

ARBITRATION BETWEEN U.S. AND WEST GERMAN  
COMPANIES:  
AN EXAMPLE OF EFFECTIVE DISPUTE RESOLUTION IN  
INTERNATIONAL BUSINESS TRANSACTIONS\*

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1. INTRODUCTION

Hundreds, if not thousands of major business contracts are signed by U.S. and West German companies each year. In most of these transactions, notably long-term performance contracts, the parties perceive the need to deal with potential future disputes and include an appropriate clause in the contract which provides for a mechanism to solve such disputes effectively.

*1.1. The Primary Question: Conciliation or Arbitration?*

Two kinds of formal, regulated procedures are at the disposal of the parties to such a contract: the rules on international conciliation<sup>1</sup> and the rules on international arbitration. In practical importance, at the level of large international transactions, the rules on arbitration far exceed those on conciliation. According to figures published by the International Chamber of Commerce (ICC) in Paris, 339 requests for arbitration were registered in 1985 by the Secretariat of its Court of Arbitration, whereas, in that same year, only a very few requests for

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<sup>1</sup> For example, the International Chamber of Commerce (ICC) in Paris has established its Optional Conciliation Rules. They appear in INTERNATIONAL CHAMBER OF COMMERCE, RULES FOR THE ICC COURT OF ARBITRATION, at 7 (ICC Pub. No. 291, 1980). The United Nations Commission on International Trade Law (UNCITRAL) has drafted its own conciliation rules which were adopted by the 35th General Assembly of the United Nations on Dec. 4, 1980. See *Conciliation Rules of the United Nations Commission on International Trade Law*, U.N. Doc. A/RES/35/52 (1980), reprinted in [1980] 11 UNCITRAL Y.B. 21, U.N. Doc. A/CN.9/SER.A/1980.

conciliation were filed.<sup>2</sup> Similar results are obtained if one looks at the figures published by the International Center for Settlement of Investment Disputes (ICSID) in Washington, D.C.,<sup>3</sup> another important international institution entrusted with the conciliation and arbitration of business disputes. During the period from 1971 through June 30, 1985, twenty requests for arbitration proceedings and only two for conciliation were registered by its Secretary General.<sup>4</sup>

Private international business arbitration thus seems to be a means of dispute resolution unparalleled in practical importance by any other procedural tool. Yearly statistics from the Court of Arbitration of the ICC illustrate this very encouraging development.<sup>5</sup> In 1946, four disputes were submitted to its Court of Arbitration. In 1956 this number increased to 32 disputes and in 1969 to 130 disputes. During the period 1970 through 1976, the annual average number of newly listed disputes was 170. This annual average increased again, to 250, during the period 1977 through 1982. In 1985, new cases exceeded 300 for the first time. This general experience on a large international scale is also of importance for special U.S.-West German trade relationships. It cannot be disputed that arbitration, if properly provided for in the contract, is the most effective means of dispute resolution between U.S. and West German business enterprises.

Before examining the manner by which arbitration may be organized most effectively, three international treaties with potentially significant impact upon such arbitration will be generally reviewed. A more detailed examination will follow later in this article.<sup>6</sup>

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<sup>2</sup> 1985 ICC ANNUAL REPORT 21 (ICC Pub. No. 437, 1986).

<sup>3</sup> See generally Broches, *The International Centre for Settlement of Investment Disputes*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 1 (1977).

<sup>4</sup> For a summary of all cases filed prior to June 30, 1981, see ICSID, FIFTEENTH ANNUAL REPORT 30 (1981). Each annual report since 1981 lists those new cases filed during that year.

<sup>5</sup> See 1985 ICC ANNUAL REPORT, *supra* note 2, at 5; see also de Hancock, *The ICC Court of Arbitration: The Institution and its Procedures*, 1 J. INT'L ARB. 21, 22 (1984).

<sup>6</sup> See *infra* notes 22-69, 145-93 and accompanying text.

As to the subject of the present article, see generally Glossner, *Law and Institutions of Arbitration in the Federal Republic of Germany and their Relevance for American - West German Business Relations*, in SCHIEDSGERICHTSBARKEIT IM DEUTSCH-AMERIKANISCHEN WIRTSCHAFTSVERKEHR (Arbitration in U.S.-West German Business Relations) 27 (K. Bockstiegel ed. 1985); Hoellering, *The Law of Arbitration in the United States and its Relevance for German-American Business Relations*, in SCHIEDSGERICHTSBARKEIT IM DEUTSCH-AMERIKANISCHEN WIRTSCHAFTSVERKEHR, *supra*, at 11.

## 1.2. *The Impact of Three International Treaties*

The United States and the Federal Republic of Germany are bound, in matters of private arbitration, by one bilateral and two multilateral international treaties: the bilateral Treaty of Friendship, Commerce and Navigation of October 29, 1954 (Treaty of Friendship);<sup>7</sup> the multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965 (ICSID Convention);<sup>8</sup> and the multilateral New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (New York Convention).<sup>9</sup>

The Treaty of Friendship provides in article VI, paragraph 2 that

[c]ontracts entered into between nationals or companies of either Party and nationals or companies of the other Party, that provide for the settlement by arbitration of controversies shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy.<sup>10</sup>

Though this paragraph deals with only two problems of limited purview, its practical importance should not be underestimated.<sup>11</sup>

This approach is different than that of the ICSID Convention. The ICSID has been viewed, by the authors of the ICSID Convention, as an institution to deal with disputes between companies from industrialized countries and those from developing states, rather than as an

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<sup>7</sup> Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-West Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593.

<sup>8</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature*, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6690, 575 U.N.T.S. 160.

<sup>9</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, *acceded to with reservations* by United States, Sept. 1, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

<sup>10</sup> Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-West Germany, art. VI, para. 2, 7 U.S.T. 1839, 1840, T.I.A.S. No. 3593.

<sup>11</sup> See U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW 366, 371 (Bilateral Studies in Private International Law No. 4, 1972).

institution to settle disputes between companies which are both from industrialized states. In fact, there is no knowledge of any request for conciliation or for arbitration having been introduced before the ICSID between either a U.S. company and the Federal Republic of Germany, or a West German company and the United States.<sup>12</sup> The ICSID Convention, therefore, does not play a role in the settlement of disputes between the United States and the Federal Republic of Germany.

The New York Convention, however, has had a considerable impact on U.S.-West German arbitration proceedings. This impact will not likely decrease. It should be noted that both the United States and the Federal Republic of Germany have acceded to the New York Convention under "reciprocity" and "commercial disputes" reservations.<sup>13</sup>

## 2. THE ARBITRATION AGREEMENT

The first critical issue to be examined in private arbitration between a U.S. and German enterprise is the validity and scope of the arbitration agreement inserted into their contract.

### 2.1. *The Basic Attitude Toward Arbitration*

When solving the manifold problems connected with the validity and the scope of the arbitration agreement, recourse must frequently be had to the basic attitudes prevailing in the respective national systems of law toward arbitration agreements in general. There is in each national system of law a basic policy with respect to arbitration agreements, either condemning, favoring, or taking an intermediate position towards them. It is imperative for U.S. and West German companies to know, before entering into arbitration agreements, which policy is pursued by their respective legislatures towards arbitration in general, and within such a basic framework, which positions their national courts have taken.

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<sup>12</sup> See 1985 ICC ANNUAL REPORT, *supra* note 2.

<sup>13</sup> Both reservations are contained in article I, paragraph 3 of the Convention:

When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

21 U.S.T. at 2519, T.I.A.S. No. 6997, 330 U.N.T.S. at 38.

### 2.1.1. *United States Federal Law*

English common law originally was hostile to arbitration agreements.<sup>14</sup> Such agreements were considered to “oust” local courts from their legitimate jurisdiction and were therefore held revocable and were denied enforcement. This hostile English attitude was adopted in the 19th century by most U.S. courts.<sup>15</sup> In 1925, however, the tide turned in the United States when the Federal Arbitration Act<sup>16</sup> (FAA) was enacted by Congress. Pursuant to section 2 of the Act, arbitration provisions “in any maritime transaction or a contract evidencing a transaction involving commerce” were declared “valid, irrevocable, and enforceable.”<sup>17</sup>

This fundamental statutory change had far-reaching consequences. U.S. courts since then have not ceased to stress that the Federal Arbitration Act, in reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid the cost and delay of litigation and to place arbitration agreements upon the same footing as other contracts.<sup>18</sup> A strong policy in favor of arbitration has therefore been pursued by federal courts<sup>19</sup> on the basis of the Federal Arbitration Act, leading to a liberal construction of arbitration agreements.<sup>20</sup> The federal courts have concluded that any doubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be resolved in favor of arbitration unless a court could state with “positive assurance” that this dispute was not meant to be arbitrated.<sup>21</sup>

<sup>14</sup> See *Kulkundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-84 (2d Cir. 1942); Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597-98 (1928).

<sup>15</sup> See *Kulkundis*, 126 F.2d at 984.

<sup>16</sup> Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982).

<sup>17</sup> *Id.*; see Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 582-84 (1952) (discussing various judicial responses to irrevocability and enforceability).

<sup>18</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974); *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 194 (2d Cir. 1984).

<sup>19</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 44 (3d Cir. 1978); *Development Bank of the Phil. v. Chemtex Fibers, Inc.*, 617 F. Supp. 55, 57 (S.D.N.Y. 1985); *McDonnell Douglas Corp. v. Kingdom of Den.*, 607 F. Supp. 1016, 1019 (E.D. Mo. 1985); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513-16 (1974) (weighing desirability of arbitration in international transactions against investors' right to judicial forum in securities matters).

<sup>20</sup> *Becker*, 585 F.2d at 44; *Singer Co. v. Tappen Co.*, 403 F. Supp. 322, 329 (D.N.J. 1975).

<sup>21</sup> *S. A. Mineracao*, 745 F.2d at 194; *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979); *Becker*, 585 F.2d at 44; *Gates Energy Prods., Inc. v. Yuasa Battery Co.*, 599 F. Supp. 368, 371 (D. Colo. 1983).

Finally, in 1970, the United States acceded to the New York Convention which, until then, had been viewed with critical skepticism. The articles of the New York Convention were embodied in chapter 2 of the Federal Arbitration Act.<sup>22</sup> This ratification of the New York Convention triggered within the U.S. a wave of optimism about and support for international arbitration,<sup>23</sup> and was interpreted outside the U.S. as another token of the U.S. willingness to accept arbitration as a regular tool for solving international business disputes.<sup>24</sup>

It may be said, therefore, that in the United States there is a growing federal policy in favor of arbitration, but that this policy has had to surmount, particularly in matters of arbitrability, certain obstacles. Considerable progress has nonetheless been made in recent years, particularly in the context of international business relations.

### 2.1.2. West German Law

Under West German law, the validity, irrevocability, and enforceability of arbitration agreements have, in general, never been disputed.<sup>25</sup> Such agreements were known from the Roman law tradition<sup>26</sup> and have been recognized as legally binding upon the parties in some of the codifications issued by the different territorial states since the 17th century, for example, in Prussia in its Code of Civil Procedure of

<sup>22</sup> 9 U.S.C. § 201-208.

<sup>23</sup> See *infra* notes 160-66 and accompanying text; Aksen, *Courts in IV 4 Y.B. COM. ARB.* 341 (1979); Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283 (1959); Harnik, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 AM. J. COMP. L. 703 (1983); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L. J. 1049 (1961); von Mehren, *The Enforcement of Arbitral Awards Under Conventions and United States Law*, 9 YALE J. WORLD PUB. ORD. 343 (1983).

<sup>24</sup> See A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981); Delaume, *L'arbitrage transnational et les tribunaux americains*, 108 JOURNAL DU DROIT INTERNATIONAL 788 (1981); Sanders, *A Twenty Years' Review of the Convention in Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (1979); Schlosser, *Verfahrenintegrität und Anerkennung von Schiedssprüchen im deutsch-amerikanischen Verhältnis*, 1978 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 455 (1978).

<sup>25</sup> See Littauer, *Schiedsgerichtsbarkeit und materielles Recht*, 55 ZEITSCHRIFT FÜR DEUTSCHEN ZIVILPROZESS 1, 6 (1930). It is important to note, however, that certain formal requirements have to be met by the arbitration agreement. See *infra* text accompanying notes 32-39. It is disputed whether, in institutional arbitration, the mere fact of someone's having joined an association will subject that member to the association's mandatory institutional arbitration provided for by its articles of association with respect to all disputes arising out of and in connection with his membership. See K. SCHWAB, *SCHIEDSGERICHTSBARKEIT* 243 (3d ed. 1979) (giving further references).

<sup>26</sup> See Littauer, *supra* note 25, at 30.

1816.<sup>27</sup> Thus, when the Federal Empire was created in 1871 and the first Federal Code of Civil Procedure was passed in 1877,<sup>28</sup> a whole chapter of the new statute was devoted to arbitration proceedings, and the binding, irrevocable nature of the arbitration agreement was the basis upon which those procedural regulations were grounded.

Importantly, the equal standing that arbitration proceedings have with court proceedings and the enforceability of arbitration agreements does not violate articles 92 and 101 para.(1) of the Fundamental Law (Constitution) of 1949 of the Federal Republic of Germany.<sup>29</sup> Article 92 provides that the power to adjudicate legal disputes is vested with the judges; and pursuant to article 101 para.(a), the exercise of judicial powers by extraordinary courts is prohibited and no one may be deprived of his right guaranteed by the Constitution to have his matters decided by duly appointed judges.<sup>30</sup> Since arbitration proceedings require the existence of an arbitration agreement voluntarily entered into by both parties, articles 92 and 101 para.(1) of the Fundamental Law are held inapplicable to arbitration agreements and arbitration proceedings.<sup>31</sup> Hence, in West German law there has never been a bias against the validity, irrevocability, and enforceability of arbitration agreements.

Parties to U.S.-West German business transactions entering into arbitration agreements do not have to fear hostility towards their agreement on either side of the Atlantic. It is important, therefore, for them to know from the beginning which rules of law they have to observe in order to secure the enforceability and workability of their agreements. Attention must be paid to the rules regarding the form of the arbitration agreement, its substantive requirements, the arbitrability of the dispute, and the autonomy of the arbitration agreement.

## 2.2. *The Form of the Arbitration Agreement*

The form of the arbitration agreement does not seem to present serious difficulties. Section 2 of the Federal Arbitration Act requires that the arbitration agreement be a "written provision" or "in writing."

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<sup>27</sup> See *id.* at 13.

<sup>28</sup> ZIVILPROZESSORDNUNG [ZPO] (W. Ger. 1877).

<sup>29</sup> GRUNDGESETZ, arts. 92, 101, para. (1) 1949 Bundesgesetzblatt [BGB] I (W. Ger.).

<sup>30</sup> *Id.* art. 101, para. (1).

<sup>31</sup> Judgment of July 3, 1975, Bundesgerichtshof, W. Ger., 65 Bundesgerichtshof in Zivilsachen [BGHZ] 61-62; Judgment of Aug. 23, 1963, Bundesarbeitsgericht (BAGE), reprinted in 17 NJW 268 (1964); Schlosser in KOMMENTAR FÜR ZIVILPROZESSORDNUNG, annot. I, (3) preceding § 1025 (F. Stein & M. Jonas 19th ed. 1975).

This requirement is construed liberally by U.S. courts.<sup>32</sup> The agreement need not be signed, nor need it be incorporated in the contract itself, but may be contained in an exchange of letters, telexes, or telegrams. The agreement does not have to be part of the same contractual instrument as the main contract, but may be listed in an annex attached to it.<sup>33</sup> West German law is even more permissive. An arbitration agreement does not have to be in writing, if it is entered into between merchants.<sup>34</sup>

Similarly, the "in writing" requirement found in article II, paragraph 2 of the New York Convention of 1958 is liberally construed in the United States<sup>35</sup> and in the Federal Republic of Germany.<sup>36</sup> This is of special importance for parties who do not envision seeking the enforcement of an eventual award under U.S. or West German law, but

<sup>32</sup> See *Universal Oil Prods. Co. v. S.C.M. Corp.*, 313 F. Supp. 905, 906 (D. Conn. 1970) (standard language printed on reverse side of purchaser's order form was enough to create agreement to arbitrate).

<sup>33</sup> See *Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F. Supp. 1013, 1019-20 (S.D.N.Y. 1971); Holtzmann, *Report of United States Arbitration Law*, 2 Y.B. COM. ARB. 116, 119 (1977).

<sup>34</sup> Section 1027 of the West German Code of Civil Procedure in English translation reads:

(1) The arbitration agreement must be concluded expressly and in writing; the instrument must not contain any agreements other than those referring to the arbitration procedure. Admission to the arbitral discussions on the substance of the case overrides any faults in form.

(2) The above provision does not apply if the arbitration agreement is a business matter for the two parties and if neither of the two parties belongs to the trading professions set out in Section 4 of the Commercial Code.

(3) Insofar as, in accordance with para. 2, the arbitration agreement does not have to be laid down in writing, each party may require a written instrument concerning the agreement.

ZPO § 1027, *translated in* O. GLOSSNER, *COMMERCIAL ARBITRATION IN THE FEDERAL REPUBLIC OF GERMANY* 42 (1984).

<sup>35</sup> Upon United States accession to the New York Convention in 1970, chapter 2 was added to the FAA. That chapter states:

"[a]n arbitration agreement . . . including, a[n] . . . agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202 (1982). Thus any agreement meeting the existing "in writing" requirement of previous section 2 will qualify for enforcement under the Convention. See *Beronum Aktiengesellschaft v. Societa Industriale "Tresse" di Dr. Domenico e Dr. Antonio dal Ferro*, 471 F. Supp. 1163, 1170 (S.D.N.Y. 1979) (section 202 incorporates section 2 requirement of a writing).

<sup>36</sup> See K. SCHWAB, *SCHIEDSGERICHTSBARKEIT* 347 (3d ed. 1979); Kornmeier & Sandrock in 2 *HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG* 923 nn.89, 90 (O. Sandrock ed. 1980); Schlosser, *supra* note 31, annex A(III) to § 1044, annot. III(3) to art. 2 of the New York Convention. It has to be noted, however, that the first alternative in part 2 of article II of the New York Convention ("in a contract or an arbitration agreement, signed by the parties") is construed by some German writers as requiring the personal signature of the parties, whereas a signature by stamp or facsimile is considered to be insufficient. See K. SCHWAB, *supra*; Schlosser, *supra* note 31, annex A (III) to § 1044.



rather intend to apply for enforcement under article V of the New York Convention. Since article II of the New York Convention supersedes domestic law,<sup>37</sup> only the formal requirements in that article need be observed to secure recognition and enforcement of a foreign award. The liberal interpretation of article II of the New York Convention in both the United States and the Federal Republic of Germany enhances the workability of international private arbitration in the trade between these two countries.

It must be noted, however, that if a contract has first been concluded orally without an arbitration agreement, and subsequently a letter of confirmation including such an arbitration agreement is sent to the other party and remains unanswered, the "in-writing" requirement laid down in article II of the New York Convention is not met. Thus, this condition is not fulfilled if one party has proposed the arbitration agreement "in writing," and the offeree has remained silent. This rule seems to be firmly established in West German decisional law as well as in West German legal doctrine.<sup>38</sup> Another ruling of a West German court interpreting article II of the New York Convention should also be noted here. The court held that if an arbitration agreement has been signed by an agent of either party, the agent must have a written power of attorney. Otherwise, by means of a mere oral granting of power of attorney, the form required by article II could be circumvented.<sup>39</sup>

### 2.3. Substantive Requirements

#### 2.3.1. The Meeting of the Minds

Both U.S. and West German domestic law, as well as article II of the New York Convention,<sup>40</sup> require the existence of a "meeting of the

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<sup>37</sup> See Sanders, *supra* note 24, at 286. One cannot, however, interpret the express reference in section 202 of the FAA to section 2 of that Act as intending that United States law supersede the Convention as to the "in writing" requirement. See 9 U.S.C. § 2 (1982).

<sup>38</sup> See Judgment of Nov. 8, 1971, Oberlandesgericht, Duesseldorf, *English language summary in 2 Y.B. COM. ARB.* 237 (1977); Judgment of Dec. 16, 1965, Landgericht, Bremen, *English language summary in 2 Y.B. COM. ARB.* 233 (1977). For a similar finding by a Swiss court, see Judgment of June 6, 1967, Tribunal du Canton Geneve, *English language summary in 1 Y.B. COM. ARB.* 199 (1976); see also Kornmeier & Sandrock, *supra* note 36.

<sup>39</sup> See Judgment of March 16, 1977, Landgericht, Hamburg, *English language summary in 9 Y.B. COM. ARB.* 274 (1978); Mezger, *Comment*, in 1979 RECHT DER INTERNATIONALEN WIRTSCHAFT 486, 486 (1979).

<sup>40</sup> Within this context, the following should be emphasized: section 202 of the FAA refers to section 2 of that Act to determine the definition of an arbitration agreement for purposes of applying the New York Convention. Therefore, the meeting of the minds is examined, in the *United States*, according to the same rules of domestic law, irrespective of whether the arbitration agreement is subject to the New York Conven-

minds” of the parties to an arbitration agreement.<sup>41</sup> According to U.S.<sup>42</sup> and West German laws,<sup>43</sup> the general principles of contract apply, subject to the consideration, however, that an arbitration agreement is of utmost importance for the future position of any of the parties and that the existence of a meeting of the minds is of special importance.

Regardless of whether this problem is to be solved under article II of the New York Convention or under the respective national laws, it seems to be established in both U.S. and German law that a meeting of the minds can normally be inferred from the fact that the arbitration agreement was contained if not in the main contract itself, then in a document attached to it<sup>44</sup> or in the general conditions printed on the reverse side of the contract form.<sup>45</sup> If, however, in the case of a reference to general conditions, a copy of those conditions has not been attached to the contract or to the exchange of letters, telexes, etc., or if such conditions have not been printed on the back of the contract or in a party's letter, it will be difficult to assume that the other party has been informed about such conditions, that it has been able to approve

tion or to section 2 of the FAA. See 9 U.S.C. § 2 (1982).

It is doubtful whether this is equally true for *German* law. No German legislative act has tied the interpretation of article II of the New York Convention back to a provision of German law. Hence, German courts might construe article II independently of any provision of their domestic law. Even in the case of such an autonomous interpretation, German courts might have recourse to their general principles of contract formation since, the literal wording of article II would not yield any result. Both methods of implementing article II of the New York Convention would, therefore, probably lead to the same result in Germany.

Furthermore, both the United States and German parties to a commercial contract and/or arbitration agreement may, by an express or tacit stipulation, submit any dispute arising thereunder to the law of a third country (England or Switzerland, for example). In such a case that particular third state's domestic rules or special rules, if any, for the interpretation of the New York Convention would govern the examination of the meeting of the minds.

<sup>41</sup> See, e.g., *Par-Knit Mills, Inc., v. Stockbridge Fabric Co.*, 636 F. 2d 51, 54-55 (3d Cir. 1980).

<sup>42</sup> See *Beronum*, 417 F. Supp. at 1170.

<sup>43</sup> Judgment of Feb. 12, 1976, Bundesgerichtshof, *English language summary in* 2 Y.B. COM. ARB. 242 (1977).

<sup>44</sup> See *id.*; Judgment of Jan. 11, 1978, Landgericht, Zweibrücken, *English language summary in* 4 Y.B. COM. ARB. 262 (1979); Kornmeier & Sandrock, *supra* note 36. In the reverse situation, an arbitration agreement in the main contract has been held applicable to documents referring to that contract. See *Coastal States Trading, Inc. v. Zenith Navigation S.A.*, 446 F. Supp. 330, 338 (S.D.N.Y. 1977) (where a bill of lading contained in bold face type the clause “[a]ll conditions and exceptions of the Charter Party being considered embodied in this Bill of Lading” and the charter party included an arbitration clause, litigation arising from the bill of lading was referred to arbitration).

<sup>45</sup> *Universal Oil Prods. Co. v. S.C.M. Corp.*, 313 F. Supp. 905, 906 (D. Conn. 1970); *Oregon-Pacific Forest Prods. Corp. v. Welsh Panel Co.*, 248 F. Supp. 903, 906 (D. Or. 1965); Kornmeier & Sandrock, *supra* note 36.

them, and that it has agreed to refer any litigation to an arbitral tribunal.<sup>46</sup> An established course of dealing might, however, satisfy the requirement that with each individual contract a party has to communicate its general conditions to its partner.<sup>47</sup>

### 2.3.2. *The Coverage of the Dispute by the Arbitration Agreement*

The language most frequently used in arbitration agreements<sup>48</sup> seems to be that all disputes "arising out of<sup>49</sup> or relating to the contract or the breach thereof"<sup>50</sup> are subject to arbitration. This language is broad enough, under U.S. and West German law, to accomplish the goal of assigning all eventual disputes to arbitration. For such language would cover not only claims based, for example, on fraud in the inducement of the contract itself,<sup>51</sup> but also all statutory claims emerging in connection with the conclusion of the contract or with its performance by the parties.<sup>52</sup>

<sup>46</sup> Kornmeier & Sandrock, *supra* note 36.

<sup>47</sup> *Oregon-Pacific*, 248 F. Supp. at 907.

<sup>48</sup> The widespread use of the following language seems to be due, at least in part, to the recommendation given by the American Arbitration Association of a "Standard Arbitration Clause" which reads: "Any controversy or claim arising out of or relating to this contract, on the breach thereof, shall be settled by arbitration. . . ." AMERICAN ARB. ASS'N, COMMERCIAL ARBITRATION RULES AS AMENDED AND IN EFFECT FEB. 1, 1984, reprinted in R. RODMAN, COMMERCIAL ARBITRATION WITH FORMS 118 (West Handbook Series 1984); see Hoellering, *Arbitrability of Disputes*, 41 BUS. LAW. 125, 125-26 (1985).

<sup>49</sup> Some arbitration clauses do not speak of disputes arising "out of" a contract, but of disputes arising "under" and/or "occurring under" it. The precise language used is generally unimportant. See *Griffin v. Semperil of America, Inc.*, 414 F. Supp. 1384, 1391-92 (S.D. Tex. 1976) (phrase "arising out of" created broad arbitration agreement despite deliberate omission of words "or relating to"). But see *S.A. Mineraçao da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 194 (2d Cir. 1984) (some claims could conceivably "occur under" a contract and yet not "arise under" it).

<sup>50</sup> In German such a clause would read: "Streitigkeiten aus oder in Verbindung mit diesem Vertrag". A literal translation of the phrase "or the breach thereof" would not have to be added because disputes of the latter nature would already be covered by the German language just quoted.

<sup>51</sup> According to a well-established U.S. doctrine, the arbitral tribunal would not, however, have jurisdiction to decide on claims based upon fraud in the inducement of the arbitration agreement itself because such a claim would involve the very existence of the arbitration agreement. See *infra* notes 106-11 and accompanying text; see also Hoellering, *supra* note 6, at 129-30. Under U.S. law, the arbitral tribunal is denied the power to rule on its own jurisdiction.

<sup>52</sup> If one party would, for example, allege the contract to be in violation of the Sherman Act and would therefore request from the other the payment of treble damages under that statute, such dispute, though implying a statutory claim, would be encompassed by the arbitration agreement. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3354 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158 (1983), *vacated sub nom. York International v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984).

In construing the applicability of arbitration clauses to particular disputes, U.S. courts often begin with the principle that all questions of the arbitration agreement's interpretation, construction, validity, revocability, and enforceability relate to federal law.<sup>53</sup> They then consider the strong policy pursued by federal courts favoring arbitration, especially in the context of international agreements.<sup>54</sup> This leads very often to the conclusion that arbitration agreements are to be liberally construed<sup>55</sup> in conferring upon them a meaning "as broad as possible."<sup>56</sup> Finally, it is a rule frequently enunciated by U.S. federal courts that any doubts as to whether an arbitration agreement may be interpreted to cover the asserted dispute should be resolved in favor of arbitration unless a court can state with "positive assurance" that this dispute was not meant to be arbitrated.<sup>57</sup> Therefore, language excluding certain disputes from arbitration should be "clear and unambiguous" or "unmistakably clear."<sup>58</sup>

Under West German law, the interpretation and construction of arbitration agreements are subject to the general rules governing the interpretation and construction, in private law, of all legal transactions. There is, remarkably enough, no principle prescribing a narrow interpretation of the arbitration agreement, even though jurisdiction by ordinary state courts is the general rule in private litigation, with arbitration an exception requiring the existence of a special agreement to arbitrate.<sup>59</sup> On the contrary, it is well-settled in the law of the Federal Republic of Germany that, in cases of doubt, arbitration agreements have to be construed rather broadly.<sup>60</sup> The same principle of broad in-

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<sup>53</sup> See, e.g., *Mitsubishi Motors Corp.*, 105 S. Ct. 3346; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F. 2d 39, 43 (3d Cir. 1978).

<sup>54</sup> See *supra* note 21.

<sup>55</sup> *Becker*, 585 F. 2d at 44; see also *Singer Co. v. Tappan Co.*, 403 F. Supp. 322, 328-29 (D.N.J. 1975).

<sup>56</sup> *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 194 (2d Cir. 1984).

<sup>57</sup> See *supra* note 21.

<sup>58</sup> *Wire Serv. Guild v. United Press Int'l*, 623 F.2d 257, 260 (2d Cir. 1980) (citations omitted); see also *Singer Co.*, 403 F. Supp. at 329 ("[F]ederal courts are . . . to apply . . . a federal rule that seemingly requires a clearly expressed intent *not* to arbitrate an issue before such issue can be ruled one for judicial determination; and, further, that if the issue is a doubtful one, the doubt is to be resolved in favor of arbitration.") (citation omitted) (emphasis in original).

<sup>59</sup> See K. SCHWAB, *supra* note 36, at 19.

<sup>60</sup> See Judgment of Dec. 10, 1970, Bundesgerichtshof, W. Ger., 26 Betriebs-Berater 369, 370; Judgment of Feb. 27, 1970, Bundesgerichtshof, W. Ger., 53 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 315, 320-23; K. SCHWAB, *supra* note 36, at 19 nn. 31-35; Habscheid, *Aus der höchstrichterlichen Rechtsprechung zur Schiedsgerichtsbarkeit*, 26 KONKURS-, TREUHAND-, UND SCHIEDSGERICHTSWESEN 2, 3 (1965). See generally Schlosser, *supra* note 31, § 1025, annot. 12.

interpretation exists when determining whether an arbitration agreement has come into existence.<sup>61</sup>

Thus, under neither U.S. nor West German law are arbitration agreements subject to narrow interpretation or construction which could impede the result intended by the parties.

### 2.3.3. *The Commercial Nature of the Transaction*

Problems of only minor importance arise from the requirement, established in domestic U.S. law and in reservations made both by the United States and the Federal Republic of Germany to the New York Convention,<sup>62</sup> that the dispute referred to the arbitral tribunal be either "maritime" or "commercial" in nature. According to section 2 of the FAA, only arbitration agreements "in any maritime transaction" or in a contract "evidencing a transaction involving commerce," shall be valid, irrevocable, and enforceable.<sup>63</sup> Pursuant to the reservations made by the United States and by the Federal Republic of Germany on the basis of article 1, paragraph 3 of the New York Convention, both states "will apply the Convention only to differences arising out of legal relationships . . . which are considered as commercial under the national law of the state making such declaration."<sup>64</sup> Section 202 of the FAA specifies that only an arbitration agreement arising out of a legal relationship "which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention."<sup>65</sup> Under German law, the notion of a "commercial transaction" is so amply defined that virtually all transactions between private companies are covered by it.<sup>66</sup>

Hence, in private business transactions between enterprises in the United States and the Federal Republic of Germany, this "commerce" requirement normally will be met by the agreements implementing

<sup>61</sup> See Schlosser, *supra* note 31, § 1025, annot. 14.

<sup>62</sup> See *infra* note 64.

<sup>63</sup> 9 U.S.C. § 2 (1982).

<sup>64</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, *acceded to with reservations* by United States, Sept. 1, 1970, art. I, para. 3, 21 U.S.T. 2517, T.I.A.S. No. 6997 (codified at 9 U.S.C. §§ 201-208 (1982)).

<sup>65</sup> 9 U.S.C. § 202 (1982). For an interpretation of this section, see von Mehren, *supra* note 23, at 352; see also *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 952-53 (S.D. Ohio 1981).

<sup>66</sup> See HANDELSGESETZBUCH [HGB] § 343(1) (1983) (W. Ger. Commercial Code), translated in *BUSINESS TRANSACTIONS IN GERMANY* app. §§ 2-72 (B. Ruster ed. 1985) ("Commercial transactions are all transactions by a merchant which relate to the operation of his business.")

such transactions.<sup>67</sup> This seems to be true even for contracts for military defense weaponry in which the government of one country acts as a buyer of weapons produced by corporations of the other country. One limitation in this regard is indicated by *Wijsmuller v. United States*,<sup>68</sup> which was decided by the U.S. District Court for the Southern District of New York in 1976. In that case, the captain of a U.S. warship had signed a contract with a Dutch corporation for the salvage of his ship. The contract provided, *inter alia*, that all disputes arising out of it should be brought before a London arbitration panel. The court held the arbitration agreement void, stating that, "[w]hatever uncertainties may arise when agencies of government engage in commercial transactions, relations arising out of the activities of warships have never been regarded as 'commercial' within the context of sovereign immunity."<sup>69</sup>

#### 2.3.4. *The Arbitrability of the Dispute*

The greatest recent advances in this area concern the arbitrability of various subject matters.<sup>70</sup> Under West German law, arbitrability of the subject matter was never a great problem. According to section 1025(2) of the West German Code of Civil Procedure, an arbitration agreement can claim legal recognition insofar as the parties to the dispute are authorized to dispose of the subject matter of their dispute by an amicable settlement.<sup>71</sup> Hence, there is a clear parallel between the power to settle a dispute and the power to enter into an arbitration agreement with regard to it. In principle, all commercial matters, including disputes on certain matters of antitrust, labor, and industrial property, are susceptible of being arbitrated.

Section 91 of the West German Act on Restrictive Trade Practices provides that arbitration agreements covering future legal disputes arising from restrictive trade agreements or understandings (permissible under certain antitrust provisions) shall be null and void, unless they permit each contracting party to bring their disputes before the ordi-

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<sup>67</sup> See, e.g., *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F. Supp. 737, 742 (S.D.N.Y. 1979).

<sup>68</sup> 3 Y.B. COM. ARB. 290 (S.D.N.Y. 1978).

<sup>69</sup> *Id.* The discussion has not addressed the general question of waiver of immunity by entering into an arbitration agreement.

<sup>70</sup> There is substantial support for this proposition. See generally Sanders, *supra* note 24, at 271 (courts of the contracting states have generally upheld the validity and enforceability of arbitration agreements in many different areas); Delaume, *supra* note 24, at 792-94; Aksent, *supra* note 23, at 348-50; Harnik, *supra* note 23, at 704 ("in approximately 100 internationally reported cases applying the New York Convention enforcement has been refused only 3 or 4 times for public policy reasons").

<sup>71</sup> ZPO § 1025(2) (W. Ger.).

nary courts instead of arbitration panels.<sup>72</sup> Disputes arising out of anti-trust matters are thus open, to a large extent, subject to certain preconditions, to private arbitration. If an arbitration agreement concerns future disputes arising out of export cartel contracts, an even more lenient rule in section 91 of the West German Act applies.<sup>73</sup> The insertion of such an arbitration clause into an export cartel contract, upon application to the competent cartel authority, may be authorized. This would then allow the contracting parties to dispense with fulfilling the general requirement that the contract permit them to bring the dispute before the ordinary courts.

In matters of industrial property, arbitrability is recognized without limitations in West German law.<sup>74</sup> Though arbitration agreements seem to be rather rare in this field,<sup>75</sup> parties to disputes bearing on the existence, extent, or enforceability of industrial property rights, as well as the license agreements entered into with respect to those rights, may settle such disputes amicably and hence agree upon bringing them before arbitral tribunals.<sup>76</sup>

A reverse approach to private arbitration is taken under West German law in labor matters, where only disputes between employers and labor unions and disputes between certain employers and certain groups of employees can be taken before special arbitral tribunals. The bulk of private labor disputes thus are foreclosed from private arbitration.<sup>77</sup>

It may, therefore, be said that West German law, within certain limits, always has been open-minded to the arbitrability of business disputes. On the basis of the clear-cut rule in section 1025(1) of the West German Code of Civil Procedure, West German courts could never dis-

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<sup>72</sup> GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN (GWB) § 91 (1980) (West German antitrust statute), *translated in* B. RUSTER, *supra* note 66, app. 3-67.

<sup>73</sup> *Id.*

<sup>74</sup> Nastelski, in PATENTGESETZ UND GEBRAUCHSMUSTERGESETZ § 47 n.104 (E. Reimer 3d ed. 1968) (patent disputes); Nordemann, in URHEBERRECHT 547 (F. Fromm & W. Nordemann 4th ed. 1979) (copyrights).

<sup>75</sup> Nastelski, *supra* note 74, § 47 n.96.

<sup>76</sup> For certain copyright matters, it is provided by statute that all claims must be brought before a certain arbitral body (rather than before the district court) while an appeal is made to the competent court of appeals. *See* Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten § 14, 15, 1965 BGBl I 1294 (W. Ger.).

<sup>77</sup> Pursuant to section 101 of the Code of Procedure for Labor Courts, employer's unions and trade unions can agree to refer their contract disputes to certain arbitral tribunals. They can also agree that their members will take their disputes to these arbitral tribunals (such an agreement would be binding on their members). Such agreements may be entered into, however, only with regard to certain kinds of employees, such as stage or circus artists, movie actors, or sea captains and sailors. ARBEITSGERICHTSGESETZ § 101 (W. Ger.).

regard an arbitration agreement upon the ground that by such agreement they would be unduly ousted from their proper jurisdiction.<sup>78</sup>

When looking at the problem of arbitrability under U.S. federal law, the two turning points already alluded to<sup>79</sup> significantly changed basic attitudes towards arbitration.

The first turning point was the enactment of the Federal Arbitration Act in 1925,<sup>80</sup> which reversed the prior hostility toward arbitration agreements and introduced a new policy in their favor. After 1925, federal courts still continued, however, to hold several important matters nonarbitrable, for example, matters relating to the validity and infringement of a patent or any right under a patent,<sup>81</sup> certain claims based on U.S. securities laws,<sup>82</sup> as well as claims deriving from U.S. antitrust statutes.<sup>83</sup> Inevitably, many international contracts concerned to some extent these areas. A great many business contracts concluded between U.S. and West German companies were, therefore, nonarbitrable. This feature of U.S. arbitration law was regarded with great anxiety in the Federal Republic of Germany.<sup>84</sup>

Until the second turn in U.S. arbitration law came about from the mid-1970s to mid-1980s, West German enterprises felt helpless in their dealings with their U.S. partners because of the following dilemma. If, on the one hand, they submitted the settlement of their disputes with their U.S. partners to arbitration, they ran the risk that a U.S. court would disregard either an agreement providing for arbitration, or the decision of an arbitral panel reached, e.g., in England, in any other "neutral" country, or under the auspices of an international institution of arbitration (e.g., the ICC in Paris). On the other hand, proceedings could meanwhile be instituted against them by their U.S. partners before a U.S. court. Thus, arbitration agreements into which West German enterprises had entered with their U.S. partners were regarded

<sup>78</sup> ZPO § 1025 (1) (W. Ger.).

<sup>79</sup> See *supra* notes 14-24 and accompanying text.

<sup>80</sup> 9 U.S.C. §§ 1-14, 201-208 (1982).

<sup>81</sup> See, e.g., *Diematic Mfg. Corp. v. Packaging Indus., Inc.*, 381 F. Supp. 1057, 1061 (S.D.N.Y. 1974), *appeal dismissed*, 516 F.2d 975 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975).

<sup>82</sup> See, e.g., *Wilko v. Swan*, 346 U.S. 427, 434-35 (1953).

<sup>83</sup> See, e.g., *Robb v. Lewis*, 488 F.2d 41 (2d Cir. 1974).

<sup>84</sup> See P. SCHLOSSER, ENTWICKLUNGSTENDENZEN IN RECHT UND PRAXIS DER INTERNATIONALEN SCHIEDSGERICHTSBARKEIT 47 (1976); Dietrich, *Internationale Schiedsvereinbarungen von Amerikanischen Gerichten*, 40 RABELS ZEITSCHRIFT ZUM AUSLÄNDISCHEN UND INTERNATIONALEN PRIVATRECHT [R.Z.A.I.P.] 1 (1976); Howaldt & Howe, *Schiedsklauseln in Internationalen Verträgen und deren Anerkennung in den USA*, 21 RECHT DER INTERNATIONALEN WIRTSCHAFT 135 (1975); Pagenberg, *Das Schiedsgerichtswesen in den USA*, 1977 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 12, 17.



as unsafe, unreliable, and insecure.<sup>85</sup> In spite of the FAA, the fear remained that West German enterprises would find their disputes before U.S. courts, where proceedings, in comparison with those carried on before European national courts, are considerably more expensive and where many features of these proceedings, like pretrial discovery, seem strange to European lawyers and businessmen.

In addition, if such West German companies entered into forum selection agreements with their U.S. partners (providing, e.g., for the jurisdiction of English, Swiss, or Canadian courts), they were not assured that these agreements would be honored. Their U.S. partners were, as a general rule, not prevented from suing them before U.S. courts. Thus, neither forum selection clauses choosing a European forum nor arbitration agreements providing for arbitration either in Europe or in the United States were, in the eyes of West German companies, safe enough to shield them against being dragged into litigation before U.S. courts. These feelings of unreliability and insecurity were only temporarily appeased by the famous *Zapata* doctrine of the U.S. Supreme Court,<sup>86</sup> which was hailed as the great turning point<sup>87</sup> in U.S. arbitration thinking.<sup>88</sup> After having been restricted by later decisions of federal courts<sup>89</sup> (e.g., to admiralty matters),<sup>90</sup> however, the doctrine turned out to be merely the beginning of U.S. nonouster theory, but not yet a real reversal of that doctrine.<sup>91</sup>

Today, a second turning point can truly be detected in the development of U.S. arbitration law, which began in 1974 with the United States Supreme Court decision in *Scherk v. Alberto-Culver Co.*,<sup>92</sup> and was crystallized with the 1985 decision in *Mitsubishi Motors Corp. v.*

<sup>85</sup> See, e.g., sources cited in note 84, *supra*.

<sup>86</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>87</sup> See Behrens, *Internationale Gerichtsstands - vereinbarungen vor amerikanischen Gerichten*, 38 R.Z.A.I.P. 590, 593 (1974); Boehmer & Jander, *Anerkennung von Gerichtsstandsvereinbarungen in den USA*, 1972 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS - BERATERS 449; Kohler, *Wirksamkeit von Gerichtsstands- und Schiedsgerichtsvereinbarungen in Internationalen Verträgen in der Amerikanischen Rechtsprechung*, 22 RECHT DER INTERNATIONALEN WIRTSCHAFT 507 (1976).

<sup>88</sup> The United States Supreme Court had already dealt with this issue in 1874. See *Insurance Co. v. Morse*, 87 U.S. 445, 451 (20 Wall. 1874) ("There is no doubt of the general principle that parties cannot by contract oust the ordinary court of their jurisdiction.")

<sup>89</sup> See *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955 (5th Cir. 1974); *Copperweld Steel Co. v. Demag - Mannesmann - Bohler*, 354 F. Supp. 571 (W.D. Pa. 1973).

<sup>90</sup> See *Copperweld Steel Co.*, 354 F. Supp. at 573.

<sup>91</sup> See Jung & Sandrock, *supra* note 36, at 865-72; see also Delaume, *What is an International Contract? An American and Gallic Dilemma*, 28 INT'L & COMP. L.Q. 258 (1979).

<sup>92</sup> 417 U.S. 506 (1974).

*Soler Chrysler-Plymouth, Inc.*<sup>93</sup> Thus, the former feeling of unreliability and insecurity has to a great extent disappeared. West German enterprises now trust that their arbitration agreements with their U.S. partners will be recognized by U.S. courts, even though arbitrability of the subject matter might sometimes seem doubtful under U.S. law. In *Scherk*, the U.S. Supreme Court rejected its holding in *Wilko v. Swan*.<sup>94</sup> This earlier decision had held that claims based on a violation of the Securities Act of 1933 (1933 Act) were not arbitrable, since any advance agreement to arbitrate such matters would constitute a waiver not permitted by section 14 of the 1933 Act, which was designed to protect investors and to require issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce. The Supreme Court in *Scherk* found "crucial differences" between the arbitration agreement involved in *Wilko* and the one which had been signed in the present case.<sup>95</sup> Holding that the arbitration agreement in *Scherk* was embedded in a "truly international"<sup>96</sup> contract and that such a contract "involves considerations and policies significantly different" from those found controlling in *Wilko*, it came to the conclusion that the policies of the Federal Arbitration Act of 1925 should prevail and that the arbitration agreement in the international context should therefore be binding, irrevocable, and enforceable since its parties would otherwise be exposed to an intolerable uncertainty, which would

almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transactions.<sup>97</sup>

The 1982 Amendment Act<sup>98</sup> expressly established the arbitrability of all disputes arising with respect to the validity and infringement of a patent or any right under a patent. According to that Act, the parties to

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<sup>93</sup> 105 S. Ct. 3346 (1985).

<sup>94</sup> 346 U.S. 427 (1953); see also C. WEHRINGER, ARBITRATION, PRECEPTS AND PRINCIPLES 22 (1969); Hoellering, *supra* note 48, at 132-35; Sturges & Murphy, *supra* note 17, at 580.

<sup>95</sup> 417 U.S. at 515.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 516-17.

<sup>98</sup> 35 U.S.C. § 294 (1982).

a contract may voluntarily agree to arbitrate a broad range of patent disputes, both pending and future, and such agreements and awards may be enforced under title 9 of the U.S. Code.<sup>99</sup>

The reversal in U.S. arbitration law finally crystallized in 1985 when the Supreme Court handed down *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>100</sup>

In overturning the long-standing principle of the nonarbitrability of antitrust claims,<sup>101</sup> the Supreme Court concluded in *Mitsubishi* that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes would require enforcement of arbitration agreements embodied in in-

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<sup>99</sup> 9 U.S.C. §§ 1-14, 201-208 (1982); see Hoellering, *New Opportunities for Patent Arbitration*, 188 N.Y.L.J., Dec. 16, 1982, at 1.

<sup>100</sup> 105 S. Ct. 3345 (1985). This decision has been extensively commented upon, both in the United States and in Europe. For a view from the United States, see Alexis, *Arbitration: Public Policy Exception to Arbitration of Antitrust Issues*, 25 HARV. INT'L L.J. 427 (1984) Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 INT'L L.&P. 361 (1986); Hoellering, *supra* note 48, at 135-38; Lesser, *Arbitration: Arbitrability of Antitrust Claims in International Tribunals*, 27 HARV. INT'L L.J. 227 (1986) Smith, *Determining the Arbitrability of International Antitrust Disputes*, 8 J. Comp. Bus. & Capital Market L. 197 (1986). For the European perspective, see Gill, *Note on the Mitsubishi v. Soler Decision*, 25 SWISS REV. INT'L ANTITRUST L. 67 (1985); Jarvin, *Arbitrability of Antitrust Disputes: The Mitsubishi v. Soler Case*, 2 J. INT'L ARB. 69 (1985); Lange & Wiessner, *Die Schiedsfähigkeit Internationalen Antitrust Streitigkeiten*, 31 RECHT DER INTERNATIONALEN WIRTSCHAFT 757 (1985); Ovington, *Arbitration and U.S. Antitrust Law: A Conflict of Policies*, 2 J. INT'L ARB. 54 (1985); Editorial, *U.S. Antitrust Law Claims Arbitrable*, 1985 J. BUS. L. 363 (1985). For the most part, these authors view the decision as a landmark in the development of international arbitration.

<sup>101</sup> See *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) ("antitrust claims . . . are inappropriate for arbitration"); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 733 F.2d 155, 162-64 (1st Cir. 1983), *rev'd*, 105 S.Ct. 3346 (1985); *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *Helfenbein v. International Indus.*, 438 F.2d 1068 (8th Cir. 1971); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980, 983-84 (9th Cir. 1970); *Hunt v. Mobil Corp.*, 410 F. Supp. 10, 27 (S.D.N.Y. 1975).

The *American Safety* doctrine reasoned that private plaintiffs asserting their rights under the antitrust statutes were acting as private attorney generals in protecting the public's interest, and thereby played a pivotal role in aiding governmental enforcement of antitrust laws. *American Safety*, 391 F.2d at 826. Under these circumstances, it could not be assumed that Congress intended such claims to be resolved elsewhere than in the courts. *Id.* at 827. Furthermore, it was maintained that the complexity of antitrust issues, and the extensiveness and diversity of the evidence involved in antitrust cases rendered antitrust claims more suitable for judicial rather than arbitration proceedings, *Cobb*, 488 F.2d 41; thus, it would be questionable to entrust the decision of antitrust issues to commercial arbitrators, who "are frequently drawn for their business expertises," when "it is business community generally that is regulated by the antitrust laws." *Id.* (citation omitted).

ternational contracts, even assuming that a contrary result would be forthcoming in a domestic context.<sup>102</sup>

The potential complexity of antitrust matters did not suffice to preclude arbitration,<sup>103</sup> since international arbitrators could often be drawn from the legal as well as the business community and that it, therefore, seemed unjustified to indulge the presumption that the parties and the arbitral body conducting the proceeding would be unable or unwilling to retain competent, conscientious, and impartial arbitrators.<sup>104</sup> It was thus held necessary for U.S. courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.<sup>105</sup>

The decisions of the Supreme Court in *Scherk* and *Mitsubishi* have finally created in the United States a climate favorable towards international arbitration that can be trusted by foreign companies.<sup>106</sup> West German companies, when entering into arbitration agreements with their U.S. partners, will heavily rely upon the rationales reflected in these decisions. It would be highly detrimental to international arbitration if the *ratio decidendi* of these decisions would, in any respect, ever be reversed or ignored by U.S. courts in the future.

### 2.3.5. *The Autonomy of the Arbitration Agreement*

All problems arising from the autonomy of the arbitration agreement have a considerable impact upon the workability of international arbitration. Two kinds of problems usually arise from autonomy considerations:<sup>107</sup> (1) the severability of the arbitration agreement from the main contract, and (2) the power of the arbitral tribunal to rule on its

<sup>102</sup> *Mitsubishi*, 105 S.Ct. at 3355.

<sup>103</sup> *Id.* at 3357.

<sup>104</sup> *Id.* at 3358.

<sup>105</sup> *Id.* at 3360.

<sup>106</sup> Prior to the Supreme Court decision in *Mitsubishi*, another category of statutory claims was held nonarbitrable: claims deriving from the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. §§ 1961-1968 (1982). See *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.*, 576 F. Supp. 566, 574 (S.D.N.Y. 1983), *aff'd.*, 745 F. 2d 190, 196 (2d Cir. 1984). In response to the new policy enunciated by the Supreme Court in *Mitsubishi*, the rulings in *Samitri* were reversed and the RICO claims were held arbitrable. See *Development Bank of the Phil. v. Chemtex Fibers, Inc.*, 617 F. Supp. 55, 57 (S.D.N.Y. 1985).

<sup>107</sup> See Glossner, *Federal Republic of Germany (Report on its Arbitration Law)*, 4 Y. B. COM. ARB. 60, 65-66 (1979); Schwab, *Die Entscheidung des Schiedsgerichts über seine eigene Zuständigkeit: Eine Stellungnahme zum Verhältnis von Hauptvertrag und Schiedsvertrag und zur sog. Kompetenz-Kompetenz des Schiedsgerichts*, 22 KONKURS-, TREUHAND- UND SCHIEDSGERICHTSWESEN 17 (1961); Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective*, in INTERNATIONAL ARBITRATION: SIXTY YEARS OF ICC ARBITRATION. A LOOK AT THE FUTURE 257, 262-64 (1984).

own jurisdiction.

The question of the severability of the arbitration agreement from the main contract results from the contention of one or the other party that the main contract has not come into existence, that it always has been void, or that it has been voided (e.g., by a later cancellation which one party was entitled to pronounce) after originally having been enforceable. In such a situation, the issue arises whether: (1) the nonexistence or nullity of the main contract also affects the arbitration agreement, thus removing any basis for the jurisdiction of the arbitral tribunal, (2) or the arbitration agreement is autonomous and may be valid and enforceable on its own, thus enabling the arbitral tribunal to decide upon the existence or nonexistence, the validity or nullity, the enforceability or unenforceability of the main contract, notwithstanding the fact that the arbitration agreement itself is a constituent part of that nonexistent or nullity-stricken main contract.

Following the U.S. Supreme Court decision in *Prima Paint Co. v. Flood & Conklin Mfg.*,<sup>108</sup> U.S. law seems fairly settled in this respect.<sup>109</sup> That is, under section 4 of the FAA, though the main contract may never have come into existence and though it may have been null and void from its inception or may have been voided or cancelled after a certain period of operation, the arbitral tribunal may proceed to exercise its jurisdiction on the deficient main contract, provided only that the existence, validity, and enforceability of the arbitration agreement in itself is not in dispute between the parties and that there is no restriction in the arbitral agreement operating as a bar against the jurisdiction of the arbitral tribunal.<sup>110</sup>

The same point of view prevails in West German law. If the main contract is alleged to be nonexistent, null, void, or for any other reason unenforceable, the West German Supreme Court<sup>111</sup> asserts a presump-

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<sup>108</sup> 388 U.S. 395 (1967); see also Hoellering, *supra* note 48, at 129, 130.

<sup>109</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974); see also 2 J. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* 11-14 (1979) (discussing the clear rule of separability in federal cases and the inclination of state courts to follow federal rules).

<sup>110</sup> *Prima Paint Co.*, 388 U.S. at 403-04; see also Federal Arbitration Act, 9 U.S.C. § 4 (1982) (discussed in *Prima Paint Co.*, 388 U.S. at 403 & n.11).

Although this solution of the issue of severability has never been spelled out expressly in any case affecting maritime contracts or foreign commerce, U.S. courts have in effect followed this ruling in such cases. See *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14, 22 (E.D. Pa. 1972); *Global Maritime Leasing Panama, Inc. v. M/S North Breeze*, 349 F. Supp. 779, 785 (D.R.I. 1972); see also *Delaume*, *supra* note 24, at 799.

<sup>111</sup> Judgment of Feb. 27, 1970, Bundesgerichtshof, W. Ger., 53 BGHZ 315, 318-19, 321-23; Judgment of Sept. 22, 1977, Bundesgerichtshof, W. Ger., 69 BGHZ 260, 261; see also H. MAIER, *HANDBUCH DER SCHIEDSGERICHTSBARKEIT* 74-75 (1979); K. SCHWAB, *supra* note 36, at 27; Schwab, *supra* note 107, at 17-21.

tion in favor of the validity of the arbitration agreement, reasoning that the parties presumably wanted the arbitral tribunal to rule upon all matters relating to the contract. This holds true particularly when the parties have phrased their arbitration agreement in general language which does not reflect any intention that the jurisdiction of their arbitral tribunal should be confined to certain specified matters unrelated to the validity of their arbitration clause.

The attitude of both U.S. and West German law is different, however, with regard to the power of the arbitral tribunal to rule on its own jurisdiction (so-called "*Kompetenz-Kompetenz*" according to West German legal terminology).

In the United States, such power is firmly denied to arbitral tribunals.<sup>112</sup> If the existence, validity, enforceability, annulment, or cancellation of an arbitration agreement is in dispute between the parties, or if there is a dispute about whether the wording of an arbitration agreement covers a certain lawsuit, the arbitral tribunal under U.S. law is considered to be without jurisdiction to decide upon these matters, since the exercise of such jurisdiction would require the existence of a valid and enforceable arbitration agreement.<sup>113</sup> As long as a valid and enforceable agreement does not exist, the competent state court cannot be ousted of its jurisdiction.

In the Federal Republic of Germany, opinions are divided as to the power of the arbitral tribunal to decide upon its own jurisdiction in the absence of an express, explicit agreement of the parties conferring jurisdiction upon the arbitral tribunal to decide this issue. Some courts<sup>114</sup> as well as commentators<sup>115</sup> deny the existence of such a power, while other courts<sup>116</sup> and commentators<sup>117</sup> are willing to permit it, at least to a certain extent.<sup>118</sup>

In international arbitration it would be unwise to consider the ar-

<sup>112</sup> See, e.g., the following cases involving international trade: *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 462 F.2d 673 (2d Cir. 1972), *aff'd on other grounds*, 523 F. 2d 527 (2d Cir. 1975); *Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp.*, 455 F. Supp. 211 (S.D.N.Y. 1978).

<sup>113</sup> See *Interocean Shipping*, 462 F. 2d at 676; *Pollux Marine*, 455 F. Supp. at 216-17.

<sup>114</sup> See, e.g., Judgment of May 5, 1977, Bundesgerichtshof, W. Ger., 68 BHGZ 356, 358, 365-66.

<sup>115</sup> K. SCHWAB, *supra* note 36, at 39; Schwab, *supra* note 107, at 21-25; Glossner, *supra* note 107, at 66.

<sup>116</sup> See Judgment of Nov. 1, 1957, Oberlandesgericht, Celle, 1958 Monatsschrift für Deutsches Recht 172.

<sup>117</sup> See, e.g., H. MAIER, *supra* note 111, at 80.

<sup>118</sup> As to the very confusing state of German law on this issue, see the detailed and critical article of Mann, *Schiedsrichter und Recht*, 1 FESTSCHRIFT FÜR WERNER FLUME ZUM 70. GEBURTSTAG 593, 608 (H. Jakobs ed. 1978).

bitral tribunal, in the absence of an express stipulation to the contrary, as destitute of all power to decide upon its own jurisdiction. It seems, instead, much more expedient to consider it as invested with such power in certain situations, for instance, in all cases where the claimant has originally introduced his request not before the competent local court, but before the arbitral tribunal.

In such cases, the reasons which generally induce the parties to an international contract to submit their eventual disputes to arbitration<sup>119</sup> demand that the arbitral tribunal itself decide upon its proper jurisdiction, even if the parties have not expressly empowered it to do so. Otherwise, the case would have to be moved to the competent state court, resulting in loss of time and money. Undesirable forum-shopping might ensue and a period of uncertainty would govern the dispute of the parties. No one would know whether the litigation would finally remain before the state court or whether it would have to be removed again to the arbitral tribunal. In the event a second (and final) removal back to the arbitral tribunal would have to be made, that tribunal would again have to read the files, consider the case, and perhaps weigh the same evidence and raise the same legal issues as the state court had already done. In view of these circumstances, it would certainly be proper to presume that the parties wanted to have the arbitral tribunal entrusted with the power to rule on its own jurisdiction, if the claimant had, in the first instance, introduced his claim before the arbitral tribunal and not before the competent state court.

For the same reasons, the opposite solution would apply if the claimant had filed his claim first with the competent state court. It would be appropriate in such a case to consider that court as entrusted with the power to decide whether it would have jurisdiction to deal with the subject matter or whether the parties had, by a valid arbitration agreement, referred the subject matter to an arbitral tribunal.

### 3. THE SUBSTANTIVE IMPLEMENTATION OF THE ARBITRATION AGREEMENT

After U.S. and West German enterprises agree to refer their potential disputes to an arbitral tribunal, they then must determine which method is best-suited to implement the arbitration agreement. Many questions will arise in this respect. Should the parties submit their

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<sup>119</sup> These reasons include: greater knowledge of arbitrators about sophisticated international commercial matters; confidentiality of the proceedings; better command of foreign languages by arbitrators, which dispenses with the need for furnishing translations and employing interpreters; other economies of expense; the relative speed of arbitration proceedings.

eventual disputes to an institutional arbitration court or to an ad hoc tribunal? If an institutional arbitration would seem to be most advantageous, which would be best-suited to handle such a dispute? Since the choice of an institutional arbitration court is in some respects interrelated with the place of the arbitration and the proper law of the contract, further problems of the choice of place of arbitration and the proper law of the contract will arise. Even if the parties agree upon an institutional arbitration, for example, upon the jurisdiction of the Court of Arbitration of the International Chamber of Commerce in Paris, this might not preclude them from choosing a special seat for their arbitral proceedings in a city other than that in which the institution's headquarters are located. The parties might even be tempted to agree upon a "delocalized" arbitration: should such an agreement be recommended or should the parties be warned against embarking upon such an adventure? A great many other questions might be raised by the parties, but those mentioned above are the most important, and thus will be analyzed separately below.

### 3.1. *The Choice of an Institutional Arbitration Court*

Many reasons suggest that U.S. and West German enterprises should, instead of conferring jurisdiction upon an ad hoc tribunal, resort to an institutional arbitration for dealing with their future disputes. Above all, arbitration institutions normally supply parties with a highly desirable organizational framework<sup>120</sup> which, with ad hoc arbitration, would have to be arranged by the parties themselves.

If institutional arbitration can generally be recommended to the parties, the question remains which institution would best be suited for an arbitration between a U.S. and a West German enterprise. It follows from the nature of such a dispute that the parties should not resort to any of their national arbitration institutions. They should rather entrust a "neutral" arbitration institution with jurisdiction, one sitting in a country which has friendly ties with both home countries of the parties. About a half dozen institutions seem acceptable in this respect.<sup>121</sup>

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<sup>120</sup> The framework takes care of, for example: the proper filing of the request for arbitration and its answer; the appointment and challenge of the arbitrators; the handling of the deposit for the costs of the proceedings; the issuance and deposit of an eventual award, its notification to the parties, its enforcement, etc. See generally 2 J. WETTER, *supra* note 109, at 257-368 (compares the organizational rules of five international arbitration institutions).

<sup>121</sup> For a general discussion of sites, see AMERICAN ARB. ASS'N, *SURVEY OF INTERNATIONAL ARBITRATION SITES* (1984); see also Branson & Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration* 24 VA. J. INT'L L. 917, 919-20 (1984) (discussing the International Chamber of Commerce (ICC) in



### 3.2. *The Choice of the Place of Arbitration*

It has been stressed already that the choice of an arbitral institution does not necessarily prevent the parties from agreeing upon a *place* of arbitration which is different from the *seat* of that institution. The primary examples are those arbitration proceedings that are organized under the auspices of the ICC Court of Arbitration in Paris which actually has its seat in a country other than France, most often Switzerland.<sup>122</sup>

Furthermore, some commentators,<sup>123</sup> arbitral tribunals,<sup>124</sup> and

Paris); Stein & Wotman, *International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1685-86 (1983) (discussing ICC in Paris, and London Court of Arbitration (LCA)).

For commentary focusing on specific sites, see, e.g., (1) London Court of International Arbitration: 2 HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG 1099-1117 (O. Sandrock ed. 1980); Lord Hacking, *Where We Are Now: Trends and Developments Since the Arbitration Act (1979)*, 2 J. INT'L ARB. No. 4, at 7 (1985); Jarvin, *London as a Place for International Arbitration*, 1 J. INT'L ARB. 59, 64-71 (1984); Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164; Paulson, *A Commentary on the 1985 Rules of the London Court of International Arbitration*, 10 Y.B. COM. ARB. 167 (1985); Schlosser, *Probleme der Internationalen Handelsschiedsgerichtsbarkeit*, 24 DIE AKTIENGESELLSCHAFT 237, 242-43 (1979). (2) Court of Arbitration of the International Chamber of Commerce in Paris: 2 J. WETTER, *supra* note 109, at 145; Bucher, *Allgemeine Einführung in die Schiedsgerichtsbarkeit in der Schweiz*, in DIE INTERNATIONALE SCHIEDSGERICHTSBARKEIT IN DER SCHWEIZ 1, 2-3 (1979) (Switzerland as place of arbitration for ICC Court); de Hancock, *supra* note 5, at 22; Eisemann, *The Revised Rules of Arbitration of the International Chamber of Commerce*, 1 Y.B. COM. ARB. 167 (1976). (3) The Court of Arbitration of the Zurich Chamber of Commerce: Bachmann, *Switzerland: The Court of Arbitration of the Zurich Chamber of Commerce*, in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 203 (E. Cohn, M. Domke & F. Eiseman eds. 1977) [hereinafter cited as HANDBOOK]; Briner, *National Report: Switzerland*, 3 Y.B. COM. ARB. 181 (1978); Endlich, *Anerkennung und Vollstreckbarkeit von Schiedssprüchen und die Schiedsordnungen auf nationaler und internationaler Ebene*, 1979 DER BETRIEB 2472; Karrer, *Arbitration Procedure in Switzerland: Zurich and Geneva Compared*, 2 INT'L CONT. 49 (1981). (4) The Arbitral Center of the Austrian Federal Economic Chamber at Vienna: W. MELIS, A GUIDE TO COMMERCIAL ARBITRATION IN AUSTRIA (1983); Melis, *Austria: The Arbitral Centre of the Federal Economic Chamber*, in HANDBOOK, *supra*, at 33. (5) The Netherlands Arbitration Institute: Sanders, *National Report: The Netherlands*, 6 Y.B. COM. ARB. 60 (1981); van Marwijk Kooy, *The Netherlands: The Netherlands Arbitration Institute*, in HANDBOOK, *supra*, at 133; *Rules (1979) of the Netherlands Arbitration Institute, Rotterdam*, 7 Y.B. COM. ARB. 228 (1982). (6) The Stockholm Arbitration Institute: 2 J. WETTER, *supra* note 109, at 231-33; Hjermer, *Sweden: The Stockholm Arbitration Institute*, in HANDBOOK, *supra*, at 187; *Sweden: Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 7 Y.B. COM. ARB. 68 (1982); *Sweden: Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 3 Y.B. COM. ARB. 254 (1978).

<sup>122</sup> See, e.g., Bucher, *supra* note 121, at 2-3.

<sup>123</sup> See, e.g., R. DAVID, *Arbitration in International Trade* 281-82 (1985); P. FOUCHARD, 2 L'ARBITRAGE COMMERCIAL INTERNATIONAL 316 (1965); Goldman, *Les Conflits de lois dans l'arbitrage international de droit privé*, 2 RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE 347, 380 (1963); Lalive, *Les règles de conflit de lois appliquées au fond de litige par l'arbitre international siègeant en Suisse*, 1976

state courts<sup>125</sup> believe that the choice of an institutional arbitration does not preclude the parties from selecting no particular geographical place for their arbitration proceedings. Under this view, such parties are free to authorize their arbitral tribunal to act on a transnational level without being bound by any procedural rules of the actual place of arbitration. The arbitral tribunal is thereby empowered to render its award on the basis of the general principles of procedural law which derive from justice and equity and which are recognized by all civilized nations. This doctrine of the so-called "delocalized" award<sup>126</sup> was first applied in the famous *Gotaverken* award which was rendered in 1978 by an arbitral tribunal acting under the auspices of the Court of Arbitration in Paris;<sup>127</sup> since then it has been widely propounded by its adherents, while being (partly) followed<sup>128</sup> or (partly) rejected<sup>129</sup> by others. If this doctrine were acceptable, one might be tempted to recommend to the

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REVUE DE L'ARBITRAGE 155, 159 (1976).

<sup>124</sup> For example, see the award rendered by an arbitral tribunal acting under the auspices of the ICC Arbitration Court in Paris on April 5th, 1978 in *Gotaverken A.B. v. Libyan Gen. Nat. Maritime Transp. Co.*, reprinted in 2 J. WETTER, *supra* note 109, at 178-230; see also award rendered by P. Lalive "as the sole arbitrator" appointed by the ICC on January 14, 1970, in the matter of an Indian cement company and a Pakistani bank arbitrated in Geneva, Switzerland. 5 Y.B. COM. ARB. 170, 171, 174 (1980).

<sup>125</sup> Judgment of Feb. 21, 1980, Cour d'appel, Paris (*Libyan Gen. Nat'l Maritime Transp. Co. v. Gotaverken Arendal*), reported in 107 JOURNAL DU DROIT INTERNATIONAL [J.D.I.] 660 (1980), translated in Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 385 (1981) [hereinafter *Arbitration Unbound*]; Judgment of Aug. 13, 1979, Svea Hovratt (Supreme Court), Swed. (*Gotaverken Arendal A.B. v. Libyan Gen. Maritime Transp. Co.*), translated in Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 244 (1980-81) [hereinafter *Role of Swedish Courts*]. For commentary on these decisions, see Paulsson, *Arbitre et jugé en Suède: Exposé général et réflexions sur la délocalisation des sentences arbitrales*, 1980 REVUE DE L'ARBITRAGE 441, 473-84; *Role of Swedish Courts*, *supra*; see also Mezger, 69 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ (R.C.D.I.P) 770 (1980) (critical annotation to decision of Court of Appeal of Paris).

<sup>126</sup> See *Arbitration Unbound*, *supra* note 125, at 358.

<sup>127</sup> See 2 J. WETTER, *supra* note 109, at 170.

<sup>128</sup> See, e.g., Ferrante, *About the nature (national or a-national, contractual or jurisdictional) of ICC awards under the New York Convention*, in THE ART OF ARBITRATION: ESSAYS ON INTERNATIONAL ARBITRATION 129 (J. Schultz & A. van den Berg eds. 1982); Hunter, *Comment*, in THE INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 60TH CONFERENCE HELD AT MONTREAL IN 1982, at 295 (1983); Paulsson, *Arbitration Unbound*, *supra* note 125, at 363-64; Jeantet, *Annotation to the decision of the Court of Appeal of Paris*, 1980 REVUE DE L'ARBITRAGE 533, 536.

<sup>129</sup> For a thorough critique of this doctrine, see Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (P. Sanders ed. 1967); Mann, *England Rejects "Delocalized" Contracts and Arbitration*, 33 INT'L & COMP. L.Q. 193 (1984) [hereinafter *Delocalized Contracts*]; see also A. VAN DEN BERG, *supra* note 24, at 28-43; 2 J. WETTER, *supra* note 109, at 171-78; Mezger, *Comment*, in THE INTERNATIONAL LAW ASSOCIATION, REPORT ON THE 60TH CONFERENCE HELD AT MONTREAL IN 1982, at 282 (1983).

parties of a U.S.-West German arbitration agreement the following wording of their agreement:

All disputes arising out of or relating to the present contract shall be finally settled by arbitration to be held in . . . [insert the factual place of arbitration] . . . in accordance with the Rules of the . . . [insert the arbitration rules of the institution chosen by the parties] . . ., but in detachment from the local procedural rules in effect at the place of arbitration.

The consequences, however, deriving from such detachment from the country where the arbitration takes place, are astounding. The local procedural rules in effect at the place of arbitration, even the most cogent ones, have no bearing at all on the arbitral proceedings or on the award to be rendered.<sup>130</sup> No appeal lies against the award under those rules,<sup>131</sup> the award being exclusively based upon the arbitration agreement of the parties which removes it from a local level onto a transnational level and serves as its only foundation. Hence, the choice of the place of arbitration would be of minor, if not of trifling, importance.<sup>132</sup> The award would only have to meet the requirements set up by the laws of the respective countries where its enforcement would afterwards be sought.<sup>133</sup>

A question arises, however, whether such a doctrine stands up to scrutiny on both theoretical and practical levels. Theoretically, one might wonder whether arbitration proceedings might be carried on and whether awards, once rendered, might be binding entirely outside the realm of any national sovereign just on the basis of a *nudum pactum* of the parties. National laws derive their binding force from the wills of their respective national sovereigns. The same is true for judgments rendered by national courts of any nation. The obligatory force of international law stems from the international community of nations which has developed a set of binding rules called the law of nations. International judgments derive their binding force from the submissions of the parties to such jurisdiction. It is hardly feasible that the judge of a private international arbitral tribunal may sit between the national

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<sup>130</sup> See 2 J. WETTER, *supra* note 109, at 209-13 (for award rendered by the arbitral tribunal in *Gotaverken*).

<sup>131</sup> See Judgment of Feb. 21, 1980, Cour d'appel, Paris, *translated in* Paulsson, *Arbitration Unbound*, *supra* note 125, at 385-87.

<sup>132</sup> Cf. Paulsson, *Arbitration Unbound*, *supra* note 125, at 358 ("marginal importance").

<sup>133</sup> See Judgment of Aug. 13, 1979, Svea Hovratt, Swed., *translated in* Paulsson, *Role of Swedish Courts*, *supra* note 125, at 248.

level of the respective states and the international level of the community of nations, rendering awards that are binding upon the parties to the arbitration, wholly without the authority of any national sovereign, solely on the basis of a presumed autonomy of such parties to contract out of the realm of their national sovereigns on an international level unfettered by their national laws or the rules of the law of nations.

On the practical level, other objections may be raised against the doctrine of delocalization. First, it is not clear whether an appeal could be launched against a "delocalized" award. If such an award would be manifestly deficient (for example, for want of a valid arbitration agreement or on the ground of the cooperation of a biased arbitrator), the need for the possibility of a review of the award before a controlling state court would be obvious. The advocates of the doctrine of the "delocalized" award have some difficulties, however, in finding a "natural"<sup>134</sup> judicial authority before which such challenge might be brought. Second, the problems which the theory of the "delocalized" award would create for the application of the New York Convention must not be forgotten. According to article V, paragraph (1) lit.(e) of the New York Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, for example, if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."<sup>135</sup> Similarly, article VI of the New York Convention provides that the authority before which the award is sought to be relied upon may adjourn the decision on the enforcement of the award and may also order the party seeking the enforcement of the award to give to the other party suitable security, if an application for the setting aside or suspension of the award has been made pursuant to the aforementioned article V, paragraph 1 lit.(e).<sup>136</sup>

The New York Convention thus seems to be based upon the assumption that there is always a "country" by the authority of whose laws an award has been made and that the respondent against which enforcement of such an award is sought should have the option of challenging the award before the courts of that "country" to the extent that the law of that country provides for such challenge. Again, if there is no "country" by the authority of whose laws an award has been made,

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<sup>134</sup> This term was used in Paulsson, *Arbitration Unbound*, *supra* note 125, at 370.

<sup>135</sup> A. VAN DEN BERG, *supra* note 24, at 399.

<sup>136</sup> *Id.*

the "delocalized" award could not be challenged at all before a court of the place in which it has been rendered. One requirement upon which the enforcement procedures of the New York Convention have been based,<sup>137</sup> would thus not have been met.<sup>138</sup> It seems doubtful, therefore, whether enforcement of a "delocalized" award could be sought at all under the New York Convention.<sup>139</sup> Without being able to secure recognition and enforcement under the New York Convention, such an award is of little practical value. Thus, even though the doctrine of the "delocalized" award has been accepted by the Court of Appeal of Paris and the Supreme Court of Sweden,<sup>140</sup> U.S. and West German enterprises would be remiss to ignore the recognition and enforcement problems in U.S., West German, and other national courts. As A. J. van den Berg recently remarked in his thorough study of the New York Convention, ". . . the insufficient legal basis and the absence of recognition by most national courts make the agreement for 'denationalized' arbitration a hazardous undertaking full of legal pitfalls."<sup>141</sup>

### 3.3. *The Choice of the Proper Law of Contract*

U.S. and West German enterprises should also be warned against stipulating in the arbitration agreement that the contract, to which such agreement would be attached, should be governed by the *lex mercatoria* or by any other set of ill-defined rules which, as their advocates believe, can be derived from international trade and commerce and which form no part of any local law at all, but also belong, in the language of Lord

<sup>137</sup> See Paulsson, *Arbitration Unbound*, *supra* note 125, at 371-72; Hunter, *supra* note 128, at 296; Mezger, *supra* note 129, at 238.

<sup>138</sup> For a detailed analysis, see A. VAN DEN BERG, *supra* note 24 (showing that a "delocalized" award has to be refused enforcement under the New York Convention).

<sup>139</sup> It has been argued, however, that if the parties to an arbitration agreement have agreed to comply with an eventual "delocalized" award as finally binding and enforceable, they would have waived their right to any form of appeal. In such a case, no challenge could therefore be brought by the parties before a court of the country by the authority of which, or under the law of which, the award would have been made. Consequently, enforcement of such "delocalized" award could be sought under the New York Convention. See Judgment of Aug. 13, 1979, Svea Hovratt, Swed., translated in Paulsson, *Role of Swedish Courts*, *supra* note 125, at 246; *Arbitration Unbound*, *supra* note 125, at 372. If that argument were accepted, no challenge whatsoever would lie against any award rendered by an arbitral tribunal acting under the Rules for the ICC Court of Arbitration. Article 24 of those Rules provides that "[b]y submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made." *Rules of Conciliation and Arbitration of the International Chamber of Commerce*, 1 Y.B. COM. ARB. 164 (1976). This would, after all, be an astounding consequence.

<sup>140</sup> See *supra* notes 125-27 and accompanying text.

<sup>141</sup> See A. VAN DEN BERG, *supra* note 24, at 33.

Judge Kerr, to the "transnational firmament."<sup>142</sup>

It is not the place here to discuss this very controversial theory<sup>143</sup> which seems to have gained a certain influence in international arbitration, to the extent that arbitration agreements nowadays sometimes expressly refer to it and that the use of such clauses is recommended by a number of legal scholars, arbitrators, and other practitioners. Its shortcomings have been demonstrated amply.<sup>144</sup> Except for a few areas where merchants have developed some rather clear-cut commercial rules to govern their respective relations (for example, the Incoterms and the Uniform Customs and Practice for Documentary Credits), there is no set of definite rules which could be derived from international customs, international equity, or principles of law common to all or most nations, giving clear guidance on how to solve, in a foreseeable and predictable manner, the intricate questions of law arising in international trade.

In cases in which arbitral tribunals are referred to *leges mercatoriae* or, in the absence of an agreement between the parties on the proper law, apply that doctrine on their own initiative, the tribunals are without clear guidance from any national law. Instead, they must develop vague notions about what, under the particular circumstances of the case, international merchants would have held just and equitable, having regard to the solutions developed in systems of law related to the

<sup>142</sup> Bank Mellat v. Helleniki Techniki S.A., [1983] 3 W.L.R. 783, 789.

<sup>143</sup> For English-speaking authorities on this theory, see J. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* (1978); Croff, *The Applicable Law in an International Commercial Arbitration*, 1982 INT'L LAW. 613, 623, 634; Lando, *The "Lex Mercatoria" in International Commercial Arbitration*, 34 INT'L & COMP. L. Q. 741 *passim* (1985). For French-speaking authorities, see R. DAVID, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* 479 (1982); P. FOUCHARD, *supra* note 123, at 401; Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives*, 104 J.D.I. 339 (1977); Lalive, *Problèmes relatifs à l'arbitrage international commercial* 1 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 569, 650 (1967). For German-speaking authorities, see E. LANGEN, *TRANSNATIONALES RECHT* (1981); Martiny, in 7 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESTZBUCH 529, 539 (H. Sonnenberger ed. 1983); Schmitthoff, *Das neue Recht des Welthandels*, 28 R.Z.A.I.P. 47 (1964); *see also* Sandrock & Steinschulte, in 1 HANDBUCH DER INTERNATIONALE VERTRAGSGESTALTUNG 99 (O. Sandrock ed. 1980) (critical survey of German-speaking advocates of the theory).

<sup>144</sup> *See, e.g.*, Mann, in 33 INT'L & COMP. L.Q. 193, 196 (1984). The discussion points to problems in the recent decision of the English House of Lords in *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.*, [1983] 2 All E.R. 884. Lord Diplock held that "contracts are incapable of existing in a legal vacuum," and that they "are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law. . . ." *Id.* at 891. Yet Lord Wilberforce retorted that "this argument. . . can be disposed of by describing it as contending for an internationalised, or floating, contract unattached to any system of law: to do so does not do it justice." *Id.* at 895.

particular case or in other prominent national laws wholly unrelated thereto. The borderline between arbitrations subject to the rule of law and arbitrations *ex aequo et bono* would be blurred. Predictability would be lost. No longer would anyone be able to assess, in approximate sums of money, the risks involved in the introduction of arbitration proceedings. In the long run, it would even have to be feared that the reputation of international arbitration would suffer.

In view of these disadvantages, the choice of the *lex mercatoria* as the proper law of contract cannot be recommended. Instead, in determining the governing law of the contract, the parties to a U.S.-West German arbitration agreement should consider the national systems of law mentioned in the section above on commendable places of arbitration. English, French, Swiss, Austrian, Dutch, and Swedish law might be considered as candidates for assuming such a function. For obvious reasons, it would be most convenient if the place of arbitration (which usually has an impact upon the procedural rules to be applied by the arbitral tribunal) would coincide with the proper law of the contract. Contradictions between the substantive and procedural rules could thus be avoided.

#### 4. THE ENFORCEMENT OF ARBITRAL AWARDS

##### 4.1. *The General Policy Underlying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958*

###### 4.1.1. *United States*

In interpreting the New York Convention, U.S. courts have evidenced a pro-arbitration leaning. For example, in *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*,<sup>145</sup> the court construed narrowly the Convention's public policy defense in order to ensure the enforcement of an arbitral award. Specifically, the court held:

In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and

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<sup>145</sup> 508 F. 2d 969 (2d Cir. 1974).

every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis . . . .<sup>146</sup>

In refusing to expand the public policy defense, the court took a pro-arbitration stance which has since been adopted and expanded in many other decisions.<sup>147</sup> The liberal spirit transpiring from these decisions has been welcomed, if not praised, by many commentators in the United States<sup>148</sup> as well as abroad.<sup>149</sup>

#### 4.1.2. Federal Republic of Germany

The Federal Republic of Germany, apart from a regrettable interval between 1933 and 1945, has been receptive to international arbitration.<sup>150</sup> It was one of the first countries to ratify the New York Convention in 1961.<sup>151</sup> As well, unlike the United States, the Federal Republic of Germany is a member of the Geneva Protocol on Arbitration Agreements and the Geneva Convention on the Enforcement of Foreign Arbitral Awards. In 1965, it acceded to the European Convention on Commercial Arbitration.

Thus, there has been no change of policy towards international commercial arbitration in the Federal Republic of Germany in recent

<sup>146</sup> See *id.* at 973, 974.

<sup>147</sup> Almost all decisions following *Parsons & Whittemore* which had to deal with the defenses enacted in article V of the Convention refer to this judgment as the basis for their construction of article V of the Convention. See *Bergeson v. Joseph Muller Corp.*, 710 F.2d 928, 930-32 (2d Cir. 1983); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982); see also *supra* notes 123-25.

<sup>148</sup> See, e.g., *Harnik, supra* note 23, at 703, 704; *Aksen, supra* note 23, at 342, 351; see also *von Mehren, supra* note 23, at 349, 361.

<sup>149</sup> See A. VAN DEN BERG, *supra* note 24, at 359, 366; *Delaume, supra* note 24, at 788, 807; *Sanders, supra* note 24, at 271; *Schlosser, supra* note 24, at 456.

<sup>150</sup> See section 1044 of the West German Code of Civil Procedure, which lists only four exclusive grounds upon which a West German court may refuse recognition and enforcement of a foreign arbitral award: (1) the nullity or unenforceability of the award pursuant to the national law by which the proceedings before the arbitral tribunal were governed; (2) the violation of German public policy; (3) a lack of due process insofar as a party has not been duly represented in the arbitration proceedings; and (4) a lack of due process insofar as a party has not had a due chance to exercise its right to be heard, and, in particular, to expound its factual and legal arguments before the arbitral tribunal. ZPO § 1044 (W. Ger.). If none of these grounds can be proved to exist by the party opposing the enforcement, the German court must enforce the foreign award even though it may be persuaded that, i.e., either the procedural rules which governed the arbitral proceedings were seriously violated, though short of nullity or unenforceability of the award, or that the arbitral tribunal might not correctly have applied the substantive law governing the underlying contract.

<sup>151</sup> See *id.* § 1044 (W. Ger.) (the author has paraphrased the statute). For the list of member states and their dates of accession, see *Kornmeier & Sandrock, supra* note 36, 1070-72.



decades. No sweeping statements like those found in the *Scherk*<sup>152</sup> and *Mitsubishi*<sup>153</sup> decisions of the U.S. Supreme Court or in the *Parsons & Whittemore*<sup>154</sup> decision of the U.S. Court of Appeals for the Second Circuit may be detected in West German judgments or legal writings. West German commentators merely assert that it was the intention of the drafters of the New York Convention to facilitate the enforcement of foreign arbitral awards vis-a-vis the Geneva Convention of 1927 by no longer requiring the *exequatur* of the state where the award had been rendered and by shifting the burden of proof with regard to any defense against the enforcement, upon the shoulders of the party raising such defenses and legal arguments.<sup>155</sup> If none of these grounds can be proven to exist by the party opposing the enforcement, the West German court must enforce the foreign award, even though it may be persuaded that either the procedural rules which have governed the arbitral proceedings may have been seriously (but short of nullity or unenforceability of the award) violated, or that the arbitral tribunal might not have correctly applied the substantive law governing the underlying contract.<sup>156</sup>

#### 4.2. *The Interpretation of Some of the Defenses Embodied in the New York Convention*

The liberal spirit governing the interpretation of the New York Convention both in the United States and in the Federal Republic of Germany becomes apparent if one looks into the cases decided by the courts of the two countries dealing with the different defenses listed in article V of the Convention.<sup>157</sup>

Due to the limited scope of this article, only a few of the defenses will be discussed here. Emphasis is placed upon those defenses which are most likely to be raised in U.S.-West German arbitration cases.

##### 4.2.1. *The Defense of the Invalidity of the Arbitration Agreement*

A previous section of this paper<sup>158</sup> dealt with the substantive re-

<sup>152</sup> See *supra* notes 92-97 and accompanying text.

<sup>153</sup> See *supra* notes 100-05 and accompanying text.

<sup>154</sup> 508 F.2d 969 (2d Cir. 1974); see also *supra* notes 145-47 and accompanying text.

<sup>155</sup> See, e.g., the very meager remarks by K. SCHWAB, *supra* note 36, at 417.

<sup>156</sup> See *supra* note 150.

<sup>157</sup> The volume of international arbitrations handled in New York City is much larger than in Hamburg or any other locations in the Federal Republic of Germany. This may explain why the U.S. case law dealing with the New York Convention is much richer than West German case law.

<sup>158</sup> See *supra* notes 40-47 and accompanying text.

quirements to be met by an arbitration agreement in order to be recognized as valid and enforceable under article II of the New York Convention. According to article V, paragraph (1) lit.(a) of the Convention, recognition and enforcement of an award may be refused if it is proven by the party opposing the recognition and enforcement of the award that the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made.<sup>159</sup>

It should be noted in this context that in a decision of the U.S. District Court for the Southern District of New York<sup>160</sup> (where the arbitral tribunal had been sitting), a charter-party between an Italian and a Bahamian company with an arbitration clause attached to it was held valid even though the charter-party purportedly contained an Israeli boycott clause which contravened the public policy of the United States and the State of New York, where enforcement of the arbitration agreement was sought. The court referred to the *Scherk*<sup>161</sup> and *Parsons & Whittemore*<sup>162</sup> decisions in holding that, though the "national policy" of the United States might have been contravened by the arbitration agreement being connected to the boycott clause, U.S. "public policy" under the particular circumstances of the case<sup>163</sup> had not fundamentally been jeopardized.<sup>164</sup>

A similar solution might be obtained under West German common law, when the enforcement of a foreign arbitral award is at stake. According to the West German common law of procedure, the validity and enforceability of the arbitration agreement is no longer a requirement for the enforcement of a foreign award, once the foreign award has become final in its country of origin. A foreign award is considered to be final when it can no longer be challenged before the courts of the state or under the national laws by which the arbitral proceedings have been governed.<sup>165</sup> Thus, in both legal systems, there is a perceivable trend in certain situations to isolate international arbitrations from certain vices resulting from the nullity or unenforceability of arbitration agreements, thereby promoting rather than hampering international

<sup>159</sup> Art. V, para. (1) lit.(a), 21 U.S.T. at 2523, T.I.A.S. No. 6997, 330 U.N.T.S. at 40.

<sup>160</sup> *Antco Shipping Ltd. v. Sidermar S.P.A.*, 417 F. Supp. 207 (S.D.N.Y. 1976).

<sup>161</sup> See *supra* notes 92-97 and accompanying text.

<sup>162</sup> See *supra* notes 145-47 and accompanying text.

<sup>163</sup> The carriage of the goods provided for in the charter-party, did not touch U.S. territory. *Antco*, 417 F.Supp. at 216.

<sup>164</sup> See *id.* at 216, 217; see also von Mehren, *supra* note 23, at 358 (article V defenses are construed very narrowly).

<sup>165</sup> This results from section 1044 of the West German Code of Civil Procedure. ZPO § 1044; see *supra* note 150.

arbitration.

#### 4.2.2. *The Defense of Inadequate Opportunity to Present One's Case*

According to article V, paragraph (1) lit.(b) of the New York Convention, recognition and enforcement of a foreign award may be refused if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case.<sup>166</sup> Thus, it has been held that, "[t]his provision essentially sanctions the application of the forum state's standards of due process."<sup>167</sup> Again, U.S. courts have very narrowly construed this part of the New York Convention,<sup>168</sup> whereas West German courts twice refused recognition and enforcement of arbitral awards rendered in the United States in accordance with the rules of the American Arbitration Association (AAA).<sup>169</sup>

The decisions of the West German courts suggest that West German law interprets the defenses embodied in article V of the New York Convention rather extensively; however, this appearance is mistaken. It is merely accidental that these two cases, clearly falling under the public policy defense of West German law, have come up before West German courts. The general trend in the Federal Republic of Germany favors a narrow interpretation of article V of the Convention. Two decisions rendered by the German Supreme Court in Civil Matters when only the rules of the bilateral Treaty of Friendship, Commerce and Navigation of 1954 were in effect, and before the United States' accession to the New York Convention conspicuously support this conclusion.<sup>170</sup> In both cases recognition and enforcement were granted.

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<sup>166</sup> Art. V, para. (1) lit. (b), 21 U.S.T. at 2523, T.I.A.S. No. 6997, 330 U.N.T.S. at 40.

<sup>167</sup> See, e.g., *Parsons & Whittemore Overseas Co. v. Société Générale de L'industrie du Papier (RAKTA)*, 508 F.2d 969, 975 (2d Cir. 1974).

<sup>168</sup> See von Mehren, *supra* note 23, at 358-59, citing *Laminioirs-Trefileries-Cableries de Lens v. Southwire Co.*, 484 F. Supp. 1063, 1067 (N.D. Ga. 1980), and *Biotronik Mess-und Therapiegeräte GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 139-40 (D.N.J. 1976). It is true that these two decisions were based on article V (2)(b) of the Convention; however, in *Southwire* the court declined to vacate an award over the objection that the party who raised it was refused the opportunity to fully cross-examine the other party's witness. In *Medford* the refusal of the U.S. to participate in the hearings was held immaterial since that party received notice of the arbitral proceedings.

<sup>169</sup> See Judgment of June 10, 1976, Oberlandesgericht, *reprinted in* 4 Y.B. COM. ARB. 258 (1979); Judgment of April 3, 1975, Oberlandesgericht, W. Ger., *reprinted in* 2 Y.B. COM. ARB. 241 (1977).

<sup>170</sup> Judgment of Oct. 21, 1971, Bundesgerichtshof, W. Ger., 86 ZEITSCHRIFT FUER ZIVILPROZESS [Z.Z.] 46 (1973); Judgment of Feb. 16, 1961, Bundesgerichtshof, W. Ger., 34 Bundesgerichtshofes in Zivilsachen [BGHZ] 274. As to the importance of the Treaty of Friendship, Commerce and Navigation, see U. DROBNIG, *supra* note 11;

#### 4.2.3. *The Defense of Limited Jurisdictional Scope*

This defense, arising under article V, paragraph (1) lit.(c) of the New York Convention, is that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or that it contains decisions on matters beyond the scope of the submission to arbitration. The seminal decision of *Parsons & Whittemore*<sup>171</sup> stated that this defense should be construed narrowly, like the others already discussed, and that, once again, such a narrow construction would comport with the Convention's emphasis on facilitating enforcement of arbitration proceedings.<sup>172</sup>

#### 4.2.4. *The Defense of Improper Constitution of the Arbitral Tribunal*

In *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*,<sup>173</sup> a U.S. company raised the defense that since the arbitral tribunal was improperly constituted, the damage award it rendered was unenforceable. Specifically, the U.S. company claimed that due to the third arbitrator's longstanding ties with the Imperial Government of Ethiopia, he could not make neutral decisions.<sup>174</sup> The U.S. Court of Appeals for the Fifth Circuit rejected the claim that the arbitral tribunal was improperly constituted. The court's holding presumed the arbitrator could exercise independent judgment since he was "a most respected man and a man of honor and of absolute integrity."<sup>175</sup> As well, the court referred to the Convention's purpose of encouraging the recognition and enforcement of commercial arbitration agreements in international contracts and unifying the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.<sup>176</sup>

Domke, *American Arbitral Awards: Enforcement in Foreign Countries*, 1965 U. ILL. L.F. 399, 406 (1965).

<sup>171</sup> 508 F.2d 969 (2d Cir. 1974). A narrow construction was applied to the defense also by *Fertilizer Corp. of India v. IDI Management*, 571 F. Supp 948, 959, 960 (S.D. Ohio 1981). See also von Mehren, *supra* note 23, at 359-60 (citing *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 703-04 (2d Cir. 1978)). *Andros* was based on 9 U.S.C. § 10(d) (1982) which authorizes vacating an award "(w)here the arbitrators exceeded their powers". The court added, however, that the same result would be obtained under the New York Convention. 579 F.2d at 703 n.16.

<sup>172</sup> 508 F.2d at 976 (West German decisions dealing with this provision of the New York Convention could not be found).

<sup>173</sup> 535 F.2d 334 (5th Cir. 1976).

<sup>174</sup> See *id.* at 337. The third arbitrator was Professor René David of Paris University. From 1954 to 1958, he drafted the new Ethiopian Civil Code. During this time, he received compensation for his work from the Ethiopian government, the successful claimant in the proceedings. *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See *id.* at 335 (drawing upon the *Scherk* decision); see also International

Unlike the U.S. and other countries,<sup>177</sup> the Federal Republic of Germany strictly supervises the independence of arbitrators. For instance, in 1970 the West German Supreme Court in Civil Matters rendered its own well-known decision<sup>178</sup> by which the following procedure for the appointment of arbitrators was declared unlawful due to its violation of West German public policy. The parties to an arbitration agreement had stipulated that an eventual dispute arising between them should be decided by an arbitral tribunal composed of two members, each of which should be appointed by one of the parties; however, if one party should fail to appoint an arbitrator, then the arbitrator appointed by the other party should be entitled to act as sole arbitrator and to render the award alone without the cooperation of a second arbitrator.<sup>179</sup>

The Court held such a procedure unlawful and in violation of West German public policy.<sup>180</sup> It reasoned that since an arbitral tribunal is vested with jurisdictional powers, its members must be independent of and impartial to the parties. Even the appearance of dependence or partiality, which would arise from the dominant position of one of the parties with respect to the appointment of the arbitrators, was held impermissible by the Court.<sup>181</sup>

Prod., Inc. v. A/S Rosshavet, 638 F.2d 548 (2d Cir.), cert. denied, 451 U.S. 1017 (1981) (refusing to vacate an award under 9 U.S.C. § 10(b) (1976) which authorizes such action vacating, i.e., "(w)here there was evident partiality or corruption in the arbitrators, or either of them"); Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., 480 F. Supp. 352, 357-58 (S.D.N.Y. 1979) (award confirmed and application of article V (2)(b) of the New York Convention denied notwithstanding the objection of the respondent that one of the arbitrators had not been wholly independent from one of the parties). See Fertilizer Corp. of India v. IDI Management, Inc. 517 F. Supp 948, 953-55 (S.D. Ohio 1981); von Mehren, *supra* note 23, at 360.

<sup>177</sup> For example, in England, by virtue of section 7 of the English Arbitration Act of 1950, if one party fails to appoint an arbitrator then the other party "who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator. . . and his award shall be binding on both parties, as if he had been appointed by consent." English Arbitration Act of 1950, 14 Geo. 6, ch. 27, 37.

<sup>178</sup> Judgment of Nov. 5, 1970, Bundesgerichtshof, W. Ger. 24 N.J.W. I 139 (1971).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* The majority of West German legal writers concur with the Supreme Court. See Schlosser, *supra* note 31, annot. III n.17 to § 1032; K. SCHWAB, *supra* note 36, at 61; Adlerstein, *Zur Unabhängigkeit des Schiedsrichters*, in *STUDIEN ZUM RECHT DER INTERNATIONALEN SCHIEDSGERICHTSBARKEIT* 19, 34 (K. Boeckstiegel & B. Boerner eds. 1979). As to the law prior to the decision of the German Supreme Court, see U. KORNBLUM, *PROBLEME DER SCHIEDSRICHTERLICHEN UNABHÄNGIGKEIT* 204 *passim* (1968); E. Heymann, *Der ordre public in der privaten Schiedsgerichtsbarkeit* 68 *passim* (1969); Habscheid, *Das Problem der Unabhängigkeit der Schiedsgerichte* 15 N.J.W. 5, 8-9 (1962).

<sup>181</sup> Judgment of Nov. 5, 1970, *supra* note 178, at 139. This ruling comes close to the ruling stated by the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150, (1968): ". . . any tribunal per-

The Supreme Court added that when a remedy was sought for the failure of a party to cooperate in the appointment of the arbitral tribunal, recourse should be had either to the competent court or to a third, independent authority for the appointment of a substitute arbitrator.<sup>182</sup>

#### 4.2.5. *The Defense of Violation of Public Policy*

The liberal interpretation given in *Parsons & Whittemore*<sup>183</sup> to the general policy underlying the New York Convention has been directly applied to the public policy defense found in article V, paragraph (2) lit.(b) of the Convention. In *Fotochrome Inc. v. Copal Co.*,<sup>184</sup> an arbitral award had been rendered between a Japanese and a U.S. company by an arbitral tribunal sitting in Japan, in favor of the Japanese claimant. When the latter party petitioned for the recognition and enforcement of the award in the United States, the Court of Appeals for the Second Circuit granted the petition even though the U.S. defendant had filed a petition for an arrangement under chapter XI of the Bankruptcy Act before the award had been issued. The court referred to the *Scherk* and *Parsons & Whittemore* decisions in repeating that "the public policy in favor of international arbitration is strong."<sup>185</sup> Hence, the public policy limitation of the New York Convention "is to be construed narrowly" and could "be applied only where enforcement would violate the forum state's most basic notions of morality and justice."<sup>186</sup>

At least one decision, however, has been rendered where article V, paragraph (2) lit.(b) was applied so that recognition and enforcement of the award of a foreign arbitral tribunal was refused. In *Laminoirs-*

mitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Id.* This ruling has, however, been considerably narrowed by later decisions following the landmark policy of *Parsons & Whittemore Overseas Co. v. Société Générale de L'industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974); *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 953-55 (S.D. Ohio 1981); *see also* cases cited in note 184 *infra*.

<sup>182</sup> Judgment of Nov. 5, 1970, *supra* note 178, at 139-40.

<sup>183</sup> 508 F. 2d 969 (2d Cir. 1974).

<sup>184</sup> 517 F. 2d 512 (2d Cir. 1975); *see supra* notes 160-64 and accompanying text; *see also* *Waterside Ocean Nav. Co. v. International Nav. Ltd.*, 737 F. 2d 150, 152 (2d Cir. 1984); *Andros Compania Maritima S.A. v. Marc Rich & Co.*, 579 F. 2d 691, 699, 703 nn.11, 16 (2d Cir. 1978); *La Société Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Shaheen Natural Resources Co.*, 585 F. Supp. 57, 63 (S.D.N.Y. 1983), *aff'd*, 733 F. 2d 260 (2d Cir. 1984); *Fertilizer Corp.*, 517 F. Supp. at 955; *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co.*, 480 F. Supp. 352, 357 (S.D.N.Y. 1979); *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 139-40 (D.N.J. 1976).

<sup>185</sup> *Fotochrome*, 517 F.2d at 516; *see also* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-20 (1985); *Parsons & Whittemore*, 508 F.2d at 974.

<sup>186</sup> 517 F. 2d at 516.

*Trefileries-Cableries de Lens, S.A. v. Southwire Co.*,<sup>187</sup> it appeared that an award had been rendered by an arbitral tribunal in favor of a French claimant company against a U.S. respondent for the payment of certain interests. The arbitral tribunal which had issued the award had been proceeding in accordance with the Rules for Arbitration of the ICC in Paris. The U.S. respondent moved to vacate the award because the arbitral tribunal had, *inter alia*, applied the French rate of interest according to which the rate assessed should rise five percent per annum after two months from the date of the award to rates of 14.5 percent and 15 percent. The U.S. District Court for the Northern District of Georgia concluded that the imposition of the additional five percent interest in accordance with the French statute had been punitive rather than compensatory, and that it bore no reasonable relation to any damage resulting from delay in recovery of the sums awarded.<sup>188</sup> The court, therefore, held that, pursuant to article V, paragraph (2) lit.(b) of the New York Convention, the public policy of Georgia precluded recognition and enforcement of the award.<sup>189</sup>

In the Federal Republic of Germany, the Court of Appeals of Hamburg<sup>190</sup> refused to recognize or enforce an arbitral award rendered in the United States, based on a public policy defense raised by the German respondent who allegedly had not had a proper chance to present his case. Recognition and enforcement were barred pursuant to article V, paragraph (1) lit.(b) of the New York Convention.<sup>191</sup> In that context, the Court of Appeals stated that not every infringement of mandatory provisions of West German law would have to be regarded as a violation of West German public policy, but that such a violation could occur in extreme cases.<sup>192</sup> This distinction between "ordinary" mandatory provisions and such provisions which, on account of their "extremely" important role in the promotion of justice, bring into play West German "public policy concerns," thus seems to create a significant condition to enforcement of arbitration decisions, about which U.S. and West German enterprises should exercise care. In that respect, the condition resembles the distinction between mere "national policy," on the one hand, and the "public policy" comprising "the forum state's most basic notions of morality and justice," on the other, introduced by the *Parsons & Whittemore* decision of the Court of Appeals for the

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<sup>187</sup> 484 F. Supp. 1063 (N.D. Ga. 1980).

<sup>188</sup> *Id.* at 1069.

<sup>189</sup> *See id.*

<sup>190</sup> *See* Judgment of Mar. 27, 1975, *supra* note 169, at 240.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

Second Circuit.<sup>193</sup>

## 5. CONCLUSION

International private arbitration is the most effective and indispensable tool of solving disputes in international business transactions. The technical mechanisms of this legal institution have been greatly improved, both on the international and national levels in recent decades. What is more important, the general spirit in which this tool has been handled in recent years has become increasingly liberal and open-minded, both in the United States and in the Federal Republic of Germany. Many problems remain to be solved in the framework of U.S.-West German commercial arbitration.<sup>194</sup> But there is much hope that the proper solutions can be created through the same liberal spirit that has prevailed in the last years.

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<sup>193</sup> See *Parsons & Whittemore*, 508 F. 2d at 974.

<sup>194</sup> As an example, many problems result from the role of states as parties to international arbitration proceedings when such states raise the defense of sovereign immunity.