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## New Trends in the Practical Application of ICC Rules of Arbitration

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# New Trends in the Practical Application of the ICC Rules of Arbitration

*Yves Derains\**

During the 1970s, arbitration has become the normal way of settling disputes arising in international trade. The statistics provided by the International Chamber of Commerce (ICC) Court of Arbitration (the Court, or the Court of Arbitration) are evidence of the incidence of the increasing recourse to arbitration by businesses involved in international transactions;<sup>1</sup> of an increase in the amounts in dispute;<sup>2</sup> of an increasing diversity in the nationalities of clients<sup>3</sup> as well as in the types of the disputes submitted to arbitration.<sup>4</sup>

The development of international arbitration in the last decade may be explained by the fact that no other system for the settlement of disputes could meet so effectively the needs of parties to international

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\* Secretary-General, International Chamber of Commerce Court of Arbitration.

<sup>1</sup> The International Chamber of Commerce (ICC) Court of Arbitration was created in 1923. When it resumed its activities after the Second World War, only four cases were recorded in 1946. By 1950, that figure had been more than multiplied by 10; in 1970, 150 new cases were submitted to the Court; in 1977, 205; and in 1980, 250. The yearly average of new cases for the last three years is over 240. Int'l Chamber of Commerce, ICC Statistics.

<sup>2</sup> While the average claim in 1977 was \$200,000 (U.S.), it is now over \$1,000,000 and disputes of amounts of \$1,000,000,000 are no longer unknown in ICC practice. *Id.*

<sup>3</sup> While parties originating from Western Europe are still in a majority, their percentages are progressively decreasing (67% in 1978; 58% in 1979). The proportion of developing countries was 22% in 1979, Arab countries being prominent among them (13% of the overall cases). *Id.* In the same year a further 9.5% of the parties were based in Socialist countries and 10.5% in North American. *Id.*

<sup>4</sup> A diversification of the nature of disputes submitted to international arbitration is another aspect of its general acceptance. The disputes that came before the ICC Court of Arbitration in 1979 fell into the following categories: supply of plant (28%); sales and purchase (30%); agency, representation and distributorship (18%); industrial property including license agreements (12%); formation of companies, winding up, transfer of shares, etc. (8%); miscellaneous (4%). See Derains, *The Future of ICC Arbitration*, 14 J. INT'L L. & ECON. 437, n.1 (1980).

contracts, and in particular, their needs for neutrality and effectiveness, two characteristic attributes of arbitration.

Neutrality, the first attribute, should not be confused with impartiality. The latter is tinged with subjectivity, whereas the former is a matter for objective observation. A person in charge of settling a dispute—a judge as well as an arbitrator—who shares the nationality of one of the parties may be subjectively impartial. He cannot, however, be objectively neutral; he speaks the same language, is familiar with the same legal concepts and has the same general approach to legal problems as that party. For example, in negotiating a contract, both parties are reluctant to accept or recognize the jurisdiction of the national courts of the other party, even when the impartiality of those courts is above suspicion. In this context, international arbitration will appear as the only acceptable compromise since the parties frequently will be able to agree, either directly on account of an *ad hoc* clause, or indirectly by referring to the rules of a permanent institution,<sup>5</sup> that the sole or the third arbitrator will be chosen from the third country where the proceedings will generally take place.

The ineffectiveness of judicial decisions abroad is another major obstacle to the recourse to national courts as a forum for international dispute settlement, and a factor that encourages parties to resort instead to arbitration.<sup>6</sup> Although some conventions on the judicial enforcement of foreign judgments have been ratified,<sup>7</sup> they remain limited in

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<sup>5</sup> For a discussion of the difference between *ad hoc* and institutional arbitral proceedings, see note 30 *infra*. A characteristic of institutional arbitral proceedings is the existence of permanent rules of arbitration. See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, RULES OF THE COURT OF ARBITRATION (1975) [hereinafter cited as ICC RULES].

<sup>6</sup> For a discussion of the ineffectiveness of the use of national court systems as a forum in which to settle international transactions disputes, see NESTOR, PROBLEMS CONCERNING THE APPLICATION AND INTERPRETATION OF EXISTING MULTILATERAL CONVENTIONS AND INTERNATIONAL COMMERCIAL ARBITRATION 229-32, in UNITED NATIONS COMM. ON INTERNATIONAL TRADE LAW YEARBOOK, III UNCITRAL YEARBOOK (1972); McClelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 INT'L LAW. 83, 84-85 (1978).

<sup>7</sup> The first practical approaches in developing multilateral conventions on the enforcement of foreign arbitral awards were the adoption of the Geneva Protocol on Arbitration Clauses, *done* Sept. 24, 1923, 27 L.N.T.S. 157, and the Geneva Convention on the Execution of Foreign Arbitral Awards, *done* Sept. 26, 1927, 92 L.N.T.S. 301. Later, and in recognition of the fact that host state disregard of arbitral commitments deters the flow of private investment capital necessary to the economic growth of developing nations, the International Bank for Reconstruction and Development (World Bank) sponsored formulation of the Convention on the Settlement of Investment Disputes. Convention on the Settlement of Investment Disputes between States and Nationals of other States, *done* March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090.

The United States did not join in the initial multilateral Geneva efforts. Instead, it attempted to cover the enforcement of awards in foreign countries through the vehicle of the bilateral treaty on friendship, commerce, and navigation. The first of such treaties to contain an arbitration en-

number and cumbersome in application.<sup>8</sup> On the other hand, because compliance in a large majority of arbitral awards is voluntary, the problem of legal enforcement in international arbitration is less acute. A refusal to pay an award made under the auspices of a reputable arbitral institution or by a well-known arbitrator is taken as a sign of bad faith that is a blot on the recalcitrant party's business record. Moreover, in those exceptional cases when a party refuses to comply with an arbitral award the legal enforcement of this award is facilitated by the existence of many bilateral and multilateral conventions on the enforcement of foreign arbitral awards.<sup>9</sup> In particular, a considerable number of states are bound by the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.<sup>10</sup> There is no doubt, therefore, that it is easier, but for a few exceptional cases,<sup>11</sup> to

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forcement clause was an agreement with China. Treaty on Friendship, Commerce and Navigation, Nov. 4, 1946, United States-China, 63 Stat. 1299 (1949), T.I.A.S. No. 1871. For a discussion of the merits of having arbitration enforcement clauses in bilateral treaties rather than in multilateral conventions, see Mirabito, *The United National Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 GA. J. INT'L & COMP. L. 471, 481 (1975).

<sup>8</sup> An exception should be made for the 1968 Brussels "Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters," done Sept. 27, 1968, 15 O.J. EUR. COMM. (No. 32) 299 (1972), reprinted in 8 INT'L LEG. MAT. 229 (1969). This Convention is applicable solely within the EEC. The Convention is discussed in K. LIPSTEIN, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 270-72 (1974). Background material on the Convention is provided by Hay, *The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments—Some Considerations of Policy and Interpretation*, 16 AM. J. COMP. L. 149 (1968).

<sup>9</sup> The foremost multilateral convention is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970) [hereinafter cited as New York Convention]. For a list and the text of various multilateral conventions on international commercial arbitration, see INDIAN SOCIETY OF INT'L LAW, *INTERNATIONAL COMMERCIAL ARBITRATION* (1964). Bilateral and regional multilateral treaties seeking to facilitate the enforcement of judgments may be found in many parts of the world. Bilateral treaties are typically embodied in Treaties of Friendship, Commerce and Negotiation. The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *supra* note 8, is an example of a regional treaty; see also Inter-American Convention on International Commercial Arbitration, done Jan. 30, 1975, reprinted in 14 INT'L LEGAL MATS. 336 (1975).

<sup>10</sup> 21 U.S.T. 2517; T.I.A.S. No. 6997 (1970). For a useful introduction to the New York Convention, see Gaja, *INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK CONVENTION, BOOKLET 2* (1978). For a review of the effectiveness of the Convention, see Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (1979).

<sup>11</sup> Enforcement of an award may prove more difficult than enforcement of a judgment if a court called upon to enforce the award regards the dispute as either nonarbitrable or its nonjudicial resolution as a contravention of a public policy to reserve such decisions for the courts. In such instances enforcement is of course almost impossible. See, e.g., Geneva Convention on the Execution of Foreign Arbitral Awards, done Sept. 26, 1927, 92 L.N.T.S. 301 (1928). Article I of this convention provided for the recognition and enforcement of a foreign arbitral award only if the award was "not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon." *Id.* art I (e).

obtain the enforcement of a foreign arbitral award than of a foreign court judgment.

International arbitration would not be capable of meeting the needs of the business community, nor would it have experienced its present development without the support of individual nation states. This support is given in recognition of the positive role played by arbitration in the conduct of international trade. Evidence of this support can be found in the existence of various international conventions on the enforcement of foreign awards. For example, the New York Convention,<sup>12</sup> ratified by more than sixty nations,<sup>13</sup> embodies the commitment to the concept of international arbitration of almost all industrialized market economies, socialist countries, as well as many developing countries. There are several more recent international conventions. The 1961 European Convention on International Commercial Arbitration,<sup>14</sup> ratified by all the member states of the Council for Mutual Economic Assistance and, with few exceptions, all the Western European countries, has largely contributed to the East-West trade relations in Europe. The 1965 Washington Convention on the Settlement of Investment Disputes<sup>15</sup> between states and nationals of other states was another step.

A more significant achievement concerning the recognition by states of international arbitration was the adoption in 1976 by the United Nations Commission for International Trade Law (UNCITRAL) of rules to be used in ad hoc arbitration.<sup>16</sup> The fact that those

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<sup>12</sup> See New York Convention, *supra* note 9. The New York Convention was the culmination of the rapid evolution of international support for the use of commercial arbitration. For a brief history of the development of international commercial arbitration, see Quigley, *Accessions by the United States to the United National Arbitral Awards Convention*, 2 CAL. W. INT'L L.J. 67, 81 (1971); Straus, *Arbitration of Disputes Between Multinational Corporations*, 24 ARB. J. 228, 233-34 (1968).

<sup>13</sup> For a recent compilation of the states which are parties to the New York Convention, see INT'L COUNCIL OF COMMERCIAL ARBITRATION, YEARBOOK COMMERCIAL ARBITRATION 255 (1980).

<sup>14</sup> European Convention on International Commercial Arbitration, *done* April 21, 1961, 484 U.N.T.S. No. 7041 (1963-1964) [hereinafter cited as "Geneva Convention"]. See also BENJAMIN, NEW ARBITRATION RULES FOR USE IN INTERNATIONAL TRADE (1978); JAKUBOWSKI, ARBITRATION IN THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE [CMEA], in INTERNATIONAL COMMERCIAL ARBITRATION 328 (C. Schmitthof, ed., 1975); SANDERS, ECONOMIC COMMISSION FOR ASIA AND THE FAR EAST [ESCAFE] RULES FOR INTERNATIONAL COMMERCIAL ARBITRATION (1970); INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 252 (P. Sanders, ed., 1967); 3 INTERNATIONAL COMMERCIAL ARBITRATION: A WORLD HANDBOOK 323 (P. Sanders, ed., 1965) (discussing Econ. Comm. for Europe rules).

<sup>15</sup> The Convention on the Settlement of Investment Disputes between the States and Nationals of other States, *done* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090.

<sup>16</sup> The UNCITRAL rules are formally known as the United Nations Commission on Interna-

rules have been accepted by the various developing countries' members of UNCITRAL contemporaneous with the emergence of a new economic order is evidence that international arbitration is not considered a value of the past. The more recent creation, by the African-Asian Legal Committee of the United Nations, of arbitration centers in Kuala Lumpur and in Cairo confirms the favorable disposition of many developing nations to international arbitration.<sup>17</sup>

The international action of states is, in some cases, combined with a national legal policy fostering international arbitration. The United States Supreme Court's recognition "of the special needs of parties to an international contract for predictable and orderly resolutions of disputes between them"<sup>18</sup> is a good example of such a policy. The approach adopted by the French Court de Cassation in the 1960s similarly favored the admissibility of special rules in favor of international arbitration.<sup>19</sup> More recently, the adoption in England of the 1979 Arbitration Act<sup>20</sup> is another example of the desire of many states to facilitate the recourse to international arbitration.

As a result of the positive attitude of most of the governments throughout the world and the superiority of the arbitral system in meeting the needs of the business community, international arbitration as a practice has arrived at the end of the 1970s at a unique point. The arbitration clause is no longer a clause which is used in special cases, as an exception to the jurisdiction of a court; rather it is a clause which is

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tional Trade Law Arbitration Rules. UNCITRAL adopted the rules in April, 1976, U.N. Doc. E/77 (1977). Then, on Dec. 15, 1976, the General Assembly unanimously resolved that it "[r]ecommends the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contexts." Resolution 31/98, 31 U.N. GAOR, SUPP. (No. 39) 182, U.N. Doc. A/31/39 (1976); adopted Dec. 15, 1976, 31 U.N. GAOR, SUPP. (No. 17) 57, U.N. Doc. A/31/17 (1976). See generally Sanders, *Procedure and Practice Under the UNCITRAL Rules*, 27 AM. J. COMP. L. 453 (1979).

<sup>17</sup> See generally McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 211 (1979).

<sup>18</sup> See *Scherk v. Alberto Culver*, 417 U.S. 506, 516 (1974). For a discussion of the Scherk case, see Note, *Greater Certainty in International Transactions Through Choice of Forum?* 69 AM. J. INT'L L. 366 (1975); Comment, *Contracts: Arbitration Clauses in International Agreements Held Enforceable*, 59 MINN. L. REV. 444 (1974).

<sup>19</sup> Cass Civ. 7 Mai 1963, Ets. Gosset, Recueil Dalloz 1963.565, validated the concept of separability of the arbitral agreement in international arbitration, although the Court de Cassation rejected the concept in the context of domestic arbitration, Cass. Civ. 2 Mai 1966, Galakis, Recueil Dalloz 1966.375 (prohibition to arbitrate disputes with the State not applicable to international arbitration).

<sup>20</sup> Arbitration Act, 1979, c. 42, (brought into operation on August 1, 1979 by Stat. Inst. 1979, No. 750) introduced a new appeals system to the High Court on questions of law arising out of awards made on arbitration agreements (§ 1), and enabled the court to determine certain preliminary points of law (§ 2). For a discussion of the Act, see Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87 (1980).

to be found in most international contracts. As a legal institution, international arbitration enjoys a monopoly which by itself is a source of problems unknown ten years ago, and which is the basis of the challenge of the 1980s for arbitral institutions. The perspective will present first the problems confronting arbitral institutions generally. The second part will then explain in the particular how the Court of Arbitration of the International Chamber of Commerce is preparing itself to meet this challenge.

## THE CHALLENGE OF THE EIGHTIES

### *Disappearance of the Spirit of Arbitration*

For many centuries, the two principle reasons that parties sought recourse to arbitration were the rapidity and inexpensiveness of this method of settling a dispute, although other factors, such as privacy, and politically-based distrust of courts, have figured significantly. However, the relation between speed and cheapness on the one hand, and arbitration, on the other, is not a necessary one, embedded in the nature of things. Arbitration was chosen by the parties because it was believed to be fast and expensive; but at the same time, the parties' very desire to settle their dispute rapidly and at reduced costs imbued arbitration with just those characteristics the parties sought in it. Speed and cheapness were the result of the so-called "spirit of arbitration," shared by the parties and the arbitrators as the members of a "club" of gentlemen trying together to find a peaceful solution to their dispute, according to the rules of a game that they had deliberately chosen to play.

As arbitration has become at the international level the only acceptable procedure, the club mentality has disappeared. Since arbitration has become the normal way of settling disputes, parties and practitioners now approach that procedure with exactly the same attitude as they would have approached a court procedure. The so-called "spirit of arbitration" has been too frequently replaced by procedural tricks and dilatory tactics. Unfortunately, the arbitrator does not enjoy the "imperium" of the judge to deal with such tricks and tactics. The contractual origin of the arbitrator's powers is hardly compatible with the attitude of a party opposed to and working against the smooth process of the arbitration. It takes time before the arbitrator may compel a party to participate, or before the arbitrator will decide to proceed *ex parte*. Speed, therefore, is less and less a characteristic of international arbitration; and the delays have direct consequences on the cost of the procedure.

The disappearance in international arbitration of the so-called "spirit of arbitration" is the ransom of the procedure's success and generalization. The disappearance of that spirit could also cause the procedure's decline in the future if arbitral institutions do not adapt themselves to this new situation.

### *Problems of Confidentiality*

In addition to cheapness and speed, confidentiality is one of the classical advantages of arbitration. In general, businessmen prefer that their disputes be resolved privately, because they consider, with some reason, that the mere knowledge of possible difficulties to the completion of their contracts will be detrimental to the future of their commercial activities. They know intuitively that a potential customer who learns of the pendency of a lawsuit concerning the product in question will not wait for the result of the lawsuit, but will buy a similar product from another seller. This concern for confidentiality, which is of paramount importance in domestic arbitration, is also a motive present in international arbitration. It is with a view to respecting the wish of the great majority of its users that the ICC Court of Arbitration has traditionally included in its rules a provision according to which copies of the awards "shall be made available, on request and at any time, to the parties but to no one else".<sup>21</sup>

The drawback of this practice is that because there is almost no access to the contents of the decision issued by international arbitrators, precedent cannot be easily established. This shortcoming was of limited importance when arbitration was an exceptional means of settling disputes or was used in well-defined branches of the trade, governed by recognized customs. Now that arbitration has become the normal way of settling international business disputes, however, the secrecy of the arbitrators' rulings is a source of uncertainty. The fact that many contracts include a choice of law clause solves the problem in part, but in part only. Since the most current and recent types of international contracts never come to the knowledge of state courts, many national laws have no solutions relating to those contracts. It is precisely to avoid the occurrence of such a situation in fields of law which are so important to the city of London that the 1979 English Arbitration Act expressly prohibits a complete waiver of the right to appeal from arbitral awards concerning admiralty, insurance and commodities problems as an exception to the general rule.<sup>22</sup> However, though such a solution might

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<sup>21</sup> ICC RULES, *supra* note 5, art. 23, § 2 (Arbitration).

<sup>22</sup> Arbitration Act, 1979, § 4, c. 42, Stat. Inst. No. 750 (1979).



be favorable to the development of English law, it may have a negative effect on arbitration, since application of the Act reduces the efficiency of arbitration. A better solution would originate within the practice of arbitration itself.

Another problem generated by the confidentiality of the arbitral awards is that some governmental bodies consider arbitration a device used by the parties to avoid the application of mandatory legislation. This is apparently the position with regard to European antitrust law of the Commission of the European Communities (the Commission), which recently published a draft regulation aiming to exempt certain categories of patent licensing agreements from the prohibition against certain restrictive agreements of Article 85 of the Treaty of Rome.<sup>23</sup> Article 4 of the draft proposal provides that: "any award made by an arbitral jurisdiction to settle a dispute involving the interpretation or application of one of the provisions or measures specified in Articles 1 and 3 should be communicated by the parties to the Commission without delay, together with the licensing agreement."<sup>24</sup>

This desire of the Commission to be informed about certain arbitration awards was previously expressed in its decision of July 18, 1975,<sup>25</sup> concerning an exclusive patent and know-how licensing agreement granted to the French company, Luchaire, by Kabelmetal, a German company. Finding first that the exclusive license granted to Luchaire appreciably restrained competition within the common market in violation of Article 85(1) of the Treaty of Rome, the Commission then found that the agreement qualified for an exception under Article 85(3). The Commission then stated:<sup>26</sup>

In order that it may be verified that the amended agreement as applied in practice does not exceed the bounds of the decision declaring inapplicable the prohibition in Article 85(1), measures should be taken to ensure that the Commission is informed of judgments given under the arbitration clause, since these might contain interpretations of the agreement which do not take account of the scope of this decision, which might in consequence have to be amended.

Such a position expresses a distrust of the cloak of confidentiality which can surround arbitrators' decisions. Forced disclosure such as this would obviously discourage parties from agreeing to arbitration

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<sup>23</sup> Proposal for a Commission Regulation on the application of Art. 85(3) of the Treaty of Rome to certain categories of patent licensing agreements, 22 O.J. EUR. COMM. (No. C58) 12 (1979).

<sup>24</sup> *Id.* art. 4.

<sup>25</sup> *Luchaire v. Kabelmetal* (Comm. Decision of July 18, 1975), 18 O.J. EUR. COMM. (No. L222) 34 (1975).

<sup>26</sup> *Id.* at 39.

clauses, and in the long run might endanger international arbitration, if solutions are not soon found by which the main principles followed by the arbitrators can be made known without injury to the parties.

### *Shortage of Arbitrators*

With the increasing utilization of the international arbitration process during the 1970's,<sup>27</sup> experienced arbitrators have become overloaded with work. The number of trained arbitrators has not increased in proportion to the number of international cases submitted to arbitration. This manpower problem, which necessarily has a regrettable effect on the speed of arbitration, is coupled with a political problem. Because arbitration, at least in its modern development, is a product of the free world economies, an overwhelming majority of international arbitrators originate from Western Europe and North America.<sup>28</sup> This unbalanced situation is becoming less acceptable to developing countries, many of which also resent the fact that the primary arbitration facilities are based in Europe or the United States.<sup>29</sup> While developing countries recognize the positive effect of international arbitration on the growth of international trade, they claim a right to active participation in the worldwide arbitration network. Thus, the duty of arbitral institutions is twofold: not just to train new arbitrators to cope with an increased number of cases, but also to make sure that those new arbitrators come from all parts of the world.

## THE ICC COURT OF ARBITRATION'S REPLY TO THE 80'S CHALLENGE

The steps taken by the ICC arbitration system to confront the current problems of international arbitration may be grouped into two different but complementary courses of action. The first is aimed at strengthening the main characteristics that are at the origin of the success of the ICC approach. The second course involves individual projects that tend to disclose the principle followed by the arbitrators, without jeopardizing the confidentiality of the proceedings.

### *Strengthening the Primary Characteristics of ICC Arbitration*

Institutional arbitration is traditionally distinguished from "ad

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<sup>27</sup> See note 1 *supra*.

<sup>28</sup> See *L'origine des arbitres* (copy of document on file at editorial offices of the Northwestern Journal of International Law & Business).

<sup>29</sup> The principal arbitration facilities are located in Paris, New York, London, Stockholm, Rotterdam, Zurich and the Hague.

hoc" arbitration.<sup>30</sup> Ad hoc arbitration entails proceedings defined by the parties themselves, in agreement with the arbitrators. In institutional arbitration, on the other hand, the parties decide to have recourse to the permanent facilities made available to them by an established arbitration center and to submit to that center's rules.

The first primary characteristic of ICC arbitration is that it is institutional.<sup>31</sup> However, such a statement needs to be qualified. As underscored by Article 2(1) of the Rules for the ICC Court of Arbitration, "the Court does not itself settle disputes."<sup>32</sup> The Court's intervention deals mainly with appointing arbitrators, deciding on the place of arbitration and making sure that the Rules are respected by the arbitrators and the parties. Even if the ICC Rules provide general solutions concerning the organization of the arbitration, the characteristics of each individual case are taken into consideration. In the ICC arbitration system, parties are free to fix the place of arbitration as they feel appropriate and to make any provisions they wish as to the appointment of the arbitrators.<sup>33</sup> It is only in the absence of the parties' own provisions that the Court of Arbitration will make the necessary decisions. The approach of the ICC has the advantage of incorporating into institu-

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<sup>30</sup> Article IV (1) of the 1961 Geneva Convention distinguishes institutional arbitration from *ad hoc* arbitration. Article IV provides that:

- (1) The parties to an arbitration agreement shall be free to submit their disputes:
  - (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of said institution;
  - (b) to an *ad hoc* arbitral procedure; in this case, they shall be free *inter alia*:
    - (i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;
    - (ii) to determine the place of arbitration; and
    - (iii) to lay down the procedure to be followed by the arbitrators.

Geneva Convention, *supra* note 14, at art. IV, § 1. For a full listing of arbitral institutions, see ITALIAN ARBITRATION ASSOCIATION, INT'L AND NAT'L INSTITUTIONS ACTING IN THE FIELD OF ARBITRATION (1970). For a criticism of institutional arbitral proceedings, see F. Higgins, W. Brown & P. Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035 (1980). Useful information about the various arbitral institutions can be found in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE (Cohn, Demke & Eisemann, eds., 1977); see also Comment, *A Survey of Arbitral Forums: Their Significance and Procedure*, 5 N.C.J. OF INT'L L. & COMM. REL. 219 (1980).

<sup>31</sup> The institutional nature of ICC arbitration is evidenced by the well developed internal rules for the Court of Arbitration. See ICC Rules, *supra* note 5.

<sup>32</sup> ICC RULES, *supra* note 5, art. 2, § 1 (Arbitration). Article 2 (1) of the ICC Rules provides:

[t]he Court of Arbitration does not itself settle disputes. Insofar as the parties shall not have provided otherwise, it appoints, or confirms the appointments of, arbitrators in accordance with the provisions of this Article. . . .

*Id.*

<sup>33</sup> Under art. 12 of the Arbitration Rules, "[t]he place of arbitration shall be fixed by the Court, unless agreed upon by the parties." ICC RULES, *supra* note 5, art. 12 (Arbitration). See art. 2, § 1, *id.* for the arbitrator appointment provisions.

tional arbitration the flexibility that the parties sometimes seek in *ad hoc* arbitration.

At the same time, the ICC Rules enable the Court to control each particular procedure more strictly than can many other arbitral institutions.<sup>34</sup> Under the ICC system, parties are not left to their own devices. As many arbitration bodies do, the Court steps in to formulate the arbitral proceedings in the event that parties have made no specific stipulations. More uniquely, the Court steps in also to supervise the application of the rules by the arbitrators appointed in each case. This supervision extends mainly to the control of time limits<sup>35</sup> and to the approval of draft awards before notification to the parties.<sup>36</sup>

This last aspect has given rise in certain circles to misunderstandings, where it has been regarded as a restriction of the freedom of the arbitrators.<sup>37</sup> Such a position overlooks the fact that the Court of Arbitration is permitted to ask the arbitrator to modify his draft award only as far as the form of the award is concerned. This is a guarantee given to the parties that the mandatory requirements of the country where the award may have to be enforced will be taken into consideration. The arbitrator, who is always of a nationality different from that of the parties, may, however, legitimately ignore<sup>38</sup> some particularities of the arbitration law of the parties' countries in preference for the experience of the members of the ICC Court of Arbitration, which presently represents a myriad of legal systems.<sup>39</sup> Concerning matters of substance, the Court may not exercise any power that would bind the arbitrator, but may only draw matters to the arbitrator's attention, without affecting his liberty of decision. Arbitrators are perfectly free to disregard the Court's comments, and in a few cases they do so. However, in the majority of these instances, the arbitrators take the Court's comments as evidence that their award would draw a similar response from a judge,

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<sup>34</sup> The ICC Court of Arbitration's control over the entire arbitration process is stricter than those of the American Arbitration Association, and the London Court of Arbitration. For a brief comparison of the ICC and the AAA regimes, see Ebrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL. INT'L BUS. 1191, 1222-23 (1977).

<sup>35</sup> See, e.g., ICC RULES, *supra* note 5, arts. 13 (2), 18 (2) (Arbitration). Article 13 (2) provides that a party failing to approve the terms of reference within the prescribed time limit will be deemed to have approved the reference. Article 18 (2) authorizes the Court to extend time limits for awards.

<sup>36</sup> Under art. 21 of the Arbitration Rules, the arbitrator must submit a draft of the award to the Court for its approval. ICC RULES, *supra* note 5, art. 21.

<sup>37</sup> See Stevenson, *An Introduction to ICC Arbitration*, 14 J. INT'L L. & ECON. 381, 390 (1980).

<sup>38</sup> See, e.g., ICC RULES (Arbitration), *supra* note 5, art. 13 (5).

<sup>39</sup> Members of the ICC Court of Arbitration presently represent 36 different legal systems (copy of membership list on file at editorial offices of the Northwestern Journal of International Law and Business).

and thus, as a rule, the arbitrators consider it appropriate to clarify or correct the award. There is no doubt that such a cooperation between the Court and its arbitrators is in the advantage of the parties, even if it may delay the arbitration for some weeks, because the intervention serves to guarantee the validity of the award. This supervision certainly helps to explain the fact that ICC arbitral awards have seldom been challenged: over the past three years, 92 percent of such awards have been voluntarily enforced.<sup>40</sup>

The disappearance of the club mentality calls for an even closer supervision of arbitral procedure by the institutions so that those bodies may help the arbitrators to manage the procedural tricks invented by parties trying to delay the proceedings. This need was taken into account in drafting the new internal rules of the ICC Court of Arbitration that were introduced in March, 1980.<sup>41</sup> Those internal regulations officially set forth principles and procedures to guide the application of the rules of ICC arbitration. At the same time, in order to adjust the rhythm of the work of the Court to the flow and variety of decisions expected from it, the internal regulations provide for a partial delegation of the Court's powers to a Committee of the Court, constituted from its members. While the difficult cases are discussed in plenary session on the basis of a report prepared by one of the Court members, decisions unanimously considered routine by the Committee are made by it.

The intervention of the Committee of the Court brings a dual improvement to the operations of the Court of Arbitration. On the one hand, through its twice-monthly meetings, parties more rapidly obtain decisions from the Court for most of the questions relating to the normal development of arbitration proceedings; on the other hand, the deliberations of the monthly plenary sessions of the Court can be concentrated on those decisions that require intensive discussion. Both the quality and the volume of the work of the Court have been thus augmented.

Through its Committee the Court of Arbitration is now in a position not only to control closely the time limits specified by the Rules, but also to obtain precise information on every aspect of each case. The Court thus can more easily distinguish what is a reasonable pro-

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<sup>40</sup> The ICC has reported that in 92 percent of its cases, voluntary compliance was made to all arbitration awards made under its jurisdiction without necessity for subsequent enforcement proceedings in court. See McClelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 INT'L LAW. 83, 89 (1978).

<sup>41</sup> ICC RULES, *supra* note 5, App. II (Internal Rules).

longation of a time limit and from what is an unacceptable delay. Moreover, the system of information has been recently introduced that allows the Committee of the Court to evaluate the period of time needed to assure a speedy resolution of each case, compatible with the sound practices of arbitration. Studies are presently underway with a view to refining that system and eliminating the sources of abnormal delays. It is encouraging to see that, as a result of these efforts, a trend towards a decreasing of the length of proceedings has been strengthened, so that in 1980 straightforward cases were settled in about one year.<sup>42</sup> The measures presently being devised will support this trend.

A second primary characteristic of ICC arbitration is what may be described as its universality: the Court of Arbitration is prepared to handle any type of dispute that may occur in a business context and arise in international relations.<sup>43</sup> Now, through the creation of certain specialized systems, the ICC is making its disputes settlement system suitable to a still wider range of disputes. Two examples may be given. The first is the International Maritime Arbitration Organization (IMAO), which is the result of a mutual understanding of the ICC and the Comité Maritime International.<sup>44</sup> The IMAO stands ready to conduct arbitration cases relating to maritime affairs, including, *inter alia*, contracts of chartering, contracts of carriage by sea or of combined transport, contracts of marine insurance, salvage, general average, shipbuilding and ship repairing contracts, contracts of sale of vessels and other contracts creating rights in vessels. This procedure, specially adapted to the needs of maritime nations, provides the first truly international forum in the field of maritime arbitration. Although some maritime disputes previously have been submitted to the ICC within its general system, this new device should facilitate the ICC arbitration of maritime disputes.

ICC's intention to extend its capacity to intervene in dispute resolution can also be seen in its efforts to link technical expertise with arbitration proceedings. Technical difficulties are most frequently found in

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<sup>42</sup> *Id.* App. II (Internal Rules), § 8. The Committee of the Court consists of a chairman and two members. *Id.* § 9. The chairmanship of the Committee is assumed by the chairman of the Court of Arbitration, or by one of its vice-chairmen, designated by the chairman. *Id.* The two other members of the Committee are designated by the Court of Arbitration from among the vice-chairmen or the other members of the Court. *Id.*

<sup>43</sup> The express purpose of the Court "is to provide for the settlement by arbitration of business disputes of an international character. . . ." ICC RULES (Arbitration), *supra* note 5, at art. 1, § 1.

<sup>44</sup> The IMAO was created in 1978 in response to the needs of maritime interests and on account of the volume and complexity of international maritime disputes. Rules governing the IMAO's arbitration procedures were developed by experts from the ICR and the Comité Maritime International. See INT'L MAR. ARB. ORGANIZATION, ICC-CMI RULES, ICC PUB. NO. 324 (1979).

the context of contracts for the supply of industrial plants to mass produce goods, or operations which include a minimum production guarantee. The construction of "turnkey" projects and industrial cooperation agreements are prominent examples. The recently created International Centre for Technical Expertise allows for the nomination of an expert as soon as disagreements of a technical nature occur during the performance of a contract.<sup>45</sup> The expert's statement given at the very moment when the difficulties arise will constitute the best evidence that can be presented during a subsequent arbitration proceeding.

The intervention of such a neutral expert is therefore a first response to the need of arbitration in construction disputes.<sup>46</sup> A second response will be, as presently studied by an ICC working party, the creation of a system of "référé arbitral" (interlocutory arbitration) by which an arbitrator will be prepared to intervene quickly and at any time during the performance of the contract to make any decisions of a legal nature that one or both parties may need. For instance, such an arbitrator will be able to make a *prima facie* decision on the right of a party to claim payment under a performance bond payable on first demand. Such a system also will be a complement to the system of experts discussed above, since parties will be able to ask the arbitrator to define carefully the scope of the expertise needed. This system of "référé arbitral" is planned to be available by the end of 1982.

The third primary characteristic of ICC arbitration is its internationalism. This stems from the international nature of the ICC itself, which is reflected, in part, in the composition of the Court of Arbitration, wherein thirty-six countries each appoint a member of the Court.<sup>47</sup> The ICC Rules, which guide the proceedings submitted to the Court, contain provisions to ensure that this internationalism will be

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<sup>45</sup> The International Centre for Technical Expertise lists as its objectives: (1) to avoid the restrictive nature of expertise, and (2) to establish the autonomy of expertise in the context of arbitration proceedings. See INT'L CENTRE FOR TECHNICAL EXPERTISE, RULES FOR TECHNICAL EXPERTISE, ICC PUB. NO. 307 (1980).

<sup>46</sup> The duration of international arbitration proceedings is often a subject of complaint in construction disputes. These disputes, which comprise nearly a third of the cases submitted to the ICC Court of Arbitration, involve individual contracts of a substantial financial value which are implemented over a relatively long period of time. As the completion of the project requires that numerous decisions concerning contractual obligations be regularly taken, the parties cannot wait for the results of an arbitration procedure in resolving their disputes. The practice has been introduced to allow the engineer to settle disputes; the contractor is thereafter bound to perform his obligations under the contract on the basis of the instructions of the engineer. There remains in such a case, however, an absence of a system from which parties could obtain a quick decision by a neutral arbitrator on a provisional basis, as, for example, the availability of a provisional injunction from a national court.

<sup>47</sup> See note 39 *supra*.

embodied in the way each dispute is handled. This is applied both to the arbitrators' nationality and to the place of arbitration. As already mentioned, the Court does not itself settle disputes, but initiates and supervises the activity of sole arbitrators or of Chairmen of Arbitral Tribunals set up for each of the cases brought before the Court.<sup>48</sup> In doing so, the Court must choose arbitrators or chairmen from countries other than the home countries of the parties to dispute. The same policy applies in choosing the venue where the arbitral proceedings will take place. Whenever the parties themselves have not already agreed on the place of those proceedings, the Court chooses a third country, selected so as to maintain a geographical balance between the respective positions of the two parties.

These two international aspects of ICC arbitration—the nationality of the arbitrators, and the place of arbitration—are in the process of being strengthened. With the 47 ICC National Committees,<sup>49</sup> the Court is in a position to appoint arbitrators from any part of the world. Chairmen of arbitral tribunals or sole arbitrators were selected from 22 countries in 1979 and 25 in 1980.<sup>50</sup> Steps are being taken so that those national committees traditionally less active in arbitration might have a greater participation.<sup>51</sup> To meet that goal requires extending the cooperation between the Court and the national committees in selecting arbitrators. Activities aimed at training arbitrators have also been initiated under the aegis of a new ICC operation, the Institute for Business Law and Practice.<sup>52</sup> The Institute is organizing intensive seminars on the techniques of international arbitration, open to the public.

With regard to the place of arbitration, it has been already mentioned that ICC arbitrations may be held anywhere in the world, either on the choice of the parties, or as decided by the Court of Arbitration. However, until recently, administrative facilities for conducting the proceedings were available only in Paris, and when an arbitration was held in another city, for example, the ICC arbitrators had to go to the trouble of securing meeting rooms and secretarial help. This situation is being changed. ICC arbitration centers are being created in several places where parties and arbitrators will find the same administrative

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<sup>48</sup> See text accompanying notes 34-40 *supra*.

<sup>49</sup> See ICC Statistics, *supra* note 1.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> To further its aim of promoting and liberalizing world trade, the ICC created the Institute of International Business Law and Practice in 1979 to improve knowledge of the law and practice of international commerce. (Copy of Institute brochure on file at editorial offices of the North-western Journal of International Law & Business.)



facilities as in Paris. A center already has opened in Seoul, and the opening of centers in London, New York and New Delhi is planned to take place in 1981. The feasibility of opening centers in Latin America and the Middle East currently is being studied.

*Rendering the Arbitral Process More Certain*

Efforts are also being made to respond to the lack of certainty created by the confidentiality in which arbitration is conducted and in which arbitral solutions are not disclosed. The ICC is presently engaged in two projects that will allow parties to arbitration cases to be informed of the kinds of decision which have been made in specific cases by arbitrators.

One project deals with the law applicable to international contracts. In current ICC practice, the Rules provide that in the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the conflict of laws principles which he deems appropriate.<sup>53</sup> In all cases the arbitrators must take account of the provisions of the contract and the relevant trade usages.<sup>54</sup> Such a rule is consistent with arbitration practice, and may also be found in the UNCITRAL arbitration rules.<sup>55</sup> Its legal justification lies in the fact that the arbitrator who is not acting on behalf of any state has no *lex fori*, the rules of conflict of which should be followed. Although such a solution has advantages of flexibility, its drawback—a lack of uniformity in the choice of the rules of conflict—results in some unpredictability. An ICC working party is preparing recommendations on the law applicable to international contracts so as to overcome this difficulty. Those recommendations will not be aimed at restricting the freedom of the arbitrators, but will appear as a restatement of the major solutions followed in the field of conflict of laws by international arbitrators. Publication will inform parties of possible solutions to be followed in a practical case.

A second ICC project aims to disclose the solutions adopted by the arbitrators as to the substance of the dispute. This project is now well advanced under the aegis of the Institute of Business Law and Practice. The first step consists in the publication, planned for Autumn 1981, of short excerpts of the ICC awards issued during the last five years. The

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<sup>53</sup> ICC RULES, *supra*, note 5, art. 13, § 3 (Arbitration).

<sup>54</sup> *Id.* art. 13, §§ 3, 5.

<sup>55</sup> If the parties do not by contract expressly designate the law which the arbitrators are to apply, the law will be determined by the choice of law rules chosen by the arbitrators. UNCITRAL RULES, *supra* note 17, art. 27, § 2.

confidentiality of the awards is preserved in the preparation of those excerpts, but the excerpts will be the basis of a knowledge of the trends of the new *lex mercatoria* currently being developed, and a valuable tool at the disposal of the arbitrators and the parties. This first publication will be followed by excerpts of awards issued before 1975 and after 1980; however, publication of those excerpts will not be sufficiently detailed to provide a complete picture of the *lex mercatoria* as applied by the arbitrators. Therefore, further studies on specific aspects will be undertaken on the basis of the awards themselves. There is no doubt that the excerpts published will be a very useful guide in this research.

This project, as well as the one in conflict of laws, is of particular importance for developing countries whose experience of international arbitration and whose knowledge of the customs and practices of international business relations is limited.

#### CONCLUSION

International arbitration has risen to a dominant position in the settling of international contract disputes. This enhanced position, however, created the new problems of long and expensive arbitration procedures, uncertainty due to the confidentiality of awards, and a shortage of arbitrators. The ICC Court of Arbitration has met the challenge of the 1980s presented by these new problems by developing rules that minimize the effect of delaying tactics and that render the international arbitral process more certain without destroying arbitration's traditional confidentiality. International arbitration should thus be able to continue in its role as the primary means of settling international contract disputes in the 1980s.