où l'on admettrait que l'arbitrage dont il s'agit échappe à la provision de l'article 3322(2) du Code civil Éthiopian.

"L'ordre public international s'opposerait avec force à ce qu'un organe d'État, traitant avec des personnes étrangères au pays puisse passer ouvertement, le sachant et le voulant, une clause d'arbitrage qui met en confiance le co-contractant et puisse ensuite, que se soit dans la procédure arbitrale ou dans la procédure d'exécution, se prévaloir de la nullité de sa propre parole".

421. In an award involving the cancellation of an exclusive concession to export precious minerals, the arbitrator, once again Swiss Federal Judge Panchaud, considered three different aspects of public policy. The concession agreement made provision for disputes to be resolved by ICC arbitration "sauf dans le domaine relevant de l'ordre public national" of the State concerned.

The arbitrator began by considering his own jurisdiction.

Could the defendant State be party to an arbitration? The arbitrator referred to French and Belgian law which he thought denied the State the right to submit to arbitration. However, he noted the law of the defendant State contained no similar provision. Thus he concluded there was no reason why the State should not be party to an arbitration. Furthermore he concluded:

"En effet, rédigé et signé par le gouvernement de l'État défendeur (signatures du premier ministre et du ministre de l'économie), c'est-à-dire par la plus haute autorité exécutif du pays, approuvé même par le pouvoir royal, ce contrat, avec sa clause compromissoire, affirme clairement l'aptitude à compromettre de l'État défendeur. L'arbitre ne saurait avoir une plus sûre information à ce sujet."  

Was the subject matter of the dispute arbitrable? The arbitration agreement had expressly excluded matters involving the defendant State's national public policy. The arbitrator considered the concession to be an ordinary
bilateral commercial contract, involving risks and advantages to both parties and not being concerned with the State's public policy. Furthermore the arbitration was concerned with damages for the non-performance of the contract and "l'ordre public n'est manifestement pas mis en jeu quand il est question d'octroi ou de refus de dommages-intérêts".

Then the arbitrator looked to the cause of the dispute. The defendant State had unilaterally rescinded the contract only two weeks after its conclusion. Was this action by the defendant State government influenced by "national public policy"? The arbitrator found it was not; the government had themselves informed the plaintiff that they had resolved the contract so as to grant the concession to someone else. If the plaintiff had requested to be re-established in his position as concessionnaire, the arbitrator held he would have been prevented by the defendant State's public policy from so doing. However as the plaintiff had only asked for damages in respect of a wrongful repudiation of the contract, the arbitrator found he was quite competent in that respect.

Public policy of the place of importation

422. A contract which had the indirect object of evading the customs regulations of the State into which goods were being imported was held not to justify an arbitrator considering the contract void. The Mexican plaintiff had been licensed to sell the French defendant's cigarette lighters in Mexico. Various disputes arose between the parties: there was a misunderstanding as regards exclusivity; the plaintiff complained that the defendant was constantly late making delivery and had failed to maintain adequate stocks or provide a satisfactory after-sales service. For these reasons the plaintiff terminated the contract and claimed damages for lost earnings and damage to his reputation.
The contract made provision for a system of "real" and "fictitious" invoicing aimed at evading Mexican customs duty: the defendant was to put on the customs declaration a duty free number registered by the plaintiff with the Mexican customs authority for other goods, and not to make an honest declaration of the content of packages consigned to the plaintiffs. The arbitrators had to determine what effect the agreement to evade the Mexican customs had on the validity of the contract. The three arbitrators looked first to the extra-territoriality of the Mexican customs regulations: certainly they had a public policy (loi de police) character but they could not govern the performance of the contract in France; the arbitrators were not concerned with enforcing the penal laws or with upholding the fiscal regulations of Mexico. The arbitrators held:

"(a) qu'il s'agit de lois de police mexicaine de caractère essentiellement territorial.

"(b) que la loi de police territoriale n'est pas pour autant d'ordre public international. L'efficacité des droits decoulant de ces lois étrangères de police n'est pas à confondre avec les lois d'ordre public dont l'étendue d'application est limitée pour les premières au territoire où elles sont en vigueur tandis que les dernières peuvent avoir des effets reconnus en France.

"(c) le droit penal d'une façon générale applicable au Mexique ou dans un autre pays ne concerne pas directement le droit public français en ce sens qu'il faut notamment une dérogation au droit d'asile français en vertu d'une convention d'extradition pour que certains sujets soient livrés, en cas de délit, à la justice mexicaine.

"(d) que chaque pays édicte aussi des lois fiscales en vue d'assurer la perception de ses impôts. Elles sont essentiellement territoriales et les divers faits se produisant sur le territoire doivent tomber sous leur empire ... Elles sont territoriales en ce sens que, sauf traité, la perception des impôts ne peut se faire que dans le pays qui les édicte et les autorités des divers pays ne se prêtent pas encore le concours de leurs services, pas plus que les tribunaux respectifs ne statuent sur ces matières à propos desquelles la compétence judiciaire est intimement liée à la compétence législative.

"(e) il en résulte qu'en principe, le droit français ne se soucie pas des droits de douane de l'étranger de fait d'éluder cette loi étrangère n'est pas en soi une cause illicite parce qu'il n'y a pas de collaboration entre les législations en ces matières."
Equally the arbitrators rejected the possibility of the contract being a
nullity in violation of the concept of bona fides. They reasoned:

"... le droit public français n'est pas touché par une importation
irrégulière au Mexique; le mandat d'importer en fraude certaines
marchandises dans un pays étranger n'est pas nul comme ayant pour objet
un acte contraire aux lois alors que les lois du pays où le mandat est
donné ne défendent pas l'exportation de ces marchandises, comme le
constate le droit belge - ence semblable au droit français; que certes
l'association ayant pour but la contrebande à exercer en pays étranger a
été considérée comme immorale et notamment parce qu'elle permet d'opposer
une concurrence déloyale envers des rivaux qui sont assez honnêtes pour
observer les lois et les règlements qu'est, en outre, nulle la vente de
marchandises à introduire en contrebande ... pourvu que la violation
de la loi étrangère soit connue des contractants; que de même, est
nul le contrat tendant à la corruption de fonctionnaires d'un gouvernment
étranger; mais, que déguiser le véritable caractère notamment quant à la
valeur, n'est pas contraire à la loi fiscale". (Emphasis added).

The arbitrators consequently rejected the contention that the contract was
void. On the merits they found for the plaintiff but granted him lower damages
than he claimed on the basis that he was not blameless in the breakdown of the
contract.

The rejection of Mexican public policy legislation by the arbitrators was
consistent with both contemporary doctrine and - as we have seen - arbitral
practice. However the award is worded as if French law was - or the arbitrators
considered it - the arbitral lex fori: this would certainly have been unjustified.
As the third arbitrator was a Belgian national if any national law was to
govern the arbitral procedure it was most appropriately Belgian law. Whatever
the real reason it is certain the arbitrators would not have decided any
differently had they based themselves on their neutral, non-national position.

d) Apply International Public Policy

423. Genuine international public policy was the cause in one award of the
arbitrator declining jurisdiction and refusing to even consider the merits
of the case.
In 1950 the Government of Argentina invited tenders for a contract to increase the electrical power in the city of Buenos Aires. The defendant, a British corporation with an office in Argentina, put in a tender at about £23 million. However, at that time in Argentina government contracts did not necessarily go to the best or lowest tender: they were granted to those who gave the largest bribes to the right people. Bribery was an everyday way of commercial life. To help win the contract, the plaintiff engaged the services of the defendant, an Argentinian "wheeler-dealer" well connected with the people that mattered in the government. The plaintiff was to "gild the palms" of everyone necessary to obtain the contract for the defendant. If successful he would receive 10% of the value of the contract, though it was accepted as he had to pay the bribes himself he would only retain 1-2% of the commission. In 1951 the Argentinian government awarded the contract to a German consortium.

In 1955 the first Peron regime fell. General Peron and all of those in his camp went into exile. The plaintiff was considered persona non grata in Argentina; he went and settled in the Federal Republic of Germany.

In 1957 the defendant corporation again tendered for an Argentinian government contract, this time with more success. The contract, to build a small power station just outside Buenos Aires, was worth about £4 million. The plaintiff from Germany claimed 10% of the contract value: the contract he maintained, was obtained because of his efforts on behalf of the defendant six years earlier. The plaintiff and the defendant agreed to submit their dispute to ICC arbitration in Paris. The ICC appointed Judge Gunnar Lagregren, President of the Supreme Court of Western Sweden, as sole arbitrator.

When Judge Lagregren heard that the case concerned a contract the object of which was the bribery of high government officials he raised himself the question of his jurisdiction. The parties were both content that the arbitrator decide on the merits: nevertheless he declined to do so. Referring initially
to French law and French public policy - as the law of the place of arbitration\textsuperscript{3} - the arbitrator considered the contract to be void, contrary to public policy,\textsuperscript{4} and reserved for the jurisdiction of the ordinary French courts.\textsuperscript{5} The arbitrator then noted that the Argentinian law contained similar provisions\textsuperscript{6}.

Neither of these two national public policies were good enough for Judge Lagregren: he looked to truly international public policy as the standard appropriate for an international tribunal. He stated:

"... it cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators. This principle is especially apt for use before international arbitration tribunals that lack a "law of the forum" in the ordinary sense of the term." (Emphasis added).

Then the arbitrator turned to consider the facts in the light of international public policy.

"As might be expected the documents drawn up seem on their face to be legal and bear the semblance of ordinary commercial documents. However, it is, in my judgment, plainly established from the evidence taken by me that the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business.

"In saying this I do not mean to imply that [the plaintiff] had no more to do than to hand over a commission to his respective collaborators; on the contrary, I am convinced that [he] had to perform other, important and quite irreproachable, functions. This has to be taken into consideration, but does not obscure the general image that the major part of the commissions to be paid to him were to be used for bribes.

"Although these commissions were not to be used exclusively for bribes, a very substantial part of them must have been intended for such use. Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations." (Emphasis added).

And the effect of this infringement of international public policy? Judge Lagregren refused to have anything to do with the contract: it contravened fundamental and internationally acknowledged standards of commercial ethics and he could not even consider it. He refused to accept jurisdiction stating:
"After weighing all the evidence I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes." (Emphasis added).

The effect of international public policy was to deny the parties a hearing on their dispute. There was no forum law to uphold nor any foreign law to reject. Rather it was the object of the contract which was considered objectionable with the effect of removing the contract from the realm of legal regulation. This was not to say the contract was illegal, only that it was outside the jurisdiction of and unenforceable in every national as well as the international legal systems.

2. The Application of Public Policy by the Courts

424. Whatever the nature of the case before it, a national court will be concerned with upholding its own public policy. Where the dispute concerns an international relationship, the court must also consider the extent to which its public policy will allow the application of a foreign law or whether irrespective of all the surrounding circumstances, it requires the application of its national law.

The relevance of national public policy on international commercial arbitration may be felt in two situations. Firstly, where, despite the existence of an agreement to submit to arbitration, one party institutes court proceedings. Whether those proceedings should be stayed pending arbitration will depend on the validity of the arbitration agreement. For this purpose, a court will consider whether national public policy legislation denies one of the parties the right to submit to arbitration or has reserved for the exclusive jurisdiction of its national courts disputes of that particular nature.
Secondly, where a national court is requested to enforce a foreign arbitration award. Here for the purposes of recognition and enforcement, the court must again consider the right of the parties to submit to arbitration and the arbitrability of the subject-matter of the dispute. Furthermore, a court may not give effect to a foreign award if the procedure followed in the arbitration proceedings or the award per se violate the fundamental public policies of the forum.

425. When concerned with the validity of an arbitration agreement or the recognition and enforcement of an award, national courts appear to have referred to their own public policy for four reasons:

a) to determine whether the subject-matter of the dispute is arbitrable;

b) to determine whether the parties are entitled to submit to arbitration;

c) to determine whether the procedural or formal requirements of the lex fori have been complied with; and

d) to determine whether the substance of the award violates any imperative law or fundamental policy of the forum.

A positive finding in any of these cases would result in the arbitration agreement or award being denied effect.

We shall consider each in turn.

a) Subject-matter excluded from arbitration:

426. Many legal systems expressly exclude arbitration as a method of settling disputes involving certain subject-matters, e.g. patents\(^1\), transfer of securities\(^2\), contracts in breach of the anti-trust regulations\(^3\), maintenance to be paid to an estranged or divorced spouse or in respect of a child\(^4\), etc.
In the main of course these limitations relate to the normal domestic relationship, involving local nationals or residents and a subject-matter situated or registered locally. What is unclear, however, is the extent to which these limitations are relevant when the dispute involves facts extending beyond the territory of one State. Do these restrictions apply to an international relationship? Whilst there are few categoric answers, several judgements in recent years appear to show a uniform line of judicial thought.

Patents

427. The competence of arbitrators may be questioned in those countries where imperative legislation reserves all matters relating to patents for the exclusive jurisdiction of the national courts. This excludes, or at least extensively curtails, the right to submit disputes affecting patents to arbitration.

In France, article 2060 of the Civil Code excludes the right to submit to arbitration questions affecting public policy. Furthermore, article 68 of the Law of 2 January 1968 provides that all questions relating to patents are only to be dealt with by certain "tribunaux de grande instance". The effect is to exclude the jurisdiction not just of arbitrators, but also of the normally competent commercial courts.

The decisions of the French courts on this matter have been far from clear. In the view of one author they exclude arbitration as a means of settling disputes concerning not only the validity, ownership, forfeiture and the infringement of patents, but also licences to exploit patents and even sub-licences. Does this literal interpretation of the law exclude even questions of e.g. whether a licence agreement has been adequately carried out or the amount of royalties payable being submitted to arbitration? Whilst the writers differ in their view as to the portent of the Law of 2 January 1968
and the effect of the French court judgements, they all agree that considering the extensive use of arbitration in contracts for the purchase of foreign patents and in licence agreements, a wide interpretation of the law would be, at the very least, a great inconvenience.

The more flexible and pragmatic interpretation has been followed by the Court of Brussels in two recent judgements. It was held that arbitrators could determine whether or not an agreement involving a patent had been performed and whether royalties were still payable in respect of a patent whose registration had expired. The Court of Appeal of Amiens has similarly held that a dispute as to the performance of a contract for "know-how" did not fall within the purport of the 1968 French legislation.

This is not the place to attempt to determine the exact state of French (or Belgian) law. However the question remains as to the effect of the French Law of 2 January 1968 on an international arbitrator. To what extent does it limit the right of an arbitrator to deal with a dispute concerning a patent? To be of any meaning, an award must be enforceable. The French legislation aims to deal with French patents: it is not concerned with patents granted in other countries. Consequently the French public policy legislation only applies where the validity, ownership, etc., of a French patent is in dispute.

Where a dispute concerning a non-French patent is submitted to arbitration in France - France chosen as the headquarters of the ICC or as a neutral, geographically convenient place, - French law is irrelevant and does not deprive an arbitrator of his authority.

Transfer of Securities

428. In 1974 the Supreme Court of the USA was faced with the question whether a dispute arising out of a transfer of shares could be submitted to arbitration. The Securities Act 1933 and the Securities Exchange Act 1934 had hitherto been interpreted as retaining exclusive jurisdiction in matters affecting securities
for the Federal courts. In Scherk v. Alberto-Culver Co.\(^1\), an American
corporation, as part of its programme to expand its overseas operations, had
purchased from Scherk, a German national resident in Switzerland, three
European companies together with their trademark rights. The agreement provided
for any disputes arising from the transaction to be settled by ICC arbitration.

A year after the agreement was made, Alberto-Culver instituted proceedings in
the US courts alleging that the contracts had been induced by Scherk's
fraudulent representations, the trademarks in fact being encumbered. The
German defendant petitioned the court for a stay of proceedings pending ICC
arbitration. The Supreme Court had to decide whether the securities legislation
covered an international contract and the shares of foreign corporations.

Had the arbitration agreement been in a domestic contract it would undoubtedly
have been denied any effect\(^2\). The Supreme Court however held this case to
concern a "truly international agreement", which by its very nature suffered
from uncertainty as to the law applicable and the forum in which disputes are
to be treated. In the interests of international commerce any limitation on
this uncertainty agreed upon by the parties should be upheld and respected.

The Court stated:

"A parochial refusal by the courts of one country to enforce an
international arbitration agreement would not only frustrate these
purposes, but would invite unseemly and mutually destructive jockeying
by the parties to secure tactical litigation advantages... the dicey
atmosphere of such a legal no-man's-land would surely damage the
fabric of international commerce and trade, and imperil the willingness
and ability of businessmen to enter into international commercial
agreements."\(^3\)

Invoking and extending the reasoning they had followed in The Bremen v. Zapata
Off-Shore Co.\(^4\), the Supreme Court again gave effect to the need for unencumbered
international trade and reiterated:

"... We cannot have trade and commerce in world markets and
international waters exclusively on our terms, governed by our
laws, and resolved in our courts."\(^5\)
The decision in *Scherk v. Alberto Culver Co.* was based on the character of the transaction: it was an international contract for the transfer of shares in foreign corporations. This was not a transaction to which the US legislation was applicable. Had the subject-matter of the transactions been shares in US corporations, no doubt the decision would have been otherwise.

An arbitrator seized of a dispute involving a transfer of shares must look to see whether his authority would be recognised by the courts of the place of probable enforcement and his award enforced. As with the French patent legislation, it would appear an arbitrator would have jurisdiction except if the shares in dispute were of US corporations and hence fell within the purport of the US Securities legislation.

b) Capacity to submit to arbitration

429. In some countries imperative legislation prohibits the State and/or public institutions from submitting to arbitration. This is the case in France where articles 83 and 1004 of the French Civil Procedure Code provide that any agreement under which the French State, a government ministry or other public institution agrees to submit existing or future disputes to arbitration is absolutely void. Court proceedings instituted despite an arbitration agreement will not be stayed; nor will any award be enforced.

It is clear that articles 83 and 1004 CPC have mandatory effect in internal French commerce. To give these provisions extra-territorial effect and to apply them even where a contract involves a foreign party would be to ignore the realities of contemporary commerce. The French government directly and through national corporations has begun to participate more and more in international commerce. It is surely not feasible for all international commercial relations involving the French State or a French public institution to be subject to French law and to be reserved for the French courts. Thus the Cour d'Appel de Paris in 1957 and the French Cour de Cassation since have held articles 83 and 1004 to reflect only "ordre public interne" and are therefore inapplicable to international commercial relations.
Analogous "inter-state" reasoning would appear behind the American Federal court judgement C.P. Robinson Construction Co. v. National Corporation for Housing Partnerships. There it was held that court proceedings in respect of a partnership agreement should be stayed pending arbitration "where the disputed subject-matter involves commerce, there is diversity of citizenship and more than $10,000 is in controversy even where the agreement in which the arbitration clause is a part provides that the agreement is to be determined by North Carolina law and the North Carolina laws at the time the agreement was executed would not allow enforcement of a future arbitration clause."2

c) Procedural and formal requirements

431. Many legal systems consider the procedural and formal prerequisites (e.g. signature of all the arbitrators, reasoning behind the award) to the enforcement of an arbitration award to have a public policy character: they must be satisfied before an award will be enforced. So for example in France every award rendered under French law whether in respect of a domestic or an international contract, must be motivated. However motivation is not required where a foreign award has been made under a procedure in which non-motivation is normal. So in 1966 the French Cour de Cassation3 enforced an award made in New York despite the fact that the award was not reasoned. The absence of reasoning was held not to be contrary to French public policy as understood in private international law, particularly seeing that under the law of the State of New York arbitrators were allowed to make an award which was not motivated. Several other legal systems would appear to have adopted a similar viewpoint.5

d) The substance of the award violates public policy

432. We have seen that both the 1927 and the 1958 Conventions dealing with the recognition and enforcement of foreign arbitration awards entitle a court to refuse to enforce an award if to do so would be contrary to its public policy. The law of most States, including those which are not party to the two Conventions, reserve public policy as a reason for not enforcing an award.1 It is clear that no national court will give effect to a foreign award which obliges one party to contravene an imperative law of the forum.
433. The defence that an award violates the public policy of the enforcing State (articles 1(e) 1927 Geneva Convention and V(2)(b) 1958 New York Convention) was intended to refer only to the content of the award. This was the crux of the judgement of the US Court of Appeals in Parsons & Whitmore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA)\(^1\). That case arose out of the repudiation by Parsons of a contract to construct a paper mill in Egypt for Rakta. In the tension preceding, and the hostilities during the "Six-Day War" between Egypt and Israel in 1967 the position of American nationals in Egypt was precarious: indeed, the US government advised their nationals to leave Egypt and those that did not were expelled (except those with special visas) when Egypt broke diplomatic relations with the USA. After the cessation of hostilities Parsons refused to return to Egypt to complete the contract claiming, inter alia, that the expulsion of American citizens and the difficulty obtaining visas to return to Egypt amounted to a force majeure. In arbitration proceedings before the ICC, Parsons was ordered to pay Rakta (almost) $400,000 damages for breach of contract\(^2\).

To prevent the award from being enforced, Parsons argued that Article V(2)(b) of the New York Convention was applicable, the interests of American nationals being involved. The Court of Appeals held that the defence of public policy must be narrowly construed.

"Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice."\(^3\)

The political and diplomatic differences between the USA and Egypt were not relevant to the defence provided by the New York Convention. The Court of Appeals concluded:

"To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement."\(^4\)
This narrow interpretation of the defence of public policy has been taken even further by the French Cour de cassation. In 1968 that court was asked to refuse effect to an arbitration award rendered by the Arbitration Tribunal attached to the Federal Economic Chamber of Yugoslavia. The dispute had arisen because the French buyer had refused to take delivery of the total amount of wine for which he had contracted. The buyer was found by the arbitrators to be in breach of his contractual obligations and was ordered to pay damages to the Yugoslav seller.

The French buyer challenged the award arguing that it violated French public policy. Firstly by holding him liable for breach of contract, the arbitrators had ignored that he was prevented by French import legislation from fulfilling his contractual obligations. Secondly, the damages awarded in Yugoslav dinars had been converted into French francs at the official exchange rate rather than the normal clearing banks exchange rate.

The Cour de cassation rejected both arguments. The award did not oblige the buyer to take delivery of the goods; that would have required him to infringe French law and would not have been enforced. The buyer was ordered to pay damages for breach of contract and this, the substance of the award, did not violate French law. The judges of the French court were not empowered to review the basis of the foreign arbitrators' award.

The choice of the free exchange rate in preference to the commercial exchange rate was equally not contrary to French public policy. Both rates of exchange were legal though in daily affairs they have different domains. There was no ground on which it could be argued that an award which refers to the free or international exchange rate violates public policy and should therefore be refused effect.
435. This same attitude appears to have influenced the appeal courts of Paris\(^1\) and Colmar\(^2\) and the French Cour de cassation in the "Impex" case\(^3\). A French seller undertook to sell and deliver barley to an Italian corporation under four separate contracts. To enable him to keep his prices low, the seller aimed to avoid French export regulations and so informed the buyer that he would be invoiced either through Portugal or through Switzerland; the buyer was subsequently notified that he would be invoiced in respect of three contracts by a Portuguese corporation and by a Swiss corporation in respect of the fourth contract. However the seller failed to deliver at all and the buyer instituted arbitration proceedings as provided for in the contracts. The buyer was awarded damages for the seller's total non-performance of the contract.

The seller challenged the award on the ground that the attempt to avoid French export regulations was contrary to public policy, and the contract and the arbitration agreement were therefore void; consequently the award was a nullity and could not be enforced. Both appeal courts and the Cour de cassation rejected the French seller's arguments. The autonomy of the arbitration agreement was beyond dispute; having opted for and submitted to arbitration, it was for the arbitrators to consider the validity of the contract. The courts could not subsequently reconsider whether the contract infringed French public policy\(^4\). Rather, the question for the courts was whether the award per se infringed French public policy. The courts, like the arbitration tribunal before them, noted that the contract itself (a sale of barley) was quite valid though it had not been performed; that the seller had chosen a method of performance which aimed to evade the French export regulations was irrelevant: the seller could still have performed the contract in a perfectly legal way. In the circumstances, the award of damages to the seller could not be impuned on the grounds of being contrary to public policy.
436. What where an award, though quite inoffensive by the law of the place of enforcement, violates the public policy of some other country? Should such an award be recognised and given effect?

Most national courts, if asked to determine the validity of a contract to evade the import or export regulations of some foreign country, would probably hold it to be an absolute nullity. However what if arbitrators had held such a contract valid and had awarded damages to one of the parties in respect of the other party's failure or refusal to perform the contract? In principle there would seem no reason why not: the award itself, as its execution is requested (i.e. X shall pay Y $10,000) is not contrary to public policy. The parties have confided their disputes to the jurisdiction of the arbitrators; there seems little reason why subsequently they should ask a court to overturn or refuse to enforce the award.

On the other hand, if the award obliges one party to make a payment which would violate the public policy legislation of a foreign State (e.g. contrary to the currency legislation of the country in which the party so condemned has his principal place of business), then the enforcing court may well decline to enforce it. This principle appears to have been accepted by the Cour d'Appel de Paris when recently requested to refuse to enforce a foreign award on the ground that it violated American public policy in the form of the Sherman Act. Though the court held the award not to contravene this enactment, it was held:

"qu'appelle a statuer sur l'exécution d'un contrat international les arbitres auraient entaché leur sentence d'un vice entraînant sa nullité, s'ils avaient imposé à un contratant étranger une obligation contraire aux règles d'ordre public du pays où il exerçait son activité."
437. From the few judgements involving the application of public policy to international commercial arbitration which we have considered, there can be no general conclusion as to the law. Nonetheless, it is clear that national courts are anxious not to interfere with the parties' agreement to submit to arbitration or the autonomy of the arbitrators; they will always interpret their public policy in the narrowest fashion where an international arbitration is involved. It is only where there is a manifest and definite contravention of the "international public policy" of the forum that an arbitration agreement or an award will be refused effect.
CONCLUSION

438. The purpose of the foregoing study was to see how in practice arbitrators actually decide what legal or other standard to apply to disputes arising out of international commerce. Despite the various theories advocated by the writers, the awards show there is no one conflict of laws rule, formula or system which is (or can be) applied in international commercial arbitration.

The various solutions resorted to in practice differ depending on the particular facts and circumstances of the case and the personal character and attitude of the arbitrators. Nonetheless it is submitted the awards discussed do provide a sufficient indication of the preferred tendencies and widely followed methods by which arbitrators decide the substantive standard they are to apply.

Within the context of a proposed choice of law methodology to which arbitrators could refer, it is here intended to recall the various methods by which arbitrators have determined the legal or other standard to apply to the substance of a dispute.

1. The Intentions of the Parties

439. The answer to every dispute is to be found prima facie in the contract itself. What did the parties intend, what did they agree and what did they expect?

Most disputes neither involve a question of law nor necessitate reference to any legal provision. Arbitrators thus need consider only the purpose of the contract and whether it has been attained. They must determine what the
parties intended and give effect to that intention. They investigate whether
the contract has actually been performed, or whether one of the parties is
responsible for the breakdown, non or imperfect performance of the contract.
They endeavour to compensate the innocent party for his loss and the damage
suffered because of the other parties' breach of contract. To all these
questions the arbitrator will look at the contract itself and the surrounding
relevant facts: they will have no need to refer to any system of law.

440. In some cases it may of course be necessary to refer to some law
to complete or interpret the contract terms and/or to determine the parties'
rights and obligations. In such cases what law can be more appropriate than
that agreed to by the parties? Presumably the parties will have expected
that chosen law to govern. Where the arbitrators are authorised to decide
ex aequo et bono, that is the standard they should follow. Arbitrators are
responsible to the parties from whom they draw their powers and authority; failure
to apply the standard agreed to by the parties could result in the award being
unenforceable.

441. The right of parties to themselves identify the law to apply and
the obligation on arbitrators to respect that choice is the one overwhelming and
truly international conflict of laws rule which has developed in international
commercial arbitration. Furthermore, this right is quite unfettered: parties
may choose a national or non-national legal standard, or even a non-legal
standard. The parties choice is only restricted by the need that the award
be enforceable: thus the standard selected must be allowed by the place of
arbitration and must be recognised by the probable place of enforcement.
442. In the absence of an express choice of law arbitrators must
themselves determine the applicable law taking into account the nature of the
contract and all the factors surrounding the case. There is little support
to justify arbitrators implying a choice of a particular law. Those factors
traditionally considered indicative of the parties' intentions are today in
disfavour in both the national and international arenas. Individually they
carry very little weight; however they may be important supporting criteria
when accumulating connecting factors.

2. The Applicable Law

443. When selecting the standard to apply, arbitrators should "dena-
tionalise" or "internationalise" the dispute. Thus rather than apply some
national legal provision, they should look to find some "non-national" and
generally accepted rule or practice appropriate to the question in issue. It
may be that the parties come from or have their main places of business in
countries which have ratified and adopted an international convention relevant
to the dispute: in which case the rules of such convention can be applied.
Alternatively, there may be some international or non-national code of practice
appropriate to the particular case: here that code of practice may be applicable.
And again, where the dispute can most easily be resolved by resorting to the
customs and usages of the particular trade or industry, such customs and usages
should be the standard applied.

These standards, which comprise the "law of international trade",
should be applied in preference and often in deference to the rules of
national law. They have been developed through the concerted efforts of those
concerned with and participating in international commerce. In consequence they will invariably reflect accurately the intentions and expectations of the contracting parties.

444. An equally non-national standard, though generally not relevant or applicable to international commercial relations, is public international law. This body of rules may be appropriate and useful to explain or determine concepts and notions unknown in national law or more developed in international law.

445. Even where there are no appropriate and internationally acceptable rules, arbitrators will still often be able to reach their award without reference to any national law. To many questions a large number of legal systems — and more frequently the systems in conflict — adopt similar solutions; indeed, in some situations the conflicting laws may even contain identical provision. In such cases there is no need to make a positive choice of the national law to apply; there will be no "real" conflict. By basing their award on a "common" or generally accepted rule rather than on a national legal rule (even though this distinction may be more fictitious than real), arbitrators emphasise the non-national character of the award.

3. The Appropriate Conflicts Rule

446. What where there is no appropriate non-national standard, where the parties are not agreed, and where the conflicting national laws contain contradictory provisions? Here it will be necessary for arbitrators
to make a positive choice of the national law to apply: the law applicable may well be the very (or main) question in issue. How then should the applicable national law be determined?

The inability to develop and the undesirability of rigid, pre-determined conflict of laws rules for international commercial arbitration influenced the drafters of the European Convention, and the texts which have followed it, to adopt a wide and flexible conflicts formula. Thus Article VII of the European Convention on International Commercial Arbitration 1961 left arbitrators free to select the conflict of laws system or rules which they - for whatever reasons - consider appropriate. The rule chosen would be applicable because the arbitrator chose it and not because of any national jurisdictional attachment. The arbitrators' freedom in selecting the conflict of laws solution to be followed enables them to "denationalise" the arbitration by applying a non-national conflict of laws rule. Though a rule may be taken from a national conflicts system, the rule is applied because in the circumstances it is considered particularly appropriate, most easily applied or would lead to the most desirable outcome.

447. In their desire to "denationalise" the award and make it acceptable and fair, arbitrators often try to show the inherent correctness of their decision in the award itself. With respect to the choice of the applicable law, rather than apply one particular conflict of laws rule, arbitrators may refer to several rules to show how they all lead to the same result.

This may be done by accumulating all the relevant connecting factors
(nationality and places of business of the parties, the place where and the
language in which the contract was negotiated, the places where the contract
is to be performed and payment is to be made, the place, if any, specifically
chosen for the arbitration) and, after weighting them in accordance with the
characteristics of the particular case, applying the law pointed to by the
weightiest or preponderant number of connecting factors. As connecting factors
are often used as conflicts rules, arbitrators can easily point out that the
law they are applying follows from the application of several different
conflict of laws rule.

This solution is similar to the "proper law" rule which has drawn
increasing support in national jurisdictions in recent years. As with the
"proper law" rule, this weighting of connecting factors is uncertain and
indeterminable; the weight to be given to an individual connecting factor may
differ from case to case, from arbitrator to arbitrator. However, as we
have seen, this solution is effectively used to choose not one but several
converging conflict of laws rules.

448. Alternatively, but equally objective, is for arbitrators to
resort to the application of a generally accepted or "common" conflict of
laws rule. A generally accepted rule may be drawn from a large number of
States where the same solution is adopted for a given problem. More frequently,
arbitrators are able to apply a conflicts rule "common" to the private inter-
national law systems from which the parties come. This solution may not always
be convenient, particularly where it deems applicable a manifestly inappropriate
or totally incompetent national law. On the otherhand, in the main, the
application of the substantive law pointed to by several relevant or "common" conflict of laws systems makes it even more difficult to allege an unfair or inappropriate choice of law.

The desirability of applying a non-national conflicts rule is clearly seen from the many awards in which arbitrators, even though basing their choice of the substantive law applicable on one particular conflict of laws rule, justified and supported that choice by noting that the other or alternative conflicts rules would have led to the same result.

449. It is often unclear why arbitrators considered a particular conflict of laws rule to be appropriate. Perhaps the rule itself was manifestly appropriate to the facts of the case? May be the arbitrators happened to favour that conflicts rule in such circumstances? Or perhaps because it enabled the arbitrators to reach the result which they considered desirable? Whatever the reasons they are hardly important. In international commercial arbitration the bona fides and integrity of the arbitrators must be accepted; the dishonest or partial arbitrator will be quickly and easily identified. Whilst undoubtedly they may be influenced by their backgrounds, attitudes and opinions, arbitrators when selecting the "appropriate" conflicts rule must above all have in mind their responsibility to the parties in particular and international commerce in general. This being done there will be little scope for criticising the choice of law or for that matter the ultimate award.

450. The major objection to allowing arbitrators total liberty in choosing the "appropriate" conflicts rule is the uncertainty which naturally follows from the absence of a fixed, predetermined conflicts system. The
The desirability of certainty believed by many to be essential, was thought only to be possible by resorting to the conflicts rules of the "siège d'arbitrage". This view had the prestigious support of the Institut de Droit International and Professor Sauser-Hall. Following this theory, disputes concerned primarily with the law to govern will dissolve when it is clear what the applicable conflicts rule provides.

Of course the frequently speculative and fortuitous nature of the "siège d'arbitrage" does deprive the theory of much of its advantage. The application of a conflicts rule merely because of its connection with the place where the arbitration is centered has no justification; that place may have no, no adequate or no appropriate conflict of laws system for the problem before the arbitrators.

On the otherhand, the conflict of laws system of the "siège d'arbitrage", especially where it is adequate and appropriate, provides the arbitrators with a certain, neutral and objective rule. Furthermore, as an award may be impeached or prove unenforceable if it fails to respect the mandatory conflicts rules of the place of arbitration (this is important where that place does not allow the application of a particular standard e.g. English law does not allow arbitration on non-legal principles), arbitrators must always look with care at - even though not applying - what the conflict of laws system of the "siège d'arbitrage" provides.

Whilst there is little ground to support the Institut de Droit International - Sauser-Hall view that the conflict of laws system of the "siège d'arbitrage" should always be applied, this theory does provide an ultimate
backstop or guide, if and when all else fails, as to the conflicts rule to apply.

4. Questions Not Satisfactorily Answered

451. The place, role and effect of public policy in international commercial arbitration remain uncertain. Undoubtedly arbitrators must respect "truly international public policy"; but there is no agreement on what are the heads of such public policy. There is no clearly definable international commercial community within which a relevant public policy can be developed. Equally there is no supervisory or legislative authority capable of enacting mandatory rules or even defining the essential standards of international commerce. So arbitrators cannot uphold or enforce a contract the object of which is contrary to some fundamental moral standard (e.g. bribery, slavery) or rule of international law (e.g. to violate the sovereignty of an independent State). However, many further questions remain: for example, what should an arbitrator do if seized of a dispute involving a commercial transaction with Rhodesia; the United Nations General Assembly has passed a resolution imposing commercial sanctions against Rhodesia. Whether such a contract (or any other) is contrary to international public policy and the effect to be given to it, is a matter of pure conjecture; in each contract the answer will depend on its particular facts and the arbitrators seized.

452. National public policy poses a different and separate problem: though often clear it is prima facie irrelevant to international commercial arbitration. Arbitrators are neither appointed by, nor do they owe allegiance to, any national jurisdiction. They cannot be expected to uphold or protect
fundamental national standards or imperative legislation. However national public policy may be relevant where the validity of the arbitration agreement or the enforceability of the award is in issue. A national court will not give effect to an arbitration agreement where the forum public policy excludes the subject-matter in question from being submitted to arbitration. Similarly, a national court will neither recognise nor enforce an arbitration award if the subject-matter was not arbitrable under the law of the place of enforcement, or if the award per se violates the public policy of the enforcing court. This necessitates arbitrators considering and restricting their conduct in accordance with the public policy of the places of arbitration and of probable enforcement.

On the other hand, the public policies of the places of contracting and from which the parties come are in themselves irrelevant. As for the place of performance, arbitrators cannot enforce a contract which violates the imperative legislation of the place of performance; they may however consider the matter of damages payable for the breach or non-performance of a contract, even though that contract violates the public policy of the putative place of performance.

453. The directly applicable laws of the supra-national communities pose another dilemma.

The CMEA General Conditions have been developed to regulate certain relations between parties from CMEA member countries; they apply instead of national law. These conditions are recognised as binding by the CMEA member States and are the standard according to which those
participating in international trade organise and regulate their commercial relations. Arbitration is the only recognised method for dealing with disputes arising out of the commercial relations to which the General Conditions relate - the ordinary courts of member States are expressly excluded from having jurisdiction - and the CMEA rules are always applied by the tribunals seized. Failure to respect and apply such CMEA laws would result in the award being impeachable and unenforceable.

454. The powers and authority of arbitrators when faced with a possibly relevant or directly applicable provision of EEC law remain regrettably unclear. Both arbitral practice and academic discussion are divided.

May arbitrators refer a question of European law to the European Court of Justice (ECJ)? Article 177 of the Treaty of Rome grants the rights to ask a preliminary question to "courts or tribunals" in Community member States. Arbitration tribunals do not form a part of any State's court system; however, arbitration tribunals are recognised to perform an important role in the resolution of disputes arising in inter-EEC trade.

Arbitrators must obviously consider relevant directly applicable EEC rules; failure to do so could result in the award being unenforceable. What where a Community organ is given exclusive jurisdiction to determine the meaning and/or relevance of the EEC provision in question? Should the arbitrators immediately decline jurisdiction, so denying the parties the forum of their choice? Or should they accept jurisdiction, consider
the relevance of the European legislation and then, depending on their conclusions, either stay their proceedings in favour of the Community organ which has exclusive jurisdiction or reach an award on the merits? Here again there is no unanimous answer.

If arbitration is not a "court or tribunal" within the meaning of article 177, then arbitrators are not subject to the mandatory rules of EEC law. On the other hand, if arbitrators are recognised to have the right to refer a question to the ECJ, then they must respect all provisions of EEC law, and like any national "court or tribunal" must stay proceedings when the Community organ with exclusive jurisdiction has become seized.

Only the ECJ and the European Commission can resolve these questions definitively. This will only come about when an arbitration tribunal—preferably with the parties' agreement—having to decide the meaning and/or relevance of a European law provision, actually refers the matter to the ECJ. The European Court will then be obliged to answer the question referred or decline jurisdiction and declare arbitration to fall outside article 177. Whatever they may decide at least the present uncertainty will be ended.

5. The Denationalisation of the Arbitration Award.

455. Since the end of the second World War, international commercial arbitration has gained in importance and stature. As the States of the world have crystallised into economic and political "blocks", international businessmen have become increasingly unwilling to believe in the ability of national courts to impartially and adequately hear and resolve their disputes. Hence more and more they have turned to arbitration.
The increased need for and confidence in international commercial arbitration has brought with it new responsibilities and practices. Arbitration is no longer simply an alternative, though similar institution to national courts; it is totally different and has a special role. It has become the neutral and impartial forum in which disputes arising out of international commerce can most appropriately be heard and determined. Owing no allegiance to any sovereign State, international commercial arbitration has a special responsibility to develop and apply the law of international trade.

456. As the parties come to arbitration specifically because it is a non-national jurisdiction, both the proceedings and the award should manifest this character. The award itself must be acceptable both on its merits and content as well as on its reasoning. Hence the desire of arbitrators to "denationalise" the arbitration: the award must not only be non-national, but must be seen to be non-national.

The denationalisation of the award in international commercial arbitration is attained by looking to the needs of the contract in question and by trying to avoid resort to any one, single, national law. In the absence of a choice of law by the parties, the preference is for some international, generally accepted or "common" legal standard; where one national law must be applied, it is to be similarly identified by resorting to an international, generally accepted or "common" conflict of laws rule. In the former situation the award will be based on a non-national legal standard; in the latter, the applicable law will have been determined by means of a non-national conflict of laws system. In both cases the effect is to "denationalise" the award, and make it more relevant to the needs of international commerce and more easily acceptable to the parties.