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

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THE CHOICE OF THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

A Study in Decided Arbitration Awards

Vol. I

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To my mother and father.

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Julian D.M. LEW

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INTRODUCTION

1. The Purpose of This Study

1. International commercial arbitration is today the preferred method of settling disputes arising out of international commerce. The reasons for this preference are varied. Generally, national courts do not have the confidence of the international business community: they are identified with the economic, legal and political systems of the countries in which they are situated. By contrast, the international arbitration tribunal, with all its inconsistencies and uncertainties, is the businessman's court: it exists to resolve disputes between, and in accordance with the needs of, the participants of international commerce.

2. One major advantage of arbitration is the absence of rigid, predetermined choice of law rules. In the words of one American commentator:

> "The desirability of arbitration among businessmen is enhanced by unpredictable conflicts of laws rules, ..."[1]

Unpredictable conflict of laws rules? Are there any conflict of laws rules specifically appropriate to international commercial arbitration? What are they? Where are they to be found? Do they always apply or do they vary from case to case?

3. It is obvious, whatever the nature of the dispute, the rights, duties and obligations of the parties can only be resolved on the basis of some yardstick or measuring standard. Several standards are available to international arbitrators.

The simplest solution is to apply the law of a given State. The relevant rules are here comparatively easy to ascertain and will ensure the certainty and stability often considered essential for the development of international commerce. On the other hand, a national law may be irrelevant to the dispute or inappropriate to regulate the transaction or arrangement in issue.

Without applying a particular national law, arbitrators may in certain circumstances resort to a general or common legal standard (e.g. similar provisions in several or at least the conflicting national laws). This however necessitates an initial investigation as to the substance of the various national legal provisions.

Arbitrators could also apply some non-national system of law. The rules of such standard would be found in relevant international conventions, codes of practice, etc., or in general commercial practice. Whilst neutral, a non-national legal standard, even where it exists, will often be irrelevant or remote from the dispute.

Alternative to a legal standard is the application of an extra-legal yardstick i.e. discretionary rules and criteria based on common sense, justice, fairness and morality. The major attraction of these discretionary rules and criteria is their adaptability to the particular needs and circumstances of each individual case. On the other hand, as the content and make-up of these yardsticks are indeterminate, their effect varies depending on the attitude of the arbitrators.

4. How should an international arbitrator determine the particular legal or extra-legal standard to apply in a given case? A national court has its own forum conflict of laws rules which direct the judge to the system of law to be applied. The international arbitration tribunal however has no forum law and no forum conflict of laws rules. As an anational, sui iuris institution, apart and independent from the control of every sovereign State, it is not subject to any national conflict of laws system. The rules of some permanent arbitration institutions do contain certain choice of law provisions; other institutions, particularly those attached to the Chambers of Commerce in the socialist countries, consider themselves bound to the conflict of laws system of the country in which they are situate. In the main however, the international arbitrator is alone, without any specifically relevant choice of law or yardstick rules to which he can refer.

5. This problem is not new: it has been the subject of extensive debate and discussion. Various authors, some with practical experience in arbitration, coming from different backgrounds and within different contexts have advocated solutions to the conflict problems which daily confront arbitrants and arbitrators[1]. Several private and public international organisations have considered the matter: they too have proposed various solutions[2]. Finally, the major international arbitration conventions, whilst not specifically concerned with the question of the law applicable, have directly or indirectly made provision for the resolution of conflict of laws problems[3].

6. In this study we shall look to see how in practice arbitrators actually determine the legal or extra-legal yardsticks applicable. Do they apply conflict of laws rules? Or do they make a direct choice of the yardstick they consider more appropriate or merely preferable to the dispute before them? To what extent do they consider and follow the various solutions advocated by the writers or proposed by the international organisations or conventions?

Within the confines of "international commercial arbitration" the purpose of this study is three fold. First, to determine the method by which arbitrators determine the applicable law and/or extra-legal yardstick. Second, to determine the legal rules and/or extra-legal yardsticks actually applied by the arbitrators[1]. Third, to determine the extent to which arbitral practice converges with and separates from the theory.

2. The Scope of this Study

7. The increasing use of the term "international commercial arbitration" has not brought with it any generally accepted meaning[1]. For this reason it is necessary to state what will be understood by the term in this study.

We shall follow a particularly liberal definition based on the subject-matter of the arbitration. Consequently, irrespective of the law governing

definition

the procedure, we shall use the term "international commercial arbitration" to refer to any arbitration arising out of a transaction or relationship which directly or indirectly affects international commerce[2] (i.e. commercial operations extending beyond the territory of one single State[3]). Primarily this definition covers all commercial contracts where the parties are nationals of, or domiciled or carrying on business in different countries, regardless of where the contract was concluded, where it is to be performed, or where the subject-matter is situated[4]. Less obvious, but equally international for our purposes, are contracts where the parties are national of, domiciled or carrying on business in the same country, but the goods are to be delivered or the contract performed in some other country.[5]

exclusion

8. The foregoing definition will naturally exclude consideration of certain forms of arbitration. Most obvious will be awards made in respect of disputes between sovereign States or State organs, such awards being based on public international law and rarely involving questions of commercial law[1]. Similarly the decisions of the mixed arbitral commissions fall outside the scope of this study[2].

9. Included within our terms of reference will be five main kinds of commercial arbitration. Firstly, arbitration awards rendered between parties - physical or legal persons - from market economy countries (e.g. the EEC member States, USA, Japan). Secondly, awards between parties from the western developed world and the third world (i.e. Africa, Asia). Thirdly, arbitration awards arising out of "east-west" trade (i.e. between parties from countries of market and planned economies). Fourthly, awards in respect of inter-CMEA trade (i.e. between parties from countries members of the Council for Mutual Economic Assistance). Fifthly, awards arising from commercial transactions where one party is a subject of international law (i.e. a State, State agency or an international organisation).

3. The Method of Study

10. The form of this study will be double pronged: every problem confronted will be considered from both the theoretical and the practical viewpoint.

Within our theoretical survey, we will trace the various solutions proposed by the writers and in the resolutions, projects and draft laws developed by the concerned public and private international organisations. Equally, we will look to see what, if any, relevant provisions are to be found in the rules of the better known permanent arbitration institutions and in the major international arbitration conventions. Whilst we shall endeavour to state and explain the consequences ensuing from the adoption of these ideas, there will be no attempt to support or take issue with any particular view.

11. Most previous studies have been limited to theoretical discussion with very few actual awards. This is due to the privacy and confidentiality still believed in many circles to be fundamental to arbitration. We have been fortunate to have gained access to a large number of awards.

Hence the major part of this study will be an in depth review of these decided arbitration awards and an analysis of how arbitrators actually determine the applicable legal or non-legal yardstick. The awards considered are of four kinds. Firstly, the awards of the International Chamber of Commerce (ICC) most of which have never before been published. Secondly, awards of the arbitration tribunals in the east-European socialist countries, many of which have already been published. Thirdly, other institutional awards, some of which have been previously published. Finally ad hoc awards; again some of which are well known and have been extensively discussed, others which are here presented for the first time[1].

4. The Plan of Study

12. The substance of this study is divided into two parts. However, in a preliminary part it is intended to consider certain fundamental questions affecting international arbitration. Initially we shall distinguish the different levels and forms of arbitration. Then we will look at one of the most contentious subjects in international commercial arbitration: the juridical character of arbitration. In theory at least, it is the juridical character of arbitration which holds the key to the conflict of laws problem.

13. Part one will consider the right and power of the parties to determine themselves the legal or non-legal yardstick to be applied by the arbitrators. Despite the objections levelled against party autonomy within the confines of national law, there are few who would today question its pre-eminence within the institution of international arbitration. What is not so clear is the extent and the effect of that autonomy. The two main aspects of autonomy, express and implied choice, will be considered separately.

14. Part two deals with the vacuum situation where the parties do not indicate what law or other yardstick is to be applied. Initially we will consider the conventional methods advocated for resolving a conflict of law, i.e. the application of a system of private international law. We will deal separately with the national and non-national systems of the conflict of laws which can be applied in international commercial arbitration.

Then we shall consider the alternative solution: the direct application by the arbitrators of the governing law or non-legal standard. Here we will look in particular at the application of the lex mercatoria and the exercise of extra-legal yardsticks in international commercial arbitration.

Finally, we will investigate the practical limitations imposed on arbitrators by national and international public policy (ordre public).

PRELIMINARY PART

CHAPTER I. THE MEANING, NATIONALITY AND FORMS OF ARBITRATION

A. The Meaning of Arbitration

15. Have you ever, in the course of an argument or discussion, suggested asking a third and neutral person to say who was right? Did you expressly or impliedly agree or intend that the third person's answer would be accepted as putting an end to the dispute or argument? If so, you were suggesting arbitration - albeit of the very roughest kind[1].

Arbitration is an institution more easily identified than defined. Most attempts to define arbitration have been or can easily be criticised. Nevertheless it is useful to look at a few definitions which have been put forward.

The Shorter Oxford English Dictionary describes arbitration as:

> "The settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision"[2].

The American Arbitration Association defined arbitration as "the reference of a dispute to one or more impartial persons for final and binding determination"[3]. Both of these definitions are incomplete: they ignore the private character of arbitration and the judicial responsibility of the arbitrators.

More instructive definitions can be found in the major arbitration texts. For example, an English handbook states:

> "An arbitration is the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction"[4].

In similar vein, Jean Robert in his renowned treatise on arbitration writes:

> "On entend par arbitrage l'institution d'une justice privée grâce à laquelle les litiges sont soustraits aux juridictions de droit commun, pour être résolu par des individus revêtus, pour la circonstance, de la mission de les juger"[5].

16. To propose a further definition here would be superfluous and most likely fail to take account of every aspect of arbitration[1]. Rather it will be useful to identify the major characteristics of arbitration[2].

1) Firstly, arbitration is a method[3] by which any dispute can be settled[4]. 2) Secondly, the dispute is resolved by a third and neutral person or persons (the arbitrator(s)) specifically authorised. 3) Thirdly, the arbitrator(s) are empowered to act by virtue of the authority vested in them by the parties' submission to arbitration[5]. 4) Fourthly, the arbitrator(s) are expected to determine the dispute in a judicial way: this does not necessarily mean strictly in accordance with the law, but rather by giving equal opportunity to the parties to put their case, and by weighing the evidence put forward by the parties in support of their respective claims. 5) Fifthly, arbitration is a private system of adjudication: it is the parties themselves, and not the State, who control the powers and duties of the arbitrator(s). 6) Sixthly, the solution or decision of the arbitrators (the award) is final and conclusive and puts an end to the parties' dispute. 7) Seventhly, the award of the arbitrators binds the parties by virtue of their implied undertaking when agreeing to arbitration that they will accept and voluntarily give effect to the arbitrators' decision. 8) Eighthly, the arbitration proceedings and award are totally independent of the State: the ordinary courts will only interfere[6] - and then strictly within the confines of its lex fori - to give efficacity to the arbitration agreement, to regulate the arbitration proceedings or to give effect to the award where it has not voluntarily been carried out by the parties.

17. Generally these characteristics are equally appropriate to all types of arbitration: commercial, industrial, labour and professional; both on the domestic and the international level. On the domestic plain, most countries have some legal provisions for the regulation of arbitration in general[1]. Such provisions define the right of parties to submit to arbitration, provide the rules for the conduct of arbitration and specify what matters may be submitted to arbitration. Some countries further have specific legislation relating

to particular types of arbitration (e.g. labour arbitration) or requiring disputes of a certain kind to be resolved exclusively by arbitration (i.e. statutory arbitration)[2].

B. The Nationality of Arbitration

1. Domestic Arbitration

18. Most arbitrations have the nationality of a particular State. The nationality of an arbitration may be important for three reasons. Firstly, it identifies the lex arbitri, the law regulating the arbitration. This is the law which regulates the arbitration proceedings and which determines what subject-matters may be considered by the arbitrators[1]. Secondly, it identifies the national court in which the arbitration is domestic[2]. This court has jurisdiction to supervise, and if necessary intervene in, the arbitration proceedings[3]. Thirdly, it identifies the procedure to be followed for the recognition and enforcement of the award. A domestic award (i.e. an award which has the same nationality as the enforcing court) is often more easily enforceable[4] than a foreign[5] award[6].

19. The determination of nationality is not always straightforward[1]. Where all the factors of the arbitration (i.e. the subject-matter of the dispute, the nationality and/or domicile of the parties and the arbitrators, the applicable law, the place of arbitration) are connected with the same State, there can be little argument[2].

Even where all the connecting factors do not converge in one single jurisdiction, an arbitration will still invariably have a nationality[3]. However, the more diverse the connecting factors, the more artificial the nationality. The arbitration may be totally domestic but for one element, e.g. the place of arbitration[4]. Alternatively, the arbitration may have connections with several jurisdictions, but no preponderant connection[5].

20. Does nationality depend on the lex arbitri? Or on the State in which the arbitration actually takes place? Or on the place with which the arbitration is most closely connected? What where these are in conflict? The lex arbitri itself may be unclear. The place of arbitration may be irrelevant or fortuitous or several[1].

The solution is to be found in the law of each State. Every national law defines itself what it considers domestic (i.e. having its nationality). This may of course result in more than one State extending its nationality over a particular arbitration and claiming the right to control and supervise the proceedings. By corollary, an award considered by the national law of State A as having the nationality of State B, may not be considered "domestic" by the law of State B itself[2].

2. International Arbitration

21. Whatever the particular nationality ascribed in individual cases, many international commercial arbitrations may in fact be more accurately described as international, non-national or multi-national. For example, an arbitration may have been transposed onto a special international organisational plain by virtue of some public international law agreement. Or by virtue of the structure and procedure chosen the arbitration may have no real connection with any national jurisdiction. Or simply, by virtue of a diversity of facts, the arbitration may have important and substantial connections with several States but no preponderant connection with any one State. We shall consider each of these in turn.

a) Arbitration: International by its organisation

22. There are certain situations where sovereign States have recognised arbitration as an appropriate method for resolving disputes arising between nationals of their respective countries out of essentially private agreements. Such recognition is made in an international convention which gives it the support of public international law. Thus every State party to the relevant

conventions is bound not only to recognise arbitration as the appropriate forum to deal with specific disputes but also to facilitate the recognition and enforcement of awards made in respect of such disputes.

The most obvious example of this type of situation arises out of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States made in Washington DC in 1966[1]. Under this Convention, contracting States created the International Centre for the Settlement of Investment Disputes (ICSID). Subject to the agreement of the parties, the Centre has exclusive jurisdiction[2] to enquire into "any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State"[3]. The Contracting States undertook to "recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court of that State"[4]. The party seeking the enforcement or recognition of the award need only furnish to the enforcing court "a copy of the award certified by the Secretary-General"[5] of the ICSID.

23. Similar international law obligations have been accepted by those States party to the International Conventions concerning the Carriage of Passengers and Luggage by Rail[1] (CIV) and concerning the Carriage of Goods by Rail[2] (CIM). The CIV aimed to create a body of rules capable of regulating the rights and obligations of both railway corporations (or enterprises) and railway users in respect of carriage of passengers and luggage from one legal jurisdiction to another. The Convention in particular spelt out the principle and the extent of the liability of the railways in respect of "death, injury or bodily damage"[3] and for the loss of luggage[4] due to the fault of the railway and/or its employees. The CIM aims to regulate the obligations of railways and the rights of persons sending goods by rail from one country to another[5]. The Convention also provides when[6] and to what extent[7] the railway organisation

will be liable for loss or damage to goods consigned by rail for delivery in another country.

Both the CIV and CIM Conventions[8] entitle parties to take any disputes to arbitration in preference to national courts of law. Articles 61 (5) of both Conventions provide:

> "Award made by arbitration tribunals against transport undertakings or users shall become enforceable in each of the Contracting States as soon as the formalities required by the State in which enforcement is to take place have been complied with."

Under this provision States party to these Conventions accepted the public international law obligation to recognise and give effect to any arbitration award made with respect to claims arising out of the death of or injury to a passenger, or damage or loss to luggage or goods in circumstances covered by these two Conventions subject to formal proof of the award actually being produced to the enforcing court.

24. A third international convention of this type, though somewhat more limited in its scope, is the Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Cooperation[1]. This Convention made by member States of the Council for Mutual Economic Assistance (CMEA)[2], aimed to exclude the jurisdiction of all national courts of law[3] in respect of disputes "arising from contracts of purchase, ... specialisation and cooperation of production, carrying out of building industrial and construction industry works, on assembling, projecting, prospecting, scientific research, designing and exploratory development, transport-dispatching and other services, as well as other civil law cases arising in the course of economic, scientific and technical cooperation of the countries-parties to the Convention[4]." The contracts referred to are naturally those between organisations or enterprises which have their main place of business in different countries party to this Convention[5]. Rather the Convention preferred all such disputes to "be subject to arbitration proceedings at the Chamber of Commerce in the country of the respondent or,

subject to agreement of the parties concerned, in a third country-party to the present Convention"[6].

To facilitate the recognition and enforcement of awards made pursuant to this Convention, the CMEA States undertook to give effect to such awards as if they were domestic court judgments. Thus the Convention provided[7]:

> "The awards shall be recognised without further proceedings and shall be subject to enforcement in any country party to the Convention in the same order as entering into force judgments of the courts of law of the country concerned"[8].

b) Arbitration: International by its structure or procedure[1]

25. Perhaps the largest proportion of international commercial arbitrations are conducted outside both national and legal boundaries. They are totally detached from every national system of law[2] and are independent of the State in which they are held[3]. The proceedings are consequently governed by and in accordance with international or at least non-national arbitration rules. This Fouchard described in the following terms:

> "... un arbitrage détaché de tous les cadres étatiques, soumis à tous égards à des normes et à des autorités véritablement internationales, c'est-à-dire, bien que toutes ces expressions soient quelque peu barbares supra-nationales, extra-nationales, ou mieux, a-nationales"[4].

Such arbitrations may be either under the auspices of a permanent arbitration institution[5], or ad hoc,[6] under some internationally accepted arbitration code adopted for the purposes by the parties or the arbitrators.

26. The parties may submit to arbitration at the International Chamber of Commerce in which case the rules of that institution rather than those of the place of arbitration would be followed. Similarly with the other international or non-national arbitration tribunals and the institutions attached to the special trade associations (e.g. the Feed and Grain Association, the International Federation of the Seed Trade, the International Wool Textile Organisation). Alternatively, the parties might submit to another established tribunal, which, while ostensibly a national institution (e.g. the American Arbitration Association, the London Court of Arbitration,

the Maritime Arbitration Court at Le Havre), was established primarily to deal with disputes arising out of international commerce. All these institutions have rules according to which they become seized, the arbitrators are appointed, the proceedings are conducted and the award is made. These rules are non-national: they belong to the arbitration institution concerned and not to the local State.

27. The parties could also choose for their dispute to be dealt with by arbitration ad hoc under some internationally developed arbitration code[1]. Such code may be contained in an international convention e.g. the European Convention on International Commercial Arbitration 1961, which makes provision for the regulation of every aspect of an arbitration, including the appointment of arbitrators, the procedure to be followed, the conflict of laws rules to be applied[2] and the recognition and enforcement of the award. Alternatively, several arbitration codes have been developed by United Nations agencies. In 1966 the UN Economic Commissions for Europe (UNECE) and for Asia and the Far East (UNECAFE) developed rules for arbitration. Both sets of rules make provision for most aspects of arbitration including the appointment and removal of arbitrators, the procedure to be followed, the conflict of laws rules to be applied[3], and the making of the award. More recently, in 1976, the United Nations Commission on International Trade Law (UNCITRAL) adopted rules for optional use in ad hoc arbitration[4]. These rules were greatly influenced by and developed from the earlier sets of rules, and provide a comprehensive code to govern an ad hoc arbitration[5].

These arbitration rules are international or at least non-national, in that they do not pertain to any one national legal system[6]. However, all having been developed under the auspices of some international agency, most countries will have directly or indirectly participated in their development. What is particularly important is that these rules apply only when expressly chosen by the parties.

c) Arbitration: International by its facts

28. Irrespective of its organisation, structure or procedure, an arbitration may be termed international by virtue of its connection with more than one jurisdiction[1]. This may be so even where the arbitration is organised and conducted under the national law of a particular country, provided there is some connection, however small, with a second jurisdiction. In the words of Fouchard:

> "... il suffit qu'un aspect, qu'un élément du litige ou de l'arbitrage, élément matériel ou juridique, touche à un pays différent de celui auquel se rattache le reste de l'affaire, pour qu'il y ait arbitrage international".[2]

It follows that an otherwise domestic contract could, because of an agreement to go to arbitration in some other country, result in that arbitration being international[3].

So an arbitration will be international, even though it may have the nationality and be subject to the law of some sovereign State. It is the "géographique ou économique"[4] factors of the arbitration, far more than the nationality or law applicable which determine whether a particular arbitration is domestic or international[5].

C. The Forms of Arbitration

29. There are two main forms of arbitration available to the participants of international commerce: institutional arbitration and ad hoc arbitration. We shall consider the major characteristics of both.

1. Institutional Arbitration

30. The rapid increase in the number of institutions and organisations providing permanent arbitration facilities is a relatively modern development[1]. These institutions have been created by private businessmen, commercial, commodity and professional organisations, governments, inter-government agencies and international bodies. Their arbitration functions are variously

incidental to, part of, or their main function.

These institutions can conveniently be divided into various categories. We will distinguish between a) international institutional arbitration, and b) national institutional arbitration.

a) International institutional arbitration

31. Certain arbitration institutions have been created primarily to provide an arbitration service to participants in international commerce coming from different political, economic and legal systems. These are international or non-national institutions: they were established by interested governments and/or organisations and/or individuals from different countries; they owe no allegiance to any one sovereign State and are responsible only to international commerce in general and to those who submit to their jurisdiction in particular.

That their administrative headquarters and secretariats are situated in one particular country may be a matter of political or commercial convenience, geographic accessibility or mere coincidence. It does not signify any major connection between the institution and the host State; however it is resident in that country by courtesy of the sovereign and in consequence must respect the local imperative laws and standards of public policy (ordre public) at least- with respect to those activities directly affecting the country in question.

32. Among the so-called "international" arbitration institutions it is necessary to distinguish between those which are truly international i.e. subjects of public international law (i) and those institutions which are international by virtue of their organisation, membership and role in international commerce. In the latter category we shall consider separately the Court of Arbitration of the International Chamber of Commerce (ii), those institutions, organised world-wide, which offer a specialised service for specific commodities or industries (iii) and the regional and bi-lateral

institutions offering general or specialised arbitration services (iv).

(i) Public International Law Arbitration Institutions

33. The International Centre for the Settlement of Investment Disputes (ICSID), the brain-child of the International Bank for Reconstruction and Development, was created in 1965 by the Convention on the Settlement of Investment Dispute between States and Nationals of other States. In the early 1960s it was considered necessary to encourage investment in the recently independent third world whose need for foreign capital was obvious but whose political instability did much to discourage prospective investors. There had already been examples of volatile governments nationalising and confiscating foreign owned property. The governments of most developing countries recognised foreign capital investment as vital to the development of their economies[1].

"The need for international cooperation, for economic development and the role of private international investment"[2] inspired the creation of an internationally acceptable forum, capable of regulating disputes arising between States and nationals of other States in respect of moneys invested or property owned by the latter in the territory of and subsequently confiscated by the former[3]. The ICSID is such an institution, which under the Convention is empowered to provide facilities for conciliation and arbitration. The conditions under and the rules according to which the ICSID acts are contained in the Convention[4], including express provisions for the appointment and removal of arbitrators, the powers, functions and duties of the arbitration tribunal and, most important of all, the undertaking of all States party to the Convention to recognise and enforce an ICSID award as if it was a domestic judgement[5].

34. The ICSID is different to all other permanent arbitration institutions in that it is the creation of sovereign States by means of an international convention, rather than the creation of private businessmen or business organisations. As such the ICSID is a public international institution, a

subject of public international law[1]. However, as the disputes which come before it for arbitration involve one private, non-government party, the arbitration is not a pure public international arbitration; rather it falls somewhere between public and private international arbitration. It has for this reason been variously described as quasi-international or semi-international arbitration[2].

International Railway Transport Arbitration[1]

35. Not so elaborately developed is the arbitration service created by the CIM and CIV Conventions 1961[2]. These conventions set up a Central Office for International Railway Transport in Berne, Switzerland, with responsibility to organise arbitration tribunals to hear disputes arising out of the carriage of goods, passengers and luggage[3]. The arbitrants may be Contracting States, national railway corporations, carriers, passengers or consignors[4]. Although the Central Office maintains a list of arbitrators[5], the parties may nominate one each, but must agree on a sole or the third arbitrator; they are also free to decide themselves the place of arbitration[6]. Should the parties fail to agree the Central Office may request the President of the Swiss Federal Tribunal to make the necessary appointment, and fix the place of arbitration[7]. As already seen awards made by such arbitration tribunals are easily enforceable in States party to the Conventions.

(ii) The International Chamber of Commerce (ICC)

36. The ICC was created in 1919 "to promote international trade and cooperation, to strengthen the role of Private Enterprise, and to improve the conditions for international business"[1]. To this end the ICC "works to encourage understanding between businessmen and business organisations throughout the world", and it "provides its members and business in general with practical services"[2].

The ICC was created as and remains an international private organisation: it has members in over 80 countries around the world; it works and cooperates

with sovereign States, inter-governmental organisations and public international and private commercial organisations to achieve its aims: it maintains national committees in many countries but remains free from political allegiance; and it is financed by the contributions of its members. Although the ICC has its headquarters in Paris, it is not a French institution: in fact during the Nazi occupation of France the ICC nominally was moved to Geneva, Switzerland[3].

37. One of the services provided by the ICC is an arbitration and conciliation service. The Court of Arbitration was created in 1924 and has since become the most important and significant tribunal for disputes arising out of international commerce. It is today the only arbitration institution "qui offre ses bons offices non seulement aux milieux économiques et aux gouvernements sans aucune restrictions d'ordre national ou territorial, mais aussi et surtout quelle que soit la nature et l'objet des litiges que lui sont soumis"[1].

38. Since its creation, the ICC Court of Arbitration has gained an immense experience of and expertise in all types of commercial disputes: both general and specialised[1], and between parties from similar and different economic, political and legal régimes. The ICC arbitration proceedings are conducted in accordance with the ICC Rules of Arbitration[2] - the most recent of which were adopted on 1 June 1975[3]; the administrative needs of the Court of Arbitration are regulated by a secretariat which is resident at the ICC headquarters in Paris[4].

39. The actual "place of arbitration"[1] depends on the volition of the parties; where the parties are not agreed, it will be fixed by the ICC[2]. In theory the place of arbitration could be anywhere in the world. In practice however the ICC fix the arbitration in a place which is accessible to both the parties and the arbitrators, which is geographically convenient for witnesses and the presentation of evidence, which is legally favourable to both arbitration

proceedings and the enforcement of the arbitration awards (i.e. a country which is party to the major international arbitration conventions), which is politically acceptable to both parties, and which has the basic requirements (i.e. hotel accommodation, local experts, telephone and telex services, translators, etc.) necessary for the conduct of arbitration proceedings. Naturally for their administrative convenience the ICC secretariat favours arbitration in Paris.

40. The international character of the ICC is blurred only by the cool relations which exist between the ICC and the socialist countries. It is not surprising that an institution created in 1919 "to strengthen the role of Private Enterprise" should have found itself in conflict with the nascent socialist Soviet State dedicated to destroying private enterprise and capitalism. The USSR was consequently not invited to participate as a member or even as an observer in the work of the ICC. Since then, many more countries have adopted the socialist ideology; and relations between the ICC and the socialist countries have thawed. Nevertheless of the Chambers of Commerce in the socialist countries, only the Yugoslav Federal Economic Chamber has become a member of the ICC. The socialist countries do however participate in certain ICC activities (e.g. the drafting of uniform laws), and enterprises from those countries have submitted to the arbitrament of the ICC. To date (1976), however, the ICC has still never been seized of an arbitration involving enterprises from the USSR or the Peoples Republic of China[1].

(iii) International Specialist Institutions

41. Institutions have been created for the purpose of facilitating international trade in and to establish internationally acceptable standards for specific industries or trades. Among other services, these institutions provide a specialist arbitration service in respect of which they are, by virtue of experience and special interest, particularly well suited to administer. In the main however they are concerned with quality or technical standard

arbitration for which they keep panels of appropriately qualified arbitrators and experts. That they have their seat or permanent headquarters in a particular country is due to historical or other reasons, but does not reflect any lien between the institution and the host State.

42. There are three international institutions providing a specialist arbitration service.

The International Reclamation Bureau (Bureau International de la Récupération (BIR)) created in 1948 is concerned with disputes arising with respect to secondary raw products (ferrous scrap, non-ferrous metals, textiles, paper-stock). Although the BIR headquarters are in Paris, arbitration proceedings take place in the country determined by the Court of Arbitration unless the parties have agreed in advance upon the place of arbitration[1].

The International Federation of the Seed Trade (Fédération Internationale du Commerce des Semences (FIS)), with its seat in Holland, has rules[2] to regulate arbitration proceedings between their members. These rules provide that proceedings shall take place under the control of the member association[3] in the seller's country[4] or in the country nominated by the General-Secretary of the FIS[5].

The International Wool Textile Organisation, which has its headquarters in Bradford (UK), makes similar provision and empowers the national committee in the country of the seller or processor abroad to arrange and preside over the arbitration[6].

(iv) Regional Arbitration Institutions

43. Some institutions providing an arbitration service are established on a regional or a geographic basis. These institutions relate to commerce generally or to specific commodities. They conduct their activities from a non-national or transnational platform: they are neither exclusively attached nor are their activities restricted to the territory of any one sovereign State. On the otherhand, they are not truly world-wide institutions:

their services are only available in respect of disputes arising out of commercial relations between persons carrying on business in or commercial transactions relating to the particular predetermined region or territory with which the institution is concerned. The "regions" or territory may cover more than one continent (e.g. the Inter-American Commercial Arbitration Commission), areas within a continent (e.g. Arbitral Chamber of the European Union for the Hops Trade), the territory of several (e.g. Scandinavian Arbitration Board for Hides and Skins; the International Court of Arbitration for Marine and Inland Navigation at Gdynia[1] (Czechoslovakia, GDR, Poland), or merely two sovereign States (Franco-German Arbitration Chamber for the Fruit and Vegetable Trade; Dutch-German Chamber of Commerce).

44. The "place of arbitration" under the auspices of a regional institution depends upon the rules and the character of the particular institution. So e.g. arbitration proceedings under the rules of the Inter-American Commercial Arbitration Commission (IACAC) "shall be held at the locality designated by the IACAC, if the parties have not indicated another place in their agreement"[1]. The actual place will be at the accredited national section in the country designated[2]. Similarly, the arbitration tribunal of the German-Dutch Chamber of Commerce has its seat in The Hague, Düsseldorf, Frankfurt-am-Main, Hamburg, Munich or Stuttgart; in each particular case the actual decision is to be made by the Chamber of Commerce itself[3]. On the other hand, arbitration proceedings of the Franco-German Arbitration Chamber for the Fruit and Vegetable Trade are always in the country of the defendant i.e. Strasbourg in France; Mannheim in the Federal Republic of Germany[4]. The Arbitral Chamber of the European Union for the Hops Trade has its siège in Strasbourg, but hearings can be held in any other city subject to the authority of the President of the Union[5].

b) National institutional arbitration

45. In most countries there is at least one institution offering an arbitration service. This institution may be a national, provincial or city chamber of commerce, a professional, trade or commodity institution established primarily to conduct and administer arbitration proceedings.

It is the national characteristic of these institutions which is of importance. Does national indicate that the institution was created by the State, is an organ or department of the State and is subject to the control of the government of the time? Or is it only indicative of the fact that the institution is nationally organised, was established by nationals of the country to which nominally it belongs, but remains a private, non-governmental institution, independent of the State and free from government interference or pressure? The structure and organisation of these national institutions differs in the market economy countries (i) and in the socialist countries (ii). We shall consider the two systems separately.

(i) Market Economy Countries

46. In market economy countries the commercial institutions providing an arbitration service and the independent arbitration tribunals have been created by private businessmen and business organisations. In the case of specialist institutions they have been established by those involved in the particular business, industry, profession or trade. The institutions exist quite independently of the State: they are private institutions, created, organised, administered and financed by their members or those for whose benefit they exist. The charter of the institution, the rules which regulate their daily affairs and the rules which they follow in arbitration proceedings are drafted and adopted by the membership of the institution. The State is generally impervious to the existence of such institutions; subject to the law of the land, the State does not interfere in their daily affairs. To the extent that they contribute to the healthy commercial life of the nation, their arbitration facilities receive at least the tacit support and encouragement

of the State.

47. The arbitration services of these national institutions are aimed equally at domestic and international trade[1]. Some national institutions have achieved a particularly wide experience and respected reputation in international commercial disputes. For example, arbitration centres well qualified for international trade disputes generally, include: the American Arbitration Association, la Chambre Arbitrale de Paris, the Indian Council of Arbitration, the Italian Arbitration Association, the Japan Commercial Arbitration Association, the London Court of Arbitration, and the arbitration tribunals attached to the Chambers of Commerce and Industry of Amsterdam, Brussels, Frankfurt-am-Main and Zurich; for "east-west" trade disputes, the arbitration tribunals of the Stockholm Chamber of Commerce and the Vienna Chamber of Commerce and Industry. Experienced specialist institutions are variously situated: e.g. for coffee - the Antwerp Arbitration and Conciliation Chamber for the Coffee Trade; the Bremen Coffee Trade Association; for cotton - Bradford Chamber of Commerce; Chambre Arbitrale des Cotons du Havre; Japan Cotton Trader's Association; for leather and hides - Antwerp Arbitration and Conciliation Chamber for Leather and Hides; for shipping - Chamber Arbitrale Maritime de Paris; Gotenberg Chamber of Commerce; The Japan Shipping Exchange; the London Maritime Arbitration Association; for wool - the British Wool Federation[2].

Proceedings under the auspices of one of these national institutions are conducted in accordance with the arbitration rules of the institution seized. The hearings take place at the institution's head office or at some other chosen venue: this will however invariably be within the territory of the city or country to which the institution belongs[3].

48. Prima facie, national arbitration institutions are subject to their national law. In practice however, the law of the country in which they are situated will only be looked to to supplement the arbitration rules of the

tribunal seized. When seized of a dispute with multi-national dimensions, the tribunal takes on a non-national character: its connection with a particular city or country pales into insignificance. There are still many who consider the national arbitration tribunal is obliged to respect and apply the procedual and private international law rules of the place where it conducts its activities[1]. However, this is neither the unanimously favoured view nor, as will be seen, the one followed in practice[2].

(ii) Socialist Countries

49. In the socialist countries, tribunals have been established to provide an arbitration service for disputes arising out of trade with foreign countries[1]. The longest established tribunal is the Foreign Trade Arbitration Commission (FTAC) in Moscow which is the proto-type upon which all the other socialist countries have built when establishing their arbitration tribunals. It is important to see the circumstances out of which the socialist arbitration tribunals were born.

50. The first years of the existence of the Soviet Union witnessed an intense hostility between the "capitalist" world and the USSR. The former were most anxious to throttle the nascent socialist State. The Soviet Union were politically and commercially shunned; what commercial relations there were, were on terms dictated by the western partner. This invariably resulted in a provision for arbitration in the west[1]. The awards which ensued were, from the Soviet stand point, "dictées par des considerations que ne correspondaient pas aux intérêts du développments des rapports commerciaux" and were "en violation des droits et intérêts des organismes soviétiques"[2].

In the mood prevailing in the 1920s and 1930s the Soviet Union considered it very unlikely that any Soviet foreign trade corporation could obtain a "fair" hearing in tribunals situated in countries determined to engineer its demise. Acknowledging that foreign businessmen would not accept that the national courts of the Soviet Union deal with disputes arising out of inter-

national commercial contracts, the Soviets created in June 1932 the FTAC. This organisation was to be a non-Governmental agency, organised within but independent of the All Union Chamber of Commerce of the USSR. The Charter of the FTAC declared its character and purpose to be (respectively) "a public organisation formed in order to further the development and strengthen the economic relations between the USSR and foreign countries".

51. Today every socialist country has an arbitration tribunal attached to and administered by its national Chamber of Commerce[1]. The Chamber of Commerce is an auxiliary institution with responsibility to promote and facilitate commercial relations with foreign businessmen. Whilst the Chambers of Commerce in socialist countries are not State institutions, they are equally not private institutions[2]. They were created by the State, are subject to the supervision of the Ministry of Foreign Trade and carry out their functions in accordance with national policy; senior officials are appointed by the Ministry of Foreign Trade. Their responsibilities encompass not only activities similar to those of western Chambers of Commerce, but also certain delicate tasks which for political reasons cannot be dealt with through normal channels[3].

The "most important single function"[4] of the Chamber of Commerce is the provision of an arbitration service. Whilst the Chamber of Commerce does not interfere in the daily running of the arbitration tribunal they are closely connected. They are invariably situated in the same building and many senior officials hold posts in both the arbitration tribunal and the Chamber of Commerce. The Chamber retains ultimate control and responsibility for the arbitration tribunal. Hence the rules according to which the tribunal conducts itself and the panel of arbitrators must be approved by the Praesidium of the Chamber of Commerce[5].

52. There are also six specialist arbitration tribunals. Four relate to maritime arbitration: the Maritime Arbitration Commission in Moscow, the

Maritime Arbitration Commission in Peking, the Maritime Arbitration Committee in Hanoi and the most prestigious, the International Court of Arbitration for Marine and Inland Navigation in Gdynia, in Poland. Also in Gdynia there are arbitration tribunals attached to the Gdynia Wool Federation and the Gdynia Cotton Association. The internal workings of these institutions are also controlled through the central organs of the State.

53. An arbitration under the auspices of these various socialist institutions are always held in the country where the tribunals have their seat. Proceedings are conducted in accordance with the rules of the institution, the procedural rules and private international law of the country to which the tribunal belongs. Indeed, in the socialist countries procedural rules have been developed especially for use in, and private international law is developed (to the extent relevant to international commerce) by the arbitration tribunals.

54. This strong connection between the arbitration institutions and the State has led to allegations that the arbitration tribunals in the socialist countries are not independent, but are national courts falling within the State's national hierarchy of courts. In a sense as understood in the west, these tribunals are national courts and do appear to be very akin to government controlled institutions[1]. Whereas in the market economy countries arbitration tribunals are the creation of businessmen and/or commercial organisations to provide themselves with a service, in the planned economy countries the arbitration institution is set up by the State to provide State enterprises (or persons authorised by the State) with the necessary services should disputes arise in relation to the State's foreign trade.

55. This ultimate control has resulted in allegations that socialist arbitration tribunals are partial to socialist corporations. This view born out of the socialist cold-war diatribe promising to "smash the capitalist

monopolies" found support in the behaviour of the Soviet FTAC in the now infamous Soviet-Israel Oil Arbitration 1958[1]. That dispute arose out of the refusal by the Soviet Government to grant an export licence in respect of oil meant for Israel. The refusal was a political act of the Soviet Government, in retaliation for the Israeli Suez campaign of 1956. When the Israeli purchaser claimed damages from the Soviet exporting enterprise, the FTAC made a very short and cursory award after an equally cursory hearing. Reports followed the award that the Israeli's had been denied an opportunity to put their case, the decision had been dictated by the Soviet government or the arbitrators had decided their award in advance. It was further reported that a Soviet professor who had been instructed by the Israeli's had been allowed to give evidence against the Israeli party. This award caused a furore in the west, amongst both lawyers and businessmen, and did more to undermine the reputation of socialist arbitration than any other fact.

This award was widely and roundly condemned in the west[2]. Much of the confidence which the FTAC had slowly and painstakingly built up was demolished in one full-swoop. But whatever the true story "one swallow does not herald the spring". There have been very few other allegations about Soviet arbitration; there have been even less concerning the other socialist countries. Several writers are even of the opinion that despite the undoubted control which the socialist States have over their arbitration tribunals, they do not interfere with the arbitrators and are particularly anxious not only to be impartial but also to be seen to be impartial[3]. Indeed some commentators have argued that if anything, socialist arbitration tribunals are biased in favour of a western party[4]. To prove their impartiality the socialist tribunals generally publish their awards[5] - albeit a few years after being made - 4 small booklets containing 148 selected awards have been published by the Soviet FTAC[6] - a practice which is generally opposed in the west. Today the Soviet-Israel Oil Arbitration is considered an isolated and unfortunate award: it can no longer be relied on to prove anything.

The domain of arbitration in the socialist countries

56. Socialist arbitration tribunals are not competent to hear disputes arising out of domestic commerce[1]. Their activities are reserved for foreign trade disputes. However, their role differs depending on whether the disputes arise out of inter-CMEA trade or trade with non-CMEA countries.

Inter-CMEA Trade

57. The eastern European socialist countries (with the exception of Yugoslavia) established the Council for Mutual Economic Assistance (CMEA) in 1949[1]. The purpose of CMEA is to coordinate whenever possible the economic, commercial and industrial policies of the member States. To facilitate trade between enterprises from the various member States, CMEA aims to develop common practices and systems. To this end three sets of general conditions have been adopted. General Conditions of Delivery of Goods between Organisations of the Member Countries of CMEA 1968 (amended from 1958 original)[2]; General Conditions for Technical Servicing of Machinery, Equipment and other Items 1973 (amended from 1962 original); and General Conditions of Assembly and Provision of Other Technical Services in Connection with the Delivery of Machinery and Equipment 1973 (amended from 1962 original)[3]. All these conditions provide that disputes arising out of contracts which they govern must be dealt with "in an arbitration tribunal established for such disputes in the country of the defendant or, by agreement of the parties, in a third member country of the CMEA"[4]. Arbitration is consequently the only method by which disputes between enterprises from CMEA countries can be determined[5].

Similarly the Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Economic Scientific and Technical Cooperation 1972 provides that any dispute which arises out of a commercial relationship aimed at one of the foregoing forms of co-operation must be submitted to "arbitration proceedings with the exclusion of the above disputes from jurisdiction of the courts of law" (article I (1)). The arbitration tribunals with jurisdiction are "the Chamber of Commerce in the country of the respondent",

or, subject to agreement of the parties concerned in a third country party to the Convention (article II (1))[6].

58. It is not possible to equate totally inter-CMEA arbitration with international arbitration generally. The purpose of arbitration in inter-CMEA trade is different from western arbitration. It has been described by one commentator in the following way:

> "While commercial arbitration in the west would tend to strike a balance between formal and substantive justice, in the socialist countries it was designed with different aims in view. The nature of commercial adjudication in the socialist commonwealth is virtually influenced by the fact that it is in the hands of experts drawn from the ranks of the bureaucracy, who are charged with economic administration. To them, all operations are primarily assessed in the context of the economic plan. It is quite natural that in this milieu there should be a tendency to uphold regulations and instructions of higher authorities and to enforce the formal rule of law, rather than to seek a solution in terms of business practices. Furthermore, socialist commercial arbitration tends to establish firm rules of procedure as guidelines for those members of the economic bureaucracy in charge of foreign trade operations"[1].

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59. The role of the socialist arbitration tribunals in east-west trade is equally important. Arbitration is the only acceptable method of resolving commercial disputes between parties from different economic and political backgrounds: national courts are understandably quite unacceptable for such disputes. The extent to which socialist countries favour arbitration can be seen from the willingness of socialist foreign trade enterprises to submit to arbitration both in their own countries and elsewhere, and from the willing participation of the socialist States in the various efforts to develop an international arbitration law. All arbitration in respect of east-west and international trade generally takes place in the socialist countries under the auspices of the local arbitration tribunals.

60. For the purposes of this study, inter-CMEA arbitration is only of limited interest, the general conditions providing uniform contract terms and, where they are insufficient, a choice of law provision[1]. However, in all other arbitration there is indeed a valuable source of material, though as will be seen, socialist arbitration tribunals almost always apply the private international law rules of the country to which they belong[2].

2. Ad Hoc Arbitration

61. Many businessmen are naturally wary of all institutional arbitration tribunals. Whether national or international, general or specialised, institutional tribunals are easily presumed to have an inherent bias towards those responsible for their creation and their continued existence. The institution's rules of procedure, whilst facilitating the method of appointing arbitrators, may restrict the choice of arbitrators to a predetermined panel - selected by those who control the tribunal - of whom none may be capable of dealing with a specific type of case. Again those rules, whilst ensuring certainty in the conduct of the arbitration proceedings may be too formal and inflexible to cover every type of arbitration e.g. by requiring hearings to be held at a fixed and definite venue.

62. An alternative to institutional arbitration is ad hoc arbitration[1]. Here the arbitrants not only agree to submit their disputes to arbitration, but also retain for themselves complete control of every aspect of the procedure to be followed. The arbitrants decide the method of appointing, the jurisdiction and the powers of the arbitrators. Where the arbitration has its seat depends on the arbitrants; this may be the place expressly selected or where the arbitrator (or third arbitrator) is domiciled or has his permanent residence. The arbitrants decide the arbitration procedure to be followed: they may select the rules of some national or non-national procedural code[2] or may even decide for themselves the exact rules to be followed by the arbitrators. In ad hoc arbitration, the arbitrators' authority derives

from the parties; this authority ceases when either the award is made or it is expressly revoked by the parties.

On the other hand, this very non-nationality is also the source of much confusion and uncertainty. If the parties are unable to agree on some question they may be left to their remedies in the normal courts. Furthermore having no secretariat the arbitrator (or third arbitrator) must himself act as administrator and secretary, fixing both the time and place of the hearings, finding the necessary accommodation, communicating with the parties, etc. This can be both inconvenient and unfair. Nevertheless, ad hoc is a popular form of arbitration particularly appropriate for disputes where one party is a sovereign State, arising out of the "oil trade", and in respect of east-west trade.

CHAPTER II THE JURIDICAL NATURE OF ARBITRATION

63. What is the legal nature of arbitration? As a private, non-national system of dispute settlement, is it subject to legal regulation? If so, to what legal order: a national law (which), an international law or a mixture of the two? Or is arbitration, as the creation of the parties, subject only to their regulation?

This question has for long been the subject of debate and argument amongst academic writers. They argue that, in theory at least, the attitude of national legal systems to arbitration proceedings (e.g. whether to uphold arbitration agreements, to assist with the appointment and removal of arbitrators) and the award (i.e. whether to enforce the award or not), depends on the legal character of arbitration.[1] Furthermore, this question allegedly holds the key to the legal or non-legal yardsticks available to arbitrators in international trade disputes and the method by which the applicable yardstick is to be determined.

No one viewpoint has received universal support in theory or practice. It will be convenient to consider the major theories which have been advocated and the effect they would have if adopted. No attempt will be made to support any particular viewpoint. As will be seen when considering the decided awards, there is some support for all the theories.

64. Four theories have been suggested with respect to the juridical nature of arbitration. Three have been around for many years; the fourth was developed only in 1965. As long ago as 1937, Alfred Bernard wrote synthesising the three older theories in the following terms:

> "... d'après le premier, - qui dissocie le compromis de la sentence - celle-ci doit être assimilée aux jugements rendus par les juridictions ordinaires; d'après le deuxième - qui considère le compromis et la sentence comme les deux phases d'une même convention: la convention d'arbitrage - la sentence a un caractère contractuel et ne peut être assimilée aux jugements; le troisième - que l'on peut considérer comme intermédiare - subordonne l'assimilation de la sentence arbitrale au jugement de la juridiction ordinaire à son exequatur préalable".[1]

These three viewpoints are today respectively known as the jurisdictional, the contractual and the mixed or hybrid theories. The fourth theory suggests arbitration to be an autonomous institution. We shall consider each of these theories in turn.

A. The Jurisdictional Theory[1]

65. The jurisdictional theory recognises the power of the State to control and regulate all arbitrations which take place within its jurisdiction. Whilst recognising that an arbitration has its origin in the parties agreement, the jurisdictional theory maintains that the act of adjudication by the arbitrators, the validity of the arbitration agreement, the powers of the arbitrators and the enforcement of the arbitration award, all rely for their authority on the law of the enforcing State. Thus, unless some national law recognised as applicable entitles the parties to submit to arbitration, empowers the arbitrators to hear and determine the issues involved in the dispute, and enforces the decisions of the arbitrators, the arbitration is meaningless and ineffective. Such authority and effect, if and when given by the law of the enforcing forum, is a concession and not a right.

66. Adjudication is a sovereign function normally exercised by national courts established by the State especially for that purpose. Parties can only submit to arbitration to the extent expressly allowed or impliedly accepted by the law of the place of arbitration.[1] Equally, an arbitrator has no authority to act without a "délégation de souveraineté"[2] by the State in which he proposes to act. In the absence of such delegated authority the award will be devoid of validity and effect. As stated by one author

> "... l'état seul a le privilège de rendre la justice, que dès lors, si la loi autorise les parties à recourir à l'arbitrage, cette institution ne saurait être l'exercise d'une fonction publique, qu'il faut donc en conclure logiquement que la sentence arbitrale est un jugement, au même titre que les décisions rendues par les magistrats de l'état".[3]

It follows that the arbitrator, like the judge, draws his power and authority from the local law. Hence an arbitrator is frequently considered to closely resemble a judge. Both are obliged "... de decider suivant le droit ou suivant leur conscience, c'est-à-dire, ... de juger";[4] both must respect and uphold the fundamental principles of the local law.[5] The only difference between judge and arbitrator is that the former derives his nomination and authority directly from the sovereign, whilst the latter derives his authority from the sovereign but his nomination is a matter for the parties.[6]

67. Since the power and authority of an arbitrator closely resembles that of a judge, it is natural that the award should be treated in the same way and granted the same effect as an ordinary court judgment.[1] These effects depend upon the law of the enforcing court.

An award (like a judgment) is not self-executing. If not voluntarily given effect to by the parties it will have to be enforced by the courts. Per se an award is worthless; its value depends upon it being enforceable. If the award is not voluntarily performed, the party in whose favour it was made must apply to the local courts for enforcement in the same way as with an ordinary court judgment. Thus Niboyet argued that in reality an award

> "... n'est encore qu'un projet de sentence, et elle ne devient une sentence complète que lorsque l'autorité judiciaire du pays ou elle est intervenue se l'est en quelque sorte appropriée, par la voie de l'exequatur national. Cet exequatur lui donne le sceau d'une oeuvre judiciaire préparée par des arbitres, mais que la justice s'annexe en définitive"[2].

68. The effect of this theory is to allow arbitrators no greater freedom in the application of substantive law than judges have. It puts the emphasis on legal certainty and requires that an award conform to the law of the State in which made. Arbitrators would consequently have to apply the conflict rules of the State in which they are sitting and would be little better off than an ordinary court. As stated by Madame Rubellin-Devichi:

> "... la forme des actes accomplis par les arbitres, devrait être soumise à la lex fori, c'est-à-dire à la loi du lieu où ils "opèrent" car les règles auxquelles ils obeissent pour rendre la sentence sont des règles de procédure proprement dites".[1]

The jurisdictional theory in practice can most clearly be seen in the attitude to arbitration in the socialist countries. Their arbitration institutions are attached to the national chambers of commerce and retain a close connection with the State. Arbitration is the officially favoured system for resolving international trade disputes. Nevertheless, in disputes arising both out of inter-CMEA trade and international trade generally, the socialist tribunals of eastern Europe are generally considered to be bound to "their own" procedural and private international law rules.

B. The Contractual Theory

69. A second group of writers submit that arbitration has a contractual character.[1] It has its origins in and depends for its continuity on the parties agreement. The parties themselves determine the system of arbitration (institutional - which one? or ad hoc), directly or indirectly choose the arbitrators to hear their dispute, select the time and place of the arbitration proceedings and regulate the procedure to be followed.[2] Furthermore the parties undertake to accept the arbitrators' award as having binding contractual force and to voluntarily give effect to it. Niboyet comprehensively described this theory as it relates to the award in the following terms:

"Les sentences arbitrales, ont une nature contractuelle, puisque les arbitres tiennant leur pouvoir non de la loi ou de l'autorité judiciaire, mais de la convention des parties (clause compromissiore, compromis). L'arbitre statue comme les parties auraient pu, par convention, le faire elles-mêmes; elles donnent aux arbitres un veritable mandat de statuer à leur place. La sentence est donc imprégnés de caractère contractual, et des lois, qu'elle apparait comme étant l'oeuvre des parties, elle doit produire, comme toute convention, ses effets de plein droit et posséder l'autorité de la chose jugée".[3]

70. The protagonists of this theory deny the influence of the State on arbitration. They argue that the very essence of arbitration is that it is"created by the will and consent of the parties".[1] The parties voluntarily agree to contract, they voluntarily agree to submit any dispute arising out of their contract to arbitration, they voluntarily agree, in advance, to accept and carry out the award of the arbitrator. In the words of one writer:

"arbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forego established rights in favour of what they deem to be the greater advantages of arbitration".[2]

Or as Dr. Domke said, "the express intent of both parties to enter into the arbitration agreement is essential to its existence".[3]

71. Both aspects of the arbitration, the agreement and the award, it is argued, manifest this contractual character of arbitration.

The origin of every arbitration agreement is a contract and consequently "the binding force of the arbitration agreement comes from "pacta sunt servanda" as well as other ordinary contracts without any State authorisation".[1] The State has no influence or effect on an international arbitration, the entire agreement being based on the parties' agreement. "C'est du consentment du parties, non pas l'autorité publique, que l'arbitre tient ses pouvoirs".[2]

The arbitration award is enforceable by the courts as a contract. Authorised by both parties to make an award to settle their dispute the arbitrator is in a

way an agent of both parties; his award is hence binding on them as an agreement made on their behalf by "their agent(s)".[3] Thus the parties are obliged to voluntarily carry out the arbitrator's award, which otherwise can be enforced by the courts, not as recognising and enforcing the judgement of another court, but as an unexecuted contract.[4]

From this point of view State legislation has very little influence on the arbitration agreement or the award. Both are contracts; as with all contracts the parties are free, within the limits allowed by the law, to determine the conditions of their relations including to submit future or existing disputes to arbitration. National arbitration laws are only to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of an arbitration.[5]

72. The contractualists do accept the fact that national law can have some influence on the arbitration proceedings and the award. A national court will naturally not enforce an agreement to arbitrate in respect of a subject-matter reserved by the lex fori for their exclusive jurisdiction.[1] Equally a court will not enforce an award which violates its public policy or where it appears the arbitrators failed to respect the fundamental notions of natural justice (i.e., giving both parties equal opportunity to put and argue their case). However this is nowhere near as wide as the powers of revision, amendment and reformation claimed by Lainé.[2] Nevertheless

> "... c'est du compromis que la sentence tient toute sa substance, se basant, en d'autres termes, sur ce que le compromis et la sentence ne sont que les deux phases d'une même convention: la convention d'arbitrage, ces auteurs déduisent que la sentence arbitrale a comme le compromis, le caractère de contrat".[3]

Hence the arbitration proceedings and the award comprise only "un ensemble d'actes contractuels privé".[4]

73. The contractual theory of arbitration recognises the parties as having unlimited autonomy in choosing the law to govern their relations. Thus an arbitrator faced with a choice of law problem will resolve it initially by recourse."... directment ou indirectment, de la volonté des parties, exprimée soit dans la convention d'arbitrage, soit même seulement dans le contrat 'principal', à propos duquel surgit le litige soumis aux arbitres".[1] In the absence of a choice of law by the arbitrators, the applicable law "... seraient toujours celles du droit materiel régissant la procédure d'arbitrage et éventuellement le contract litigieux, lui-même déterminé par le recours au principe de l'autonomie".[2] This theory sees arbitration as an "instrument of free enterprise"[3] capable where necessary of responding to the specific requirements of the community of international merchants.

C. The Mixed or Hybrid Theory.

74. It is clear to any onlooker that neither the jurisdictionalists nor the contractualists are totally correct. Arbitration requires and depends upon elements from both of these two viewpoints. The agreement to submit to arbitration, the form of arbitration and the regulation of the proceedings are within the exclusive control of the parties; the legal effect of their agreement and the enforceable character of the award depends on the attitude taken by the law of the court seized. It is not surprising that a comprise theory claiming arbitration to have a mixed or hybrid character should have been developed.[1]

75. The theory was developed in detail by Professor Sauser-Hall in his masterly report to the Institut de Droit International in 1952.[1] He argued that arbitration could not be beyond every legal system: there had to be some law which could determine the validity of the submission to arbitration and the enforceability of the award. Equally he realistically acknowledged that an

arbitration has its origins in a private contract, and who are to be the arbitrators and the rules to govern the arbitration procedure depend primarily on the parties agreement. Thus he maintained the contractual and jurisdictional elements of arbitration to be "indissolublement mêlés".[2] He consequently defined arbitration as

> "une institution juridique mixte, sui generis, qui tient de la convention par sa genèse et du droit de procédure pas ses effets juridictionnels".[3]

On the recommendation of Professor Sauser-Hall this theory was impliedly adopted by the Institut de Droit International in the resolution adopted in Amsterdam in 1957.[4]

76. Despite their apparently diametrically opposing views, the jurisdictional and the contractual theories can be reconciled if one accepts that the character of arbitration "conforme à la realité, à savoir de droit privé et de droit de procédure à la fois".[1] Arbitration contains elements of both private and public law; it has procedural and contractual features. The agreement to arbitrate is a contract and must be treated as such, its validity being determined by the criteria applicable to contracts. The arbitration proceedings however must be subject to some national law.

This situation led Jean Robert to poignantly term arbitration an "institution juridictionelle libre"[2]: "libre" because the existence and authority of the arbitration tribunal depends on the volition of the parties; but "jurisdictionelle" because the arbitration procedure is subject to the law of the place where the arbitration has its seat (le siège du tribunal arbitral").[3] Equally with respect to the enforceability of the arbitration award: enforcement, though in the discretion of the enforcing court, is generally a formality; however the discretion to refuse enforcement may be exercised where the award is contrary to the public policy of the forum, where the arbitrators have ignored the fundamental principles of natural justice or where the subject-matter of the arbitration falls within the exclusive jurisdiction of the national court.

77. The effect of the hybrid or mixed theory of arbitration is to acknowledge the strong, though not overwhelming, connection between the arbitration and the place where the tribunal has its seat ("le siège d'arbitrage"). The arbitration proceedings are to be regulated in accordance with the parties' agreement, at least to the extent allowed by the law of the "siège d'arbitrage". The arbitrator must find a happy medium between the parties' wishes and the law of the place of arbitration. As for the law to govern the substance of the dispute, arbitrators must respect and apply the law chosen by the parties to the extent allowed by the private international law rules of the "siège d'arbitrage". In the absence of any express choice the arbitrators will resort directly to the private international law rules of the "siege d'arbitrage" to determine the applicable law.

D. The Autonomous Theory.

78. The most recently developed theory, that arbitration has an autonomous character, is that of Madame Rubellin-Devichi.[1] She argued that the character of arbitration can realistically only be determined by looking at its use and purpose. In this light arbitration could not be classified as a purely contractual or jurisdictional institution; equally it could not be termed an "institution mixte". Madame Rubellin-Devichi stated:

> "La question est alors de savoir si l'arbitrage ne dépasse pas ses deux composantes pour constituer une institution autonome, dont la nature ne devrait pas être définie par référence au contrat ou à la juridiction, et dont le régime juridique se justifierait à la fois par le but poursuivi et par les garanties nécessaires aux parties qui ne cherchent pas la solution de leur différend auprès de la justice officielle".[2]

By contrast to the three conventional theories the autonomous theory views arbitration from a different angle. For the three older theories the question is where arbitration fits within the existing structure of the national and international legal systems, and how and to what extent the law restricts the right to submit to and conduct arbitration proceedings the autonomous theory looks to arbitration per se, what it does, what it aims to do, how and why it

functions in the way it does; the relevant laws have developed to help and facilitate the smooth working of arbitration.

79. Madame Rubellin-Devichi rejected the contractual and the jurisdictional theories of arbitration as they did not correspond with reality. Furthermore they were in direct contradiction with one another. The courts whilst anxious to uphold the arbitration agreement are jealous of their authority and hostile towards private judges. Equally, the great advantage of arbitration is not the enforcability of the award, but rather the speed and flexibility of the proceedings. Thus she held the two notions to be "antinomiques" and incapable "s'affronter sans subir une alteration profonde, et au demeurant si inextricablement mêlées en l'espèce qu'elles en deviennent indissociables".[1] Equally the hybrid theory was rejected as too indefinate and too imprecise.[2] Each of these viewpoints advocates certain restrictions on arbitration, so hampering its growth and negativing the many advantages which induce businessmen to prefer arbitration to national courts of law.

80. Arbitration has developed because businessmen have found it a convenient and appropriate method by which to resolve their disputes. Consequently it is the businessmen themselves who, through pragmatic experimentation, have been responsible for the development of arbitration. Yet they have done it outside and irrespective of the law; indeed the law has, in large measure, followed existing practice. So for example, autonomy of the parties in determining the law to govern both substance and procedure in arbitration is based not on the contractual or jurisdictional character of arbitration but on the practical "nécessités de l'institution".[1] Equally both arbitration agreements and awards are enforceable, not as contracts nor as a concession on the part of the enforcing sovereign State, but as an essential requirement for the smooth functioning of international commercial relations. The private arbitration institutions were created and established as viable dispute

settlement centres before the various multi-lateral international arbitration conventions were concluded.[2] Thus, Madame Rubellin-Devichi concluded:

> "La nature particulière de l'institution se manifeste ici avec force: seul un régime original, libéré de la notion de contrat comme de celle de juridiction, permettrait de concilier la rapidité nécessaire ainsi que les garanties que les parties sont en droit d'exiger".[3]

81. The effect of recognising arbitration as an autonomous institution is to acknowledge the denationalisation of arbitration as a reality and unlimited party autonomy as the controlling force in arbitration. This extends to questions of applicable law and also to matters of procedure and form. With respect to the law to govern questions of substance the parties are free to choose for themselves the system of law to be applied. The community of merchants is a "milieu international"[1] sufficient for developing its own law,[2] and international arbitration, as the forum which normally determines their disputes, has an important role in developing the laws to apply to international commercial relations.[3] This absolute autonomy is, in Madame Rubellin-Devichi's opinion, the means by which arbitration will attain a truly "supra-national" character in which the international commercial law can be directly applied.[4]

Thus in an arbitration, parties are entitled to select to govern their relations, a national system of law, or the law of international commerce, the customs and usages of the trade concerned (the lex mercatoria) or even the general principles of equity. In the absence of an express choice of law by the parties the autonomist theory excuses arbitrators from resorting to the traditional conflict rules of the "siège d'arbitrage" or of the place of domicile or permanent residence of the arbitrators. Rather the arbitrators may either apply the conflict of laws rule which in the circumstances of the particular case they consider appropriate,[5] or they can resort directly to some international law or standard relevant to the dispute.[6]

DETERMINATION OF THE APPLICABLE LAW

82. As a generality it is traditionally considered that both a national court and an arbitration tribunal faced with having to determine the question of the applicable law can only do so by applying conflict of laws rules. Whilst national courts are considered bound to apply their own conflict of laws rules, most previous discussion on this subject has considered which conflict of laws system should be applied in international arbitration where arbitrators have no national or forum private international law. This discussion has centred around whether a national or a non-national conflict of laws system should be applied by the arbitrators. We too shall partake of this discussion. However, initially we shall consider the effect of a choice of law or extra-legal yardstick by the parties. It is submitted and will be shown that the principle of party autonomy has attained universal acceptance. Equally the right of parties to select the standard to govern their relations is recognised by the emerging law of international commerce. In consequence, a national law or extra-legal standard chosen by the parties must be applied by the arbitrators; there is no need to show that such choice is authorised or justified by some system of conflict of laws.

83. Our discussion will be divided into two parts: Part I, the determination of the applicable law by the parties; and Part II, the determination of the applicable law by the arbitrators.

PART ONE

DETERMINATION OF THE APPLICABLE LAW - BY THE PARTIES

84. Within the domestic scene parties to a contract bind themselves to carry out their obligations as agreed. The binding character of the terms of the contract is given by the law. The parties are obliged to perform the obligations undertaken on pain of the penalties provided for by the contract itself or implied by law. However, the law aims only to provide the framework within which the contract can be regulated where in itself it is not sufficiently explicit or where outside factors so require.

In the international arena the problem is similar, only one is faced with the question of what law governs the contract. The alternative to the courts or arbitrators determining the applicable law by some artificial presumption is to allow (even encourage) parties to do so themselves and hence relieve the courts and arbitrators of the problem. Hence, despite the opposition of some writers, Martin Wolff argued:

> "Just as the parties are permitted to create rights and duties between themselves as they please, and thus to 'make law for themselves', so it is for them to determine the law governing their contract."[1]

This method of avoiding the conflict of laws problem is commended above all by logic and simplicity.

85. The determination by the parties of the applicable law is known as "party autonomy". Party autonomy is generally considered to have two forms. Firstly there is the autonomy which is clearly expressed by the parties either in the written contract, or alternatively, before the court or arbitrators. Secondly, there is implied autonomy: that is where through words or acts the parties clearly manifest their intention and expectation that a particular law govern their relations. Though traditionally treated as a subject apart, it will be convenient here to consider the right of contracting parties to choose an

extra-legal standard to be applied by the arbitrators as an extension to the doctrine of party autonomy.

We shall consider first the effect of and the recognition to be given to the law or other standard expressly chosen by the parties. Then we shall look at the meaning of "implied choice" and the effect that is given to it.

CHAPTER I EXPRESS CHOICE

86. It is today an every day fact of commercial life that many international contracts do contain an express choice of law. Indeed it is sometimes suggested that a lawyer who fails to ensure that a contract contains a clear choice of law fails his client[1]. This practice came about as it was found to be a convenient and simple method to ensure the avoidance of the application of some law unfavourable to the contract[2]. The simplicity of allowing parties by their express choice to relieve the courts and arbitrators of having to determine the applicable law was clearly captured by Schmitthoff when he said:

> "The determination of the proper law of the contract will not involve any difficulty if the parties have been wise enough to record expressly which legal system is to apply to their agreement."[3]

Whether the practice of stating which law is to govern the contract was a result of or itself induced the acceptance of party autonomy in the various national private international law systems is unclear : it is a little reminiscent of the proverbial chicken and egg situation. What is clear is that today most national conflict of laws systems do provide that where parties to a contract with multi-national contacts expressly provide for a particular law (or body of rules or equitable principles) to govern their contract, that choice is to be respected and upheld. As long ago as 1945 Ernest Rabel stated categorically:

> "The practice allowing parties to determine the law applicable to their contractual relations,... for centuries has been applied by courts throughout the world with slight dissent."[4]

The doctrine of party autonomy has attained an even greater acceptance in the international and transnational arena than on the national plain. The "slight dissent" which Rabel talked of has been almost inaudible. Autonomy has been adopted in all the international conventions dealing with contracts[5] or arbitration[6] and there are indeed few who today still question its validity.

Before looking at its acceptance in principle and extent by international arbitrators, we shall look at the meaning, development, objections and advantages of party autonomy.

A. THEORY

1. The Meaning of Party Autonomy

87. In 1927 Niboyet claimed that "la théorie de l'autonomie de la volonté est actuellement la plus difficile de tout le droit international privé."[1] It is perhaps a sign of the passing of time that today party autonomy is one of the most straight forward and simple aspects of private international law.

The definition given by Niboyet in that 1927 study still remains good. He said:

> "On entend couramment par autonomie de la volonté le pouvoir des parties de choisir la loi compétente en matière de contrats."[2]

Under the doctrine of party autonomy parties are free to select themselves the law to govern their relations. Where a system of conflict of laws embraces the doctrine of autonomy it recognises "the power of the parties to determine for themselves the applicable law"[3], rather than impose upon the parties a law which following the connecting factors of that system of conflict of laws is deemed applicable to govern an international contract. This is to prefer a law subjectively ascertained by the parties themselves in each case, to a law objectively determined for the type of case in question. Autonomy is thus accompanied by an initial removal of the responsibility from the judge or arbitrator to the parties[4].

So a contract with connections to more than one legal system will be governed prima facie by "the law which the parties have chosen"[5]. Within the principal contract, the choice of law provision[6] becomes a contract per se, subsidiary[7] to, though independant of the main contract[8]. The effect of the doctrine of autonomy is to concede to the parties the power to determine the portent of the law over their contract[9].

2. The Origins and the Development of Party Autonomy

88. It is a matter of doubt quite when the doctrine of party autonomy was born. Most contemporary writers attribute the idea to Dumoulin[1]. However some credit ought perhaps also to be given to Robertius Curtius who in the 15th century explained the support for the lex loci actus in the area of contracts on the basis that "les parties ont implicitement consenti à l'application de cette loi"[2].

Prior to Dumoulin the lex loci contractus formula had an almost unopposed supremacy over all other possible solutions, including the lex loci solutionis[3]. Despite the arguments of Dumoulin that in certain cases other rules would be applicable "in accordance with the tacit and probable intentions of the parties"[4], the lex loci contractus remained authoritative[5]. This was due in large measure to the arguments of d'Argentré who derided a choice which did not really exist[6].

The 19th century saw the real development of the force of the autonomists[7]. They were of course greatly aided by the favourable attitudes taken by Savigny and Mancini towards party autonomy[8]. Story too added his support in the U.S.A.[9] By the beginning of the 20th century most authors acknowledged the special position of autonomy in the area of contracts though perhaps not all were happy with the development.

Acceptance of Party Autonomy in Domestic Conflict of Laws Systems:

89. Although they followed behind the academic commentators, the courts of most developed countries adopted the doctrine of autonomy in the early part of the 20th century. The English courts led the field as far back as 1760 when in Robinson v. Bland[1] the great Lord Chief Justice of the time, Lord Mansfield said:[2]

> "The general rule established ex comitat and jure gentium is, that the place where the contract is made, and not where the action is brought, is to be considered, in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom"[3]

Two further cases one hundred years later, The Peninsular and Oriental Steam Navigation Company v. Shand[4] and Lloyd v. Guibert[5], both in 1865, put the question beyond doubt. In the latter case Wiles J. said:

> "It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter"[6].

One reason which has been given for the very early adoption of party autonomy in England was the supremacy of the "laisser-faire" philosophy which prevailed even then in that country[7].

In Italy party autonomy was adopted by the Italian Civil Code in 1865[8] and decisions of the Court of Appeal in Trieste in 1937[9] and the Court of Appeal in Rome[10] gave effect to the law expressly chosen by the parties.

In Holland the influence of Voet favouring party autonomy was given effect by the Court of Amsterdam in 1908[11] and was put beyond doubt by the "Hooge Raad" in 1927[12].

Party autonomy was adopted by the French Cour de Cassation in 1910[13] in the most emphatic terms. The court stated:

> "La loi applicable aux contrats, soit en ce qui concerne leur formation, soit quant à leurs effets et conditions, est celle que les parties ont adoptée".

A similar judgment was rendered by the Belgian Cour de Cassation in 1938[14].

The courts of Switzerland too have also recognised the right of the parties to express a choice of the law they wish to govern[15].

In Germany, although there appear to have been many cases favouring party autonomy since the late 19th century,[16] it was not until 1952 that the Federal Supreme Court of the German Federal Republic applied a choice of law and stated clearly that a choice of a law other than German law does not violate German public policy[17].

The courts of Denmark, Norway and Sweden have also recognised the right of parties to select the law to govern their relations and have given effect to such chosen law[18].

Most surprising of all was that in the United States of America it was not until after the second World War that autonomy began to obtain a following. This was due to a great extent to the influence of Professor Beale who was greatly opposed to the doctrine[19] and was responsible for its exclusion from the American Law Institute's Restatement, Conflict of Laws in 1934[20]. But in 1953[21] and again in 1955[22] the U.S.Supreme Court gave favourable recognition to the law which the parties had chosen. The acceptance of the doctrine of party autonomy has been clearly affirmed by the Restatement Second[23].

90. The purpose of the foregoing discussion was not to determine what conflict of laws rules are followed with respect to international contracts by the major western European trading nations - that is beyond the scope of this study - but rather to show how extensively the doctrine of party autonomy has been accepted. This doctrine has received a similar reception in the socialist countries[1] and in many developing countries[2]. What can be clearly deduced from our brief and superficial study is that, despite their differences,common law, civil law and socialist countries have all equally been affected by the movement towards the rule allowing the parties to choose the law to govern their contractual relations. This development has come about independently in every country and with out any concerted effort by the nations of the world; it is the result of separate, contemporaneous and pragmatic evolutions within the various national systems of conflict of laws.[3]

3. The Objections to Party Autonomy

91. The almost universal acceptance of the doctrine of party autonomy in national systems of private international law has only come about after a long and hard fought doctrinal battle.[1]

One major argument which was frequently raised and levelled against party autonomy was that to allow parties the right to choose the law to govern their contract "practically makes a legislative body of any two parties who choose to get together and contract...."[2] Lorenzen similarly argued that "allowing the parties to choose their law in this regard, involves a delegation of sovereign powers to private individuals".[3] This argument foundered due to the fact that most sovereign States do recognise and give effect to a choice of law by the parties. They do so as a manifestation of State sovereignty rather than to recognise a limitation thereof. Walter Wheeler Cook argued that as parties were allowed to "legislate" in many other areas (e.g. by making a contract containing a clause which excludes the application of conditions and warranties, or making a contract without mentioning the law to govern but stipulating that the contract shall be determined in accordance with specified rules), it is "hypocritical" to deny them the right in the case of an international contract.[4] It must be recognised that unlike legislation which governs all to whom it is directed, the parties choice of law governs relations inter se and only in respect of the particular contract and the rights and obligations arising therefrom.

92. A similar objection to party autonomy was advanced in the European civil law countries. It was argued that every action to have legal effect must be given such by a particular law recognised as having authority. Thus the German von Bar stated:

> ".... before allowing effect to the intention of the parties, (we must) know from what territorial law the limits of this intention are to be extracted. If the intention of the parties could prescribe the territorial law to be applied in the law of obligations, they might simply declare that any foreign law you please should govern a contract concluded in this country, to be implemented in this country, and belonging altogether to this country, and in this way withdraw at their pleasure such contracts from all the rules of law recognised in this country. No one will venture to say that that is a sound conclusion."[1]

Batiffol expressed this in his epic 1938 monograph as follows: "L'objection fondamentale, d'où découlent toutes les autres, à la loi d'autonomie, est qu'il

n'appartient pas aux parties de choisir la loi par laquelle elles acceptent de se laisser gouverner, mais à la loi de déterminer elle-même quelles personnes, quels biens, quels acts ou quels faits elle régit."[2] A choice of law can only have effect if so authorised by some national law as for "rights being created by law alone it is necessary in every case to determine the law by which a right is created."[3] This argument has sometimes been described as a "cercle vicieux".[4]

It is conceded that a national court can only recognise a choice of law to the extent allowed by its (the forum) conflict of laws rules.[5] However, as already seen, most national systems of conflict of laws do allow parties to choose the law to govern their contractual relations. But the real argument which supports the recognition of the law chosen is that the contract is a creation of the parties' free and independent volition.[6] Provided it does not infringe the public policy of the national court seized or violate the imperative laws of the place of performance the choice must be respected.

The von Bar contention that only the law can determine who, what and the extent to which it governs, ignores the fact that in practice most contracts are made and performed independant of and without reference to the "applicable" law. If the contract is voluntarily performed there is no need to invoke the law.[7] Only where there is disagreement as to the meaning of the contract terms or where one party requests some assistance in enforcing rights and obligations alledgedly created under the contract is it necessary to determine the applicable law and even then, it is only necessary to determine the law to the extent necessary to answer the questions raised by the parties.[8] The intentions expressed by the parties as to the performance of the contract, will however prevail over all but the mandatory provisions of the applicable law and international public policy.[9] For any court - national or international - to refuse to apply the law chosen by the parties would result in great confusion and uncertainty in international business circles.

93. Another objection to party autonomy is that the weaker party has invariably to accede to the wishes of the stronger party with the latter insisting on a choice of law most favourable to him. This it is argued, is particularly apparent where the contractual need of one party is very much greater than that of the other. This particular objection has been voiced by socialist lawyers[1], arguing that the shortage of technological know-how in the socialist countries often gives to the party from a technologically developed "capitalist" country an unfair advantage. However, this ignores not only the fact that the size, financial resources and power of the large foreign trade corporations in the socialist countries are far greater than that of most "capitalist" corporations, but also that in many areas the socialist States are technologically as far advanced, and sometimes even more advanced, than their western business partners.[2]

This argument has some merit when voiced on behalf of the developing third world countries. Not only are the developing countries short of technological know-how, but they often also need training for their workers and financial credit to enable them to entertain certain types of contract. As for them many contracts are basic to the country's path to development, it is alleged they are faced with take it or leave it terms - including the choice of law clause.[3] Despite the undesirable truth behind this argument two factors are ignored. Firstly, from a specific point of view, many developing countries whilst short of technological and financial resources, are very rich in raw materials - some very urgently needed by developed countries. Indeed, has this raw material wealth not enabled some developing countries to force their will - both economic and political - on the rest of the world?

Secondly, from a more general view point, contracting parties from developing countries are free to negotiate with other prospective contracting partners;

they can choose to negotiate for technological know-how with parties from developed countries in the capitalist and the socialist blocks, as well as from certain non-aligned but developed countries.

In contractual relations, it is submitted, until this world takes on a Utopian character, there will always be a stronger and a weaker party. Even were governments to take responsibility for all international commercial relations, can it really be envisaged that a stronger government would not use its political and economic (and perhaps even military) power to influence the weaker government? In the present egalitarian age, the only solution to a blatant and unconscionable use of strength by a contracting party, is for weaker parties to rely on emerging moral standards, and to hope that threats of adverse and embarrassing publicity will restrain the stronger parties in their contractual relations.

94. A further and still existing objection to party autonomy concerns the possibility and the right of the parties to select a non-existent or inappropriate or irrelevant or incompetent law to govern their relations.[1] This brings up the question of the freedom of choice which contracting parties may enjoy. It is clear that parties are entitled to choose the law to govern their relationship; but the extent of the parties' choice is not quite so clear. Must there be some connection, substantial or tenuous, between the law chosen and the parties, or are they free to choose any legal system however distant from the parties and the contract? Must they choose an existing legal system, or can they resort to an ancient and no longer autonomous system of law e.g. Roman or Jewish law? Can they choose a non-legal body of rules e.g. the EEC draft rules, or an amorphous body of rules e.g. the "principles generally accepted in international trade", or an "alegal" body of rules e.g. principles of equity?

We shall not here consider the objections levelled against contracting parties enjoying total freedom in their choice of applicable law. Rather, when looking

at decided arbitration awards we will consider the various degrees of party autonomy and see the extent to which such freedom in choice of law is actually recognised.

4. The Advantages of Party Autonomy:

95. The principle of party autonomy is today accepted for simple and logical reasons. An important requirement of all legal rules, whether substantive or choice of law, is that they should provide "certainty, predictability and uniformity."[1] These three factors, for long revered by private international lawyers in every country,[2] have in the last century lost much of their support to logic, justice and reason. But whilst justice and reason are strong arguments when dealing with personal rights and status, the arguments are far weaker with respect to commercial relations. It is now clear - and few will still argue otherwise - that for international trade relations certainty is essential, uniformity is desirable and predictability an absolute necessity. As international commercial contracts have increased in value, complexity and duration, the importance of these three criteria has increased commensurately.

96. Whilst party autonomy will not guarantee uniform or predictable solutions for like type cases, it does guarantee certainty, uniformity and predictability for the parties. Party autonomy enables the parties to be certain which law will be applied to their contract, the effect and the interpretation of the contract becomes predictable, and in turn ensures a uniform solution to the particular dispute whatever the nature of the tribunal, wherever it may be situated and whoever the judges. As Rabel wrote:

> "Autonomy .... endeavours to obviate the unpredictable findings of unforeseeable tribunals and to consolidate the contract under one law while negotiation is in course".[1]

Furthermore, recognising the right to choose the applicable law, provides contracting parties with the mechanism by which to avoid the contract being regulated by an ambiguous or unfavourable law, or being given an undesired effect. This deprives the parties from alleging, subsequent to the judgment or award, that the court or arbitration tribunal applied to their contract a law which was unjust or unfair or inappropriate and due only to the application of some fixed, rigid and irrational choice of law rule. The effect given to the contract and the ensuant rights and duties between the parties are therefore due entirely to the expressed will of the parties.

5. Party Autonomy in International Commercial Arbitration

97. Hitherto our discussion has been concerned in the main with the acceptance of party autonomy in national systems of private international law. The arguments in favour of party autonomy are even stronger when considered in the light of a contractual dispute submitted to arbitration. This is due in large measure to the major differences between national courts and international arbitration tribunals : their allegiance and the source of their authority. The international arbitrator has no duty to any sovereign State or any national law; empowered by the parties his duties are to them and to international trade in general.

98. Logic, simplicity and common sense all favour the recognition of party autonomy by the arbitrators. They do not have their own substantive law or conflict of laws system. By applying the law chosen by the parties, arbitrators are alleviated from the difficult task of determining the applicable law and can give effect to the expectations of the parties.

The arbitrator need only look to see simply whether the parties are agreed as to the law to govern: this will be found either in an express choice of law clause or in an agreement before the judge or arbitrator at the time of the hearing.

The application of conflict of laws rules is itself problematic; to explain such a choice is even more difficult. Hence arbitrators are anxious wherever possible to avoid having to make a positive choice of law. This they can do where the parties are agreed or have selected what law shall apply.

99. The fact that party autonomy is recognised in most national private international law systems gives to the rule a special "transnational" character. Invariably the national conflict systems of the countries with which the parties and the arbitrators are connected, as well as that of the place of arbitration will allow the parties to choose the law to govern their relations. In such situations it is superfluous for the arbitrators to further consider the law to apply. "Rules which hold good in the same or a very similar way for a given concrete legal situation in two or more spheres of national jurisdiction"[1] have been defined as comprising rules of the "transnational commercial law". Extending this idea to the field of conflict of laws, could it not be argued that party autonomy is a "transnational conflict of laws rule" applicable in all non-national tribunals?

100. By submitting to arbitration, the parties remove their contract from falling within the jurisdiction of any one country. They manifest an intention to avoid all national courts of law and to place their relations on an international or non-national level. With no national conflict of laws system and no forum law on which to fall back, on what basis should the arbitrators determine the rights, obligations and duties of the parties? Presumably on the basis of some non-national conflict of laws system. What could be more non-national than the will of the parties?

This is a view given expression to by Professor Fragistas of Greece, when acting as arbitrator in a dispute between an Italian agent and his Jordanian principal.[1] The arbitrator needed to determine the proper law and reasoned as follows:

> "Considérant que l'insertion dans un contrat, ayant des liens de fait avec plusieurs Etats, d'une clause compromissoire confiant la solution des différends qui auraient résulté dudit contrat à l'arbitrage d'une Institution Internationale telle que le CCI, exprime la volonté des parties de placer leur litige sur un plan international et de le faire trancher par un arbitrage vraiment international, se déroulant au dessus de tout ordre juridique national; qu'en pareil cas l'arbitre, pour résoudre le problème de conflits de lois, inhérent à cette sorte de litige, et pour déterminer le droit substantiel applicable au contrat en cause, doit, tout d'abord, rechercher la volonté, expresse ou tacite, des parties; que faute d'une pareille volonté, l'arbitre doit, statuant ex bono et aequo, déclarer applicable la loi qui, compte tenu des éléments objectifs et des circonstances particulières du cas litigieux, convient mieux au contrat".[2] (Emphasis added).

Professor Fragistas has elsewhere recognised that "l'arbitrage privé supra-national est un faite social".[3] Such tribunals are increasingly being resorted to where "la volonté des parties de déborder toute cadre étatique et de soumettre l'arbitrage directement à un ordre supra-national".[4] To determine the law to govern the substance of the dispute by means of any national system of private international law would be to ignore the very nature of international arbitration and its function in the international business community. Being on a non-national plane a non-national private international law system must be applied: hence party autonomy.

101. Arbitrators are in fact obliged to recognise and give effect to the wishes of the parties. This is due entirely to the nature of arbitration and the source of the arbitrators' authority. The basis of the arbitration proceedings is the will of the parties. The arbitrators are seized by virtue of the parties' agreement, for the purposes and on the conditions agreed by the parties. They are subject to the agreed instructions of the parties and can be disseized by the agreement of the parties. Should the arbitrators refuse or fail to comply with those instructions, their award could subsequently be refused recognition

under the major international arbitration agreements by the courts of the State in which enforcement is sought.[1]

So where parties are agreed that their contractual relations should be governed by or their dispute determined[2] in accordance with a particular law or non-legal yardstick, the arbitrators are obliged to respect and act in accordance with that agreement. Failure and/or refusal to do so could not only lead to the possibility of the arbitrators being disseized, but could also leave the successful party somewhat impotent should the losing party refuse to voluntarily carry out the award.[3]

102. There is neither need nor justification for the parties' choice of law to have the backing of any system of private international law. It has become an accepted fact that in international trade contracts choice of law is not only acceptable but is generally also desirable and advisable.[1] It would not be practical and would negative the intention of the parties if arbitrators were to look to find whether the parties' choice was allowed by some applicable body of private international law. Although it might be necessary where the parties have not expressed a choice of law to determine the conflict of laws rules in accordance with which the law to govern the contract can be determined, where parties have expressly selected a law or body of rules to govern their contract, that choice is recognised per se and will be given effect. It is a so generally accepted practice amongst trading nations that parties may choose the law (subject to certain and differing limitations) to govern their contractual relations that party autonomy can be said to be justified and authorised by the law of international commerce.

Maître Jean Robert has followed a similar line when arguing that "l'arbitre consacrera au premier chef, la volonté expresse des parties quant à la loi applicable."[2] The reasons for this view he explained in the following passage:

"Tout d'abord il convient de laisser aux parties le droit entier à la manifestation expresse du choix de la loi applicable. Et ce serait une erreur à notre sens que de subordonner cette autonomie à son admission par les règles de rattachement d'une autre loi. Le caractère contractuel domine tellement la matière de l'arbitrage, spécialement international, qu'il faut tenir la loi d'autonomie comme la règle supérieure de cette institution, qui ne pourra jamais trouver sa limite que dans l'ordre public. Il faudrait donc que l'ordre public international de la loi de l'arbitrage interdise aux parties d'exprimer leur choix quant à la loi de fond qui leur sera applicable, pour qu'il en soit autrement. Or, dans aucun des systèmes législatifs normalement applicables n'existe, à notre connaissance, une semblable interdiction. En conséquence, l'on considérera que la liberté d'expression de choix par les parties constitue la première et essentielle règle. Et cette liberté d'expression pourra notamment conduire les parties à adopter une loi de fond différente de la loi de procédure."[3] (Empahsis added).

103. The international recognition of the doctrine of party autonomy can be seen in almost every major treaty or uniform law affecting international contracts or arbitration in the past thirty years. The Hague Convention on the Law Applicable to International Sales of Goods, 1955[1] provides in Article 2 that:

"A sale shall be governed by the domestic law of the country designated by the contracting Parties".

Article 3 of the Uniform Law on the International Sale of Goods[2] made in the Hague in 1964 provides that although the uniform law was itself to govern international sales, the parties to a contract are free to exclude the application of the uniform law. Furthermore, it is provided in Article 9 that "the parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract ...".

Similarly, the Benelux Uniform Law Relating to Private International law[3] provides in Article 13 (1): "Les contrats sont régis par la loi choisie par les parties tant en ce qui concerne les dispositions impératives que les dispositions supplétives".[4]

The Draft EEC Convention on the Law Applicable to Contractual and Non-Contractual Obligations simply proposes in Article 2: "A contract shall be governed by the law chosen by the parties".

104. With respect to international arbitration, the right of parties to indicate the law to govern their contractual relations was indirectly recognised in the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards That Convention provided in Article V (1)(a) that the recognition and enforcement of a foreign arbitration award may be refused if the arbitration "agreement is not valid under the law to which the parties have subjected it".

The 1961 European Convention on International Commercial Arbitration was quite emphatic. It stated in Article VII that "the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute". Autonomy was again accepted in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, Article 42, of which provided that the "tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties".

The arbitration rules developed through the United Nations Economic Commissions for Europe (UNECE) and for Asia and the Far East (UNECAFE) both contained provisions entitling parties to determine themselves the law to be applied. Article 38 of the UNECE Arbitration Rules provided that "the arbitrators' award shall be based upon the law as determined by the parties for the substance of the dispute". Article VII (4) (a) of the UNECAFE Arbitration Rules similarly provided: "The award shall be based upon the law determined by the parties to be applicable to the substance of the dispute". And most recently, the UNCITRAL Rules for Optional Use in Ad Hoc Arbitration provided in Article 33 (1):

> "The arbitrators shall apply the law designated by the parties as applicable to the substance of the dispute."

B. PRACTICE

105. In considering the principle and the extent of party autonomy through a review of arbitration awards, it will be easiest to consider the principle first and then to look at the varying degrees of party autonomy, starting with the most restrictive view-points and working outwards to the most liberal.

1. The Principle of Party Autonomy

(a) Adoption of Party Autonomy

106. This almost universal acceptance of party autonomy was clearly explained by Professor Pierre Lalive in 1971 when sitting in Geneva as the sole arbitrator in a dispute between an Indian corporation and a Pakistani national corporation[1]. The contract out of which the dispute arose contained an express choice of Indian law. Accepting the validity of the choice of law clause, Professor Lalive said:

> "There are few principles more universally admitted in private international law than that referred to by the standard terms of the "proper law of the contract" - according to which the law governing the contract is that which has been chosen by the parties, whether expressly or (with certain differences or variations according to the various systems) tacitly.
>
> "The differences which may be observed here between different national systems relate only to the possible limits of the parties' power to choose the applicable law or to certain special questions or to modalities, but not to the principle itself, which is universally accepted".

Although the arbitrator did consider the validity of the choice of law in all the possibly applicable private international law systems - i.e. the Indian, Pakistani and Swiss systems - he did so more to cover every avenue of argument rather than because it was legally necessary. Indian law was applicable by virtue of the contract clause which was enforceable as a "principle .... universally admitted in private international law", i.e. the law of international commerce.

ICC Awards

107. The choice by the parties of a particular law to govern their contract has been upheld by arbitrators in innumerable awards. Whether the parties' choice needs to be supported by some law is a matter of dispute. However, many awards, particularly ICC awards, have given effect to the autonomy of the parties without any discussion as to the validity of the choice or what law authorises it. The arbitrators appear to have considered the law chosen as applicable per se, justified only by the generally accepted principle of party autonomy.

Thus in a dispute involving a licence agreement between Swiss and French corporations the arbitrators held: "La décision au fond doit intervenir selon le droit suisse dont les parties ont convenue de faire application par l'article XVI du contrat de licence intervenu entre elles".[1] In an exclusive sales agreement between Austrian and Federal German corporations, it was held that "les deux parties reconnaissent que le litige doit être tranché selon le droit allemand".[2] In an award[3] between a Swedish manufacturer and a Phillipine buyer the arbitrator found:

> "In clause 13 of the contract of January 26 1963, the parties agreed that disputes arising from the contract should be dealt with according to Swedish law. As from the legal point of view, there is no objection to such an agreement, the arbitrator is bound to apply Swedish law".[4]

Although the arbitrator here acknowledged that there could be some legal objection to the parties' choice, he did not discuss or indicate what those objections are or their source.

In another case a private European organisation situated in Brussels (but not part of the EEC) employed the Italian plaintiff as an accountant. They terminated his employment after 4 years. The arbitrator decided the question of compensation for wrongful dismissal on the basis of Belgian law because that

was expressly chosen by the parties.[5] In an award[6] between an English plaintiff company and three Spanish defendant corporations the Swedish arbitrator held:

> "As the agreement expressly states that it shall be governed by the laws of England, I find that only English law is applicable on the dispute".

So overwhelming is the existence of an express choice of law by the parties that it has even been held to over-ride the law deemed applicable in accordance with the private international law rules considered appropriate. Thus in an ICC award[7] concerning a dispute arising out of an agency agreement the arbitrator held Swiss law to be the law applicable in accordance with Swiss private international law rules, such being applicable because the arbitration was taking place in Switzerland and he, the arbitrator, was a Swiss national. However he then rejected what he considered the proper law in favour of the law chosen by the parties. The arbitrator stated:

> "Dans le cas qui nous occupe, ce serait donc le droit suisse qui devrait être appliqué. Cependant, les parties ont invoqué à différentes reprises le droit Yougoslave. ... Il ne serait donc pas admissible d'appliquer le droit suisse si les parties elles-mêmes veulent voir appliquer le droit Yougoslave. Celui-ci est du reste, en effet applicable comme droit du lieu d'exécution des contrats des parties".

Although in this case the arbitrator considered his personal connection to Switzerland to oblige him to follow Swiss private international law rules, he felt he was over-ruled by the parties' exercise of their autonomy. Of course it is not universally accepted that an arbitrator is subject to the private international law rules of his "siège".[8]

Eastern European Awards

108. Despite the formal application of their national systems of private international law[1], the arbitration tribunals in the socialist countries all recognise the right of parties to choose the law to govern their relations and give effect to such a choice.[2] Thus e.g. the Romanian Arbitration Commission[3] in Bucarest upheld the choice of Romanian law in a 1970 award.[4] Despite the absence of any definite provision in their private international law allowing party autonomy[5], the Bulgarian Court of Arbitration[6] similarly recognised a choice of the defendant's law despite the parties' adoption of "un système de rattachement compliqué".[7] However, the arbitrators declined to apply the law chosen to determine the competence of the tribunal stating:

> "Les parties ont convenue que le demandeur aura le droit de s'adresser à son choix soit à la Cour arbitrale de Sofia, soit à celle de Prague ou de Moscou, et que celle qu'il aura choisie, appliquera la loi du défendeur. Les contractants ont de cette facon nettement délimité le champ d'application du droit choisi. Il n'est à appliquer que pour ce qui est du fond du litige".[8]

The Court of Arbitration in Poland has also given effect to the expressed intention of the parties.[9] In a dispute between Polish and Yugoslav corporations Yugoslav law was applied because it was so chosen;[10] again German law was applied as provided in a contract between the GDR plaintiff and a Polish defendant;[11] Polish law was similarly applied to a dispute between a Polish plaintiff and a (West) German defendant.[12] It is also noteworthy that the rules of the Courts of Arbitration at the Polish Chamber,[13] the Gdynia Cotton Association[14] and the Gdynia International Arbitration Court for Maritime Disputes[15] expressly instruct the arbitrators to apply the substantive law chosen by the parties.

Similarly in Czechoslovakia, the arbitration commission applied Czechoslovak law to a dispute arising out of a sales contract betweem a Czechoslovak enterprise and a U.K. firm, on the grounds that:

> "Both parties have signed the General Conditions of Sale and Payment, and thus they have concluded an agreement that the Czechoslovak law shall apply to all legal relations between the parties which have arisen from their business activities".[16]

In another award, the Czechoslovak plaintiff brought an action against the Turkish defendant for 333,216 Czechoslovak Crowns, as the loss he had suffered as a consequence of the defendant's failure to deliver the 650 tons of lemons as agreed under the contract. The defendant argued his obligations were extinguished by his inability to obtain an export licence. The arbitrators held this defence without merit "under Czechoslovak law, whose application has been agreed between the parties under article 16 of the said General Terms of Sale of the Plaintiffs".[17]

Again, when a dispute arose out of an agreement between a Czechoslovak foreign trade enterprise and a Federal German firm for the construction of a building, the arbitrators applied Czechoslovak law because:

> "Les deux parties ont convenu de ce que le litige doit être jugé conformément à la loi tchécoslovaque".[18]

The Soviet FTAC[19] which also allows parties to choose the law applicable[20] has recognised a procedure whereby the parties can get round the strict application of Soviet private international law rules. A dispute arose between an English firm and a Soviet exporting corporation in respect of short-delivery of wood-goods by the Soviet defendant to the English plaintiff. The contract contained no express choice of law. The arbitrators thus applied the appropriate Soviet private international law rule - the lex loci contractus. English law was thus held to apply. The Soviet party brought evidence that in many contracts between themselves and the plaintiffs, they had expressly stated that the place of contracting be Moscow despite England being the place of actual signature. Although in this case the defendants failed to prove to the arbitrators' satisfaction that with respect to the contracts in dispute the parties had agreed to Moscow as the place of contracting, the arbitrators acknowledged that where such manifestation is clear, the intention of the parties would be respected.[21] The tribunal held:

"In making contracts the parties are entitled to stipulate to the effect that a place different from that of the actual signing of the contract should be deemed as the place of the conclusion thereof. In the course of the proceedings in the present case the Objedinenije presented to the Foreign Trade Arbitration Commission the originals of a number of its contracts for the sale of wood goods to England, containing at the top the word 'Moscow' along with the indication of the date of conclusion. The Foreign Trade Arbitration Commission finds that the Objedinenije has thereby proved that as a matter of their usual practice the buyers in England and Objedinenije stipulate to consider Moscow as the place of the conclusion of their contracts for the delivery of wood goods.

"The Foreign Trade Arbitration Commission finds, however, that in the present case the Objedinenije has not proved that in concluding contracts Nos. M 8009 and M 8085 the parties intended to consider Moscow to be the place of their conclusion. Unlike the other contracts presented by the Objedinenije to the Foreign Trade Arbitration Commission, these two contracts do not contain at the top the word 'Moscow' along with the indication of the date. As for the word 'Moscow' typed near the signatures of the Objedinenije's representatives, it is held to be merely an indication of the Objedinenije's place of business, just as the word 'Grimsby' written near the signatures of the Firm's representatives is an indication of the place of business of the buying firm.

"Proceeding from the aforesaid, the Foreign Trade Arbitration Commission recognises that England is the place of the conclusion of contracts Nos. M 8009 and M 8085 and that English law as lex loci contractus must be applied in deciding on the issue of the period of limitation".[22]

Autonomy is also recognised by the law of the People's Republic of China,[23] the G.D.R.,[24] Hungary[25] and Yugoslavia.[26]

109. This discussion of part autonomy is limited to trading contracts between capitalist and socialist parties: it does not apply to trading relations between enterprises from the countries' members of the Council for Mutual Economic Assistance (CMEA). The CMEA countries have adopted "General Conditions" to govern their relations between their foreign trade enterprises.[1] These "General Conditions" apply in deference to all the national systems of law and to this extent can be termed CMEA laws.[2] So in inter-CMEA trade, such CMEA laws apply; if there be no appropriate provision in the CMEA law, the "General Condition" itself

provides the choice of law rule to be followe.[3] In inter-CMEA commercial relations there is consequently no place for autonomy. In this way the CMEA member countries have greatly reduced the problem of a conflict of laws in contracts between their nationals.

In commercial contracts with non-CMEA countries, these CMEA laws are irrelevant: the domestic laws of the CMEA countries will be applied if the law of such country is found to be applicable.[4]

(b) Recognition of Party Autonomy as Point of Departure

110. Further evidence of the general acceptance of the principle of party autonomy can be seen from the many awards in which arbitrators of different nationalities have, when determining the law to govern a dispute before them, started by looking first for any express choice of the parties. Only after finding that the parties have not made a valid choice of law will the arbitrators begin to look for some other means to determine the applicable law. In one dispute[1], the Belgian (third) arbitrator conceded the pre-eminence of the law chosen when he said:

> "Attendu qu'il y a lieu de rechercher ici quelle loi doit être appliquée au contrat des parties, en raison du fait que la nationalité des sociétés en cause est différente : la société demandresse est de nationalité suisse, tandis que la société défendresse est de nationalité française;
>
> "Attendu que le régime de la loi nationale applicable dépend de la volonté des parties".

The arbitrator then found French law to be applicable to the dispute and noted that "interrogées sur ce point à la première audience, les parties ont marqué leur accord pour reconnaitre que le droit français régissait leurs rapports contractuels".

ICC Awards

111. There are many awards in which the arbitrators just note the absence of any choice by the parties. So under the heading "Sur la législation qui doit être appliquée", the three French arbitrators seized of a dispute between Swiss and Iranian parties stated:

> "Les conventions litigieuses ne contiennent aucune indication sur la législation à appliquer en cas de contestation".[1]

Similarly a Federal German arbitrator in a dispute between Swiss and Spanish corporations began his discussion on the applicable law with the statement:

> "La convention passée entre les parties ne précise pas le droit qui doit être declaré applicable en l'espèce".[2]

In a dispute between three French co-plaintiffs (two of whom were naturalised Hungarian citizens) and a Swedish defendant, the Belgian arbitrator noted:

> "Les parties n'ont pas indiqué dans leurs conventions ou dans leur correspondance le droit national qu'elles entendaient éventuellement appliquer à leurs relations ou à leurs différends".[3]

Another Belgian arbitrator seized of an arbitration between a French agent and his Italian principal, when discussing the question of the legal provisions applicable to the dispute stated that:

> "Les parties sont restées silencieuses dans leur convention et correspondance quant au droit national éventuellement appliquable à leurs relations et à la solution de leur différends, ..."[4]

Eastern European Awards

112. This process is equally evident in the deliberations of Socialist arbitration tribunals. In an award of the Polish Foreign Arbitration Commission, the tribunal held "qu'en l'absence d'un choix exprès - ce qui était le cas - de la loi compétente pour apprécier le compromis ...."[1] The Soviet FTAC[2] similarly began in an award between Italian and Swiss parties that "en l'absence d'entente entre les parties quant au choix du système juridique applicable ...."[3]

A particularly illustrative award is one of the Czechoslovak arbitration court.[4] The dispute arose out of a contract between a Czechoslovak purchaser and a Sudanese seller under which the latter agreed to deliver to the former 170 tons of Sudanese ground-nuts. The Czechoslovak purchaser claimed damages on the grounds that the ground-nuts were not fit for human consumption. The arbitrators began their discussion as to the law applicable in the following way:

> "As far as the applicable law is concerned, the contract does not contain an explicit provision concerning the choice of law governing the contract. Therefore the arbitrators in accordance with the provisions of (Czechoslovak private international law) ..."

Here, before resorting to their own private international law, the Czechoslovak arbitrators looked to see if there was an expression of intention by the parties. That, they recognised, would over-ride all and any local provisions as to the applicable law and even though it would lead to a result different from and perhaps even contrary to the "otherwise applicable law".

Ad Hoc Award

113. Similarly in the arbitration award between the Royal Hellenic Government v. the British Government in the matter of the "Diverted Cargoes",[1] the arbitrator when looking to the applicable law started his discussion:

> "In the absence in the agreement to submit to arbitration of any special provisions establishing the law upon which the decision of the arbitrator is to be based, or authorising him to effect an amicable settlement...."[2]

Being a dispute between sovereign States, this award was in fact decided on the basis of public international law.

2. The Justification of Party Autonomy

114. It is of particular interest that in most of the awards discussed above, the applicable law was determined purely and simply from the expressed intention of the parties. Where parties had manifested a choice of the applicable body of legal rules the arbitrators gave effect to the choice per se, without looking for any system of private international law to justify or support the validity of that choice. In contrast to the practice in national courts, in international arbitration party autonomy is invariably given immediate and direct effect irrespective of any authorisation or recognition by some private international law system.

ICC Awards

115. However, arbitrators do in practice often try to show that the application of the law chosen by the parties is valid in accordance with some system of private international law.[1] Invariably arbitrators will try to show, if they can, that whichever private international law system they look to the law to apply will be the same.[2] By doing this, arbitrators aim to cover themselves and their award from every angle of attack, and to prevent any accusations of arbitrariness. In the Indian-Pakistani case discussed above[3], Professor Lalive looked at the various possible private international law systems which could be applied[4] and came to the conclusion that they would all - in any case - lead to the same result. The arbitrator said:

> "..... the three or four solutions just mentioned with regard to the various systems of private international law to be applied by the Arbitrator, would, in the present case, lead to the same practical result in all likelihood, since there exists a large measure of agreement and concordance, on the question of applicable law to contracts, not only between the various systems deriving from English conflict of laws, but also more generally between the main systems of conflict of laws in the world. In the field of contract, it is possible to speak, to a large extent, of a common or universal private international law, at least whenever the question is that of the law governing the contract when there is an expressed choice by the parties." (Emphasis added).

Further in his award, the arbitrator talking of the meaning and extent of party autonomy said:

> "It is however irrelevant in this case and need not be discussed further since it is beyond discussion that all legal systems (including those of India, Pakistan, England, Switzerland etc.) accept this fundamental principle, sometimes called that of "autonomy of the will" in private international law." (Emphasis added).

116. A similar approach was adopted by a Belgian arbitrator in a dispute concerning the grant of an exclusive license by the Federal German owners of a trade mark to the French claimant, entitling the latter to exploit their trade mark in France.[1] Determining the law to apply the arbitrator said:

> "Attendu que les parties sont d'accord sur l'application de la loi allemande au contrat ...;

> "Attendu qu'il incombe à l'arbitre de respecter la légitime autonomie de la volonté des parties sur ce point; que quel que soit le droit applicable, soit le droit allemand, soit le droit francais, soit à titre de "lex fori", la primauté de cette référence à la volonté des parties est à sauvegarder".

Despite the fact that the contract was to be performed totally in France, the arbitrator upheld the parties' choice of German law. Indeed he was obliged to respect the choice of the parties: if he wished to avoid the law chosen none of those private international law systems to which he could look for assistance, i.e. France, Germany, or Belgium, would have helped him.

In another award[2], Gunnar Largregren, President of the Appeal Court of Western Sweden, sitting as an ICC arbitrator, held a choice of law to be applicable per se and then, almost as an after-thought, implied that even if the law chosen was not applicable per se, it would have been applicable by virtue of the rules of private international law. (The arbitrator did not identify which system of private international law he would have applied). The dispute was between an Argentinian national, resident in the German Federal Republic, and a U.K. corporation, in relation to a contract made and performed in the Argentine. The parties agreed that the law of Argentine should govern their relations. President Largregren said:

> "The parties have agreed that Argentine law is the proper law of the commission agreement (or agreements), and should their choice of law, which was only made during the course of arbitration procedure[3], not by itself be binding upon me, I have no doubts about the correctness of their conclusion in that respect."

A similar thought process was evident in an award[4] made by a Swiss arbitrator in a dispute between a FederalGerman plaintiff and an Austrian defendant, in connection with the defendant's sole right to represent the plaintiff in Austria. Their agreement contained an express choice of German law. Thus the arbitrator stated:

> "En ce qui concerne le droit applicable, les parties sont d'accord pour estimer que le contrat de représentation est régi, en tant que tel, par le droit allemand."

Then to further justify and explain his recognition of the parties' choice, the arbitrator continued:

> "Avant tout, il faut se rappeler que l'opinion dominante en Allemagne, en Autriche et en Suisse, reconnait aux parties le droit de choisir le droit applicable. Quant à savoir quel compte il y aurait à tenir d'une volonté des parties simplement hypothétique, cela ne nous touche pas ici puisque les parties ont clairement exprimé leur volonté en cours d'instance,[5] sinon au moment de la conclusion du contrat."

Again, in a dispute between French and English parties, the Belgian arbitrator in a partial award on the applicable law first recognised and applied the law chosen by the parties,[6] and then tried to illustrate that the choice was valid by both of the two conflicting laws. The contract contained the clause that "this agreement shall for all purposes be subject to and shall be construed under and be governed by the laws of England." The French plaintiff however argued that the express choice of law was only an element in the determination of the applicable law and was not in itself automatically applicable.[7] The plaintiff argued that the contract was more closely and substantially connected with France than with England, and consequently French law should apply in preference to the law chosen. The arbitrator began by noting:

> "Il n'appartient pas au juge du fond de rechercher d'après l'économie de la convention et les circonstances de la cause quelle loi doit régir les rapports des contractants, qu'à défaut de déclaration expresse de la loi choisie par ceux-ci; qu'en l'espèce, cette déclaration expresse a été formulée et comporte élection de la loi anglaise".

The arbitrator found for the defendant, stating that the plaintiff "ne fait état d'aucun motif permettant d'écarter l'exécution de la volonté des parties." The choice of English law was valid by both English and French private international law rules. The choice was not "fantaisiste, contraire à la bonne foi ou correspondrait à l'accomplissement d'une fraude" and was therefore not avoidable under English private international law rules. French private international law "exclut l'application de la loi française au fond et comporte le recours à la loi anglaise." The arbitrators, it is clear from the award, only considered the effect of applying the English and French private international law systems because the validity of the choice of English law was challenged.[8]

Ad Hoc Award

117. In the Alsing Case,[1] the Umpire similarly looked to both the private international law rules of Greece, which the umpire held applicable, and the private international law rules of Switzerland, where the umpire was actually sitting.

118. It is submitted, reference by the arbitrators to a particular or any system of private international law to uphold a choice by the parties is unnecessary and even undesirable it could have the effect of negating the intention of the parties. This is without any mention of the complications involved in determining which system of private international law to apply. The undesirability and impracticability of looking to private international law rules to justify and uphold a choice of law by the parties are illustrated by the following examples.

119. Assume a contract is made in Warsaw between a New York firm and a Polish foreign trade corporation. The contract contains provisions providing that it be construed and governed by English law and that any dispute arising concerning the contract be resolved by arbitration ad hoc in Sweden. Neither New York (America)[1] nor Polish[2] private international law recognise the parties' right to choose a law which has no connection with the transaction or the parties; in Sweden however, the choice of English law would be upheld[3]. Both the New York and Polish courts would recognise and enforce an arbitration award by the Swedish tribunal.[4] If the arbitrators were to apply either New York or Polish (as opposed to Swedish) choice of law rules to determine the validity of the parties' choice, English law would have been found inapplicable, and some other law objectively determined applied. In such a case however the award would not have been enforceable - the arbitrators not acting in accordance with the parties' instructions - and the intentions of the parties would have been avoided.

If however, on the same facts, the arbitration was to take place e.g. in Italy, the choice of English law may not be recognised[5] - as being too remote from the transaction - and the proper law would be objectively ascertained in accordance with the conflict rules of the lex fori - Italy, i.e. the lex loci solutionis. This would result in New York or Polish law being held to apply - the very thing which the parties were aiming to avoid!

120. This situation is again well illustrated by the following fact situation. Assume a contract between English and French corporations providing for any disputes between the parties to be resolved by arbitration in London in accordance with either "the general principles of international trade law" or "ex aequo et bono". If the arbitrators apply English private international law rules they would hold both choices to be void[1] and would so refuse to give effect to the intention of the parties.[2] If however the arbitration was to take place in France (or even ICC arbitration), and French private international law rules were to apply, both choices would be upheld[3] and any decision rendered accordingly would be recognised and if necessary enforced in England.[4]

121. The interests of international commerce requires that party autonomy be recognised per se, provided it is not fraudulent, nor aimed to avoid a mandatorily applicable rule of a directly interested State, nor contrary to international public policy.[1] As most laws today allow parties to choose the law to govern their relations, and as submitted above, this is today an accepted rule of the law of international commerce, there is no good reason - juridical, commercial or for that matter political - to refuse to recognise a choice of law merely because the extent allowed by one national system differs from that allowed by another system. Until a uniform law dealing with the extent of party autonomy is developed which has the support of and is ratified and adopted by the majority of trading nations, only by an unfettered recognition of autonomy in arbitration can the intentions of the parties be protected.

Perhaps as evidence of the need for certainty which this guarantees in international trading relations is the fact - albeit not publicised - that arbitrators do recognise and give effect to an unlimited choice by the parties (subject to the normal restrictions and the need for the award to be enforceable) and such awards are recognised and enforced by national courts even though those courts would not themselves have upheld the choice of law. It is this characteristic which gives to party autonomy its character as an international conflict of laws rule.

The Limitations to Party Autonomy

122. In those awards already discussed, the law chosen was in each case the law of the country in which one of the parties was domiciled or had his habitual residence. But could the parties have chosen some other law? Some authors argue[1] and some national laws provide[2] that the parties can only select a law which is directly connected with the parties or the contract. They concede that where the factors are equally divided between two conflicting systems of law, that conflict can be resolved by the parties, but only by a choice of one or other of the conflicting laws. The laws which will normally be in conflict will be those of the places where the parties are domiciled or have their habitual residence, the place where the contract was made, the lex loci contractus, and the place where the contract is to be performed, the lex loci solutions. The basic reasoning which justifies such a restrictive doctrine of autonomy is that parties can only choose a law which they know and understand and hence prefer to the otherwise applicable law.[3]

123. As we have seen the lex loci contractus and the lex loci solutionis presumptions gained favour during the seventeenth and eighteenth centuries on the basis of their respectively being the law which the parties naturally thought of or had in mind when contracting and therefore expected to apply. After all, it was argued, you cannot contract to do something illegal or contrary to the public policy of either the place of contracting or the place of acting.

In consequence, as the desirability of party autonomy increased during the nineteenth and early twentieth centuries, so too the view restricting the parties' choice to a law which did not violate the laws of the places of contracting or of performance.

124. Fundamental to the concepts of intention and expectation is one basic legal presumption extended from the domestic to the international scene: "everyone is presumed to know the law and to act in accordance with it." Thus contracting parties are assumed to have considered and understood the legal provisions applicable to their contract and to appreciate the legal implications of their agreement. It is argued that it is only possible for the parties to know and understand or to determine the relevant provisions of a legal system with which they are connected; the parties could not know or be expected to know the relevant provisions of some unconnected or third, neutral law. They can only choose a law they know and understand. But this argument ignores that there is no reason to believe one party will know and understand the "other party's law" anymore than a third or neutral law. Furthermore, a party will often not even know or have attempted to understand his "own" law, particularly where that law be unclear, ambiguous or complicated. If knowledge and comprehension are the pre-requisites of choice, it is surely equally possible for a contracting party to research into the relevant provisions of any chosen legal system.

125. Most reservations to the doctrine of party autonomy arose out of concern for the logical extent of autonomy. If parties are entitled to choose the law to govern their relations, could they not choose a law which made legal and enforceable their contract which by both the lex loci contractus and the lex loci solutionis was without effect? What if they were to inadvertently choose a law which had the effect of making void an otherwise valid contract.[1] Could the parties choose a law for the sole purpose of avoiding the strictures or even an imperative regulation of a law which might otherwise be applied?[2] What if the

parties submitted their relations to a non-existent or incompetent law?[3] Need they choose a law at all: could they not choose some non-legal standard to govern their relations?

All the reservations which have arisen on this subject and the comments of the many writers are, like the limitations in particular national systems of law, irrelevant to international arbitration. These reservations are based on the view that the parties' choice may be influenced by a desire to avoid the application of a particular law rather than because of a more positive preference for the chosen law. They presume the existence of a forum law and a forum public policy.

The limitations advocated arise out of and are aimed to uphold the supremacy of the lex fori, the law of the State; but an international arbitration tribunal has no lex fori and is not responsible to uphold the law of any State. The international arbitration tribunal has a duty to uphold the law of international commerce, and to control the actions of contracting parties in accordance with the prevailing standards of international business morality. But the lien between the international arbitration tribunal and the law of international commerce is not comparable to that existing between a State court and its lex fori. Like many aspects of international law, the law of international commerce has an amorphous character: its content is difficult enough to determine, let alone enforce. The international arbitrator cannot be limited by any national law.

> The mere fact that the choice of law aims to avoid an inconvenient or restrictive national law is not in itself reason for an arbitrator to refuse to give effect to the "loi d'antonomie". However, an arbitrator may refuse to recognise and apply a chosen law in the very unlikely situation where the content or effect of that chosen law violates international public policy.[4]

126. For the reasons just given, party autonomy in arbitration is quite unlimited. Whatever restrictions different legal systems may place on the right of parties to choose the law to govern their relations, those limitations can only bind the courts of that legal system. Arbitrators, as already pointed out, are not bound to respect the restrictive provisions contained in national private international law rules; on the contrary, by virtue of the origin of their authori and the nature of arbitration, they are free - and indeed obliged - to recognise and give effect to a choice of law by the parties.

This contention can only be supported by the somewhat negative evidence that no awards have been found in which arbitrators have declined or refused to apply the law chosen. In the majority of cases where the facts are equally divided between the parties the arbitrators gratefully accept the choice of the national law of one of the parties. Here there can be little argument that the law chosen is too remote.

127. There are further awards in which the factors did not divide equally (e.g. where performance was exclusive or almost entirely to take place in one country) and yet the choice of the law less closely connected to the factors has been upheld. Thus arbitrators recognised a choice of French law when the principal in an exclusive sales agreement was French, despite the fact that the contract was totally to be performed in Switzerland and the contract was more closely connected with Switzerland.[1]

Again[2] in respect of a 20 year license agreement under which the French defendant was granted the exclusive right to manufacture and promote the American plaintiff's patented mattress in France, the expressly chosen law of Maryland - the State in which the licensor had his main place of business - was applied.[3]

In neither of these two cases was the preponderent connection with Switzerland and France respectively considered sufficient to exclude the law expressly chosen by the parties.

128. In the foregoing situations there was at least some connection between the chosen law and the contract. What of a choice of a third and neutral law? Here again no awards have been found in which the choice of a law with no connection with the contract has been rejected. On the otherhand, again negative evidence, there are awards in which effect has been given to the law chosen when that law was connected to the arbitrators or the place of arbitration.

So in a dispute arising out of a license agreement under which a New York corporation had granted a French firm the exclusive right to exploit their patent in France and Germany the arbitrators applied Swiss law because "les parties ont convenu d'appliquer le droit suisse au fond du litige."[1] Similarly, a choice of Swiss law was upheld as the lex loci arbitri in an award involving a Federal German firm and a Phillipine corporation, there being no other connection between the contract and Switzerland.[2]

Particularly telling is the reasoning whereby three arbitrators justified the application of Swiss law, the lex loci arbitri, in a dispute between a Danish plaintiff and two joint defendants, a Bulgarian state enterprise and an Ethiopian corporation.[3] The arbitration arose out of a contract for the construction of a fish processing plant and a refrigeration warehouse in Asmara, Ethiopia. The arbitrators stated:

> "En l'occurrence, il convient de tenir compte du fait que les parties ressortissent à des pays dont les systèmes sociaux sont différents et que les objets du contrat étaient destinés à un pays du Tiers Monde. Elles ont évité les conflits susceptibles de se présenter dans ces circonstances, en stipulant l'application du droit suisse. Comme le siège du tribunal arbitral se trouve en Suisse, le choix ainsi fait se justifiait par un intérêt legitime. Dans ces conditions, l'application du droit suisse ne soulève aucune objection."

Of course in these cases the place of arbitration did provide a connection between the contract and the law chosen.[4]

Regrettably no awards have been found in which a totally disinterested law has been chosen; nevertheless, it is submitted such a choice would be upheld.

129. Eastern European Awards

In the socialist countries there appears also a tendency to allow the parties some degree of freedom when choosing the applicable law. In the Soviet Union there is no legislative provision stating what limits there are to party autonomy;[1] however, the USSR is party to certain bilateral agreements which allow unlimited choice of law.[2] In practice the Soviet arbitration courts will uphold the law chosen by the parties provided the contract is in respect of a foreign trade transaction,[3] and that the choice is neither aimed at avoiding Soviet imperative legislation,[4] nor is contrary to Soviet "policy and integrity,"[5] nor "contravenes the fundamental principles of the Soviet system."[6]

This liberal limitation can be well seen from an award of the Soviet Maritime Arbitration Commission (MAC). A dispute rose out of a shipping contract between a Cuban exporting enterprise and a Soviet shipper.[7] The contract contained an express choice of Canadian law to govern the carriage of goods by sea. The Merchant Shipping Code of the USSR recognises party autonomy[8] but only[9] "en ce sens que l'accord des parties sur le choix d'une loi étrangère ne peut cependant écarter l'application des regles les plus essentielles et les plus impératives, mais peu nombreuses, auxquelles il est impossible de déroger."[10] When considering the validity of the parties' choice, the MAC held that:

> "lors de l'examen de l'affaire en question il est nécessaire, selon la condition incluse dans le S.1 des connaissements, de se soumettre aux dispositions de la loi canadienne de 1936, sauf les exceptions qui pourraient ressortir de l'Article 15 du Code, mais qui, de l'avis de la (MAC), n'ont aucune incidence sur l'affaire en cause.[11]

The Czechoslovak law on private international law[12] is silent as to the extent allowed to party autonomy. Thus Lunts comments:

> "The choice of the law of the contract is not restricted by imperative legislation of the forum or any other legislation. It is limited by the general principles of public policy (the ordre public, the Vorbehaltsklausel) of the forum."[13]

Skapski goes further and maintains that since the 1963 law on private international law in Czechoslovakia "on admet en principe un choix illimité de la loi en laissant aux parties l'entière liberté de désigner la loi applicable à leur contract."[14]

The Czechoslovak enactment thus does not preclude the parties from choosing a third or neutral legal system.[15] It would now seem that the decision of the Czechoslovak arbitration tribunal in refusing to recognise a choice of English law in a contract for the sale and purchase of jute between a Czechoslovak buyer and a Pakistani seller is unlikely to be followed.[16] In that case the jute was to be delivered and payment was to be made in Czechoslovakia. There was no connection whatever with England, other than the choice of law clause providing English law to be applicable. The arbitrators preferred to apply Czechoslovak law on the basis of it being both the law with which the contract was most closely connected and on the basis of the qui elegit iudicem elegit ius principle, the Czechoslovak arbitration tribunal having been agreed as the sole competent authority to determine any dispute between the parties arising out of the contract.[17]

Bulgaria and Romania follow similarly permissive rules. Bulgarian private international law allows free choice but "le droit choisi, ou les clauses contractuelles qui le reproduisent, ne peuvent comporter des dispositions contraires aux règles impératives des lois bulgares. On se réfère encore à l'appui de cette thèse à l'article 9, alinéa 1 de la loi portant sur les obligations et les contrats, en alléguant qu'il ne consacre l'autonomie contractuelle que dans la mesure où le 'contenu du contrat n'est pas contraire à la loi, au plan économique national et aux règles de la communauté socialiste'."[18]

In Romania, the Arbitration Commission of Bucarest will recognise the law chosen by the parties as the law governing the substance of the contract "so long as it is a valid law in force in a definite state and so long as it has a direct connection with the contract itself. It must not, however, be contrary to Romanian public policy ...."[19]

As concerns Hungary, the authors are divided as to the extent to which the parties are free to choose the law applicable. Some authors, maintain that there must be some definite connection between the facts of the case and the law chosen.[20] Others[21] however, maintain a "wide latitude"[22] is allowed the parties in choice of law. Indeed, Madl even suggests that only public policy should restrict the choice of the parties: he does however consider "the choice of law conflicting with so-called imperative rules should also be considered one defeating public policy."[23] This would of course also cover a choice "in fraudem legis".[24] It is submitted that Hungary's accession to both the 1958 New York and the 1961 Geneva Conventions, as well as the generally accepted practices in the socialist countries, would give some weight to the contention that a Hungarian arbitration tribunal will take a liberal rather than a restrictive approach to an express choice of law by the parties.

Poland also appears to have contradictory authority. Article 25 of the 1965 Polish Law of Private International Law provides clearly that:

> "Les parties peuvent soumettre leur rapport juridique à la loi de leur choix, pourvu qu'elle ait une relation avec ledit rapport."[25]

It is unclear what is meant by "a connection." The Polish Private International Law of 1926 restricted choice to the law of the parties' nationality, the place of the parties' domicile, the place of performance, the place where the contract was made or the place where the contractual subject matter is situated.[26] It is probable the 1965 law would be interpreted similarly.[27] Although this prima facie appears a wide choice, it does preclude the choice of a neutral or particularly developed legal system.

As has already been pointed out[28] the Rules of the Polish Chamber of Arbitration as well as that of the Gdynia Cotton Association both provide expressly that arbitrators shall apply that law chosen by the parties. Both are silent as to the extent of the choice. As a statute must over-ride the rules of a State institution it would appear that choice must be of the law of a country

substantially connected to the contract. However where a third and neutral law is chosen, it will be recognised where the neutrality or desirability of that law is clear from the facts of the particular case. Thus talking of the law applicable by the Gdynia International Arbitration Court for Maritime Disputes, one recent commentator stated, the chosen law of a third State would apply "à moins qu'il ne soit évident qu'elles ont choisi la législation d'un état tiers pour des raisons inavouables."[29]

It is submitted in Poland too a choice will be recognised provided the choice is made in good faith, is not aimed at avoiding a mandatory Polish law (with a public policy content) and is not in itself against public policy. It is further submitted a choice of a third and neutral law would be recognised and upheld provided there were good reasons for such choice. Only Poland's ratification of the major international arbitration conventions and the general practice of nations, capitalist and socialist, supports this last contention.

Finally, in Yugoslavia whilst there is no private international law legislation, the two Yugoslav enactments which pertain to international contracts[30] recognise party autonomy and are silent as to the extent allowed. They are considered to be restricted only by public policy and "fraude à la loi."[31] Indeed, the arbitration court of the Federal Economic Chamber in Belgrade has in one award actually given effect to a choice of a neutral and totally unconnected law.[32] A dispute arose out of a contract under which the Yugoslav plaintiff was to manufacture for and deliver to the Federal German defendant a specified number of children's shirts. Payment was to be immediate on delivery of the goods. The shirts were to be made in Yugoslavia and delivered to the defendant in Federal Germany. The contract contained clauses providing for arbitration at the Belgrade court and an express choice of Swiss law as the law of the contract. The defendant declined to pay the contract price claiming a set-off for money due by virtue of an assignment to him of a debt owed by the plaintiffs

to another Federal German firm "O". The tribunal held the effect of the novation to be outside the arbitration agreement and consequently their jurisdiction. They recognised Swiss law as the law of the contract (although no question of law was involved) and ordered the defendant to pay to the plaintiff the 27,000 DM claimed.

4. The Choice of Some Other Measuring Standard

130. But need there be any limitation to the law or other yardstick which the parties may choose? We have seen that arbitrators will give effect to any express choice of law made by the parties. Though our awards show a connection always with the parties, the place of performance, the place of the arbitration or the nationality or residence of the arbitrators, there is little doubt a choice of a totally neutral law with no connection whatever to the contract will also be upheld[1]. But can the parties choose a non-national system of law, e.g. the general principles of international trade law, or the general usages of a particular trade? Or perhaps even an extra-legal standard e.g. amiable composition?

The major international arbitration conventions are silent as to the extent of party autonomy allowed. However, as we have already seen , the first sentence of article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopts a particularly liberal terminology. It states:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties".

This has been interpreted by most writers to entitle the parties not only to select any national law they wish to apply, but also to "delocalise or internationalise their legal relationships by reference to general principles of law, principles of law common to a group of legal systems, principles of international law and the like." [2]

This is obviously correct. Within international commercial arbitration there can be no limitation to party autonomy. For the same reasons which support

autonomy generally there is no legal reason to refuse recognition to a choice of the type of yardstick proposed above. Just as parties are free within their contract to make a hazardous or even a reckless bargain, so too they must be entitled to choose a legal or other yardstick which has no connection with the contract or the parties, which is equitable, amorphous and flexible in content and which is only chosen as a standard of measurement by the parties.

(a) Distinction Between the Law of the Contract and the Standard to be Applied by the Arbitrators.

131. It is appropriate at this stage to make a distinction between the law which governs the existence, the validity, the effect and the performance of a contract, and the legal or non-legal yardstick which arbitrators apply to determine the rights and obligations of the parties in a dispute before them. The former is invariably a fixed standard which implies certain terms and conditions into the contract; this standard will be used by any tribunal seized to interpret the contract and to resolve any dispute arising therefrom. The latter is the yardstick adopted by the parties to provide the arbitrators with the criteria upon which to measure the rights and obligations of the parties.

This distinction may be important for while invariably these will be one and the same, they can be (and are becoming with increasing frequency) different. Thus although the proper law may be some national system of law, the parties may specifically provide in their agreement or at the time when submitting to arbitration for the arbitrators to resolve their dispute in accordance with some non-legal measuring standard. In consequence, and this follows from the foregoing, the legal or non-legal yardstick to be resorted to by the arbitrators can - and often will have to - be determined separately from the law of the contract.

132. The negotiations of parties have no legal effect until such time as the law which governs their relations give to their agreement a binding force. When that magical moment is differs from legal system to legal system.[1] If negotiations were to break down before completion and one party were to claim the existence of a valid and enforceable contract, a national court seized of the problem would have to determine the relevant legal provisions which would apply and then, in accordance with those legal provisions, decide whether or not a valid contract has been made. Where the parties have agreed on a choice of law to govern the contract, the court seized of the matter might - provided this was allowed by its conflict of laws rules - determine whether the contract existed under the appropriate provisions of the chosen law. This is most easily ascertained from a written contract, particularly where the parties have expressly provided that their "contract is to be governed by and construed in accordance with the laws of" a particular country. This type of choice can be made in advance when the contract is concluded or subsequently: the exact conditions will depend on the choice of law rules of the court seized.

133. Where the parties select a law or a non-legal yardstick to be applied by the arbitrators, they do so to provide the arbitrators with a measuring standard. The effect to be given to such a choice depends not on any conflict of laws rules but on the willingness of the arbitrators to accept the submission and, where the submission is to an existing arbitration institution, on the rules of that institution. In this situation the choice of measuring standard, provided it is agreed by both or all the parties, can be made at any time, right up to the time when the award is made. But, whether or not such a choice is made, the validity of the contract is a matter separate and independent. It cannot be argued that a contract only takes effect from the time when the choice of measuring standard is made. To hold otherwise would mean that the nature of and the obligations under a contract would not be determinable until a date perhaps

several years after the contract was concluded and even executed. The effect of a choice of yardstick different from that which governs the contract is simply a contract provision providing that should a dispute arise necessitating a submission to arbitration, the rights and obligations are to be measured in accordance with that standard. If the provision is contained in a separate arbitration submission it forms part of a separate and independent contract providing for specified standards to be applied by the arbitrators. Whilst a national court which may become seized of the contract would have to determine the validity of such a provision in accordance with its forum private international law rules, an arbitrator is obliged to respect the choice of the parties because his authority is based on their "volonté" and as stated above, failure to respect their "volonté" could lead to his either being disseized or to his award being subsequently refused enforcement.[1]

134. This type of choice is well illustrated by the many contracts in which it is provided that the arbitrators will decide in accordance with the "general principles of international trade law" or "good faith and business ethics". But more common than this are provisions for a choice of arbitration "ex aequo et bono" or giving the arbitrators power to act as "amiables compositeurs". Whilst perhaps there are some legal systems which do not recognise the choice of a non-legal yardstick,[1] it is quite clear that this type of choice is becoming increasingly popular amongst both arbitrants and lawyers.

This is particularly so in contracts of long duration and great complexity.[2] Thus one finds in a contract made in 1962 between certain oil companies and the demised Republic of Vietnam for the construction of an oil refinery in that country, provision that in the event of any dispute arising out of the contract "the arbitrators shall base their decision on equity and the principles of international law".[3]

Again, an agreement between a Swedish company and the Tunisian government for the development of the superphosphate industry in Tunisia provided:

> "When the provisions of the present Agreement or of its Appendices, which are binding on the parties, have to be interpreted, the arbitrators shall base their decision on the general principles of law."[4]

In two decided ad hoc awards arbitrators have been faced with particularly ambiguous extra legal and non-legal choice of yardstick. Ironically, in the Lena Goldfields Arbitration[5] the arbitrators had to interpret the parties agreement "on the principles of goodwill and good faith, as well as on reasonable interpretation of the terms of the agreement".[6] In the Abu Dhabi Arbitration[7] the parties based their agreement "on goodwill and sincerity of belief and on the interpretation of this agreement in a fashion consistent with reason".[8] One recalls also the provision in the Consortium agreement referred to in the Sapphire Arbitration[9], - though itself never the subject of arbitration:

> "In view of the diverse nationalities of the parties to this Agreement it shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles then by and in accordance with the principles of law recognized by civilised nations in general, including such of those principles as may have been applied by international tribunals".[10]

A similar provision to that of the Abu Dhabi case was contained in a concession agreement between the Shaikh of Kuwait and a Japanese owned corporation, the Arabian Oil Company Limited. That agreement provided:

> "The parties base their relations with regard to this Agreement on the principle of goodwill and good faith. Taking account of their different nationalities this Agreement shall be given effect and must be interpreted and applied in conformity with the principles of law common to Kuwait and Japan and, in the absence of such common principles, then in conformity with the principles of law normally recognized by civilized states in general, including those which have been applied by international tribunals"[11]

These two different types of choice will be considered here separately as

a choice of a non-national legal standard, and

a choice of an extra-legal standard.

(b) A Non-National Legal Standard

135 . In a desire to avoid the application of either parties' national - or any other national - system of law, provision is sometimes made for such contracts to be governed by e.g. the general principles of international trade law or the general usages of a particular trade. This kind of choice is a very useful means of the parties avoiding the sticky problem of choosing the applicable national law. It is particularly popular in east-west trade contracts where there is both a conflict of laws and a conflict of economic and political systems. However, such a choice is objected to because it is uncertain and unclear.[1]

Some writers argue only a definate and certain system of law can give an agreement binding and legal effect, and such a system must be that of a sovereign State.[2] This is a view which has received judicial support in several countries[3] and from the Permanent Court of International Justice. In the Serbian and Brazilian Loans Cases,[4] the PCIJ stated that:

> "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country".[5]

136. On the other hand, there has developed in recent years a body of rules and customs which are accepted and followed by most trading nations.[1] These rules have developed due to expediency or directly through the efforts of the various public and private international commercial organisations. Despite the different economic systems in the world, international business practices and terminology are often given the same meaning.[2] Thus convenience encourages and has effected the development of rules and practices the same for all parties, regardless of their nationality, with respect to international business. These rules and customs form the basis of the law of international commerce.

When negotiating, most businessmen have in mind the customs, practices, rules and standards appropriate to their particular trade or industry, rather than the provisions of their or another national law. These customs, practices, etc. are invariably of greater relevance to quality and quantity, performance and delivery, finance and payment provisions in an agreement than individual national laws. Consequently, as will be seen, in the absence of an express choice by the parties of a national system of law to govern, arbitrators often have resort to these common and generally accepted standards.[3] When the parties actually express the desire that their rights and obligations be determined in accordance with the customs, practices and standards of international commerce, arbitrators are obliged to respect that desire.

137. The rules of several permanent arbitration courts expressly provide that arbitrators may apply relevant trade customs "as far as the recognition of these customs has been agreed upon by the parties".[1] The tribunals in Poland on the otherhand only take into consideration the appropriate customs "in so far as they are permitted by the proper law".[2] The International Court of Arbitration for Marine and Inland Navigation at Gdynia similarly "follows the principles of good faith and the commercial, marine and mariners' customs and habits concerning the issue, inasmuch as the laws to be applied allow it".[3] In consequence, seeing all the Polish arbitration tribunals consider "above all the party will"[4] in determining the applicable law, so a choice of "general principles" or "internationally accepted custom" would, it appears, be upheld provided it does not violate the imperative laws of Poland or Polish public policy: if custom is chosen to govern, there is no other proper law to measure its applicability.[5]

The application of international trade custom is favoured by the arbitration tribunals of both the USSR and Romania. Thus Ramzaitsev, one-time President of the Soviet FTAC, wrote:[6]

"On peut ainsi constater d'après les décisions de la Commission que lors qu'il existe dans le contrat un concept généralement admis dans le commerce international qui donne son sens aux clauses du contrat, la signification de ce concept est précisée en l'absence d'indications spéciales dans l'accord même, par application des coutumes commerciales".

If international custom can be excluded or limited by the will of the parties how much more direct must be its applicability if the parties expressly provide it to be the standard governing their relations.

Similarly, with respect to the Romanian Arbitration Commission, Nestor and Capatina said in a note on an award that the Commission allows

"les parties de soumettre leur contrat soit aux usages commerciaux d'un certain port maritime (lex mercatoria)...."[7]

ICC Award

138. The Rules of the I.C.C. are silent in this respect. Nevertheless, in an interim award[1], arbitrators sitting in Brussels to hear a dispute between French and Swiss corporations held that "the principles of law and custom in force through out the civilised world are applicable,both parties having consented thereto". The arbitrators however neither attempted to define the content of the parties' choice nor to explain or justify (legally) the reason for upholding the choice of the parties.

Ad Hoc Award

139. The third arbitrator in an ad hoc oil arbitration was faced with the problem of having to determine a dispute on the basis of such a choice of the general principles of law.[1] The dispute arose out of a 75 year concession granted by the Sheikh Abdullah bin Qasim al Thani, the Ruler of Qatar, in 1935, to the plaintiff company. Under the concession agreement, the company were given "the sole right throughout the Principality of Qatar to explore, to prospect, to drill for and to extract and to ship and export, and the right to refine and

sell petroleum and natural gases, ozokerite, asphalt and everything which is extracted therefrom", within the area over which the Sheikh ruled and which was marked on a map appended to the contract. The contract further provided that disputes arising out of the contract were to be settled by arbitration, and the arbitrators' award was to be "consistent with the legal principles familiar to civilised nations".

In 1949 a dispute arose concerning the extent of the area subject to the concession. This, in the main, concerned three separate areas: the sea-bed and sub-soil beneath the territorial waters of the mainland of Qatar; the sea-bed beneath the territorial waters of certain islands over which the Sheikh ruled; and the sea-bed and sub-soil beneath the high seas of the Persian Gulf over which the Sheikh had proclaimed his sovereignty in June 1949. One complication was the fact that certain islands claimed to be within the concession were not marked on the map. Naturally, with the post World War II rush for oil exploration concession and the new technology enabling the sea-bed to be exploited, both the Sheikh and the company were anxious to resolve the question. Lord Radcliffe, the third arbitrator, together with the arbitrator nominated by the company, held the concession to include "islands over which His Excellency Sheikh Abdullah ruled at the date of the Concession, whether or not they are shown on the map attached to the Concession". This was held to include the sea-bed and sub-soil of both the mainland of Qatar and the Islands. However, the concession was held not to "include the sea-bed or sub-soil or any part thereof beneath the high seas of the Persian Gulf contiguous with such territorial waters, which sea-bed and sub-soil are more particularly mentioned in the aforesaid Proclamation of 8th June 1949".

Regrettably, the reasoning of the arbitrator is unknown: it is unclear whether the question of the applicable law was brought up or even discussed: the report is unfortunately in skeletin form. However, it would appear the arbitrator relied on the general principle of pacta sunt servanda and purported to enforce the agreement as he considered the parties had agreed. By interpreting the

agreement as it must have been understood at the time of contracting in 1935 the arbitrator reached a conclusion "consistent with the legal principles familar to civilised nations" - that of making the parties keep to the terms which he considered they agreed. It is of course interesting to note that Lord Asquith of Bishopsgate reached a very similar award and on very similar lines - though fortunately with very much more explanation - in his award in the Abu Dhabi Arbitration[2].

140. The sparcity of decided awards on this question is due to what appears a reluctance of contracting parties to submit their relations to the lex mercatoria or the "general principles of international trade". Parties still today prefer the choice of a determined national law which clearly enables them to know what are the rights and obligations under their contract. Alternatively they are prepared to authorise the arbitrators to decide ex aequo et bono or to act as "amiables compositeurs", knowing that they would then just interpret the terms of the contract and apply the usages of the trade concerned and the general principles of international commercial law.[1]

(c) An Extra-Legal Standard

141. The acceptability of the parties choosing an extra-legal standard can be seen from the fact that all the major international conventions and other instruments which deal with the law to govern the substance of a dispute expressly allow a decision to be made ex aequo et bono[1] or for the arbitrators to act as "amiables compositeurs", provided always the parties so agree. Thus Article VII (2) of the 1961 European Convention on International Arbitration provides:

> "The arbitrators shall act as amiables compositeurs if the parties so agree and if they may do so under the law applicable to the arbitration".

The Arbitration Rules of the ECE 1966 provide in Article 39:

> "The arbitrators shall act as "amiables compositeurs" if the parties so decide[2] and if they may do so under the law applicable to the arbitration".

The ECAFE Rules for International Commercial Arbitration 1966 provide similarly in Article VIII (4) (b):

> The arbitrator/s shall, ... decide ex aequo et bono (amiables compositeurs) if the parties authorise the arbitrator/s to do so, and if he/they may do so under the law applicable to the arbitration."

The ECE General Conditions for the Erection of Plant and Machinery Abroad[3] (No.188 D) 1963 provides in paragraph 23.3:

> "If the parties expressly so agree, but not otherwise, the arbitrators shall, in giving their ruling act as "amiables compositeurs".[4]

Again, Article 42(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States provides that the requirement that the arbitrators decide the dispute in accordance with rules of law "shall not prejudice the powers of the Tribunal to decide a dispute ex aequo et bono if the parties so agree".

The recent Unicitral Arbitration Rules for optional use in ad hoc arbitration, has followed this theme. These rules provide in Article 33(2):

> "The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration"[5]

It is noteworthy that all these provisions recognise the necessity that the lex loci arbitri, the law of the place of arbitration, must recognise and allow arbitration on a non-legal yardstick. Thus, if the arbitration is to take place in a country which does not allow non-legal arbitration,[6] a submission to arbitration ex aequo et bono or empowering arbitrators to act as "amiables compositeurs" would be void and have no effect. This acknowledges the sovereignty of the law of the place where the arbitration is to take place.

142. It has for long been accepted that all forms of international adjudication may be ex aequo et bono if the parties are so agreed. Thus the Statute of the Permanent Court of International Justice whilst stating in Article 38 the sources from which the court was to draw international law, provided that those sources did "not prejudice the power of the court to decide a case ex aequo et bono, if the parties agree thereto".[1]

The rules of several permanent arbitration institutions make similar provisions. Article 13(4) of the rules of the Arbitration Court of the International Chamber of Commerce provides that the Arbitrators "shall assume the powers of an amiable compositeur if the parties are agreed to give him such powers." Article IX-3 of the Arbitration Rules of the Chambre Arbitrale Maritime de Paris simply provides that the arbitrators "may act as amiables compositeurs if the parties have expressly agreed".

A different wording but with similar effect is adopted by Article 28 of the Rules of the Netherlands Arbitration Institution which provides:

> "The arbitrators shall have power to decide on equitable[2] grounds. The parties may, however, agree that the arbitrator shall decide according to rules of law".

Similarly, Article 12 of the rules of Arbitration of both the Amsterdam and the Rotterdam Chambers of Commerce and Industry oblige arbitrators to

> "conscientiously give an award in fairness, unless parties have stated at the outset of the arbitration, that they wish the award to be issued according to the rules of law".

The effect of these three Dutch rules is to give the arbitrators the right to decide purely on the basis of equity and to place responsibility for limiting this power in the hands of the parties. If the parties wish the arbitrators to base themselves on the rules of law, the onus is on them to so instruct the arbitrators.[3]

The rules of most socialist arbitration tribunals are silent on this matter. Only the Rules of the Yugoslav Foreign Arbitration Chamber make any clear provision with respect to the choice of a non-legal yardstick. Article 39(4) of those rules provides:

> "The arbitrators may render the award exclusively on the basis of the principle of equity only if so authorised by the parties".

Article 29 of the Rules of the Court of Arbitration at the Polish Chamber of Foreign Trade is particularly interesting. The provision provides that once the Tribunal has determined the applicable law, it "shall take into consideration the principles of equity and of customs in so far as they are permitted by "that applicable law". This appears to preclude arbitration ex aequo et bono other than to temper the application and effect of the applicable law, and then still only to the extent allowed by that law.[4] However, Poland like the other eastern European countries do recognise non-legal arbitration, as they are party to the European Convention on International Commercial Arbitration of 1961 and participated in developing the ECE arbitration rules.

ICC Awards

143. It is clear that in practice arbitrators will give effect to a choice of an extra-legal yardstick, i.e. a choice for the contract to be governed by and/or the arbitrators to determine the dispute in accordance with, the "general principles of equity and justice" or ex aequo et bono, or for the arbitrator to act as "amiable compositeur"[1]. Whatever reservations different national systems of law may have to a choice by the parties of an extra-legal yardstick, it is clearly quite acceptable in international commercial arbitration: international arbitration tribunals are not subject to the idiosyncracies of national legal provisions. It is only in very rare circumstances that arbitrators will refuse to give effect to such a choice. An award rendered in accordance with a chosen non-legal yardstick will invariably be recognised and enforced in most legal systems.

Thus in a dispute between corporations from Belgium and Luxembourg the arbitrator considered himself appointed to act "comme amiable compositeur" in accordance with the agreement of the parties[2]. In a dispute[3] concerning liability under a bank guarantee given in respect of a contract for the purchase and installation of machinery in Turkey between the Turkish buyer's bank and the Czech seller, the contract expressly provided that Turkish law was to govern the contract. At the hearing the parties invited the arbitrator, Professor Réné David, to decide as "amiable compositeur". Thus in the award Professor David stated:

> "Tenant compte de cette circonstance et en application des pouvoirs d'amiable compositeur qui m'ont été donnés, il me parait equitable de limiter à 4% le taux des intérêts dus par S ...."

In another case,[4] despite the existence of a choice of French law in the contract, the parties invited the arbitrator to "juger en amiable compositeur, ce dont nous tenu compte". This dispute concerned the termination by the French defendant of the Israeli plaintiff's exclusive agency for the defendant's goods in Israel. The plaintiff had been the defendant's agent in Israel for twelve years. Although he had to keep contact with only one major Israeli corporation and had no duty to find other customers, the plaintiff claimed compensation for loss of clientele. Relying on both law and equity, the arbitrators held that although legally the defendant was under no obligation to the plaintiff, morally, the plaintiff was entitled to 10,000 F.Fr compensation. The arbitrator said:

> "Ainsi sur le terrain du droit strict la demande d'indemnité formulée par (M.A.) ne trouve pas de fondement, quelle que soit la qualification que l'on puisser donner á cette compensation.
>
> "Cependant, les parties nous ayant donné mission de juger en amiable compositeur nous avons recherché si, en équité, la demande de (M.A.) ne trouve pas de justification".

Having examined all the facts of the contract and the dispute, the arbitrator held:

> Ainsi, il resulte de l'examen de la convention et de l'intention des parties, de la situation de fait et de droit, des circonstances particulières de la cause de l'équité que (M.A.) à droit à une compensation de la part de la Société.

> "De l'ensemble des éléments de la clause nous évaluons ex aequo et bono cette compensation à F.10.000".

A somewhat indirect recognition of the right of parties to chose an extra-legal yardstick was given in another award where an arbitrator held that he "ne peut reçevoir de la Cour d'Arbitrage les pouvoirs d'amiable compositeur que si les parties sont d'accord pour lui donner ceux-ci," and "la defendresse refusant cet accord, l'arbitre aura à statuer, en droit et non en équité".[5]

Ad Hoc Awards

144. A choice of this kind of amorphous and flexible measuring standard was contained in the agreement between Lena Goldfield Limited and the Government of the USSR[1]. It was provided that "the parties base their relations with regard to this agreement on the principles of good will and good faith, as well as on reasonable interpretation of the terms of the agreement."[2] However, in the actual award, although the arbitrators indicated their views of the Soviet Government's conduct[3], they based their award on Soviet law, generally accepted principles of law and international law proper[4].

145. An even more ambiguous choice was that in the Abu Dhabi Arbitration between the Petroleum Development (Trucial Coast) Ltd. v. the Sheikh of Abu Dhabi.[1] In January 1939 the Sheikh of Abu Dhabi granted the exclusive rights to the Petroleum Development Company to drill and mine oil for 75 years within

> "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependancies and all the islands and the sea waters which belong to that area. And if in the future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area shall coincide with the limits specified in this definition".[2]

The agreement provided that any disputes arising under the contract were to be referred to arbitration before two arbitrators; in the event of their being unable to agree, to an umpire. Finally, the agreement provided in Clause 17:

> "The Ruler and the Company both declare that they base their work in this Agreement on goodwill and sincerity of belief and on the interpretation of this agreement in a fashion consistent with reason".[3] (Emphasis added).

A dispute arose as to the extent of the Company's concession[4]: were they entitled under the 1939 agreement to exploit (i) the sea-bed and sub-soil in the Sheikh's territorial waters and (ii) the sea-bed and sub-soil of the continental shelf contiguous to those territorial waters? The question came to Lord Asquith of Bishopstone as Umpire. He had to determine the meaning of the concession agreement and for this the proper law of the agreement. The arbitrator rejected the municipal laws of Abu Dhabi ("no such law can reasonably be said to exist")[5] and of England.

> ".... Clause 17 of the agreement.. repels the notion that the municipal law of any country, as such could be appropriate. The terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations - a sort of "modern law of nature".[6]

It then fell to the arbitrator to determine the content of the 'modern law of nations'. Although he rejected English municipal law, the arbitrator held "some of its rules (to be).... so firmly grounded in reason, as to form part of this broad body of jurisprudence - this 'modern law of nature'."[7] The arbitrator thus relied on the maxim expressio unius est exclusi alterius favouring a logical and reasonable interpretation of the wording of the agreement in accordance with clause 17.

Lord Asquith then proceeded to consider what the Sheikh and the Company had understood their agreement to mean when they made it. As for the sea-bed of the territorial waters, the arbitrator had no doubt they were included in the 1939 agreement:

> "I should have thought this expression[8] could only have been intended to mean the territorial maritime belt in the Persian Gulf, which is a three mile belt, together with its bed and sub-soil, since oil is not won from salt water".[9]

This part of the award was found to be relatively straight forward. The arbitrator applied "a simple and broad jurisprudence to the construction of this contract"[10] giving "territorial waters" the meaning it was understood to have in 1939, "including but... limited to, the territorial belt and its subsoil".[11]

The question of the continental shelf created more difficulty. Indeed it was only during the war that the continental shelf became an area within the claimed jurisdiction of the adjacent sovereign State, and it was not until 1949 - ten years after the concession agreement was concluded - that the Sheikh of Abu Dhabi declared his sovereignty over the sub-soil of the Persian Gulf contiguous to his State.[12]

Interpreting the contract as it was understood in 1939 Lord Asquith found the concession agreement did not include the continental shelf. The arbitrator held that the doctrine of the continental shelf was not established in 1939[13], nor for that matter at the time of his award. Thus he said:

> "I am of the opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definite status of an established rule of international law".[14]

The arbitrator refused in this regard to read into the 1939 agreement an interpretation not mooted until seven years after the agreement was made[15].

146. The international arbitration conventions[1] all provide for arbitration ex aequo et bono or entitle parties to authorise arbitrators to act as "amiables compositeurs". There are however other non-legal yardsticks but with a more definate and certain content, e.g. a settled body of rules. Such rules may be worked out by professional or trade organisations to form a code of behaviour in given types of contract or relationships. Another non-legal yardstick could be a choice of a no longer "living" law (e.g. Roman law) or of a religious law (e.g. Jewish law[2]).

This type of choice is just as acceptable as a submission to arbitration ex aequo et bono: both opt out of the normal system of legal interpretation of a contractual relationship. Surprisingly, only the rules proposed by the Institut

de Droit International[3] have actually considered such a choice of a non-legal body of rules. Article 11(3) of those rules provided:

> "If the law of the place of the seat of the arbitral tribunal so authorises them, the parties may give the arbitrators power to decide ex aequo et bono or according to the rules of professional bodies". (Emphasis added).

The last phrase of the provision[4] is no more than a logical extension of the acceptance of arbitration ex aequo et bono. If businesmen are prepared to allow arbitrators to decide on the basis of their feelings of right and wrong, their "understanding" of commercial practice and on a mere interpretation of the agreement in accordance with the presumed bona fides of the parties, there seems no reason why they should not allow arbitrators to decide according to generally accepted business practices or the settled rules of some legal or commercial organisation to which both parties submit. Similarly, there seems little justification to deny to Jewish businessmen the right to have their commercial disputes resolved by the Rabbi or Beit Din[5] of their choice in accordance with Jewish law.

Given the powers of "amiables compositeurs" or asked to decide ex aequo et bono or faced with a somewhat ambiguous choice of the yardstick to apply, arbitrators have little choice but to resort to their repository of general common sense, commercial experience and legal knowledge. In this respect they will apply the terms of the contract, interpreted and supplemented by the "general principles of international trade" and tempered by the customs and usages of the particular trade.

147. An express choice of a religious law was made in the ARAMCO case.[1] That award concerned an oil concession granted in 1933 by the King of Saudi Arabia to an American oil company. When after the second world-war a dispute arose as to the extent of the concession, both parties agreed to submit to arbitration. As to the applicable law they provided in their arbitration agreement:

"The Arbitration Tribunal shall decide this dispute

(a) in accordance with the Saudi Arabian law as hereinafter defined in so far as matters within the jurisdiction of Saudi Arabia are concerned;
(b) in accordance with the law deemed by the arbitration Tribunal to be applicable, in so far as matters beyond the jurisdiction of Saudi Arabia are concerned.

"Saudi Arabian law, as used herein, is the Muslem law

(a) as taught by the school of Imam Ahmed ibn Hanbal;
(b) as applied in Saudi Arabia."[2] (Emphasis added).

Despite the ambiguity, the three arbitrators, the third of whom was Professor Sauser-Hall, upheld this choice stating:

> "This agreement regarding the law to be applied is in conformity with the rules of private international law adopted in most civilised States and it must be observed by the Arbitration Tribunal".[3]

The choice of law clause was construed to have excluded the law of Saudi Arabia from general application: it only applied to matters within the jurisdiction of Saudi Arabia. Now the concession agreement was to look for and exploit oil found in the territory of Saudi Arabia; furthermore, one of the contracting parties was the Government of Saudi Arabia. From an objective viewpoint as well Saudi Arabia was the place "where the operation [was] to be carried out".[4] So the arbitrators looked to the law of Saudi Arabia to determine the character of the oil concession. This question they held was to be resolved "according to the principles of Moslem law, as taught by the Hanbali school".[5] As "the regime of mining concessions, and, ... of oil concessions, has remained embryonic in Moslem law",[6] the arbitrators relied on a basic principle of Moslem contract law: "Be faithfull to your pledge to God, when you enter into a pact".[7] This the arbitrators interpreted to mean that "the rule pacta sunt servanda is fully recognised in Moslem law".[8]

This general principle was inadequate to apply to a highly sophisticated oil concession agreement. In consequence the arbitrators held "in the case of gaps in the law of Saudi Arabia",[9] they would determine "the applicable principles by resorting to the world-wide custom and practice in the oil business and industry; failing such custom and practice, the Tribunal will be influenced by the solutions recognised by world case-law and doctrine and by pure jurisprudence".[10]

148. However the opposite was the case in the Abu Dhabi arbitration[1] where the law of Abu Dhabi, Muslem law, was totally rejected as not being competant to regulate a modern commercial instrument. The arbitrator stated;

> "What is the "Proper Law" applicable in construing this contract? This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any body of legal principles applicable to the construction of modern commercial instruments".[2]

The arbitrator consequently applied "principles rooted in good sense and common practice of the generality of civilised nations - a sort of 'modern law of nature",[3] as the yardstick in this award.

Similarly, in the award between the Ruler of Qatar v International Marine Oil Company Limited[4] the arbitrator despite considering the law of Qatar to be the proper law, declined to apply it. The law in the Sheikhdom of Qatar was Islamic law which was not only inappropriate to govern a modern oil concession but indeed would have considered the agreement invalid. The arbitrator clearly explained himself as follows:[5]

> "There is nothing in the Principal or Supplemental Agreements which throws a clear light upon the intention of the parties on this point. If one considers the subject matter of the contract, it is oil to be taken out of grounds within the jurisdiction of the Ruler. That fact, together with the fact that the Ruler is a party to the contract and had, in effect the right to nominate Qatar as the place where any arbitration arising out of the contract should sit, and the fact that the agreement was written in Arabic as well as English, points to Islamic law, that being the law administered at Qatar, as the appropriate law.
>
> On the other hand, there are at least two weighty considerations against that view. One is that in my opinion, after hearing the evidence of the two experts in Islamic law, Mr. Anderson and Professor Milliot, 'there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments' to quote and adapt the words of Lord Asquith of Bishopstone, in his Award as Referee in an Arbitration in 1951 in which the Shaikh of Abu Dhabi, a territory immediately adjacent to Qatar and in fact much larger than Qatar, was a party, and the Arbitration concerned the interpretation of words in an oil concession contract. I need not set out the evidence before me about the origin, history and development of Islamic law as applied in Qatar or as to the legal procedure in that country. I have no reason to suppose that Islamic law is not administered there strictly, but I am satisfied that the law does

not contain any principles which would be sufficient to interpret this particular contract.

Arising out of that reason is the second reason, which is that both experts agreed that certain parts of the contract, if Islamic law was applicable, would be open to the grave criticism of being invalid. According to Professor Milliot, the Principal Agreement was full of irregularities from end to end according to Islamic law, as applied in Qatar. This is a cogent reason for saying that such law does not contain a body of legal principles applicable to a modern commercial contract of this kind. I cannot think that the Ruler intended Islamic law to apply to a contract upon which he intended to enter, under which he was to receive considerable sums of money, although Islamic law would declare that the transaction was wholly or partially void.[6] Still less would the Ruler so intend, and at the same time stipulate that these sums when paid were not to be repaid under any circumstances whatever. I am sure that Sir Hugh Weightman and Mr Allen did not intend Islamic law to apply. In my opinion neither party intended Islamic law to apply, and intended that the agreement was to be governed by 'the principles of justice, equity and good conscience' as indeed each party pleads in Claim and Answer, alternatively to Islamic law, in the case of the Claimant."[7]

149. Whilst the different reactions to Islamic law in the various awards considered are interesting there is no proof of any general practice. What is clear - and it is submitted would be the same even if some developed law had been expressly chosen - is that an involved concession agreement must be construed, at least in part, in accordance with general principles of law,[1] customs and usages[2] and an interpretation of the contract terms.[3] No legal system is sufficiently sophisticated and developed to have kept abreast and ahead of technological development to be able to specifically regulate the multi-dimensional character of modern international commercial contracts.[4] This would cover those modern phenomena of joint-venture or co-production agreements which include obligation on parties from different countries with respect to two or more of the following: financial loans and investments; licensing of technology; construction of plant on site; training of workers; marketing; manufacturing; transporting; research; exploration for and exploitation of national resources and raw materials, etc. Not even the efforts of international organisations (e.g. the ECE,[5] CMEA,[6]) have managed to develop a body of rules capable of regulating every aspect of such involved international contracts.

5. The Eviction of Party Autonomy

150. Though they are rare, there are awards in which arbitrators have refused to respect the parties choice of law or have considered there to have been an insufficient manifestation of their intention. It is considered these few awards show no tendancy sufficient to give rise to some exception to the general rule. Nevertheless, for the sake of completeness they are considered.

ICC Award

151. One award[1] in which an arbitrator did not give effect to a choice of law by the parties, concerned a choice of German law as the applicable law "in case of doubt". The facts of this case were as follows: The plaintiff, an unincorporated family "import - export" business in Strasbourg, France, was appointed agent for the defendant German corporation's fridges, televisions, radios, etc., in a defined area around the Rhine. The agency contract was made with the head of the plaintiff firm who was also the head and father of the family. The father died some 7 years after the agency was first granted but the business continued to function and to represent and act for the defendant. Some five months after the death of the father, the defendant notified the plaintiff that they were terminating the agency because it has been made personally with the father and not with the firm. The plaintiff started arbitration proceedings pursuant to an ICC arbitration agreement and claimed a declaration that the agency agreement was wrongfully terminated, damages for loss of clientele and commissions earned during the five months after the father died and the agency being terminated.

When considering the law applicable the arbitrator held:

> "... il est nécessaire de rechercher le droit applicable puisque la sentence doit se fonder sur un système de droit déterminé."

> "Les parties ont négligé de placer, expressis verbis, leur contrat sous l'empire du droit de l'un ou de l'autre Etat. Le droit allemand, dont se réclame la défenderesse, n'est certainement pas applicable d'emblée comme ayant été stipulé par les parties. Pourquoi auraient-elles, sans cela, convenu que le droit allemand s'appliquerait "en cas de doute"? Ainsi puisqu'en principe, les parties n'ont pas fait choix d'un droit déterminé l'arbitre détermine le droit applicable en fonction des principes du droit international privé. C'est seulement si cet examen ne devait produire ni clarté ni solution acceptable, que l'arbitre serait lié par la volonté des parties de lui voir, 'dans le doute", appliquer le droit allemand."

The arbitrator then proceeded on the basis of the generally accepted private international law rules to find the applicable law - that he found to be French. However, the arbitrator concluded his discussion as to the applicable law by saying:

> "Ajoutons à cela, d'ailleurs, que la présente sentence ne se présenterait pas autrement si elle se fondait sur le droit allemand".[2]

Thus the arbitrator in this case gave the choice of the parties little more credence than as a factor to be considered when localising the contract.

Socialist tribunals

152. Socialist tribunals have refused to give effect to the parties' choice of law where that choice exceeded the liberty allowed by their private international law rules. Thus the arbitration court of the Czechoslovak Chamber of Commerce declined to apply English law which the Pakistani and Czechoslovak parties had expressly chosen[1]. Instead they applied Czechoslovak law on the grounds that there was no sufficient connection between the law chosen and the facts as required by the 1948 Czechoslovak private international law - then in force[2].

More recently the International Court of Arbitration for Maritime and Shipping Matters at Gdnyia refused to apply the US law chosen, on the grounds that such choice had an insufficient connection with the facts[3]. The plaintiff, a Federal German Insurance Company, brought an action for the reimbursement of monies paid

to an assured for loss caused to goods by contamination with a noxious liquid. The contamination was allegedly the fault of the defendant, a Polish shipping enterprise. It was expressly provided that the bill of lading issued by the shipper was to be construed and the rights thereunder determined according to the law of the USA : i.e. the American Carriage of Goods by Sea Act 1936 was to apply. The arbitration tribunal declined to give effect to this choice on the grounds that the choice was invalid under the 1926 Polish private international law statute. The USA was neither the place of contracting nor the place of performance and was therefore too remote[4].

The Romanian Arbitration Commission[5] declined to give effect to a choice of Romanian law where they found it to be "inapte à remplir le role qui lui a été assigné".[6] The dispute arose out of the sale by a Greek dealer of olives, of a certain quality; there were to be 185-200 olives per kilo. When delivered there were an average of 199 olives per kilo. The buyer alleged the goods were not up to quality (there should have been an average 192.5 per kilo), and therefore claimed a reduction in price. The seller argued it was not possible to measures olives with such precision. Romanian law gave no help. Greek law, on the otherhand, provided a standard for measuring olives between two extremes. In the circumstances the arbitration tribunal took cognisance of the Greek law and the buyer's claim failed.

Partial application of autonomy

153. Despite the universal and international acceptance and recognition of an express choice by the parties of a legal or non-legal yardstick to govern their relations, there appear certain special circumstances where, whilst ostensibly giving effect to the parties' choice, the arbitrators will look to or rely on,

at least in part, some other yardstick. So, whilst recognising a choice of a national body of laws, arbitrators will also, where they think it appropriate, give credence to or base their decisions on some internationally accepted trade or commercial custom or on their concepts of justice and fairness (i.e. ex aequo et bono). Similarly, when arbitrators are acting as amiables compositeurs they will often base their award on the appropriate legal provisions of the otherwise, or some other, applicable law. This will only be done where the arbitrators find it necessary to make an award which will help to maintain good relations between the parties - (so that future business between the parties will not be precluded by distrust and bad feeling) - or to render a fair or just or sensible commercial decision. This will be discussed in greater detail below when dealing with the extra-legal influences on arbitrators' choice of applicable law[1]. For the present, two examples will suffice. A dispute[2] concerning the amount of commission owed arose out of an agency agreement by which the Chilian plaintiff was to represent the French defendant in Chili. The contract contained an express choice of French law. The arbitrator having found the defendant in breach of contract, held when measuring damages for wrongly terminating the agency agreement:

> "De l'ensemble des éléments de la cause, nous évaluons ex aequo et bono cette compensation à F.10.000."

The Plaintiff claimed entitlement to commission at 5% of the total value of all orders effected through the Plaintiff's agency: the defendant said the correct percentage was 1%. Finding the correct percentage was somewhere between the two, the arbitrator said:

> "Nous estimons, en équité, que le taux de la commission devrait être de 2%. Ce taux applique au montant du marché (prix de base), soit F.2,183,336.00 donne une commission totale de F.43,666.72."

Similarly in an award[3] concerning the wrongful termination by the plaintiff of an exclusive sales agreement and the wrongful retention by the defendant of moneys collected pursuant to the agreement, the arbitrators determined

the amount of moral damages ex aequo et bono despite an express choice of French law by the parties. The arbitrators held:

> "Attendu que le dommage moral ainsi infligé au défendeur n'est guère susceptible d'être mesuré de façon rigoureuse par les moyens de la technique comptable; qu'il peut cependant être évalué ex aequo et bono après examen de tous les éléments de la cause; qu'estimer à Fr.Sw. 50,000 le dommage ainsi subi par le défendeur et, fixer à ce chiffre l'indemnité qui lui revient de ce chef, apparaît raisonnable".

6. The Incidence of Time on Party Autonomy

154. Two questions which arise involving the incidence of time on party autonomy concern a change in the law chosen between the time of choice and the time of the arbitration proceedings, and the question of when the parties may exercise their choice of law and to what extent they may amend that choice. We shall consider these two questions separately under the headings:

(a) Change in the Autonomous Law.

(b) Time for Choosing Autonomous Law.

a) Change in the Autonomous Law

155. An interesting problem arises from the passage of time: the inter-temporal problem. As of what date should the arbitrators determine the content of the chosen law or extra-legal standard: when the relationship was created, when the dispute arose or when the standard is actually to be applied? So for example where a contract contains an express provision as to the law applicable should that law be applied as it was at the time of contracting or as it is at the time when the arbitrators wish to apply it? What where the choice is made at the time the dispute is submitted to or during the arbitration: should the arbitrators apply the law as it is then or should they refer back to the law as it was at the time when the relationship between the parties was first created?

The writers have expressed various views[1] with respect to the effect of a change in the law between the time a relationship is created and when a question of law arises. These views all presume the forum seized to be a national court which is obliged to respect its forum law and public policy. If the effect of party autonomy is to connect the contract with a legal system, then, in the absence of transitory provision, the new law should be applied[2]; to apply the old law would be to give effect to a law which no longer exists[3]. If on the other hand the parties choice of law identifies the specific rules to be implied into the contract, then the old law should be applied[4] except where the new law has a public policy character[5].

ICC Award

156. There being few awards on this matter little practical guidance is available. One award[1] involving an intertemporal problem arose out of a contract made in March 1948 under which the Danish plaintiff undertook to supply men and machinery for the purpose of purchasing and processing wood in Germany. The defendant was the Allied High Commission in Germany after the 2nd World War. Due to the difficulties in obtaining the required passport visas and other necessary legal formalities, grave delays arose. The arbitration agreement made in September 1951 contained the following choice of law clause:

> "La loi applicable au contrat en cause sera celle existant dans les zones d'occupation d'Allemagne Occidentale et notamment celle existant en zone française d'occupation d'Allemagne, lieu du contrat."

Giving effect to this clause the arbitrators held:

> "Il y a donc lieu de se fonder sur le code civil allemand (BGB), dans le mésure où ses dispositions n'avaient pas été abrogées par la Puissance occupante au moment de la conclusion de contrat et de son exécution."

This is an award in favour of applying the law as amended[2].

By contrast, in another award[3] an arbitrator held the content of the applicable law should be determined as of the time when the contract was meant to be performed.[4] The dispute arose out of a contract for the sale and purchase of

goods under which the Austrian buyer undertook to open irrevocable letters of credit with a bank in Trieste, Italy. The French seller was to deliver the goods to the defendant in Trieste. The seller alleged the buyer had failed to open the letters of credit and was therefore in breach of contract: he claimed damages as a consequence thereof. As to the relevant time to determine the applicable law the Italian arbitrator held:

> "il faut appliquer dans ce cas la législation qui était en vigueur à Trieste dans la période du 18 Octobre 1949 (date à laquelle la [défendresse] devait ouvrir le crédit irrevocable) au 2 novembre 1949 (date à laquelle en cas d'ouverture régulière du crédit par la [defendresse], la [demandresse] devait livrer la marchandise au consignataire de la cargaison), c'est-à-dire, le code civil italien approuvé ... 16 Mars 1942 ... et qui a été en vigueur au cours de la période sous indiquée dans le territoire de l'Etat libre de Trieste formant la zone anglo-américaine". (Emphasis added)

Neither of these two awards can be considered to show a general attitude. The approach to be taken will differ from award to award, from arbitrator to arbitrator, depending on the facts and circumstances of the particular dispute.

Ad Hoc Awards

157. An intertemporal problem arose after the second World War in the light of the technology developed for exploiting the mineral resources on the sea-bed. This posed important questions with respect to the various oil concessions granted by the Persian Gulf Sheikhdoms to western corporations. Was an oil concession contract to be understood in the light of the prevailing knowledge and law at the time when the concession was granted or as they evolved? The preference appeared to be for the time when the concession was granted.

Lord Asquith, in the Abu Dhabi Arbitration[1] applied the "modern law of nature" and public international law as they were understood in 1939 when the agreement was concluded. When considering whether the continental shelf fell within the concession "the sea waters which belong in that area", the arbitrator started his discussion:

> "Placing oneself in the year 1939 and banishing from one's mind the subsequent emergence of the doctrine of the 'shelf' ..."[2]

Furthermore he later concluded:

> "Directed as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later ..."[3] (emphasis added).

In the Petroleum Development (Qatar) Ltd v Ruler of Qatar[4] arbitration Lord Radcliffe appeared also to apply the contract as understood at the time of contracting, (and that includes the implications given by law) when he held the concession to include only the territory over which the Sheikh ruled "at the date of concession".

Similarly in the Alsing Case[5] where a dispute arose with respect to the prolongation of an exclusive concession to supply matches to the Greek State monopoly. The Umpire, Monsieur Python, held that the law to be applied should, in accordance with the agreement of the parties, be that in force in 1926, when the contract was signed, rather than at the time of the award[6].

158. This problem can be divided into whether the choice is for the law to govern the parties' contractual relations or a standard with which the arbitrators are to measure the parties' rights and obligations in any dispute before them.

In the former case it is necessary to determine exactly what the parties intended. When the choice was made they will have thought of the law as it then existed. Perhaps it was because of the very merits which they saw in the law that they chose it to govern their contract? Indeed, it may well be that had the parties known of the changes to be made to the law they would have chosen some other law to govern their relations. Only by applying the law as it was at the time chosen will it be possible to give the contract the effect which the parties intended and expected[1].

Where the choice is of a measuring standard rather than a body of regulating norms, it is equally submitted the choice must be given effect to as it was at the date of the parties' agreement. If one acknowledges the right of parties to choose a standard according to which their rights and

obligations are to be measured, there can be no reason to resort to that standard as it existed prior or develops subsequent to the parties' choice.

What where the changes are influenced by the national public policy of a relevant State? This, it is submitted, should make no difference in principle. The arbitrators are not concerned with any national public policies, except to the extent relevant in the enforceability of the award[2]. The parties' wishes must be respected and this means applying the law or extra-legal yardstick chosen as it was understood by the parties when chosen.

b) Time for Choosing Autonomous Law

159. A question which often causes vexed (albeit academic) argument is whether or not parties to a contract can choose the law to govern subsequent to the conclusion of the contract[1]. Can they choose the law to govern when they submit to arbitration or at the time of or during the arbitration proceedings? Or must the choice be expressly made at the time of contracting? It is argued that if rights and obligations arising out of the contract are to be clear and certain, there must be some legal system which determines whether the contract has been made and which governs the contract from the very moment of conclusion. Thus the Czechoslovak Arbitration Commission stated:

> "Determination of the applicable law must however be done precisely when the contractual relation arises. It is impossible for the parties to remain uncertain about the applicable law until such time as legal proceedings may be brought.[2]

So, if the law of country X governs (as the law applicable in the absence of an express choice), parties cannot subsequently, even perhaps some years after the contract was made, choose another legal system to govern. After all, the chosen legal system could construe differently and give a totally different effect (perhaps even hold them to be invalid) to the many activities which have already taken place between the parties under the contract. Furthermore, parties cannot contract with one legal system in mind, and then when at a later date they find it convenient choose some other legal system to apply.

Whatever the merits of these arguments in domestic legal systems, their force as concerns international arbitration are for two major reasons substantially weaker. Firstly, just as the parties have the right to contract, so they have the right to retroactively change, inter se, the legal characteristics and effect of their contract. They are entitled to abrogate their contract and terminate their relationship; they may equally vary the terms of their agreement. As the agreement of the parties is the all important characteristic in all contractual matters, such changes as agreed by the parties must be recognised. Whilst conceding that in some national courts a retroactive choice may be refused recognition when its effect is contrary to the forum policy, as an international arbitration does not have a national forum public policy, arbitrators must recognise and respect a choice of law unless it be made contrary to some truly international principle of public policy (ordre public réelment international)[3] or was induced by some universally accepted unconscionable means i.e. under duress or by fraud.

Secondly, a choice made at the time of the submission to arbitration or at the arbitration proceedings, will invariably be more as a measuring stick for the arbitrators, than as a body of rules to govern the relations of the parties inter se. The arbitration exists and the arbitrators are seized because the parties so wish; a decision of the parties in reverse could equally disseize the arbitrators and terminate the proceedings. If the parties are agreed that their dispute be determined in accordance with a particular yardstick, be it legal or non-legal, the arbitrators must act as instructed and failure to do so could lead to the award being unenforceable. It is surely irrelevant when the parties actually express their agreement. Furthermore, international arbitration is above the strictures of any national legal system, and arbitrators, as anational adjudicators, are not bound by the rigours of any national law (subject of course to the national laws which must be respected for the purposes of enforcement); they are subject only to the will of the parties.

ICC Awards

160. Whatever may be the case in national courts, where this question has arisen in arbitration proceedings, arbitrators have not in any way questioned the right of the parties to make a choice and have given effect to the choice without any discussion. As was alluded to in two awards already discussed, arbitrators conceded the right of the parties to choose the law to govern even during the arbitration proceedings.[1] In an award[2] between an American businessman and a French corporation concerning a licence granted to the French defendant to exploit the plaintiff's patent in France, the arbitrator applied French law to their dispute as agreed by the parties at one of the hearings. Also in an award[3] between a Turkish Bank and a Czech foreign trade corporation, the arbitrator gave effect to a choice at the time of the first hearing empowering him to act as "amiable compositeur".[4] That the choice could be made at the hearing was recognised in one award,[5] where, when considering the law to govern the dispute, the arbitrator began by noting:

> "Les parties n'ont convenu du droit applicable, ni à l'origine, ni en cours de procédure." (emphasis added).

Although there may be no express choice of law in the contract or before the arbitrators, if the parties both base their arguments on the provisions of the same legal system, the arbitrators can infer an express agreement between the parties as to the law to apply.[6] However, arbitrators are often reluctant to base their decisions purely on the parties' agreement. Thus in a dispute[7] arising out of an exclusive sales agreement made between Swiss and German corporations, the French arbitrator supported his findings of German law as the proper law by stating: "De plus, les deux parties d'un common accord se sont référées au droit allemand." Similarly,[8] where an Italian firm gave a licence to the French defendants to manufacture their specially designed brazzieres and to sell them within a defined area. As the parties did not make any express choice of law, it fell to the Belgian arbitrator to determine the law to apply. He considered and

rejected what he termed "la règle classique de droit international privé," which pointed "au droit national applicable à la lex loci contractus." The arbitrator then looked to "la règle subsidiare ... la lex loci solutionis, c'est-à-dire, à la loi française." To conclude his discussion and (it is submitted) to explain his choice of French law as the proper law, the arbitrator stated:

> "Attendu de surcroît qu'en terme de plaidoirie, les conseils des parties ont expressement déclaré s'en référer à l'application de la loi française."

Similarly, in a dispute[9] arising out of an agency contract, the Austrian and Federal German parties had made no express agreement as to the law to apply. In support of the law of the country in which the agency was to be exercised, the arbitrator stated:

> "Eu égard ... au fait que, lors de l'audience, les représentants des deux parties se sont référés au droit autrichien, un examen plus détaillé de la question sur le plan du droit international privé ne semble pas s'imposer."

Eastern European Awards

161. A similar approach has been taken by the socialist arbitration tribunals.[1] The Soviet FTAC applied Soviet law in a dispute between a Belgian firm and a Soviet enterprise on the basis of both parties referring to Soviet law at the hearing.[2] Again recently the Soviet MAC[3] held Soviet law applicable to a dispute between the Cuban export enterprise Ali-import and the Soviet Black-Sea Maritime Corporation because:

> "les deux parties se sont référées aux normes du C.N.M.C. de l'U.R.S.S. dans leurs explications tant écrites qu'orales."

The Romanian arbitration commission have also recognised a choice of law made at the hearing.[4] Similarly the Czechoslovak Arbitration Commission held:

> "... the Defendants have agreed at the public hearing on October 17, 1968 to the application of the Czechoslovak law and the Plaintiffs in their declarations have referred to the Czechoslovak law, so that it is possible to consider these declarations of the parties as an additional choice of law."[5]

Where parties had provided in their contract for the US Carriage of Goods by Sea Act and the Brussels Convention 1924 to govern and subsequently at the arbitration proceedings expressed a choice of Polish law, the International Court of Arbitration for Maritime and Shipping Matters at Gdynia preferred the choice made at the hearing. Lebedev states that the Soviet MAC has similarly recognised that "l'existance de la clause prévoyant l'application d'une loi n'exclut pas la possibilité pour les parties de modifier cette clause par accord ultérieur pour s'en remettre à l'application par les arbitres d'une autre loi, en l'espèce, celle du C.N.M.C. de l'U.R.S.S."[7]

Ad Hoc Award

162. In the ad hoc Alsing Case arbitration[1], the parties choice at the hearing was upheld - though on the grounds that it was valid by both the private international law rules applicable and the private international law rules of the place of arbitration. The Umpire held:

> " ... the plaintiffs agreed before the arbitration tribunal that the case be judged according to Greek law, as requested by the defendant; the reservations which they made do not affect this acknowledgement."
>
> "The parties admit ... that in Greek private international law the litigants may even during the trial itself agree as to the law to be applied .... According to recent jurisprudence of the Swiss Federal Court the parties may choose the applicable law even during the case. Consequently the umpire is justified in applying Greek law to the suit, without having to state which law would have been applicable, in default of agreement between the parties, under the rules governing disputes laid down in Greek private international law."[2]

163. Some arbitral institutions have a procedure whereby the arbitrators try initially to define, before getting down to the fundamentals of the dispute, what common ground exists and the matters of contention between the parties. This is most notably the case with ICC arbitration. By Article 13(1) and (2) of the ICC Rules of Conciliation and Arbitration the arbitrators are to draw up a document defining the terms of reference (Acte de Mission) in which they, inter alia, identify the parties, state their terms of reference, indicate the points at issue to be determined, and all other matters required in order that the award

when made shall be enforceable at law. The document should be signed by the arbitrator and both parties (though the refusal of one of the parties to sign does not deprive the statement of its effect or disseize the arbitrators). Where possible the statement will describe any and all commonly agreed points, including the law to govern, even though the choice may only have been made when the arbitrators were drawing up the statement of their terms of reference.

So, in one award[1] made in respect of a dispute between a French Government Ministry and a Swiss trader, it was held that as both parties had agreed and signed the Acte de Mission providing for the application of French law the tribunal was obliged to apply that law. Explaining this the arbitrators said:

> "Le tribunal arbitral tire de l'action de mission, la totalité de ses pouvoirs et de sa compétence et qu'au contraire d'un tribunal de l'ordre judiciaire, il est lié par la volonte des parties, lorsque celles-ci s'expriment de façon concordante".

The case involved an exclusive sales agreement made in 1949 under which the Swiss defendant was given the exclusive right to market and sell in Switzerland the French plaintiff's gun powder. The defendant was to receive commission at 5% on all civil sales and at 2% on military sales. Although the plaintiffs were well pleased with the growth of civil sales which increased from 150,244 Sw.Fr. in 1955 to 825,333 Sw.Fr. in 1959, they were dissatisfied with very feeble military sales. In consequence, in 1963 the plaintiff withdrew the defendants exclusive agency and engaged another agent. The defendant refused to hand over an outstanding 150,000 Sw.Fr. and claimed the money as damages for wrongful termination of his agency, including "les dommages moral", i.e. - for loss or reputation. The plaintiff claimed the return of the moneys outstanding to his account. The tribunal found both claims well based[2] but in doing so upheld the choice of French law in the Acte de Mission. The arbitrators held:

> "... que malgré qu'il en ait et pour suprenant que puisse paraître, de prime face (abord) au regard des principes du droit international privé[3], le rattachement au droit français d'une cause dont les principaux éléments se situent en suisse, le tribunal (ne) peut que déclarer le droit français applicable à la cause."

The choice of French law was applied here despite the contract having a closer lien with Switzerland and the choice only having been made after the arbitration proceedings had begun[4].

In another award[5] it was found that "les parties ont, dans l'Acte de Mission, reconnu et convenu, que leurs relations réciproques découlant du contrat en cause, sont régies exclusivement par le droit italien." However, the arbitrators only upheld the validity of this choice on the grounds that:

> "Le tribunal arbitral doit respecter les principes généraux du droit international privé. Là où il faut s'en remettre à des règles concrètes en matière de conflits de lois, il convient d'appliquer les normes du système juridique au lieu où siège le Tribunal arbitral. Dans le cas présent, c'est donc sur le base des règles et de la pratique du droit international privé suisse que les décisions doivent être prises.

Needless to say, the choice of Italian law was upheld[6].

CHAPTER II IMPLIED CHOICE

164. Often parties, either for reasons of convenience or by mistake fail to provide in clear and unambiguous terms the law to govern their relations.[1] They may fail to clearly express a choice of law because they did not in the circumstances think it necessary, e.g. where the parties had been doing business together for some time and either had never made provision as to the law applicable or they were no longer using written contracts. Again, the parties may have considered there to be no need to expressly state which law governed their contractual relations, that law being self-evident.

A. THEORY

The Principle of Implied Autonomy

165. The absence of an express choice confronting the desire to give effect to the intentions and expectations of the parties has led to party autonomy receiving an extended and liberal interpretation. Thus party autonomy is today understood to refer not only to the right of parties to expressly choose the law to govern their contractual relations, but also to parties being entitled to indicate impliedly what law they wish should govern their relations[1]. As party autonomy is based on the will of the parties that a particular law govern their relations, it follows that the arbitrator (or the judge) must endeavour to determine what the parties did intend. So where there is no express choice, an arbitrator (or judge) must look to see whether the parties have in some other way indicated which law they want or expect to govern their contract. Such a choice is known as an "implied"[2], "infered"[3], "tacite"[4], or "implicite"[5] choice. Thus the use in a written contract of terminology exclusively comprehendable in or drafted in accordance with the formal requirements of a particular legal system may be considered an implied choice of the relevant substantive law rules of that legal system[6]. Similarly, a provision in a contract that disputes arising out of or in connection with it be considered exclusively either in the courts of a particular country or by arbitration

in that country, has been construed to be an implied choice of the law of that country[7]: this on the basis of the latin maxim qui elegit iudicem elegit ius - if you choose your judge you choose your law[8].

2. The Recognition of Implied Autonomy in National Systems of Private International Law

166. This implied choice is recognised in almost every legal system which accepts the principle of party autonomy: indeed it is an aspect of party autonomy. So e.g. with respect to England, Dicey-Morris states:

> "When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case and such inferred intention determines the proper law of the contract."[1] (Emphasis added).

Similarly, the reporter of the American Law Institute, Restatement of the Law, Second, Conflict of Laws, when commenting on the Restatement's provision entitling parties to choose the law to govern their relations[2], stated:

> "But even when the contract does not refer to any state, the forum may nevertheless be able to conclude from its provisions that the parties did wish to have the law of a particular state applied."[3]

With respect to France, Batiffol says:

> "La jurisprudence française, prenant une position qui se retrouve généralement dans son principe à l'étranger, soumet les contrats de caractère international à la loi expressément, voire implicitement, désignée par les parties, dite encore loi d'autonomie."[4] (Emphasis added).

Again, with respect to the socialist legal systems, Szaszy wrote:

> "Transactions coming under the law of contracts are adjudged in all peoples democratic countries, as in the Soviet Union, first of all under the law which has been explicitly or implicitly chosen by the parties."[5] (Emphasis added).

3. The Irrationality of Implied Autonomy

167. But what is really meant by an implied choice of law?[1] Is it really possible for an arbitrator faced with contentious parties to determine with any certainty, from the facts and the surrounding circumstances of the case, exactly what the parties intended? Even an arbitrator conversant with the usages and customs of

a particular trade or area of business cannot be absolutely certain that the parties did actually intend a particular law to govern. Though the evidence may point in a particular direction, to draw any conclusions from that evidence presumes a normal situation, the parties being reasonable, cautious businessmen. It does not take into account the idiosyncratic and eccentric characters of many businessmen, invariably prudent though sometimes prepared to take a risk, invariably experienced and realistic though sometimes naïve and reckless. It also ignores the different aims and viewpoints of and pressures on businessmen when contracting, such differences having their origin in the background of the individual businessman, the system from which he comes and the particular problems he faces.

168. The theory of "implied choice" is based on the "volonté" of the parties being "distinctly characterised."[1] "The parties are not presumed but positively assumed to have agreed on, not only thought of, the legal system to be applied."[2] But the theory is "fallacious"[3]: it ignores the unpredictability of man and the very diverse outside factors which may influence his behaviour. It is never possible to know what exactly was the intention of a person at a particular time - especially when he is arguing against the conclusion not in his favour. Nevertheless, despite these criticisms, the theory of implied choice has developed through the application of certain presumptions which have been and are assumed to imply to the parties a particular intention[4].

B. PRACTICE

1. The Recognition of Implied Autonomy

169. The principle of implied autonomy has been recognised in many awards although in recent years they have become more and more rare. For example, in one award[1] a dispute arose out of a contract under which the Swiss inventor granted to a Swiss export company the exclusive right to market his patent throughout the world except (Federal) Germany. The Swiss arbitrator, sitting in Zurich, when looking for the applicable law stated:[2]

> "Lors de la conclusion du contrat, les parties n'ont convenu ni expressément ni tacitement du droit applicable."

Similarly one remembers the award of Professor Fragistas discussed above[3] in which he said:

> " ... pour déterminer le droit substantiel applicable au contrat en cause, (l'arbitre) doit, tout d'abord, rechercher la volonté expresse ou tacite des parties."

2. The Forms of Implied Autonomy

170. As already noted, implied autonomy is considered to have three forms. Most general is to apply the law which from an objective review of the contract, its terms and the surrounding circumstances, clearly shows that the parties intended and expected to govern their relations. Secondly, is the presumption that the use of terminology or language only comprehendable in one legal system manifests a desire that the relevant provisions of that legal system be applied. Thirdly, and this is the most controversial, the presumption that a provision for any subsequent dispute to be exclusively dealt with by the courts of, or an arbitration tribunal in, a particular country, implied a choice of the law of that country.

To consider the extent to which each of these three forms of implied autonomy have been adopted by international commercial arbitrators, we shall divide our discussion as follows:

(a) Implied autonomy on the basis of the surrounding facts.

(b) Implied autonomy on the basis of the language used.

(c) Implied autonomy on the basis of the presumption qui elegit iudicem elegit ius.

(a) Implied autonomy on the basis of the surrounding facts

171. There are few examples of awards in which arbitrators have actually purported, by looking at all the surrounding circumstances, to state what the parties actually intended. However, in one case,[1] the doctrine of party autonomy was extended by the arbitrator who implied from the facts that the parties had

chosen a particular law to govern. That case concerned an agreement under which the plaintiff a (Federal) German manufacturer of sheet-metal for the graphic industry, granted to the defendant in France (almost) exclusive sales rights of their goods. The defendant was engaged in the sale and distribution of machinery and equipment for use in the printing industry. The plaintiff claimed 7371 DM from the defendant for money laid out for and not repaid by the defendant. There being no express choice of law, the arbitrator began by trying to determine the proper law. The arbitrator said:

> "La demanderesse a son siège en Allemagne alors que la défenderesse a le sien en France. Aussi, en premier lieu, la question du droit applicable à leurs relations contractuelles doit-elle être posée. Vu que le litige porte sur la question de savoir si l'acheteur s'est conformé à ses obligations contractuelles et que dans les formules employées par la demanderesse pour les confirmations de commandes - que la défenderesse a toujours acceptées sans objection - les dispositions sous chiffre 7 fixent le lieu d'exécution pour les obligations de part et d'autre au lieu du domicile de la demanderesse, l'arbitre doit s'en tenir à l'accord réalisé par les parties dans le cadre de leur autonomie de volonté et juger le litige qui lui est soumis selon les dispositions du droit allemand, en particulier celles du Code de Commerce allemand sur la vente commerciale." (Emphasis added).

Thus having considered the factors surrounding the relations between the plaintiff and the defendant, including their past relations, the Swiss arbitrators held German law to have been impliedly chosen by the parties to govern their contract.

One questions whether it would not have been more realistic and accurate for the arbitrator to have said - on the same findings - that the contract was localised in Germany, or that the contract had its closest connection with German law, rather than to fictitiously imply a choice of law by the parties?

172. An intriguing determination of an implied choice of law took place in an award[1] between a Swedish manufacturer of rayon and three French citizens - two of whom were naturalised Hungarians. The Swedish defendant granted the plaintiffs exclusive sales rights for their products in France and agreed to pay a 10% commission on all contracts introduced by the plaintiffs. During 1966 the plaintiffs introduced contracts worth just under 2 million French francs. The defendant failed to pay the agreed commission and the plaintiffs came to arbitration to claim

73,780 French francs. The initial question for the arbitrators concerned their competence to deal with the matter. The arbitrators found that as the parties were of diverse nationalities and backgrounds, the contract had been made in English and German - the mother tongue of none of the parties - there was an implied choice for the application by the arbitrators of international commercial usage and general principles of law. To explain the non-nationality or inter-nationality of the contract, the arbitrator, a Belgian citizen, held:

> "Attendu que dès le début de leurs relations, celles-ci, qui sont de nationalité différente ont entendu souligner le caractère international de leur accord; que si le contrat est établi à Paris, il est redigé en la langue allemande, qui n'est la langue nationale d'aucun des contractants."

Having set the scene, the arbitrator then discussed the question of the applicable law stating:

> "Les parties n'ont pas indiqué dans leurs conventions ou dans leur correspondance le droit national qu'elles entendaient éventuellement appliquer à leurs relations ou à leurs différends;"
>
> "Elles ont ainsi implicitement laissé à l'arbitre la faculté et le pouvoir d'appliquer, pour l'interprétation de leurs obligations, les normes du droit, et à défaut, les usages commerciaux."

(b) Implied autonomy on the basis of the language used

173. Although it would appear that use of a language exclusively referable to one legal system could in itself be a sufficient manifestation of the parties' intentions, there is to the knowledge of this writer no award where this has formed the reason for the arbitrators' choice of applicable law. It is clear that the mere fact that a contract be negotiated or even drafted in a particular language can have no effect whatever. As Niboyet said: "Le fait, en particulier, de l'emploi de la langue britannique dans un contrat de transport outre-Atlantique, ne peut-avoir, a lui seul, la moindre signification".[1]

So in one award[2] arbitrators rejected as an implied choice of American law the fact that the contract was written in English. In that case all the factors, including the nationality of the defendant, pointed to French law; only the language of the contract and the nationality of the plaintiffs pointed to American

law. There was no express choice of law: the plaintiffs argued for the applications of American law; the defendant for French law. The plaintiffs' two major arguments in favour of American law were rejected in the following way:

> "The applicability of French law is suggested in the first place by the fact that the contract was concluded in France. It is true that the signing took place at the United States Embassy; but if (the plaintiffs) had intended this to have the consequence that American law would be applicable, he should have made an express stipulation to that effect, since K could certainly not be expected to understand it automatically. ..., The argument that the contract was drawn up in the English language does not carry sufficient weight, particularly since the American parties understood French only very imperfectly while the French party did not understand English."[3]

In another award[4], concerned with a sale and purchase contract between Austrian and New York parties, the arbitrators rejected various single connecting factors, including the language of the contract, as carrying exclusive weight. They held:

> "The use of a language understood throughout the world and of a currency of international repute, in a contract between parties of different countries, is no longer a decisive argument with regard to the applicable law".

174. On the other hand there are awards in which the use of a particular language or terminology has been considered an extra consideration to be used by the arbitrators in determining the applicable law. In one award[1], between a French plaintiff and an Italian defendant, both parties argued for the application of the other's law. The dispute concerned the commission payable under an exclusive agency contract by which each party appointed the other the exclusive agent for his products in the other's country. Minimum sales were provided. Deciding in favour of French law the arbitrator held:

> "Attendu que les parties ne sont pas d'accord sur le droit applicable à la cause, la demanderesse invoquant le droit français et la défendresse le droit italien;
> "Attendu que la contrat du 11 juillet 1964 se présente globalement comme un contrat d'adhésion, rédigé en français, par un ressortissant français et dont la traduction italienne est parsemée de gallicismes flagrants;
> "Attendu que les obligations principales résultant de ce contrat et premièrement la livraison du matérial doivent s'exécuter en France;
> "Attendu surtout que l'article 16 du contrat définissant les normes de qualité à respecter, le fait par référence "aux règles gouvernementales françaises et aux indications du Bureau Sécuritas", institution française;

> "Attendu enfin, alors que tout indiquait que le contrat référait implicitement au droit français, que la défendresse n'a assorti sa signature d'aucune observation ou réserve à l'égard de la législation applicable au contrat;
> "Attendu que ces divers éléments concordants sont autant d'indices que les parties ont tacitement choisi ou accepté que le contrat soit régi par le droit français;
> "Attendu par conséquent que le droit français doit être déclaré applicable à la cause."

In another award[2], an arbitrator considered the use of the German language and German legal style to be a supporting criterion to those other factors which pointed to German law. That award concerned an agency contract under which the Canadian plaintiff was to represent and sell the Federal German defendant's product in the USA and Canada . When considering the question of the applicable law, Monsieur Ernst Mezger, the sole arbitrator, gave several reasons to justify his reliance on German law to govern the contract. Considering the language of the contract, the arbitrator stated:

> "The original contract, ... while written in English, is not at all drafted in the English or Canadian legal style. It reads more like a translation into English of a German model".

(c) Implied autonomy on the basis of the presumption qui elegit iudicem elegit ius.

175. But the most widely accepted form of implied choice follows the qui elegit iudicem elegit ius maxim. Not only did this principle have a degree of acceptance in many legal systems but it was easy to impose and was for long considered quite logical. As Batiffol stated:

> "Si les parties ont voulu être jugées par les juges de tel pays, il y a là la présomption la plus sérieuse qu'elles ont envisagé, l'application par ces juges de leur propre loi."[1]

More pertinently, Professor Alexander Goldstajn, writing about the Foreign Trade Arbitration Tribunal in Yugoslavia said:

> "If a dispute has been submitted to the FTA in Belgrade and if there is no specific stipulation on the choice of law it can be assumed, by virtue of generally accepted practice, that the agreement of the parties to submit the case to the standing arbitration tribunal in Yugoslavia, justifies the assumption that it was their will to accept the Yugoslav legal system as competent for the settlement of their relationship .... i.e. tying up of the arbitration award to a specific legal system."[2]

The presumption has enjoyed declining favour in recent years as the basis on which it is founded has been seen to be irrational and inaccurate. We shall consequently see how after being generally accepted in international commercial arbitration, the qui elegit iudicem presumption has become less acceptable as a choice of law rule per se. Today it is merely another general connecting factor which may be of relevance in the circumstances of the particular case.

(i) Litteral application of the qui elegit iudicem presumption

Eastern European Awards

176. This solution was clearly adopted by the Czechoslovak arbitration tribunal in the case of a Germany company, M.N. v Koospol, a Czechoslovak foreign trade enterprise[1]. The dispute arose out of a sales contract, the German buyer alleging that the goods were defective. The contract made no provision as to the law applicable; there was however an express provision that the parties would accept the competence of the Czechoslovak arbitration court for any and all disputes arising out of the contract. The report states:

> "The arbitrators were of the opinion that the parties have, by reserving the matter for the Czechoslovak Arbitration Court, tacitly subjected their relations to Czechoslovak law. This signification of the arbitration clause should be clear even to the plaintiff, an experienced businessman, for similar clauses are interpreted in the same way both by international doctrine and legal decision ....."[2] (Emphasis added).

The Czechoslovak arbitration tribunal again adopted the qui elegit iudicem presumption in the case of the Czechoslovak enterprise Centrotex v M.K. Company, a Pakistan corporation[3]. The report of the award describes the arbitrators reasoning on choice of law as follows:

> "The arbitrators had to determine whether the parties had not tacitly adopted a legal system and whether this intention did not result from the tenor of the contract. They examined separately the facts from which such an intention may be inferred. They found:
>
> (a) that the parties had accepted the Arbitration Court of the Czechoslovak Chamber of Commerce to settle, in accordance with the rules of that Court, any difference arising out of the contract;
>
> (b) that the parties chose Prague as the place of payment;
>
> (c) that they did not agree expressly on the place of execution of the contract;

(d) that the seller company has its head office in Pakistan.

Some of these criteria designate Czechoslovak law, and another Pakistan law. By their design, they preferred application of Czechoslovak law because, by accepting the competence of the Court of Arbitration, the parties chose Czechoslovak law."[4] (Emphasis added).

ICC Awards

177. A similar approach has been taken in several ICC arbitrations. So in an award[1] on a contract between an Austrian seller and a Yugoslav buyer, the Swiss arbitrator held "en application des principes généralement reconnus du droit suisse, l'arbitre a considéré comme droit applicable celui du siège du tribunal arbitral." This was despite the fact that Switzerland and Swiss law had no connection whatever with the contract[2].

A similar attitude, but from a slightly different stand point, was taken in another ICC Award[3]. The arbitrator, a Swiss national sitting in Basle, had to determine the law to govern an agency contract between a French motor-car manufacturer and a Yugoslav enterprise. The arbitrator stated that following the principles of private international law both a judge and an arbitrator should always apply his own law unless he is pursuaded some foreign law is applicable in the particular case. The arbitrator stated:

"D'après les principes du droit international privé, il incombe aux parties de soumettre au juge les dispositions du droit étranger. Si tel n'est pas le cas, le juge doit appliquer son droit .... "

This is very much the old lex fori theory but in the particular circumstances was a straight application of the qui elegit iudicem principle. Thus despite the fact that Switzerland and Swiss law had little connection with the contract, other than it was a neutral forum and yardstick, equidistant (more or less) between Paris and Zagreb (the respective domiciles of the parties).

In another award[4], a Swiss arbitrator held Swiss law applicable because in the absence of an express choice of law and with the connecting factors being equally divided, he could assume the choice of a Swiss arbitrator sitting in Switzerland as an indication of the parties understanding that Swiss law should be applied[5]. The arbitrator stated:

> Dans le présente espèce, les contractants sont convenus d'une clause compromissoire et ils ont localisé l'arbitrage en Suisse. Mais il faut se demander encore si cet indice conserverait sa signification si cette localisation de l'arbitrage n'avait aucun lien avec les autres éléments du contrat. Selon la doctrine, la réponse sera affirmative si le choix du lieu se justifie par une considération objective; elle sera négative si ce choix ne manifeste que le désir d'échapper à des dispositions impératives d'une autre législation.... Dans le contrat du 11 février 1952, le choix d'un arbitre suisse s'explique objectivement par l'intérêt que les deux parties - l'une allemande, l'autre bolivienne - avaient de soumettre leur litige à un arbitre d'un tiers pays, d'autant plus qu'elles pouvaient aisément connaître la législation de ce pays. Leur choix se justifie aussi par la nécessité de supprimer toute équivoque touchant l'interprétation d'indices contradictoires quant au droit applicable...: la Bolivie étant le pays d'origine et de domicile des défendeurs et de plus le lieu de conclusion du contrat, mais l'Allemagne étant le pays d'origine et surtout de domicile de la demanderesse dont la prestation caractérise le contrat.
>
> Les parties sont donc librement convenues de soumettre leur contrat à la loi suisse." **(Emphasis added).**

Ad Hoc Award

178. A strict application of the qui elegit iudicem presumption occurred in an ad hoc arbitration award held in Norway[1]. The dispute arose out of a charter-party made in the Baltime standard form with respect to an Norwegian ship. The ship's engine broke down during the voyage necessitating extensive and expensive repairs. The ship was taken to New York rather than Palermo for repairs mainly because of the former's shorter repair-time. The question arose as to the liability of the shipowner to pay the higher cost of repairs incurred by taking the ship to New York. The charter-party contained a clause providing for arbitration to take place in London, but for reasons of convenience the parties agreed after the dispute arose to the appointment of a Norwegian sole arbitrator and for the arbitration to be held in Oslo. The arbitrator had to determine what law governed the charter-party and hence the obligations arising under it - Norwegian or English law. The arbitrator held:

> "Both parties must, as well at the time of the making of the contract as the time thereafter, be aware of the fact that the charter-party had an effective clause of arbitration to be held in London, and that this clause would have meant that the English Arbitration Court would decide the charterparty according to English law. English law would therefore in fact, according to the arbitration clause come to be the competant law. Under these circumstances, it is natural to interpret the arbitration clause as a clause also deciding the choice of law."

The use of the Baltime charterparty with its provision for arbitration in England was considered here to outweigh the fact that all else pointed to the application of Norwegian law. It is presumed that it is the special nature of maritime arbitration which persuaded the arbitrator to imply a choice of English law. Afterall, most charter-parties based on the Baltime (and several other similar) standard-form are understood to imply the application of English law. Secondly, and perhaps of even greater influence, was the fact that most shipping arbitration takes place in London and in accordance with English law. That practical and convenience reasons induced the parties in this case to agree to the arbitration actually being conducted in Norway did not amount to the parties having changed their view as to the law applicable . Hence the arbitrator was bound to the originally implied choice of law.

A similar approach was taken by the Rotterdam Cotton Arbitration Association[2]. A contract for the sale of cotton contained a provision that any dispute arising therefrom was to be dealt with by arbitration under the rules of the Liverpool Cotton Association.

Article 300, by-law 3 of the Liverpool Cotton Association arbitration rules provides:

> "Every contract made subject to the By-Laws and/or Rules of the Association, or subject to Liverpool Arbitration, or containing words to a similar effect, is to be construed and take effect as a contract made in England and in accordance with the Laws of England,..."

When a dispute arose as to whether the contract price should be revalued following the devaluation of the English pound, the parties agreed for their dispute to be dealt with by the Rotterdam Cotton Arbitration Association. The arbitration tribunal found English law to be the "proper law" of the contract. By providing for arbitration at the Liverpool Cotton Association the arbitrators assumed, following the rules of that Association, that the parties intended English law to govern their contract. The subsequent transfer of the arbitration to Rotterdam did not affect the contract conditions.

(ii) Inaccuracy in applying the qui elegit iudicem presumption.

179. However, with time and experience the inadequacies of the qui elegit iudicem elegis ius presumption became apparent. The logic which appeared to support the presumption was not always that profound and the results of strictly applying the rule were frequently quite illogical and untenable. Of course, for those who favoured a fixed and easily applicable rule the presumption was ideal and it gave the parties the right to indicate, by the choice of the country of arbitration, the law to govern. It certainly alleviated the arbitrator from having to decide this sensitive question. But in practice it became clear that the presumption, if applied strictly and without any exception, offered few if any advantages over the lex loci contractus and lex loci solutionis presumptions.

It had all of the weaknesses of those presumptions and its alleged advantages were based on very questionable premises. Whilst it might frequently mirror the intentions of the parties, the qui elegit iudicem principle was subject to too many flaws and weaknesses and could not be supported by "commercial reality".[1]

180. The qui elegit iudicem presumption lost favour for several reasons.

Firstly: more often than because of a desire that a particular law govern their relations, parties may agree on arbitration in a particular country and/or at a particular institution because of their confidence in that kind of arbitration. If they provide for ad hoc arbitration by a particular well known jurist, it is for his arbitrament that they come, not the law of the country in which he lives. This is frequently a guiding factor in the choice of arbitration forum for "east-west" trade contracts. The socialist party may be unwilling to submit to an institution which he believes to be hostile to his system and thus incapable of objectivity: the western party may be equally reluctant to submit to a "communist" tribunal. By way of a compromise, the parties agree on ad hoc arbitration in a neutral forum: in east-west trade Sweden has become very popular. In such situations it cannot be suggested that the parties intended to submit to arbitration in Sweden and hence for Swedish law to govern their relations.

181. The "psychological"[1] inability to agree to arbitration at "the other party's tribunal" is a problem which has also been encountered in trade between the developed and the third world. A developing country, very often acting directly through its government, may be unwilling to agree to arbitration in the other party's country, that being not only an effront to its sovereignty but also because of the belief in a bias inherent in the old colonial mentality[2]. This may be even more apparent where the western partner comes from the old colonial power.

This situation can be well illustrated by one ICC award[3] which arose out of the peremptory termination of a contract under which a central African State government had granted to a Belgian citizen an exclusive concession to their gold and diamonds. The African State was a former Belgian mandate. The contract provided for ICC arbitration in Paris "sauf dans le domaine relevant de l'ordre public national" of the newly independent African State. A Swiss national, sitting in Paris as arbitrator sole, declined to infer a choice of French law. The contract was to be performed on the territory of a foreign sovereign State; the State itself was a party to the contract and was unlikely to agree to the application of the law of some other State and especially not the law of the former colonial power. The arbitrator held the choice of ICC arbitration to be merely a submission to "une juridiction arbitrale internationale" and the choice of such a "non-national" or "international" tribunal could not carry with it any implication as to the applicable law. On the contrary, the arbitrator appears to have presumed that as one party was a sovereign State, the law of that State must have been intended[4]: the law of the African State was consequently held applicable. However, the arbitrator then based his award on an assortment of authorities drawn from several different legal systems, relying "pêle-mêle"[5] on a Belgian writer on administrative law and a judgement of the Belgian Cour de Cassation, the case law of the Swiss Federal court, contemporary theory and the prevailing theory and case law of France: no African authority was cited. This reasoning appears to have made pointless the arbitrator's choice of the law of the African country to govern the contract.

182. This reluctance to submit to the arbitration tribunal of a foreign country can and does arise, though for different reasons, in trade between businessmen from the developed world[1]. Again, as with the preceding examples, unless one of the parties gives way, the parties will have to compromise either by choosing a neutral or international forum, or by resorting to a "joint" or "double" arbitration clause.

183. One solution frequently resorted to by parties unable to agree on the appointment of the sole or third arbitrator (at whose domicile the arbitration will invariably take place), is to provide for some third person (e.g. the President of the International Court of Justice, the President of the supreme court of a particular country, the President of a chosen bar association) to make the appointment of the arbitrator. So either at the outset of the dispute or on the parties being unable to agree on the arbitrator, such third person is requested to make the necessary appointment[1]. The appointor could choose an arbitrator from any country: there is no knowing what criteria will influence the appointor other than the presumption that he will aim to appoint someone competant for the particular type of dispute. Thus to apply the qui elegit iudicem presumption where there was this type of arbitration agreement "would often lead to strange results"[2] and could result in "different and artificial solutions for the same facts and to the same problems."[3]

184. Instead of agreeing to submit to a neutral arbitral forum, contracting parties may provide for certain types of dispute to be submitted to one arbitration tribunal and other types of disputes to another tribunal[1]. Alternatively, the contract may give the parties the right to submit any dispute to a choice of arbitral tribunals[2]. Or again, and this is particularly common in eastern European trade, provision may be made for the arbitration tribunal in the country in which the defendant is domiciled or carries on his business to have jurisdiction.

Can it be suggested in the first hypothesis, that the law of one State should apply to certain aspects of the contract and the law of another to such other aspects? Can it be suggested, with respect to the second proposition that the law to govern shall depend on the tribunal the plaintiff chooses? Can it be even contemplated that the law to govern shall depend on which party should first bring an action in the tribunal of the other[3].

The application of the qui elegit iudicem elegit ius presumption to any of these types of joint or double arbitration agreements would have the effect that the applicable law - or non-legal yardstick for that matter - would be contingent on the determination of the tribunal which is to deal with the dispute. Taken further, this could lead to the situation that an aggrieved party, before commencing arbitration proceedings, would have to consider which law would most favour him. He could then begin his claim in the arbitration tribunal most in his favour - leading to the undesirable but practical practice of forum shopping. Alternatively, where it is the arbitration tribunal in the defendant's country which has jurisdiction, a prospective arbitrant considering "his" national law to favour him might act in a way to induce the other party to commence proceedings against him in "his" national arbitration tribunal. Then, on a counterclaim, he could benefit from the law which was most in his favour. This is an objectionable situation which would defeat all and every principle of international commercial law, except perhaps the desire for certainty.

The third problem actually arose in an award of Yugoslav Arbitration Court[4]. A contract was made for the sale and purchase over a period of years of building materials between a Bulgarian seller and a Yugoslav purchaser, provision for payment having been made by means of letters of credit. The contract provided that disputes were to be dealt with by arbitration at the arbitration court attached to the Chamber of Commerce in the defendant's country. A dispute arose out of the alleged failure of the Yugoslav party to open letters of credit as undertaken. When discussing the applicable law, Professor Kozuharov of Sophia, Bulgaria, in a dissenting opinion, rejected Yugoslav law as the law to govern the

substance of the dispute on the grounds, inter alia, that the arbitration clause provided two possible fori. The arbitrator argued that as the parties expected one law to apply but two tribunals had jurisdiction, the parties could not have intended the law of the place of arbitration to govern[5].

This same problem can be even more clearly seen from an award of the Czechoslovak arbitration tribunal[6] at a time when the qui elegit iudicem presumption was part of Czechoslovak private international law . The dispute arose out of a contract for compensation trading requiring the Czechoslovak defendant to deliver lorries, in accordance with the contract, to Morocco. The connecting factors were diverse: one party, a Czechoslovak foreign trade enterprise, the other a Tangiers firm but acting through its Paris office; the contract was made in Prague, though its object was in Paris; performance was to be, inter alia, in Morocco. The arbitrators began by looking to see if the applicable law had been chosen expressis verbis or tacitly. The arbitrators

> "considered that the contract of 1950 did not contain explicit provisions on the applicable law and that the special letter signed by the parties, when the contract was concluded, and dealing with the competent jurisdiction in case of a difference arising, did not either contain provision which might be considered as an implicit choice. This letter contains the sentence "the jurisdiction to be applied shall be that of the Court entertaining the difference." But the same letter provides for the competence of the "Prague Court" in case an action is brought against one of the parties and, in the event of the second contracting party bringing an action against the first, it offers a choice between "the Paris Court and that of Tangiers". The arbitrators were unable to consider this agreement as entailing determination of the applicable law, for when the obligation arose, the parties did not know whether a court and what court would try the case. Determination of the applicable law must however be done precisely when the contractual relation arises. It is impossible for the parties to remain uncertain about the applicable law until such time as legal proceedings may be brought: in this case, no applicable law had been agreed to eliminate this uncertainty from the outset".[7]

The ambiguous selection of an arbitration tribunal in more than one county left the arbitrators little choice but to fall back on the Czechoslovak private international law, No. 41/1948. The arbitrators thus classified the contract as to the separate sales contract and, on the particular facts, applied the law of the place of the seller's head office, Czechoslovak law.

185. In the case of a submission to a permanent arbitral institution, it again cannot be irrebuttably implied that the parties intended the law of the place where the institution is situate to apply. With respect to the ICC or the ICSID, parties come to these institutions because of their international and impartial character. It cannot surely be suggested that a submission to ICC arbitration carries with it a choice of French law to govern the substance of the dispute, merely because the ICC headquarters are in Paris. As already noted[1], although the wishes of the parties as to the place of arbitration will always be respected, the ICC secretariat will decide the question on the basis of administrative convenience and the convenience of the parties[2]. Thus the Guide to ICC arbitration clearly states:

> "Le lieu de l'arbitrage est absolument independant du fait que le siège de la Cour d'arbitrage est à Paris. L'arbitre peut être appelé à siéger dans n'importe quelle ville et dans n'importe quel pays."[3]

This must be so. The alternative could result in some totally irrelevant law depriving the contract of effect. Assume the contract was illegal by the law of France, but perfectly lawful and unobjectionable by the law of the countries in which the parties have their places of business, the "proper" law and (if it should differ) the lex loci solutionis. Surely an arbitrator under the rules of the ICC could not justifiably hold the contract invalid as contrary to French law merely on the basis of qui elegit iudicem elegit ius!

This can be well illustrated from one ICC[4] award in which a Dutch arbitrator seized of a dispute between French and (Federal) German parties held the fact that one of the parties "a fait valoir, que le lieu de l'arbitrage est Paris" to give rise to no presumption whatever. Rejecting any inference from the place of arbitration, the arbitrator stated:

> "C'est un indice auquel l'arbitre ne saurait attacher d'importance, étant donné que la clause arbitrale ne prévoit aucune lieu déterminé de l'arbitrage, et que c'est la Cour d'Arbitrage qui a fixé le lieu de l' arbitrage."

A French third arbitrator, sitting in Paris to hear an arbitration[5] between Swiss and Spanish corporations arising out of a licence agreement, refused to infer a choice of French law because "le lieu où doit sieger le tribunal arbitral étant fixer par le CCI...."

In another award[6] the arbitrator stated at the outset:

> "qu'il convient tout d'abord d'éliminer la loi du for, lieu de rattachement qui serait purement fortuit vu les dispositions des articles 7 alinéa 3, et 18 du Règlement de Conciliation et d'Arbitrage."

Similarly, a Swiss arbitrator refused to treat a provision for arbitration in Switzerland under the rules of the ICC "comme une professio iuris." The contract, made between an American citizen, resident and working in Paris, and a Panamanian corporation, was for the former to be employed as President of the latter. Talking of the law the parties intended to apply, the arbitrator found:

> "qu'en signant, à l'ouverture d'un établissement commercial à Paris, les parties, ressortissant du continent américain, n'entendaient pas que l'activité du (demandeur) et ses rapports avec (le défendeur) fussent régis par le droit suisse, droit qu'elles ignoraient vraisemblement et auquel elles n'ont pas pensé. L'élection de for en Suisse avait pour seul but de garantir que les contestations éventuelles seraient jugées dans un tiers pays par un arbitre étranger aux Etats en cause."[7] (Emphasis added).

The arbitrator then resorted to the private international law rules of the lex fori to determine the applicable law.

The importance of the place of the arbitration, as already pointed out, is that it provides the possible legal framework for the arbitration procedure . But as also noted this procedure is primarily dependent on the agreement of the parties . It may be that even after the place of the arbitration has been determined, whether by the parties or by the ICC secretariat, the agreement of the parties can always change the place of arbitration. Such a change could be made both for practical as well as reasons of convenience. It must of course be recognised that the place of arbitration (lieu d'arbitrage) does not necessarily correspond to the place where the arbitration is actually being held.[8]

186. A choice of a national permanent arbitration institution may carry more weight in support of the qui elegit iudicem presumption. This could particularly be argued with respect to the arbitration tribunals in the socialist countries, or such similar institutions in the west which are restricted to conducting the arbitration proceedings in one country (e.g. La chambre arbitrale de Paris, the London Court of Arbitration). But even this does not invariably mean the parties are agreed or desire the law of that country to govern their relations. The parties may have chosen the particular tribunal because of its experience, its reputation or its neutrality. Thus in a dispute arising out of a contract between a Italian and Swiss parties, the FTAC in Moscow which had been expressly chosen by the parties did not even consider applying Soviet law to govern the substance of the dispute.[1] Appreciating that it was chosen for its neutrality, the Soviet FTAC applied its own private international law rules to determine Italian law as the applicable law. The inferences to be drawn from every submission can only be considered in the light of the circumstances in each particular case.

187. Another factor which decreases the persuasiveness of any choice of forum presumption, is that the stipulated tribunal will often be seized due to the stronger bargaining power of one party. Such extra bargaining strength may be due to the size, financial resources, experience in the international business market, the greater needs of one of the parties or perhaps even the weaker character or lesser negotiating skills of the parties' representatives. So when arbitrators come to consider the applicable law to govern the basis of the dispute, the fact that one of the parties used their superior "strength" to obtain the particular arbitration clause may deprive that clause of any influence based on an agreement between equals.

188. A similar situation exists where the contract is based on the "contract-type" of one party and the contract-type contains an arbitration clause. Here the arguments against the presumption are of course far weaker. One thinks here in particular of charter-party contracts which invariably follow a similar pattern

including a provision for arbitration in London. In the light of the special place of London as a centre for maritime arbitration, the presumption that the parties intend English law to apply whilst strong is not irresistable.[1] It is presumed the "adhering" party has agreed to the terms of the contract. But even so, what imputation the arbitration clause carries will differ from case to case. Again it will be necessary to try to determine what the parties actually intended. However, where one party has agreed to all the terms of the "contract-type", he will have a heavy burden to show that he did not intend to agree to the inference carried by the arbitration clause with respect to the law applicable.

189. Furthermore, the arbitration provision may be the clause in the contract to which one party will agree with a minimum of argument, saving his bargaining card - and retaining good-will - for the more constructive and important terms of the contract. The businessman negotiating a contract is very much more concerned that there be provisions guaranteeing a fixed price, defining the respective obligations of the parties, protecting him from the default of the other party, and making provision for any unexpected occurrence i.e. force majeure, than the existence of an arbitration clause. The arbitration agreement, at the time of contracting, is certainly of very minor importance; Batiffol called it "un élément purement éventuel."[1] So where the parties have completed their negotiations to their mutual satisfaction and the contract is all but concluded, the businessman is very reluctant to allow a provision for what he considers a very unlikely eventuality to vitiate or even slow down the concluding of the contract.

(iii) Rational application of the qui elegit iudicem presumption[1]

190. As the foregoing weaknesses in the application of qui elegit iudicem elegit ius have become apparent, the presumption has lost much of its persuasive force. Today the presumption is rarely relied on per se: what authority it retains is only when combined with other factors. Of course it may be that the parties will choose the arbitration forum and intend its law to apply; but then again that intention might equally not exist. Where such an intention does exist the parties are free to and should indicate by means of a clear and unambiguous express choice

of law clause what that intention is. Where there is no express manifestation of intention, the arbitrators will be left either to decide in the particular circumstances of each case what the actual intention of the parties was, or alternatively, to determine the "proper law" of the contract, treating the choice of law forum as just another relevant factor to be considered for this purpose.

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191. This change in emphasis with respect to qui elegit iudicem elegit ius is clear from the doctrinal writings and the awards of the past few years. Thus the Czechoslovak arbitration tribunal which had so completely resorted to the qui elegit iudicem principle in the 1950's has more recently taken a very different approach. In one recent case[1], a Czechoslovak buyer came before the Prague tribunal claiming damages from the Ethiopian seller, alleging the latter had failed to deliver the agreed quality or quantity of linseed and niggerseed. When discussing the question of the applicable law the arbitrators posed for themselves the question "whether the submission to the jurisdiction of the arbitration court of the Chamber of Commerce of Czechoslovakia in Prague entered into under the respective contract is to be construed as a choice of law done tacitly?"

The arbitrators refused to apply Czechoslovak law: rather they held Ethiopian law to apply on the ground that the contract was to be performed "without the territory of the Czechoslovak Republic", the object of the contract was expressly stated to be Ethiopian linseed and niggerseed and the purchase price was payable in pounds sterling[2]. The award states:

> "In the opinion of the arbitrators it is not possible to conclude under these circumstances that the submission to the jurisdiction of the institutional arbitration court of the Chamber of Commerce of Czechoslovakia could be regarded as a choice of the Czechoslovak law done tacitly as it is impossible to maintain that in view of the circumstances there is no doubt as to the manifest will of the parties. In these circumstances the arbitrator could not but determine the governing law in accordance with the provisions of S. 10 of the Act No. 37/1963, Conflict of Laws. The latter provisions refer to the Ethiopian law as the law of the country where the seller has his seat (domicile)".

The arbitrator here based the choice of the applicable law on the 1963 Czechoslovak law. As the parties intention was not clearly manifest, the arbitrators were bound to weigh up all the relevant factors and on this basis found Ethiopian law to be applicable.[3]

192. The situation in the other socialist countries is much the same. Lebedev stated without any reservation "que la jurisprudence des tribunaux et des organes arbitraux ne s'en tiennent pas au principe selon lequel 'qui legit judices elegit jus."[1] The attitude of the Soviet arbitration tribunal in Oscar Meyer v Cogis[2] is conclusive proof of this.

With respect to Romania, the choice of the place of arbitration will be considered of importance where it is supported by some other connecting factor[3]. This can be clearly seen from the award of the Romanian arbitration tribunal in a dispute arising over the delivery of pig-iron by the Romanian seller to the Italian buyer[4]. The dispute arose out of the failure on the part of the buyer to open letters of credit as agreed. Applying their own private international law rules to determine the applicable law the arbitrators stated:

> "La Commission estime qu'il existe des motifs sérieux pour décider que les parties ont entendu soumettre leurs rapports juridiques plutôt à la loi roumaine - qui correspond tant au lieu d'exécution qu'au siège de la juridiction arbitrale - qu'à la loi italienne qui ne correspond qu'au lieu de la conclusion du contrat."[5]

The Bulgarian arbitration tribunal again will only consider the choice of arbitration in Bulgaria if it is supported by other factors. One case[6] concerned a contract for the sale by a Lebanese seller of several thousand tons of cotton to a Bulgarian buyer. The cotton was from the region of Izmir and delivery was to take place in Izmir. The Bulgarian buyer failed to open letters of credit within the time agreed and the seller resiled on the contract. The buyer brought his action for damages. With respect to the law applicable the arbitrators stated:

> "Considérant ces éléments internationaux bien contradictoires, qui rattachent le contrat à différents pays (soit la Bulgarie, la Turquie, le Liban), la Cour arbitrale estime qu'il ne sera tenu compte de la volonté des parties que si l'on attribue un rôle prépondérant à certains de ces indices à savoir: (1) le lieu de la conclusion du contrat, (2) celui de la destination de la marchandise, (3) celui enfin, où il a été convenu que les litiges éventuels devront être tranchés. La Cour retient ces indices et le contrat s'avère par conséquent rattaché au droit matériel bulgare. Pour conclure en ce sens, la Cour a également retenu que la modification du contrat est intervenue elle aussi á Sofia, lieu de sa conclusion. Elle constate encore que les obligations réciproques (celle de livrer la marchandise et celle d'en payer le prix) devaient en effet être exécutées à des lieux différents (la livraison à Izmir, le payement à Beyrouth)".[7]

The International Court of Arbitration for Maritime and Shipping Matters at Gdynia, Poland, also counted in the chosen place for arbitration when determining the law which the parties would have wanted to govern their relations.[8] The arbitrators held Polish law applicable

> "compte étant tenu du fait que la procédure se déroule en Pologne, que l'armateur en tant qu'entrepreneur est un sujet de droit polonais, et qu'il a son siège en Pologne et enfin que la navire bat pavillion polonais."[9]

Finally, despite the claims of Goldstajn[10] and Lunz[11], there is only one reported case[12] in which the Yugoslav arbitration tribunal has resorted to the qui elegit iudicem presumption. On the basis of that 1960 award alone, it cannot be suggested that the presumption forms any rigid or definite rule in the choice of law practice of the Yugoslav tribunal; it is like elsewhere just another factor to be considered.

Professor Skapski in his Hague lectures summed up the contemporary standing in the socialist countries of the qui elegit iudicem presumption in the following words:

> "Il en est de même avec le principe connu du droit anglais qui elegit iudicem elegit ius, qui n'est pas reconnu dans les pays socialistes. Le choix de la juridiction n'est pas automatiquement considéré comme équivalent au choix de la loi en viguer au siège du tribunal ou de l'arbitrage. Tout au plus il peut servir d'indice, à côté d'autres circonstances, à la reconnaissance du choix tacite de la lex fori."[13]

ICC Awards

193. The same development is clear in the awards of the ICC. In an award[1] between New York and French corporations concerning an exclusive licensing concession granted for France, the Dutch arbitrator applied French law as the proper law because "the agreement was in the first place to be executed in France, and ..... differences between the parties have to be decided by arbitration in Paris."

Again, in another case[2], the two French plaintiffs granted to the Swiss defendant the exclusive right to use their patent, including the right to sub-licence. The defendant was to pay an agreed percentage of the profit to the plaintiffs, but such payments were always to amount to a minimum of $10,000 per annum. The plaintiffs alleged that the defendant had not sufficiently exploited the patent and claimed damages amounting to $50,000. The plaintiffs requested an award ex aequo et bono; the defendant wanted the award based on law. Having stated his inability to act as an "amiable compositeur" in the absence of the agreement of the parties[3] the arbitrator continued:

> "Attendu que, en effet, que le contrat donnant lieu au présent arbitrage a été signé à Paris et que les parties ont fait élection au siège de CCI à Paris;
>
> "Attendu que, il doit, dans ces conditions, être presumé qu'elles ont voulu se soumettre à la loi française."

An interesting case[4] was one where the arbitrators, (one French, one Italian and one Belgian), had to determine the law to govern a contract for the importation of goods into France, made between an Italian seller and a French importer. All the factors were equally divided between Italy and France. They decided finally to apply Italian law because other than the fact that the parties had expressly provided that the arbitration take place in Rome, there was no other more realistic way to determine which law the parties wanted applied[5].

3. Implied Autonomy in International Commercial Arbitration Today

194. What conclusions then can be assumed with respect to implied choice? It would appear that in international arbitration an implied choice of law will be recognised and respected. However this can only be to the extent where that implication through the facts and circumstances give a very clear indication of the parties' intention. The criticism levelled above, that it is not possible in the absence of an express choice for arbitrators to be absolutely certain what the parties actually intended when contracting, remains. The confusion will be even greater where the parties are both before the arbitrators, each arguing for the application of a different system of law. For this reason, the burden of proving an implied choice of law is a particularly heavy one and falls on the party alleging its existence. Only if that burden has been proved to the satisfaction of the arbitrators will they apply the law "impiedly chosen". So, if an arbitrator feels such an implied intention does exist and has been manifested he will no doubt give it effect. However, the level of this burden of proof and the difficulty of satisfying it, is clear from the very few awards in which the arbitrators have determined the applicable law on the basis of an implied choice alone.

195. As will be seen, the recent tendancy in the international arbitration arena - as in domestic private international law systems - has been towards a grouping of contacts for the choice of law. Whilst party autonomy is a choice of law rule which has attained a sufficient degree of international acceptance to have become an international rule , the same is not true in practice for implied autonomy. The implied choice of law is a branch of party autonomy and as such must also be accepted as a limb of the international rule. Nevertheless, not supported by the logic and simplicity fundamental to express choice, the burden of proving the existence of an implied choice is naturally a heavy one. The preference has developed from practice and convenience to consider any factor(s) indicating an implied choice of law into the melting pot together with all the other factors normally considered when determining the "otherwise applicable law."

Frequently it will be found that the factor(s) indicating an implied choice will point to the same law as those other factors. In such cases it will not be necessary for the arbitrators to decide which choice of law rule to apply: there will be a "false conflict"[1] as the conflict rules will both (or all) lead to the same result. Only where the "impliedly chosen law" differs from the "otherwise applicable law" will it be necessary for the arbitrator to make a positive choice of law.

196. Where there is a true conflict, i.e. the implied choice and the otherwise applicable law differ, the arbitrators will have to decide themselves which law to apply. It is not possible to state a general rule or even general guidelines to apply in every such situation. There are insufficient awards dealing exclusively with this problem for any general practice to have become apparent. What does appear to emerge from the awards - and this surely must be the only solution - is that arbitrators will in each case determine just how strong the particular implication is, and whether it is sufficient to outweigh the "otherwise applicable law." So e.g., where all the factors point to the law of State X, but the agreement is drafted in the language of State Y, the arbitrators may consider the implied choice of the law of Y too remote to outweigh all the other factors pointing to the law of X. On the other hand, where the factors point to the law of more than one State, and there is an arbitration clause, the arbitrator may feel in the circumstances it would be right to apply the law of the chosen place for the arbitration[1]. Furthermore, and this is of great assistance to an arbitrator, when looking at the connecting factors indicating an implied choice of law, the arbitrators will take into consideration the usages of a particular trade and/or the expectations of those participating in that business or industry. Thus e.g. a clause in a shipping contract providing for arbitration in London[2] will carry a stronger presumption for choice of law than a clause providing for "arbitration at the ICC in Paris" in a general sales contract or a clause for ICSID arbitration in an investment contract.

PART II

DETERMINATION OF THE APPLICABLE LAW

- BY THE ARBITRATORS

197. However desirable it may be that the parties expressly make a provision in their contract as to the law applicable there are many reasons why, despite the advice of their legal advisers, they will either fail or decline to do so. As already pointed out in many respects the choice of law clause to a businessman is a question of minor importance. He is more concerned with the commercial clauses dealing with the actual substance of the contract. What might appear of great importance to the lawyer is of minimal importance to the businessman. Whilst the businessman thinks of commercial certainty his lawyer, somewhat more negatively, thinks of possible eventualities.

For this reason, the businessman may be reluctant, having completed what he considers a commercially sound contract, to vitiate all his work merely because of the inability of the parties to agree on the law to govern. In such cases businessmen may either agree to leave the question for the time-being, or perhaps if anticipating difficulty will merely refrain from discussing it. Rather they will leave the matter to be dealt with if and when any dispute should arise.

198. There are in any case practical reasons why for certain types of contract parties may be ill-advised to express a choice of law. For example, with respect to a long term joint venture contract, particularly in east-west trade or trade with the developing world, there will often be no one legal system sufficiently sophisticated and developed to deal with the many and various intricate aspects involved in such a contract. Furthermore, in the political instability of the present, parties may not wish to tie

their relations to the law of any particular State. Instead they prefer to draft their contract in clear and very detailed form and remain mute with respect to the law applicable. In this situation they will know that in the event of a dispute arising the rights and obligations under their contract will be construed by arbitrators who as experienced businessmen and commercial lawyers, would apply the general principles of law, relevant commercial usage, good business sense and commercial bona fides.

Of course another reason, perhaps the most common, why parties may not express a choice of law is simply that they either forgot when looking at all the other questions, or they just did not think of it.

199. Whatever their reasoning, if the parties have failed to indicate, expressly or impliedly, what law (or other yardstick) they wish should govern their contract, the arbitrators will have to decide the question of the applicable law themselves. Until such time as they have decided this question, the arbitrators will be unable to measure the parties' respective legal rights and obligations under the contract. As often the determination of the applicable law will in itself be sufficient to give an answer to the dispute, the vital importance of how the arbitrators actually resolve a conflict of laws is obvious[1].

200. Of course it is essential, before any tribunal need attempt to resolve a particular conflict of laws, that a conflict be established. If neither party suggests a conflict and both argue on the basis of the same legal system, or if no question of law is involved, the arbitrators will not have to determine the law to apply. So, in an ICC award rising out of the breach of a license agreement between Swiss and French companies the arbitrators held:

> "Ainsi qu'il apparaîtra ci-après, les rapports juridiques entre les parties sont entierement régis par ce qui a été convenu entre elles. Ni l'une ni l'autre des deux parties n'a invoqué aucune disposition de loi susceptible de limiter ou de compléter ce qui avait été convenu. Il n'y a donc aucun motif pour décider quel est le système juridique (suisse, français ou autre) qui régit le rapport contractuel entre les parties."[1]

There being no question of law in dispute, there was no need for the arbitrators to determine the law applicable and they decided the dispute entirely on the facts.

However, it must be conceded, in certain arbitrations and particularly those before the arbitration tribunals in the socialist countries, a determination of the law to govern the substantive dispute will be made, even though it be quite unnecessary and there be no question of law in dispute.

201. But where there is a genuine conflict of laws the problem arises as to how the arbitrators should determine the applicable law. Should they attempt to subjectively determine what the parties would have chosen had they considered the question? Should they objectively determine what reasonable businessmen in the situation would have intended? Is there some pre-determined choice of law presumption to which they can resort? Or is there some other way of determining the law to apply?

202. Within a national court the solution is prima facie quite simple: the judge will apply the private international law rules of the forum. Indeed, a judge in a national court is obliged to adhere to the conflict of laws rules in his country. After all, the forum conflict of laws rules are just as binding on the judge as any other forum law. National conflict of laws rules, like most other forum rules, have been developed through the legislative and judicial systems of each country. Thus Dr. Schmitthoff writes:

> "The rules pertaining to the conflict of laws ..... are not of an international character, but form part of the national law of a country and are enforceable in the same manner as the rules of any other branch of law prevailing in that country."[1]

203. An international arbitration tribunal, unlike a national court, has neither its own mandatorily applicable conflict of laws rules, nor any other conflict of laws rules to direct it to the applicable law. The arbitrators thus find themselves in the unenviable position of having to resolve a conflict of laws problem in a vacuum. Unlike judges they do not have their own conflict of laws rules and yet as international arbitrators they may still have to determine the law to apply.

Of course, the rules of some permanent arbitration institutions do provide in themselves certain choice of law provisions. So for example, article 29 of the Rules of the Court of Arbitration at the Polish Chamber of Foreign Trade provides:

> "The tribunal shall apply that country's law, which has been chosen by agreement of the parties, and in absence of such choice, the law which in the opinion of the tribunal is most clearly connected with the relation of parties in litigation. The tribunal shall take into consideration the principles of equality and of customs in so far as they are permitted by the proper law."[1]

Again, article 12 of the Rules of Arbitration for the Chamber of Commerce and Industry of Amsterdam similarly provides:

> "The arbitrator or the arbitrators shall conscientiously give an award in fairness, unless parties have stated at the outset of the arbitration, that they wish the award to be issued according to the rules of law."[2]

In this case the basic standard is the arbitrators notion of "fairness" except where the parties expressly indicate that they wish the award to be based on the law. In this latter eventuality, no help is given (other than presumably autonomy) as to how the arbitrators shoud determine the applicable law.

The arbitration rules of the London and the Bradford Chambers of Commerce in similar terminology impose clearly on the arbitrators a duty to observe and apply English law; however, they do allow the escape of an expressed alternative agreement. It is thus provided by Rule 8 (h) of the Bradford Chamber of Commerce Arbitration Rules:

> "Unless otherwise agreed by the parties, in any reference to arbitration under these Rules, the law governing the contract, agreement or matter in dispute and the Arbitration Agreement if not included in the said Contract and the validity, construction and performance thereof, shall be English law."[3]

Similarly narrow choice of law provisions - if they can be called choice of law provisions at all - are contained in the arbitration rules of certain commodity institutions in England. So the Rules relating to Arbitration of the Sugar Association of London provide in Article 406:

> "For the purpose of all proceedings in arbitration, the contract shall be deemed to have been made in England, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding, and England shall be regarded as the place of performance. Disputes shall be settled according to the law of England wherever the domicile, residence or place of business of the parties to the contract may be or become."

Rule 194 of the Coffee Trade Federation Arbitration Rules makes identical provision.

Regretably most arbitration tribunals do not give any indication as to the law or other yardstick to be applied by their arbitrators. In the main, those provisions which do exist are statements as to the law or non-legal yardstick to be applied and appear to leave little discretion to the parties or the arbitrators. Thus, with respect to the latter standard, article 12 (1) of the Arbitration Rules of the Netherlands Coffee Trade Association provides that "arbitrators shall give their award like good men and true". Similarly Article 8 (4) of the Netherlands' Oils, Fats and Oilseeds Trade Association Rules for Arbitration provides that "arbitrators shall give their award as good men in equity."[4]

204. However, where on the other hand the tribunal's rules do not contain any provision as to the applicable law, or of course where the arbitration is ad hoc, the arbitrators are really on their own in determining the law to apply. Two main solutions have been advocated in this respect: the arbitrators must resort to either some existing national conflict of laws system, or alternatively can apply international conflict of laws rules. However, is it necessary for arbitrators to apply any conflict of laws system? Would it not be preferable for them to make a direct choice of the national law or other standard which their common sense and commercial experience suggest to be most appropriate for the particular circumstances?

We shall divide the ensuant discussion into three sections. In section one we shall consider the application by arbitrators of some system of private international law. Then, in section two, we will look at the various legal and extra-legal standards directly applied by arbitrators without resort to any rules of private international law. Finally, in section three, we will consider what restrictions are imposed on arbitrators by the doctrine of public policy.

SECTION I. APPLICATION BY THE ARBITRATORS OF A SYSTEM OF PRIVATE INTERNATIONAL LAW

CHAPTER I. THE APPLICATION OF A NATIONAL SYSTEM OF PRIVATE INTERNATIONAL LAW

205. Despite its origin as a "supra-national law"[1] and its "notoriously misleading name"[2], private international law is not international[3]: it differs from country to country and is only enforceable within a given territory to the extent that the law of that territory so provides[4]. Even with the many efforts aimed at unification and internationalisation, "every system of private international law is a system of national law"[5]. Hence it is only within national law that conflict of laws rules effective and appropriate for international commerce have been developed.

206. The problem for every arbitrator is to which national system of conflict of laws he should refer. Should he apply the conflict rules of the place where the arbitration institution has its headquarters? Or the place where the arbitration tribunal has its seat? Or the rules of the place where the arbitration is actually held? Should the nationality or domicile or residence of the sole or third arbitrator be relevant in determining the national conflict of laws system to apply? Or perhaps the conflict of laws system of the country in which one (or both) of the parties had his permanent place of business or was a national or was resident should be applied?

207. Three main proposals have been put forward as to the national private international law system to be referred to in an international arbitration. They are:

- that expressly chosen by the parties;
- that impliedly chosen by the parties; and
- that of the "loi du siège d'arbitrage".

We shall consider each of these in turn.

A. The System of Private International Law Expressly Chosen by the Parties

1. THEORY

208. The simplest solution is undoubtedly for arbitrators to apply a conflict of laws system chosen by the parties. This of course alleviates the arbitrators from the burden of selecting themselves the conflict of laws system to apply. It equally will exclude the parties subsequently alleging that some irrelevant or partial conflict of laws system was applied.

We have seen that party autonomy is today fundamental to and "taken for granted"[1] in international arbitration. If parties can select the law to govern the substance of their relations, they must surely also be entitled to select the conflict of laws system which would indicate to the arbitrators the law to govern[2]. Though somewhat indirect, the choice of conflict system or rules to be applied manifests the intentions and expectations of the parties. The application of the chosen conflict system is consequently little more than a recognition of the autonomy of the parties.

Furthermore, it is today "generally admitted that the will of the parties can arrange the arbitral procedure."[3] The appointment of the arbitrators, the times, place and mode of hearing, the method and time-limits for entering and answering pleadings, the taking of evidence, the burden of proof, etc., are all dependant initially on the will of the parties; equally the parties may determine the conflict of laws system to be applied. Any agreement on these matters must be respected; failure to do so could result in the arbitrators being disseized or the award being unenforceable.

209. One limitation to the right of parties to themselves select the conflict of laws system or rules to be applied, may arise in the arbitration tribunals of the socialist countries. The very strong connection between the arbitration institution and the State in the socialist countries[1] has resulted in the invariable practice in all those countries for arbitrators to apply the private international law rules of the country to which the tribunal belongs[2]. Thus one commentator stated, "all the arbitration commissions apply the conflict of law rules according to the lex fori."[3]

It would consequently appear that a choice of conflict of laws rules, other than those of the forum, would present a socialist arbitration tribunal with an unenviable dilemma. Assume that the parties submit their dispute to a socialist arbitration tribunal (e.g. the Soviet Foreign Trade Arbitration Commission in Moscow), and at the same time, expressly chose a different conflict of laws system to apply (e.g. English conflict rules). The tribunal would be faced with three alternatives: firstly, to accept jurisdiction on the parties' conditions; secondly, to refuse absolutely to accept jurisdiction; or thirdly, to accept jurisdiction but to refuse to give effect to the choice of English conflict rules.

The second possibility would be the easiest and the cowards way out; it would be to deny the parties the services of the tribunal which they have mutually chosen and in which they have both expressed confidence.[4] The third possibility is to deny the notion that arbitration is based, organised and run in accordance with the wishes of the parties, and in the process would deny to the parties their right to regulate the conduct of the arbitration.[5] It would have the further effect of denying the parties the right recognised under Soviet law to choose the law to govern their relations.[6] It must be remembered that failure or refusal to adhere to the instructions of the parties, would subsquently be grounds to refuse to enforce the award.[7]

The first possible solution is the preferred, as in that way the wishes of the parties can be given effect in accordance with the flexibility fundamental to arbitration. However, whether the tribunal would accept the submission at all, will depend on the extent to which the FTAC would consider itself bound to the rules of Soviet private international law. There is, however, no known case where this exact problem has been confronted.

210. Illogicality of the parties choosing the conflict of laws system.

Whatever the legality of the choice of conflicts system to apply, contracting parties would be better advised to devote their energies to the selection of the substantive law to be applied. If the parties are able to agree on the substantive law to govern their contract, it is preferable that they do so directly, with an express, clear and unambiguous choice of the law to govern their contract. To indicate the law which the parties wish should govern by means of or through the application of a given system or a particular rule of the conflict of laws is both cumbersome and haphazard.

Before choosing a particular national law to govern a contract, the parties (or at least their advisers) will be, or will make themselves, conversant with the possibly relevant provisions of that law. Presumably, the parties and/or their advisers will undertake some research into the particular law and will give much thought to the implications arising there-from, before proposing or agreeing to the application of that particular law.[1] This problem is particularly acute and far more complicated where the agreement concerns an involved and highly technical long-term trans-national contract, involving several parties of different nationalities, with elements touching several different countries and involving several different legal problems, perhaps with differing dimensions. If parties wish to select the conflict

of laws rules to apply, they must not only research the various laws to decide which they desire should be applied, but they must also research which system of conflict of laws will lead to the application of the law they wish to govern their contract. The latter will often be extremely difficult bearing in mind how frequently conflict of laws systems are uncertain or ambiguous. Even where the parties have done the requisite research, the choice of applicable law to be given effect through or via a chosen system of conflict of laws could be aborted by an unforseen, unexpected or bizare classification of the dispute. The arbitrators may thus apply to the substantive dispute the law designated by the chosen conflict system in accordance with their classification though not the same law as that intended and expected by the parties.

2. PRACTICE

211. Perhaps it is for the foregoing reasons that in this study, no arbitration awards have been found in which the parties have made an express choice of the conflict of laws system or choice of law rules to be applied.

B. The System of Private International Law 'Impliedly' Chosen By the Parties

1. THEORY

212. The right of parties to choose the system of conflict of laws to be applied can also be considered to extend to implied choice. If the intentions of the parties as to the law to govern their relations can be implied, there can be little reason why a similar extension should not be given to the right of the parties to choose the conflict of laws system to govern their relations. The conflict of laws rules 'impliedly' chosen are determinable from the facts and circumstances of each case. Thus it is from the form and content of the arbitration agreement that the arbitrators will determine the legal system which the parties intended to govern the arbitration, and naturally the conflict of laws rules of that system as well.

213. But what is meant by an implied choice of the conflict of laws system to appl The most obvious examples are where parties agree that the arbitration shall take place in a particular country and/or under a particular legal system or in accordance with the arbitration provisions of a particular law. So, for example, a provision that arbitration proceedings shall be held in Sweden could enable the arbitrators to infer a desire on the part of the parties for Swedish conflict rules to be applied. Again a provision that the arbitration agreement be construed and interpreted and the arbitration proceedings conducted in accordance with English law may be considered a manifestation of the intention that English conflict of laws rules be applied. And again, a provision for arbitration to take place under the rules of e.g. the Court of Arbitration at the Polish Chamber of Foreign Trade can be thought to show a choice of Polish private international law rules.

214. However, can it really be suggested that the parties 'impliedly intended' that particular conflict of laws rules be applied? After all, few businessmen even know what is meant by conflict of laws rules; and those that do will rarely appreciate when and how such rules are applied. If the parties had thought of it and had been so minded, no doubt they would have expressly chosen the conflict of laws rules to be applied. They having expressed no intention as to the applicable law there is neither logical nor sensible reason to justify an 'assumption' that the parties intended the application of a particular conflict of laws system.[1]

215. Despite the foregoing there have been cases in which arbitrators have attributed to the actual agreement of the parties an implied choice of conflict rules. We shall consider separately arbitration ad hoc, under the rules of the ICC and at the national arbitration institutions.

2. PRACTICE

a) Ad Hoc Arbitration

216. A choice of the private international law rules to be applied was inferred in the Alsing Case[1]. The dispute arose out of a 28 year contract made in 1926 under which the Swedish plaintiffs were granted "the exclusive provisioning of any quantity of matches necessary for the Greek (Government) monopoly .... and for the consumption of the country in general".[2] This contract was made simultaneous to and in part consideration for a £1 million loan to the Greek State repayable over 28 years at 8½% interest. The contract contained provision for disputes arising out of the contract to be resolved by two arbitrators sitting in Greece; and if they were unable to agree, then by an umpire of Swiss or Dutch nationality. At the end of the 28 year period the loan had not been paid off. The plaintiff argued inter alia

(i) that as the contracts had been suspended during the second world war and (ii) that as the two contracts were inter-linked, their concession to supply the Greek monopoly with matches should be extended for the period of time lost due to the war and/or until the loan was paid off.

The arbitrators were unable to agree and Monsieur Python, President of the Swiss Federal Tribunal, was invited and agreed to act as umpire. In determining the proper law, he looked to Greek private international law, explaining himself in the following words:

> "The arbitration proceedings having been carried out in Greece in conformity with the arbitration clause found in Article 10 of the supply contract, it is Greek private international law, as 'lex fori', which must be used to determine the applicable law. It is true that the parties submitted, in case of disagreement between the two arbitrators appointed, to the decision of a Swiss or Dutch umpire. But in so doing they did not agree that, at this stage of the arbitration proceedings, the law to be applied should be redetermined according to the rules followed by the judge newly called upon to settle the dispute without appeal, and whose nationality was not yet certain. It is not conceivable that in the same trial the law to be applied to the main issue could possibly change during the course of it."[3]

Thus the choice of Greece as the country in which the arbitration proceedings were to take place was held to be a choice of Greek private international law. It is submitted that this implication was unjustifiable: Greece was chosen for reasons of convenience and not because of a desire on the part of the parties to submit to Greek private international law. The Umpire himself sat in the Swiss Canton of Vaud. Furthermore, the Umpire declined to apply either Swiss or Greek law to govern the arbitration procedure. Relying on the Geneva Protocol on Arbitration Clauses of 1923, the Umpire held Greek procedural law to be inapplicable because the tribunal was not sitting in Greece[4], and Swiss law was subsidiary to the procedure agreed upon by the parties. Monsieur Python stated:

> ".... according to the Protocol, the territorial law applies only in a subsidiary fashion, in the absence of provision made by the parties and the arbitrators appointed by them. In this respect the rules of procedure agreed upon by the parties are the only ones valid here .... Indeed, in international arbitration under the Protocol, even the imperative provisions of the internal law must give way to the will of the parties..... As for the procedure applicable to the inquiry and to the decision, the umpire, exercising the power conferred upon him by the parties and, in view of the fact that, in the present stage of the proceedings, the case falls within the exclusive competence of a Swiss Federal judge exercising his powers in Switzerland, decides to apply the federal law of civil procedure to all questions not governed by the rules agreed by the parties....."[5]

Logically, following the Umpire's reasoning, Swiss private international law should have been applied. However, the question of the law applicable was resolved in favour of Greek law on the basis of party autonomy. The plaintiffs were ultimately held unable to succeed.

217. The provision in a contract for arbitration to be ad hoc in a particular country does not manifest any intention as to the conflict of laws rules to be applied. Whatever reasons induce parties to choose a particular country as the place where the arbitration be hald - its neutrality, its geographic or climatic convenience, or even perhaps because the arbitrator is resident there - it is certain the merits or sophistication of the conflict of laws system of that country will have had little if any influence. It is highly unlikely that even the most conscientious lawyers would investigate the conflict of laws system of a country before agreeing to that country being selected as the place of arbitration. It is surely only in extremely rare cases that the parties will actually have thought of in advance and will intend the conflict of laws rules of the place of arbitration to be applied.

b) ICC Arbitration

218. A submission to ICC arbitration is an attempt to avoid the procedural and other restrictions in all national legal systems: this includes a desire to avoid national conflict of laws rules. However, the ICC does have its permanent headquarters in Paris. Can a provision in a contract for ICC arbitration be considered to imply a choice of French conflict of laws rules?

That the ICC has its permanent headquarters in Paris does not mean that the arbitration will take place in France; indeed we have already considered many ICC awards made elsewhere than in France. The arbitration will be held in a place agreed between the parties, or where they are not agreed will be fixed by the ICC secretariat in accordance with the practicalities of the particular case, and the convenience of the arbitrators, the parties and itself[1]. This situation does not provide an adequate connection or sufficient stability for any implication to be drawn as to the national conflict of laws rules to be applied. Furthermore, regardless of where the proceedings are initially held, subject to the agreement of the parties and/or the decision of the arbitrators, the place of the arbitration may be held, with the effect that different stages of the proceedings would be held in different countries. Is it to be suggested that the conflict of laws rules change with each move?

Nonetheless there are ICC awards in which a choice of conflict of laws rules appears to have been implied[2].

219. In one 1958 case[1] a dispute arose between four private individuals, two joint plaintiffs, one American and one French, and two joint defendants divided similarly as concerns nationality, parties to a contract for the manufacture and

distribution of films, gramaphone records and television shows all over the world. The sole arbitrator appointed by the ICC was a respected and well known English Q.C. In discussing the law to be applied the arbitrator said:

"The first question is under what system of law must this issue be decided:

(1) Having regard to the fact that the contract was signed in France and contains an arbitration clause providing for arbitration in Paris, the law applicable in this arbitration is French law - being the law which the parties indicated as being the law applicable.

(2) This raises the question of whether under French law the law of any other country would be applied. The two possible laws are English and American.

(a) As to English law, the only element is that the contract is in English. Otherwise, the contract has no special connection with England. Therefore, under the rules of French Private International Law, English law does not apply to the validity or interpretation of this contract.

(b) As to American law there is the fact that two of the parties one on each side, M. B and M. C are American and there is reference in the contract to payment in dollars - these are not sufficient facts as to lead to the application of American law - further there is no such law as "American" law but only the law of some State of the United States and there is nothing in the contract to indicate one State more than another. For these reasons "American" law is not applicable.

(3) The law applicable is therefore internal French law because the rules of French Private International Law do not demand the application of any foreign law in the circumstances of the case and all the main factors in the contract such as the place where the contract was signed and the place where the arbitration is to be held - in both cases Paris - and reference to French currency indicate the application of French internal law. The law applicable is, as the defendants contended in a note Annex IV, French law." (Emphasis added).

From a literal interpretation of the first paragraph quoted above it would appear that the arbitrator had decided that French law governed on the basis of the qui elegit iudicem elegit ius principle. However as can be seen from the facts a proper law approach would also have been quite satisfactory and led to the same result. What does seem a little strange - and contrary to all views of renvoi[2] - was the reading of the choice of French law as including the French

rules of private international law. Nevertheless, whatever the reasons, it is clear that despite a factual situation in which the contract was most closely connected with France, the arbitrator still felt it necessary to go through the motions of determining the law to govern. Applying French private international law rules on the fictional basis of their having been chosen by the parties, the arbitrator came to conclude that French law was the law of the contract because neither English nor American law were applicable under the rules of French private international law!

220. This concept can be further seen from an award between a Swiss merchant and a Bulgarian State trading corporation[1]. In that case, the sole French arbitrator held that by agreeing to ICC arbitration in France and with a Frenchman as sole arbitrator, the parties had agreed to French law to govern every aspect of the arbitration proceedings, and this obviously includes French private international law rules.

> "Les parties sont d'accord pour considérer que .... le droit français est applicable, tant pour la procédure que pour le fond du droit. Les parties se sont déclarées d'accord sur la désignation d'un arbitre unique français".

As this arbitration involved only the capacity of drying machines and the defendant's obligation to pay for them, the choice of French private international law rules was of no practical importance.

221. In ICC arbitration neither the place where the institution has its permanent headquarters nor the venue of the actual proceedings can be considered indicative of any intention of the parties. Any inferences to be drawn must be based on an expressed desire that the arbitration proceedings be held in a given country.

In every case arbitrators must thus determine whether the choice of a particular city as the place of arbitration also carries with it an implied choice of the procedural and private international law rules of that place. The burden of proving the existence of such an intention is a heavy one which should be supported by some other considerations. One award in which an arbitrator found the existence of such an intention was where the parties had agreed on ICC arbitration to take place in Zurich. Andre Panchaud, the respected judge of the Swiss Federal Court was appointed the sole arbitrator. He said when discussing the law to apply to the parties' contractual obligation:[1]

> "Si l'on se refère à la volonté des parties, on s'en tiendra au droit suisse en tant que lex fori, l'arbitre ayant été designé en vertu d'une clause compromissoire qui soumet la contestation à la connaissance de la Chambre de Commerce Internationale en Suisse (art. XVI du contrat du 11 février 1952)."[2]

c) National Arbitration Institutions

222. These institutions not only have their permanent headquarters and secretariat in one country but also arbitration proceedings under their rules are invariably held in that same country. When submitting to such institutions parties must accept to conform to the rules or charter of that institution. Such rules or charter may contain specific conflict of laws provisions to regulate a conflict situation[1], or alternatively, may provide that a given system of conflict rules be applied in a conflict situation[2]. However, where there is no help in the institutions' rules or charter arbitrators may naturally be greatly tempted to apply those conflict rules they know best, their own; that will often mean the conflict of laws rules of the place where the arbitration proceedings are being held or where the arbitration institution is situated.

Not surprisingly, because of the lien between permanent arbitration institutions and the country where they are situate, and the natural tendancy for arbitrators to favour their own law, an argument akin to the qui elegit iudicem presumption

has developed with respect to the procedural and conflict of laws rules to apply. In this context it is contended the presumption has greater merit than it has in the area in which it is normally considered. Where parties submit to a permanent national arbitration institution, there is some support for the contention that they accept and adopt all the machinery normally applied by that institution: perhaps it was for exactly that purpose - and to avoid the machinery of their respective national courts - that they chose to submit to that tribunal. The machinery of the arbitration tribunal includes, where appropriate, the local conflict of laws rules to which the tribunal may resort.

On the other hand however, the adoption of any rigid formula could have the effect of negating the parties' purpose of submitting to arbitration, i.e. to avoid the strictures of the normal court system, including the rigid application of a particular conflict of laws system. Whatever the content of the rules or charter of the particular arbitration institution seized, and whatever the lien between the instition seized and the State in which it is situate, it is submitted the needs of international trade require that arbitrators treat both the rules of the arbitration institution and of the State more as principles of guidance rather than as fixed, rigid and mandatorily applicable rules.

It is necessary here to look separately at the choice of conflict of laws rules to be implied in a submission to a national arbitration institution in (i) western and in (ii) socialist countries.

(i) Western tribunals

223. As already noted, arbitration institutions in the market economy countries are generally created by business men to serve their needs. The State in which they were created and in which they normally act was neither instrumental nor involved in the creation of the institution. The permission of the State to

create an arbitration institution is invariably unnecessary. Such institutions are thus private, totally independent and non-national. In consequence, there is little, if any, lien between the local State and the arbitration tribunal; they do not have a lex fori and are not bound to the strictures of the law of the place where they are situate. Arbitrators appointed under the rules of such an institution may, if they wish or need to apply some conflict of laws rules, resort to the provisions in the institution's Rules of Procedure[1], look to the local or some other national or supra-national body of choice of law rules, or merely apply the substantive law the arbitrator thinks necessary. For this reason it is not a viable argument, although it may frequently be the effect, that a submission to an arbitration tribunal in a market economy country is a choice of the conflict rules of the place where that tribunal is situate.

(ii) Eastern European tribunals

224. By contrast, one of the major effects of the very close lien which exists between the State and the arbitration institutions in the socialist countries is the reliance of arbitrators appointed by these institutions on the private international law rules of the country in which they are situated. Indeed, the Rules of the Court of Arbitration attached to the Chamber of Foreign Trade in the German Democratic Republic expressly provide that "the private international law of the German Democratic Republic" must be applied to determine the applicable law[1].

So at the outset, to determine the law to govern the substance of the contract "all the arbitration commissions apply the conflict of law rules according to the lex fori"[2]. This will be the legislative enactment in those countries where there is one[3], or the rules which have developed through the cases where there is no such enactment[4]. Certain arbitration tribunals[5] however provide in their rules particular conflict of laws provisions to be applied. In such circumstances, if the tribunal's rules differ from the national conflict of laws rules, i.e. the lex fori, the tribunal's rules are generally preferred as a lex specialis[6]. This has led one writer to express regret that "les arbitres soviétiques donnent ainsi l'impression de ressembler à des juges appliquant tout naturellement la règle de conflit de leur for"[7].

225. This can be well illustrated by the reasoning of the Arbitration Tribunal of Bucharest in an award between German and Romanian parties[1]. When wishing to determine the applicable law, the arbitrators said:

> "In this respect, the Commission must take into account: that for defining the relevant law to govern the relations between the litigious parties use should be made, according to a constantly accepted principle, of the conflict rules of the judicial authority;
>
> "that art. 43 of the Rules of the Arbitration Commission by the Chamber of Commerce of the Romanian People's Republic explicitly prescribes that its provisions are supplemented with all the provisions of the laws of the Romanian People's Republic, a prescription which means that the Rules are also supplemented with the conflict rules of the Romanian private international law;
>
> "that in the case when the Arbitration Commission was faced with the problem of defining the relevant law to govern the substances of juridicial relations become disputable (lex causae), use has constantly been made of the conflict rul s of Romanian private international law;
>
> "that is keeping with these rules, the substance of the dispute being with regard to a sale-and-purchase contract, it is a matter where the Romanian private international law accepts the principle according to which the contract, its effects and consequences may be governed by the law convenanted by the parties;
>
> "that however, in the case of point, such a covenant had been made neither on concluding the contract nor subsequently, during the debates, with the claimant maintaining that relevant is the German law (art. 155, 157 and 158 of the German Civil Code) as a law of the place where the contract was concluded, while the defendant upholding that the Romanian law should be applied as a law of the place of performance, hence the Commission being the one to establish the law applicable to the juridical act occurred between the parties;
>
> "that according to the Romanian legal (arbitral) practice in the absence of the parties concordant expressions of will at the date of the conclusion of the juridicial act, the latter and the relations resulting from it are considered to be subject, generally - as the claimant also pointed-to the law of the place where the act was concluded, as the chief link in a matter like the one under discussion.
>
> "Consequently, since the act was concluded in Frankfurt-am-Main, the Commission is to resolve the dispute in keeping with the prescriptions of the German substantial law i.e. the German Civil Code."

A similar approach was taken by the Soviet FTAC in their award between Romulus Films Limited v Sovexportfilm[2]. That case arose out of a contract made in London whereby the Soviet defendant corporation had sold to the English

plaintiff the exclusive right to distribute to the cinemas and television networks in the U.K., the Republic of Ireland and on board British ships, the Soviet film version of "Sleeping Beauty". The defendant was to provide the plaintiff with the film ready for distribution at both 70 and 35 millimetres. Due to an accident in the USA when a part of the negative fell off the back of a lorry and was lost, the defendant was unable to deliver a satisfactory 35 mm version of the film. The English plaintiff brought the arbitration proceedings claiming damages for breach of contract. With respect to the applicable law the plaintiff argued it was English law; the defendant maintained it was the law of the USSR. The FTAC found for the plaintiff; what is quite clear (and was accepted by the parties in their pleadings) was the arbitrators reliance on the conflict of laws rules of the USSR. The arbitrators held:

> "La question de la loi applicable au contrat du 30 juin 1964, conclu entre la Objedinenije at la Societé, est tranchée par l'article 126 des Principes de droit civil de l'U.R.S.S. et des Républiques fédérées auquel correspond l'article 566 du code civil de la R.S.F.S.R. Dans le cas présent, le différend se rapporte à des relations nées d'une transaction de commerce extérieur faite en Angleterre et ne contenant pas de stipulation sur la loi applicable. En conséquence, d'après l'article 126 des Principes de droit civil de l'U.R.S.S. et des Républiques fédérées, la Commission d'arbitrage du commerce extérieur doit appliquer au contrat du 30 juin 1964 la loi du lieu de la transaction, à savoir la loi anglaise." (Emphasis added).

An award[3] of the arbitration court of the Czechoslovak Chamber of Commerce concerned a contract for the purchase by the Czech plaintiff of linseed and niggerseed from an Ethiopian seller. With respect to the applicable law, the Czechoslovak tribunal held:

> "In the opinion of the arbitrators, it is not possible to conclude under these circumstances that the submission to the jurisdiction of the institutional arbitration court of the Chamber of Commerce of Czechoslovakia could be regarded as a choice of the Czechoslovak law done tacitly .... In these circumstances the arbitrators could not but determine the governing law in accordance with the provisions of Section 10 of the Act No.97/1963, Conflict of Laws. The latter provisions refer to the Ethopian law as the law of the country where the seller has his seat (domicile). Thus the arbitrators considered this case in accordance with the Ethiopian law of 1960."

The practice of socialist arbitration tribunals applying their own rules of of private international law "se conforme ainsi à sa jurisprudence absolument constant."[5] It is beyond doubt that arbitrators will consider a submission to an arbitration tribunal in the socialist countries a tacit acceptance that the private international law rules of the country in which the chosen tribunal is situated will be looked to to resolve any conflict of laws question.

C. The System of Private International Law of the 'siège d'arbitrage'

1. THEORY

226. The "traditionally"[1] most favoured view is that arbitrators must resort to the private international law rules of the place where the arbitration is being held or where the arbitration tribunal has its "seat", i.e. "le siège du tribunal arbitral"[2]. This view is developed from the assumption that there must and can only be one legal system which governs the arbitration. The relevant provision of that legal system is known as the lex (loci) arbitri or the "loi de l'arbitrage".

Dr. Mann has argued "that the loi de l'arbitrage is the law of the country in which the tribunal has its seat".[3] Indeed, Dr. Mann emphatically stated: "The lex arbitri cannot be the law of any country other than that of the arbitration tribunal's seat".[4] To have legally binding effect, any act of the parties must be sanctioned by the law; and only the law of the place where that act takes place can give it effect.[5] So for arbitration, this viewpoint advocates and intends the application of one legal system to every aspect of the proceedings.[6] Thus the lex arbitri governs the right to consider the subject-matter of the arbitration, the nomination, appointment and removal of the arbitrators, the powers of the arbitrators, the arbitration procedure, the form and validity of the award and the conflict of laws rules to be applied. Though the parties may be entitled to exercise their autonomy for most of these matters, this theory only allows them to do so to the extent allowed by the lex arbitri.

a) Resolution of the Institut de Droit International

227. This viewpoint was developed by the late Professor Sauser-Hall as rapporteur of the Institut de Droit International's Commission on "l'arbitrage en droit international privé"[1]. We have seen[2] that Professor Sauser-Hall was of the opinion that the institution of arbitration had a mixed or sui iuris character[3].

The effect of such a classification of the juridical character of arbitration was to

> "reconnaître aux parties le pouvoir d'indiquer aux arbitres le droit selon lequel elles entendent que la sentence soit rendue; mais ce pouvoir, elles ne peuvent l'exercer que dans les limites permises par les règles de rattachement de l'Etat du siège du tribunal arbitral qui, en tant que *lex fori*, délimite l'étendue de l'autonomie qu'il y a lieu de reconnaître aux parties dans ce domaine. Si les parties n'ont pas conclu d'accord au sujet du droit applicable, les règles de rattachement des lois de l'Etat du siège du tribunal arbitral seront appliquées par les arbitres pour résoudre les conflits de lois soulevés devant eux par les parties".[4]

This view was adopted by the Institut de Droit International at their Amsterdam session in 1957 and again at the Neuchâtel session in 1959. Article 11 of the Resolutions adopted at those meetings provides:

> "The rules of choice in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference.
>
> Within the limits of such law, arbitrators shall apply the law chosen by the parties or, in default of any express indication by them, shall determine what is the will of the parties in this respect having regard to all the circumstances of the case.
>
> If the law of the place of the seat of the arbitral tribunal so authorises them, the parties may give the arbitrators power to decide *ex aequo et bono* or according to the rules of professional bodies".[5]

The effect of this article is to allow the parties to choose the law or other measuring standard, but only to the extent allowed by the lex arbitri; an express choice of the conflict of laws rules to apply is clearly excluded. Thus the loi du siège d'arbitrage or the lex loci arbitri becomes the lex fori of the arbitration tribunal. The only escape left to the parties is their right "in the

arbitral agreement ... to exercise their free choice and to indicate the place where the arbitral tribunal must sit".[6] In this way parties are able to influence the law to govern their relations deciding themselves where the arbitration tribunal shall have its seat; any express choice of law other than that of the siège d'arbitrage would probably be without effect.[7] An express choice of law without any indication as to the desired siège d'arbitrage would be considered an agreement that the arbitration "tribunal shall sit in the territory of the country the law of which has been chosen";[8] presumably to the extent allowed by the chosen law.

b) Meaning of the "siege d'arbitrage"

228. The greatest objection to Sauser-Hall's theory surrounds the determination of the "siège d'arbitrage". Professor Sauser-Hall himself and others since have purported to develop principles or rules to facilitate determining where the arbitration tribunal has its "siège". As already noted, the Resolution adopted by the Institut de Droit International allowed the parties "to indicate the place where the tribunal must sit".[1] Where the parties did not choose the "siège d'arbitrage" but have chosen the law to govern the arbitration agreement,[2] it is implied that the parties intended the "siège d'arbitrage" to be in the territory where the chosen law is sovereign[3]. The dichotomy of an ambiguous choice of both the law to govern the arbitration agreement and the "siège d'arbitrage" will be resolved in favour of the "loi du siège" when the law in force either in that place or in the place where the chosen law is sovereign does not admit that the "siège d'arbitrage" shall be the territory of the State of the chosen law[4]. Where both systems of law (i.e. the law chosen and that of the chosen "siège") admit a preference to the territory of the State of the chosen law, then naturally that will be the "siège d'arbitrage"[5].

Where the parties are silent as to the where the tribunal would have its "siège", the Institut de Droit International gives the arbitrators the responsibility to determine the "siège d'arbitrage".[6] This is to be the place where the arbitrators

are to meet; where they expect to or may meet in different places, the place of the first meeting will be the "siège d'arbitrage", "unless the arbitrators expressly decide in favour of some other place".[7] Where the arbitration proceeds by way of an exchange of letters without a meeting, the "siège" would be the place where the sole arbitrator has his residence; where there is more than one arbitrator, the place where the umpire is resident will be the "siège d'arbitrage"; where there is no umpire, the "siege" will be determined by the majority opinion of the arbitrators[8].

The wording of the Resolution of the Institut de Droit International is in certain respects misleading. It does give the impression that the "siège d'arbitrage" is where "le ou les arbitres se sont 'assis', pour, là, recevoir les plaideurs, entendre les témoins, lire les pièces et rédiger une sentence"[9]. But of course in practice there is often more than one hearing: the parties often produce evidence at more than one hearing, and such hearings are held at different places. To apply the same law, the lex arbitri, at each hearing (presuming such to be in a different country), negates the jurisdictional theory of arbitration; the alternative, to apply the law of each place of the hearing could work greatly to the advantage or disadvantage of the parties, if e.g. certain evidence was admissible in one place but inadmissible in another.

Sauser-Hall's proposals further ignored the increasing popularity of both international and national arbitration institutions. Where an arbitration is organised under the auspices of such institutions there is a presumption in favour of the place where that institution has its headquarters to be the "siège d'arbitrage". So, e.g., a choice of arbitration at the court of arbitration of the Czechoslovak Chamber of Commerce would result in Czechoslovakia being the "siège d'arbitrage"[10]. Similarly with the choice of an arbitration under the rules of any other national institution or by a trade organisation situated in a given place.

On the other hand a choice of international institutional arbitration, e.g. under the rules of the ICC, presents far greater complication. We have already adequately considered the method whereby the place where an arbitration is to be held is determined under the rules of the ICC. As also seen, the place of the arbitration may, and frequently will, be changed to suit the convenience of the parties[11]. If the theory of Sauser-Hall is to have any merit the "siège d'arbitrage" must be stable and cannot be changed every now and then[12]. The alternative would be to have a different lex arbitri every time the parties were to change the substance of the arbitration agreement.

229. Although both Sauser-Hall and more recently other writers have purported to argue their thesis to have the support of the international conventions[1], this theory fails above all to recognise the over-riding importance of party autonomy in arbitration. The arbitration exists because of the parties agreement and its conduct is thus subject to their direction. Failure to recognise and respect the desires of the parties would, as already pointed out, either entitle the parties to disseize the arbitrators or alternatively to subsequently refuse to give effect to their award: in the latter case enforcement would be denied pursuant to the relevant international conventions[2]. This was perhaps a major influence on Judge Panchaud to describe the "loi du siège d'arbitrage" as the "procédure subsidiare" or "l'autorité judiciaire d'appui".[3] However the learned judge expressed the view, different from that of the Institut de Droit International, that this secondary law would only be applicable when either some problem arose not provided for in the rules of the arbitration institution seized, or where the parties were unable to agree on some aspect of the procedure.[4]

Because of the foregoing, Judge Panchaud developed his arguments in a far more flexible way. Whilst he unreservedly preferred a jurisdictional character for arbitration,[5] he acknowledged that arbitrators were primarily meant to follow the procedure agreed upon by the parties or provided for in the rules of the arbitration institution seized.[6] As most arbitrations passed-off without any difficulty, the need to determine the "siège d'arbitrage" is only "pour assurer

quoi qu'il arrive la protection du faible contre un abus de force"[7]. Thus he continued and explained the importance of the "siège" in the following terms:

> "Il est pour la partie menacée une sauvegarde de dernier ressort, au moment d'introduire l'arbitrage ou au cours de celui-ci: le siège, tout à la fois, lui procure l'adresse de ce juge que nous avons appelé juge << d'appui >> et il identifie la procedure que nous avons appelée << procédure subsidiaire >>. Ainsi cette partie menacée d'un arbitrage injuste trouve-t-elle les moyens de parer au déni de justice."[8]

Judge Panchaud took the view that the "siège d'arbitrage" would be where the parties wanted it to be[9]. In the absence of any expression of their intentions, the arbitrators had the right - which the learned Judge urged every arbitrator to exercise as early as possible[10] - to fix themselves the "siège" of the arbitration, in accordance with the facts of the case.[11]

Finally, in passing, it is interesting to note how Judge Panchaud defined the "siège d'arbitrage". He said:

> En définitive l'on peut dire que le siège de l'arbitrage est dans le pays que les parties ont désigné, soit expressément, elles-mêmes ou par l'organe des arbitres, soit implicitement, par des faits concluants qui leur sont imputables à elles-mêmes ou à leurs mandataires les arbitres."[12]

This definition would appear to fit equally the division we have made earlier in this chapter by applying the private international law rules chosen or impliedly chosen by the parties.[13] Of course, in those cases, they were based on the theory that arbitration has a "contractual" character.[14]

c) The major international arbitration conventions

230. Of the four major international conventions which relate to commercial arbitration only the 1961 European Convention on International Commercial Arbitration refers directly to the conflict of laws rules to be applied. Article VII of that Convention provides for the application of "the rule of conflict that the arbitrators deem applicable".[1] This of course does not oblige the arbitrators to apply the conflict of laws rules of the "siège d'arbitrage." Indeed, it is generally considered to allow the arbitrators to look to some international or non-national system of conflict of laws. But we shall consider the meaning of this provision later.[2]

As for the three earlier Conventions, though they are silent in this regard, they do contain provisions as to the procedural law to be applied. It is noteworthy that two of the three conventions give prime consideration to the "will of the parties". They provide for the application of the procedural law of the "siège d'arbitrage" only in the event of the parties having failed to agree on the rules to be followed.

Thus one finds paragraph 2(1) of the 1923 Geneva Protocol on Arbitration Clauses provides:

> "The arbitral procedure, ... shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place". (Emphasis added).

The two Conventions relating to the recognition and enforcement of awards provide similarly. The Geneva Convention for the Execution of Foreign Arbitral Awards of 1927 states in Article 1(c) that for an award to be enforced it must be shown "that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure" (emphasis added). However, it does not indicate what that law is.

Again, and in far wider terms, Article V(1)(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 provides that enforcement of a foreign award can be refused if it is proved that:

> "The composition of the arbitral authority, or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place".[3] (Emphasis added).

Provisions as to the procedural law to govern do not indicate what private international law rules should apply. Whilst generally the system of private international law applicable may well follow the procedural law applied, no general rule can be assumed. Private international law rules are not rules of procedure: they are rules of private international law. A manifestation, whether express or otherwise, as to the procedural law to be followed at the arbitration,

does not show that the parties intend the private international law of that same system to apply. Whilst the Institut de Droit International was clearly of the opinion that both the procedural and the private international law applicable to international arbitration should be determined by the "siège d'arbitrage", their provisions were distinct and separate in respect of each matter. Thus there appears to be no justification for any claim that the international Conventions either support or favour the application of the private international law rules of the "siège d'arbitrage", or that the failure to apply the private international law rules of the "siège d'arbitrage", would give grounds to refuse to recognise or enforce the award.

d) Critique of the "siege d'arbitrage" theory

231. Despite the respect which exists all round the world for the Institut de Droit International, the theory adopted in their 1957 and 1959 Resolutions has never attained particularly wide support. The application of the conflict of laws provisions of the "siège d'arbitrage" followed logically from the jurisdictional theory as to the nature of arbitration and provided the arbitrators with clear and simple directions.[1] However, the failure of the theory of the "siège d'arbitrage" to appreciate the very basic facts of life of international commercial arbitration is undoubtedly a major explanation for the theory never being universally accepted. Furthermore, though the theory may often be easy to apply, it's rigidity[2] could lead to bizarre results by the application of a conflict of laws system which was often fortuitously determined and which had no real connection whatever with the parties, the arbitration or the dispute.

Whilst it is conceded that there may be a need for a "procédure subsidiare" to which the arbitrator can resort when the parties are unable to agree or the institution's rules are silent on the procedure to be followed, it is a matter of some conjecture whether the "designation ex officio"[3] of the "loi du siège du tribunal arbitral" is the best solution.[4] However the arbitrary application of the conflict of laws system of the "siège d'arbitrage" has been widely criticised. These criticisms are of two kinds: one based on the effect of the theory itself and the second being against the effect of the conflict of laws rules of the "siège d'arbitrage".

232. Firstly, despite the protestations of Dr. Mann,[1] there are international arbitrations separated by both fact and desire from any national system of law. These are "extra-national" arbitrations which have been sometimes described as "flottantes".[2] Whilst naturally in theory every sovereign legal system can enact provisions making it illegal or undesirable or impractical or impossible for arbitration proceedings to be held in the territory over which it governs - and to this extent one must admit some merit in the jurisdictional theory as to the juridical character of arbitration - one cannot ignore that almost every trading nation does recognise and encourage arbitration, and interferes with arbitration taking place within its territory to a very minimal extent. The effect of Sauser-Hall's theory is to give an inter-national or non-national arbitration a national character, such nationality being determined purely on the fortuitous basis of the "siège d'arbitrage". Thus by some factor often beyond the control of the parties the arbitration becomes an internal arbitration and the proceedings internal proceedings.[3]

To allow this "geographic localisation"[4] rather than the juridical and factual character of arbitration to determine the private international law rules to be applied by the arbitrators could have the effect of negating the intentions of the parties and would ignore the practical organization of international commercial arbitration. The international business community have through their needs and practice developed international arbitration without any connection to a national system of law. It is both pointless and misleading to create a lien between the arbitration and some national system of law just in case the arbitrators may have need for guidance or one of the parties wishes to resort to the courts. Afterall, in the absence of agreement between the parties as to the procedural rules to apply, the arbitrator has the power to decide himself the procedure to follow: indeed that is a part of his responsibility. Furthermore, an aggrieved party could either challenge the arbitration in the courts where the defendant is resident, or can challenge the ultimate award at the time of enforcement.

233. The second and in the present context the most serious[1] objection to the "siège d'arbitrage" theory, is the absence of any real connection between the "siège d'arbitrage", and the parties, the arbitrators, the contract and the dispute.[2] The effect of applying the conflict of laws rules of the "siège d'arbitrage" will often mean the applicable law will be determined by a system of conflict of laws neither known nor even considered by the parties. The desire of parties to submit to arbitration in a neutral country, or in a geographically or socially convenient country, does not in any way indicate a desire or an acceptance by the parties that the conflict of laws system of that country should govern the arbitration.[3] Afterall, as we have already noted parties are highly unlikely to even understand -- let alone think of - the need or desirability to choose the conflict of laws system to be applied; they are equally unlikely to understand or expect the conflict of laws system of the "siège d'arbitrage" to be applied.[4] Furthermore, the conflict of laws system of the "siège d'arbitrage" may well be incapable of dealing with the conflict in question.

The effect of applying such a fortuitously determined conflict of laws system is that the law deemed applicable may often be inappropriate or incompetant to regulate the contract in question or could even consider the contract as illegal or null and void. The possibility of the contract being turned on its head can be well illustrated by a few examples.

Assume parties to an east-west trade contract agree that any disputes arising out of their contract shall be resolved by arbitration by a named Swedish or Swiss arbitrator, but make no provision as to the "siège d'arbitrage". It will in consequence fall to the arbitrator to himself decide where the arbitration shall have its "siège". For reasons of convenience or politic or comfort the parties may agree or the arbitrator decide that the arbitration be held in a country relatively equidistant between the residences of arbitrators and parties i.e. Greece or Yugoslavia.[5] Can there, in these circumstances, be any

logical or legal justification for a Swedish or Swiss arbitrator to resort to the conflict of laws rules of Greece or Yugoslavia?

Again, if there be an institutional arbitration between e.g. French and English parties, the secretariat of the institution seized may themselves appoint a Dutch arbitrator and nominate Holland as the "siège d'arbitrage". What relevance here have the rules of Dutch private international law?

The irrationality of the arbitrators applying the conflict of laws rules of the "siège d'arbitrage" can be seen by the possibility of those rules pointing to a substantive law to be applied different from that which would be applied if the conflict of laws system of both parties - or either of them - were followed. This could arise out of the simple situation of the parties coming from countries which embrace the lex loci contractus rule, whilst the "siège d'arbitrage" follows the lex loci solutionis rule. Similarly, the conflict of laws rules of the "siège d'arbitrage" may, like those of many countries, be lex fori orientated. This would result in the arbitrators applying the domestic law of the "siège d'arbitrage", with the ensuant embroilment in the imperative legislation and public policy principles of that legal system, to a contractual relationship which has little, if anything, to do with the "siège d'arbitrage".[6]

These type of situations are what will bring international arbitration into disrepute and which are very much against the interests of international business. In the words of one commentator, this "surprising and dangerous"[7] situation "risquerait de nuire au developpement de ces arbitrages internationaux de type 'neutre' pourtant fort commodes dans les circonstances présentes".[8] Whilst the application of the conflict of laws rules of the "siège d'arbitrage" cannot be totally rejected and might often be of some use to arbitrators, they should not always be mecanically applied.[9] Rather they should be considered at best rules of guidance which can be resorted to when their application will not only enable the arbitrators to reach "la meilleure solution de fond",[10]

but also will be consistent with good legal sense and the needs of international commerce.

2. PRACTICE

234. Despite the foregoing criticisms which we have directed at the theory of the "siège d'arbitrage", there are awards in which the arbitrators have resorted to the principles advocated by Sauser-Hall. This is perhaps natural bearing in mind the eminence of Sauser-Hall himself and the prestige of the Institut de Droit International. Any arbitrator who is to determine either the procedural law he should follow or the private international law rules to apply will naturally be influenced by the persuasiveness of Sauser-Hall and the Institut's Resolution.

As very often the arbitration will be held and have its "siège" in the country where the sole or third arbitrator has his normal residence, the tendancy has developed for the arbitrator just to look to the system he knows well or, at least, best. Should the application of that law be challenged, then of course in any interpretation there would be an understandable inclination towards the arbitrators' own law.

Of course that is not always the case. As we will see later, many arbitrators are inclined to try to avoid the application of private international law rules, or to apply a selection of private international law rules, or even to just apply the substantive standard which appears appropriate in the given case.

a) The arbitrators' dilemma

235. Faced with a genuine conflict of laws and the need to find the most appropriate system of law to govern the case before them, the difficulty of the arbitrators is obvious. In the absence of an existing conflict of laws system ready and competent to indicate which law they should apply, the arbitrators

find themselves in a vacuum, without any co'e or even guidelines on which to lean. This problem is clearly illustrated in an award[1] by a Swiss arbitrator sitting in Switzerland to resolve a dispute arising out of an exclusive distribution contract made between the plaintiff, a Federal German corporation, and the defendant, a Yugoslav State trading corporation. When discussing the question of the law to govern the parties relations, the arbitrator stated:

> "Les co-contractants, parties à la présente instance, domiciliés respectivement en Allemagne Fédérale et en Yougoslavie, n'ont rien convenu en ce qui concerne le droit applicable quant au fond, s' bien qu'il appartient à l'arbitre de déterminer.
>
> "Il n'existe pas de règles de conflit des lois en puissance' qui indiqueraient à l'arbitre d'un pays tiers, sans lien aucun avec le rapport de droit existant entre les parties, selon le droit international privé de quel pays il devrait déterminer la loi applicable au fond. Il n'y a pas non plus de critère susceptible de faire pencher la balance en faveur soit du droit international privé allemand, soit de celui de la Yougoslavie; une telle recherche ne résisterait pas à la critique et le résultat aurait toujours l'apparence d'une préférence arbitraire. Aussi la solution pratiquement la plus accessible, d'ailleurs reconnue comme telle par la doctrine la plus récente...., consiste à se référer aux règles de conflit des lois du for."
>
> (Emphasis added).

The arbitrator here clearly expressed his problem: how does he determine the applicable law? As the arbitrator in non-national proceedings he had no conflict of laws rules to guide him. The application of the national system of conflict of laws of one or other of the parties would be arbitrary and could subsequently be attacked on that basis. The only other national system of conflict of laws which he could look to was that of the place of arbitration. This was quite natural: as the arbitrator pointed out himself, in the circumstances, the conflict of laws rules of Switzerland were the most accessible - he was in Switzerland and understood the Swiss conflict of laws best - and were applicable in accordance with recent doctrine. The arbitrator thus applied German law as the law of the country in which the manufacturer resided and with which the contract had its closest connection.

b) Follow resolution of the Institut de Droit International

236. In some awards arbitrators have actually relied on Sauser-Hall and the Insitut de Droit International to justify their resort to the "loi du siège d'arbitrage". In one award[1] between an Argentinian ex-patriot living in the Federal Republic of Germany and an English corporation concerning a contract performable in the Argentine, the arbitrator wished to determine the "loi de l'arbitrage" so as to be able to determine the validity of the arbitration agreement and its consistency with public policy[2]. Judge Gunnar Largregren, President of the Appeal Court of Western Sweden, was appointed the sole arbitrator. Despite there being no connection with France other than the headquarters of the ICC, President Largregren relying on the ICC Arbitration Rules looked to French law although he acknowledged that there were "doubts whether the question of arbitrability is to be qualified as belonging to the Rules governing the proceedings". Having based his discussion on French law, the arbitrator to justify his conclusions added:

> "In the same way as the Resolution of the Institut de Droit International guide international tribunals in the field of public international law, they are in the field of private international law of great value to arbitrators who have to decide international disputes".

Again in an ICC award[3], the arbitrator, Monsieur Ernst Mezger, justified his resort to French private international law because it was the solution advocated by the Resolution of the Institut de Droit International. The dispute arose out of a contract made in 1954 under which the Belgian plaintiff was given the exclusive right to sell the German defendant's goods in Belgium and certain other western European countries. When the plaintiff discovered that one of the defendant's subsidiary companies was placing imitation but none-the-less competitor goods on the market, he ceased his sales of the defendant's goods although he still held large stocks of them. Some years later, in 1965 the plaintiff claimed damages in arbitration for the stock he still held and was unable to sell, relying on the original contract provision obliging the defendant to repurchase from the plaintiff stock not sold.

Whilst the defendant did not deny that he allowed a subsidiary to sell imitation goods within the plaintiff's market, he argued that the plaintiff had failed to sell the required number of his goods, that the contract had anyway naturally expired in 1956 and that in consequence the plaintiff's action was barred by lapse of time. The plaintiff based his arguments on German law - which naturally was favourable to him - which he claimed was applicable as the law of the seller, pursuant to the 1955 Hague Convention on the Law Applicable to International Sales of Goods.

In resolving the conflict of laws and deciding which system of conflict of laws to apply the arbitrator found:

> "... que ladite Convention internationale ne soit pas en vigueur en Allemagne, peu importe même la date(1er Septembre 1964) où elle est entrée en vigueur en Belgique. Le présent arbitrage ayant lieu en France, et ce,en vertu d'une stipulation formelle de l'acte signé conformément à l'article 19 du Règlement d'arbitrage de la Chambre de Commerce Internationale, il résulte des principes généraux régissant la matière que non seulement les règles de procédure, mais aussi les règles du droit international privé à appliquer par l'arbitre doivent être puisées à la loi française. Cette doctrine a été professée en particulier par la Résolution de l'Institut de Droit International du 16 septembre 1957 sur l'arbitrage en droit international privé, article II. .. Elle est reconnue aussi bien dans la doctrine française et belge que dans la doctrine allemande. ... La loi française coïncide sur ce point avec la loi belge : la Convention du 15 juin 1955 y est également entrée en vigueur le 1er septembre 1964. La Convention n'a cependant aucun effet rétroactif et ne saurait changer les effetsdes contrats signés avant son entrée en vigueur.(Emphasis added).

What is not quite clear from this award is the capacity in which Monsiuer Mezger pointed to French private international law: was it to the law of the place where the ICC has its headquarters and hence as the "loi du siège."? The reason for this uncertainty is that the award was actually signed in Brussels! It is unclear whether just the award was signed in Brussels but the proceedings took place in France: if the hearings were held in Brussels and the award was rendered there, then prima facie it would appear that the "siège d'arbitrage" was Brussels, and Belgian private international law should have been applied. The award does not of course say anything as to whether

the parties expressely chose France as the "siège d'arbitrage":[4] but if that was the case then presumably whilst the arbitrator could have agreed to hold the hearings in Brussels, he would still have actually made and signed his award in Paris. On the other hand, if the reason for explaining the resort to French private international law was because it was a "neutral" system of law and of course that of the arbitrator, then although it may be justified in itself, it cannot be based on the Resolution of the Institut de Droit International. Nevertheless, whether the "siège d'arbitrage" was Belgium or France, the solution adopted by French private international law was, as pointed out by the arbitrator himself, exactly the same as had the arbitrator applied Belgian private international law.

c) Connection between the lex arbitri and the conflict of laws system to be applied

237. When looking for the conflict of laws system to apply or the procedural law to follow, the arbitrators invariably begin by posing for themselves the question of the law which governs the arbitration. Naturally, the various theories will often lead to different laws being applied. Hence the arbitrators will be grateful for what guidance they can get from the rules of the arbitration institution seized. In this respect the Rules of Arbitration and Conciliation of the ICC were until recently[1] of only limited assistance as the relevant article refered only to the law governing procedure. However it is generally understood that subject to an express view to the contrary, the conflict of laws rules to be applied are those of the system of law governing procedure or at least the subsidiary procedural law.

Strictly in accordance with doctrine, the procedural law to govern the arbitration is the rules of the institution selected by the parties. Where however that institution has no rules, or the rules are inadequate for the particular arbitration, or of course where the arbitration is ad hoc, the law to govern is that chosen by the parties. Only in the absence of any choice by the parties can arbitrators resort to the law of the country in which the proceedings are being held.

Article 16 of the ICC Rules on Arbitration and Conciliation of 1 June 1955 provided:

> "The rules by which the arbitration proceedings shall be governed shall be these Rules and, in the event of no provision being made in these Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings".

This provision has been followed in numerous awards as it was a guideline for which the arbitrators were often grateful. In one 1955 ICC award[2] the arbitrators (the President of the tribunal was French) sat in Paris to hear a dispute between a Czechoslovak State enterprise and a New York corporation.

The arbitrators had to determine their competence to decide the substance of the dispute. The arbitrators' competence in this regard was challenged by the American party. The initial question for the arbitrators was according to what law were they entitled to consider their own competence. They found:

> "... les arbitres recevant leur mission de la dite Cour d'Arbitrage sont tenus de se conformer, en ce qui concerne la procédure, aux dispositions du dit Règlement, qui dans son article 17(3) précise que, dans le silence de celui-ci, ce sont les dispositions de la loi du pays où a lieu l'arbitrage, en l'occurrence la loi française, qui s'appliquent".

In a truly multi-national award[3] arbitrators concerned in the main with a factual problem were grateful to be able to follow the ICC Arbitration Rules with respect to the procedure to govern. The dispute arose out of a contract, between the three plaintiffs, United Kingdom, Panamanian and Liberian ship-owners, and the defendant, a Dutch shipyard, for the repair and coversion of a ship. Dissatisfied with the work done, the plaintiffs' action was for reimbursement of the amount paid. The contract provided for ICC arbitration in Paris. Three arbitrators were appointed: a Belgian, a Frenchman and a Norwegian. Following the Rules of the ICC the arbitrators held, despite the very tenuous connection of the whole contract and the arbitration with France,

"that the arbitration proceedings are governed by Rules of the International Chamber of Commerce and in the second place by the French law".[4]

A similar approach was taken by a Swiss arbitrator appointed to consider a dispute arising out of an exclusive sales agreement between French and Italian corporations[5]. Having to determine the applicable law, the arbitrator said:

> "Selon les principes du droit international privé, c'est la "lex fori" qui régit la qualification de l'acte examiné et qui dit quel principe de rattachement déterminera le droit applicable à l'acte ainsi qualifié. Or la Cour d'Arbitrage, au Règlement de laquelle les parties se sont soumises, a décidé que la procédure devant l'arbitre se déroulerait à Paris, ce qui a effectivement eu lieu. La "lex fori" est donc la loi française".

Again, despite France being only the place where the ICC has its headquarters, an English arbitrator, in a preliminary award[6] between a Spanish plaintiff, and defendant corporations from Ohio, USA, and Venezuela, held the law governing the arbitration to be "the Rules of proceedings of the International Chamber of Commerce supplemented, as far as necessary, by the law of France". As then the ICC Rules did not make any provision as to the conflict of laws rules to be applied, presumably the arbitrator here intended to "supplement" the rules with French private international law.

But of course France is not always the place where ICC arbitrations are held. In another aspect of the Indian Pakistan case discussed above[7] Professor Lalive made a similar finding though his wording appears to give a greater consideration to the autonomy of the parties. The award[8] states:

> "Considering the absence of choice by, or agreement between the Parties as to a subsidiary law of procedure, the Arbitration shall follow, in all procedural questions not regulated by the Rules of Conciliation and Arbitration of the ICC, the law of the country in which the proceedings have taken place, i.e. the Code of Civil Procedure of the Canton of Geneva, Switzerland".

d) Connection between the procedural law applicable and the conflict of laws system to be applied.

238. In some awards, arbitrators, following the "siège d'arbitrage" theory, will determine first the procedural law to apply on the basis that the conflict of laws rules applicable belong to the same legal system as the procedural law.[1] In one case[2] the Federal German plaintiff had contracted with a Bolivian State enterprise to construct an explosives factory in Bolivia for $200,000. Payment was to be in instalments on fixed dates. The agreement contained a provision for ICC arbitration. During the currency of the agreement the State enterprise went into liquidation and naturally money on the uncompleted contract was outstanding. The plaintiff claimed in arbitration some 600,000 DM from the enterprise in liquidation and from the Bank responsible for the liquidation of the enterprise and the conduct of its continuing effects. André Panchaud, the respected Swiss judge, was appointed the sole arbitrator.

The successor bank refused to participate at the arbitration, either as successor to the enterprise or as liquidator; the bank claimed to be unable to submit to arbitration in accordance with Bolivian law and its charter. Not only had the arbitrator to determine the validity of the Bolivian bank's claim, but there was also the questions of the main contract itself. Thus the arbitrator needed to find the applicable conflict of laws rules to apply and for this purpose looked first to the procedural law to be applied. The arbitrator found:

> "I. Sur la procédure arbitrale
>
> 1. Le contrat passé, le 11 février 1952, est un contrat international; la clause compromissoire qu'il contient se réfère à l'arbitrage de la Chambre de Commerce Internationale et situe cet arbitrage en Suisse. Il s'agit donc d'un arbitrage international, qui participe du caractère contractuel du compromis et relève de la loi d'autonomie du point de vue de son rattachement.
>
> La loi d'autonomie détermine en particulier la procédure applicable.... Or la procédure voulue par les parties ne peut être que celle qu'a instituée la Chambre de Commerce Internationale dans son Règlement de conciliation et d'arbitrage.

> L'acte de mission de l'arbitre .... prévoit, à titre subsidiaire, l'application de la loi de procédure civile fédérale de la Confédération suisse[3]. Mais il n'y a pas eu lieu d'en faire application, les principes posés par le Règlement s'étant révélés suffisants dans la présente espèce."

Having found Swiss law to be the law governing procedure, the arbitrator considered the substance of the dispute. The award states:

> "IV. Sur la loi applicable aux obligations nées du contrat
>
> 12. Il s'agit premièrement de savoir quelles sont les règles de droit international privé dont on fera usage pour déterminer la loi applicable au contrat litigieux. Si l'on se réfère à la volonté des parties, on s'en tiendra au droit suisse en tant que lex fori, l'arbitre ayant été désigné en vertu d'une clause compromissoire qui soumet la contestation à la connaissance de la "Chambre de Commerce Internationale en Suisse" (art. XVI du contrat du 11 février 1952). L'application du droit international privé suisse aboutit du reste au même résultat que celle des principes généralement reçus en cette matière dans les différents pays".

Through his application of Swiss private international law the arbitrator found Swiss law to govern the substance of the contractual obligations of the parties[4].

With respect to the capacity of the Bolivian bank to participate in the proceedings the arbitrator surprisingly did not base himself on Swiss private international law but rather held:

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

The arbitrator's use of Swiss private international law to one aspect of the case and the "principles of private international law generally admitted" to another, is quite illogical. This inconsistency can only be explained by the arbitrator's desire that the award should be acceptable and that it should be clear whatever private international law system was resorted to the result would have been the same. This is particularly so bearing in mind that the arbitrator held that the Bolivian Bank had capacity to submit to and participate in arbitration proceedings. Whilst the arbitrator could have resolved both conflict of laws question by the application of the "principles of private international law generally accepted", to have done so would have been against Judge Panchaud's view that arbitration has a jurisdictional character[5].

239. We have already seen the ambiguity surrounding the meaning of the term "siège d'arbitrage" and the difficulty in determining it. The academic writers favouring the jurisdictional character or arbitration, have variously advocated the application of the private international law rules of the "siège du tribunal arbitral", of the "seat" of the arbitration, of the place of the arbitration and of the "lex fori" of the arbitration. In the circumstances it is not surprising that arbitrators - many of whom have participated in the constant academic discussion on the subject - should, when looking for the relevant private international law rules to apply, also refer variously to the "loi du siège d'arbitrage", the law of the place of the arbitration and the "lex fori" of the arbitration. Whilst perhaps regrettable, this confusion in terminology is at least understandable: not only do many arbitrators have different views on the problem but they also come from different countries and different legal systems. Thus naturally, their methods of explaining themselves differ, although, as will be seen, the ultimate effect as concerns the private international law system applied is invariably the same.

This can be illustrated by briefly considering a few awards in which the arbitrators have applied the private international law rules of their "siège d'arbitrage" or the place where they are actually holding the arbitration proceedings, and a few awards in which the arbitrators have looked to the private international law of their "lex fori".

e) Private international law rules of the place of arbitration

240. The private international law rules of the place where the arbitration was held were resorted to in one award[1] where a licence was granted throughout the world (except the Federal German Republic) to exploit the plaintiff's invention of a powdered mother's milk. The Swiss arbitrator, holding the hearing in Switzerland looked to "des principes du droit international privé suisse tels qu'ils ont été developpés par le Tribunal Fédéral suisse". However, as both parties were Swiss it was only the fact

that the area of exploitation was outside Switzerland which gave the case its international character. Of-course, whatever the grounds, only Swiss law, both private international and substantive law, could possibly have been applied.

In an award[2] arising out of a dispute between Federal German and French parties, the Dutch arbitrator "se rallie à l'opinion prévalente d'après laquelle le droit applicable au fond du litige doit être déterminé selon les règles de droit international privé de pays de l'arbitrage ".[3]

Again, in another award[4] three arbitrators sitting in Switzerland to hear a dispute between parties from Federal Germany and Italy had to determine the private international law system to apply. They held:

> "Là où il faut s'en remettre à des règles concrètes en matière de conflits de lois, il convient d'appliquer les normes du système juridique valable au lieu où siège le Tribunal arbitral. Dans le cas présent, c'est donc sur la base des règles et de la pratique du droit international privé suisse que les décisions doivent être prises".

In one other award[5] an arbitrator applied the private international law rules of the place of arbitration as if it was the obvious procedure. The Swiss arbitrator, who was seized of a dispute between a Yugoslav enterprise and three Turkish defendants, had to decide his own competence in the particular case. The arbitrator held without any discussion "le lieu de l'arbitrage est à Neuchâtel (Suisse)", and promptly applied the private international law rules normally applicable in the "canton où le tribunal arbitral a son siège", to determine the law to govern his competence. Though he offered no explanation for applying the conflict rules of the "siège d'arbitrage", the arbitrator hastened to add that the solution he adopted was in accordance with the 1923 Geneva Protocol on Arbitration Clauses to which Yugoslavia and Switzerland (but not Turkey) had adhered.

241. A litteral application of the Sauser-Hall theory was also applied by Monsieur Mezger when sitting in Paris as sole arbitrator in a dispute between the plaintiff, a Canadian company, and the defendant, a Federal German partnership[1]. Under the contract the plaintiff has been licensed to register to his own benefit the defendant's trademarked hedge-shears, and was also appointed the defendant's sole agent for the sale and promotion of those shears in Canada and the USA. The defendant's hopes for the sale of his hedge-shears were not achieved and on investigation he learnt that the plaintiff was also the agent for a competitor Japanese hedge-shear. In consequence the defendant repudiated the agency contract and attempted in the courts of Canada and the USA to have cancelled the Canadian and US trademarks.

The contract contained a clause providing for all "differences arising from this contract" to be referred to arbitration under the rules of the ICC. The plaintiff came to arbitration claiming damages not only for the "wrongful" termination of his agency, but also for the expenses he had incurred defending the actions brought by the defendant in the Canadian and US courts to cancel his trade-marks, contrary to the arbitration agreement in the contract.

In respect of both questions facing him, the arbitrator showed his clear preference for looking to French law as the "loi du siège d'arbitrage", and thus governing both procedure and the conflict of laws.

The plaintiff claimed that, in accordance with the law of Ontario, the German partnership was obliged to identify to whom and how many competitor Japanese hedge-shears had been sold. The arbitrator refused the plaintiff's claim stating:

> "The law of Ontario referred to by (the plaintiff) is procedural law, which does not apply in a French arbitration. This would be true, even though the substantive law governing the litigation were Canadian law (Ontario). There is a fundamental difference between substantive and adjective (procedural) law, which is important in arbitration matters, as has recently been affirmed also by the House of Lords in the English case WHITWORTH STREET ESTATES (MANCHESTER) LTD. v JAMES MILLER AND PARTNERS LTD [1970].... The Ontario law referred to by (the plaintiff) clearly is predicated exclusively upon a partnership within the strict meaning of Ontario law .... it is unlikely that even a Canadian judge sitting in the Province of Ontario would apply those statutory rules as referred to by (the plaintiff) to a German 'Offerne Handelsgesselschaft.'"

As for the law to govern the agency contract, the arbitrator held that German law applied. This he explained as follows:

> "This is an agency contract. Where there is no provision in such a contract - and the same is true of a distributor's contract - the law of the country where the agent or the distributor had his seat normally prevails.
>
> "This is, however, only a presumption. The parties may decide otherwise, and even if the parties have not provided for this question, there may be special circumstances which give precedence to the law of the country of the manufacturer. This is the point of view of French private international law which this arbitrator sitting in France in a French procedure is obliged to follow. But this arbitrator is satisfied that the same rule prevails in German and in Canadian private international law". (Emphasis added).

Here the distinguished arbitrator likened his role to that of a judge and so he looked to see what attitude a French judge would have taken.

f) Private international law rules of the lex fori

242. A different approach but with the same effect follows from the search for and application of the "lex fori"[1]. In one award[2] arbitrators, two of whom were Swiss, sitting in Switzerland, had to determine the effect of late delivery on a contract between a Swedish corporation and a Federal German public corporation. The Swedish plaintiff argued Swedish law governed the contract; the German defendant argued German law was applicable. The arbitrator held:

> "Il convient donc en premier lieu de déterminer quelle est la loi applicable étant entendu que, conformément à la doctrine dominante, les règles de rattachement doivent être empruntées à la lex fori, en l'espèce, la loi suisse, étant donné qu'en vertu du compromis, le tribunal arbitral siège au lieu de domicile de son président à Marcote". (Emphasis added).

Similarly, arbitrators in Switzerland[3] had to determine the lex arbitri to decide upon the locus standi of one of the American defendants and then the law to govern the main contract out of which the dispute arose. The Austrian plaintiff alleged that the law of the State of New York should apply; the American defendants argued the law of Austria be applied. To both questions the arbitrators applied Swiss private international law. With respect to the first matter the arbitrators stated:

> "An agreement to submit litigation to arbitration, even when part of a comprehensive contract of civil law, is governed by the law of procedure and hence by the lex fori".

Again, a Federal German arbitrator had to determine the validity of the arbitration clause in a contract under which the Swiss plaintiff had agreed to do certain engineering work in Spain for the Spanish defendant. The arbitrator, holding the proceedings in Paris, held:

> "La convention passée entre les parties ne précise pas le droit qui doit être déclaré applicable en l'espèce. Avant toutes choses, il importe donc de déterminer le droit national au regard duquel le contrat devra être examiné dans le cadre de la validité de sa clause d'arbitrage. A cet effet, le tribunal d'arbitrage a retenu, au départ, la "lex fori", donc le droit français. Suivant le droit international privé français, l'ordre juridique applicable aux contrats est déterminé....[4]"

And again, in an award[5] rendered in Basle between a French plaintiff and two defendants, one French and one German, the arbitrator wished to determine the applicable law with respect to a concession agreement. The award stated[6]:

> " (a) Le lieu de l'arbitrage étant à Bâle, un juge ordinaire serait tenu de se référer aux règles suisses de conflit de lois comme lex fori, pour déterminer quelle est la loi applicable au contrat liant les parties. Selon le droit international privé suisse, les effets d'un contrat se jugent d'après le droit du pays avec lequel le contrat est dans le rapport territorial le plus étroit, soit le pays de la partie dont la prestation caractérise le rapport juridique.... Or, dans le cas d'un contrat de représentation avec droit de vente exclusif, qui combine avec les

> obligations réciproques de vendeur et d'acheteur l'obligation du fournisseur de s'abstenir de vendre ou faire vendre dans un certain rayon et l'obligation du représentant de promouvoir la vente dans ce rayon, c'est la prestation du représentant qui est caractéristique et ceci spécialement, si le contrat d'exclusivité a été en vigueur de longues années. Il se rapproche alors du contrat d'agence pour lequel l'art. 418 b CO Suisse prévoit l'application du droit du pays dans lequel l'agent exerce son champ d'activité....
>
> Le siège de la société demanderesse A, représentant exclusif, se trouvant à Paris, un juge ordinaire conclurait que c'est le droit français qui est applicable, et un tribunal arbitral siégeant en Suisse sera conduit à la même conclusion, dans la mesure où il doit tenir compte du droit international privé du for" . (Emphasis added).

Ad hoc award

243. A similar approach was taken in an ad hoc arbitration which was held in Sweden[1]. The dispute arose out of a contract for the sale of a Dutch motor-vessel, by the Dutch owner to a Swedish buyer. The contract provided for arbitration to take place in Gothenberg. The Dutch sellers began arbitration proceedings claiming damages from the Swedish buyers for the latter's failure to fulfill the contract as agreed. Wanting to determine the applicable law, the three arbitrators - a Norwegian, a Swede and a Dutchman - held the "question must be decided according to the lex fori, i.e. under Swedish rules as to conflict of laws".

g) Critique

244. In this section most of the awards discussed illustrate examples where the arbitrators have applied a neutral lex arbitri, whether as "la loi du siège d'arbitrage" or as the law of the place of the arbitration, or as the "lex fori" of the arbitration. The concern of arbitrators to make a choice of law on the basis of rules which neither can be accused of partiality nor have "l'apparence d'une préférence arbitraire"[1] and challenged on that basis is understandable. Though perhaps without foundation, there is a natural tendancy to believe the law of the other party is biased against one, and that one's own national law will be in one's favour. Hence the acknowledged

reluctance of contracting parties to readily agree to a choice of the law of the other party. Similarly, one sees in the organisation of an arbitration - and particularly ICC arbitration - the constant attempt to arrange and hold the proceedings in some place other than where either of the parties are normally resident or have their places of business. However unjustified, parties do prefer arbitration proceedings to be conducted in a neutral forum, subject to a neutral procedural law, a neutral private international law, and above all, under conditions which are unfavourable to the exercise of any pressure on the arbitrators. It is for this reason, that except where the parties agree otherwise, the ICC will not arrange an arbitration procedure in the country where one of the parties is normally resident. Even where an arbitration is held in a country with which one of the parties has such a close relation, the sole or third arbitrator will invariably be a national of a third and neutral country, who will conduct the arbitration proceedings in accordance with some law different from that of either of the parties[2].

We have already briefly seen two awards in which the arbitrators have applied - as the law of the place of arbitration or as the lex fori - the private international laws of one of the parties. We referred cursorily to an award[3] in which a Dutch arbitrator applied French private international law rules as he was sitting in Paris. That was a case brought by a Federal German plaintiff to recover money owed by the French defendant in respect of motor vehicles specially constructed by him in accordance with the defendant's specifications. The provision for arbitration in accordance with the rules of the ICC was no doubt placed in the contract more because of the character of the ICC as a non-national institution, than pursuant to a desire that French procedural or private international law should be applied. The Dutch arbitrator was appointed because not only was he appropriately qualified, but more importantly because he was of a nationality different from the parties. That the arbitration took place in Paris was to satisfy the convenience of the parties: one party had his place of business in Paris itself; the German party, who

carried on business in Cologne, could travel as easily to Paris as to Amsterdam; and the arbitrator normally resident in Amsterdam, was quite happy[4] to use the secretarial, etc. facilities available at the ICC head-quarters.

A similar analysis can be given with respect to an ICC arbitration clause contained in a contract between the plaintiff, a French corporation, and the defendant, an Italian manufacturer of electrical goods[5]. Under the contract, the defendant had granted the plaintiff exclusive sales rights of his goods in certain areas of France. It was agreed that the plaintiff would buy the defendant's goods at a reduced price, and would sell them direct to the public offering an "after sales" service; the "after-sales" service would be provided by the defendant. When the contract was terminated by the defendant on the grounds of the plaintiff's failure to sell the required number of machines manufactured by the defendant, the plaintiff claimed damages for wrongful termination of the contract, alleging that his failure to sell the required number of appliances was due to his inability to guarantee delivery on time by virtue of the defendant's continual delay in delivering the appliances and the defendant's failure to provide a satisfactory, or any, adequate "after-sales" service. To resolve the dispute arising out of the contract a distinguished Swiss professor was appointed arbitrator. Presumably the appointment of a Swiss national was to have a person from a third and neutral country as arbitrator. Again, presumably the submission to ICC arbitration was to benefit from the "non-national" character of that institution; if the parties merely desired some institutionally organised arbitration in Switzerland, they could have submitted to the arbitration tribunal of the Zurich Chamber of Commerce, or some other similar organisation in Switzerland. Presumably the arbitration was actually held in Switzerland, not because of the parties confidence in the merits of Swiss procedural and private international law, but rather because in the circumstances, it was more convenient for the parties, the arbitrator and the ICC.

There is no criticism of the actual decision in either of these two awards. Rather it is the application of the private international law system of one of the parties that gives rise to some misgivings. Is the application of a system of private international law so closely connected with one of the parties not prima facie likely to raise questions about the partiality of the law applied? Is the application of a prima facie partial private international law not contrary to the spirit of international arbitration? Will the application of private international law rules closely connected with the contract leave one party feeling aggrieved and dissatisfied or give grounds for the award to be ultimately denied recognition and enforcement? If the conflict of laws rules referred to are not impartial, if the substantive law applied is not appropriate to the particular case, if the award leaves one or both parties aggrieved and is unenforceable, then several of the advantages of submitting international commercial disputes to arbitration will be wanting[6].