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Articles for publication should be sent to the Editors-in-Chief, members of the Editorial Board, or to the Publications Manager (**ICCbulletin@iccwbo.org**). Suggestions for book reviews are also welcome.

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Directeur général, directeur adjoint de la publication : Emmanuel Jolivet

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Message from the President

Claudia Salomon
President, ICC International Court of Arbitration

In this special edition of the ICC Bulletin, which celebrates its 35th anniversary and reflects on how the practice of international arbitration has changed,[1] it seemed fitting to compare the preliminary dispute resolution statistics for 2025[2] with those in 1990.

- In 2025, 881 **new cases** were filed under the ICC Arbitration Rules and 13 new cases under the ICC Appointing Authority Rules, bringing the total number of new cases registered to 894, ranking 2025 among the top three years in terms of case volume. This compares to just 365 cases filed in 1990 (one a day).
- **Parties** came from 147 countries or independent territories, compared to 86 countries in 1990. As in 2024, the top three nationalities in 2025 were: the United States (representing 11.2% of all parties), Brazil (8.4%), and Spain (5.6%). Completing the top 10 nationality ranking are France, China (incl. Hong Kong SAR), Germany, the United Arab Emirates, Mexico, Türkiye, and India.
- In 2025, **ICC arbitral tribunals** were seated in 123 cities across 70 countries or independent territories, closely following a previous record of 127 cities in 71 countries, achieved in 2021, compared to 29 countries in 1990. In 2025, the top 10 jurisdictions were France, the United Kingdom, the United States, Switzerland, Singapore, Brazil, Spain, Germany, Mexico, and the United Arab Emirates.
- The **average amount in dispute** for cases registered in 2025 was approximately US$50 million, while pending cases involved an average of approximately US$172 million, compared to US$17 million in 1990.
- As in previous years, the **median amount in dispute** in cases registered in 2025 was approximately US$5 million and reached US$14 million in cases pending at year end, compared to approximately US$1.3 million in 1990.
- The **aggregate value of cases** pending at year end reached US$299 billion, with disputes ranging from just below US$2,500 to US$31 billion, compared to US$15 billion in 1990.

I also note that of the 881 new cases that began in 2025, 30 began with Emergency Arbitrator applications, and 169 new cases were administered under the Expedited Procedure Provisions, two elements of ICC Arbitration that did not exist 35 years ago when the 1988 Rules were in force.[3]

From this comparison, it is evident that ICC Arbitration has become far more international over the last 35 years.

This global aspect of ICC Arbitration is also reflected in the way the ICC International Court of Arbitration itself has changed, with ICC Court members from 43 countries in 1990 to now representing 119 countries and territories. The significant increase of women in ICC Court membership should also be recognised, as female membership has risen from 4% (two women) in 1990 to just over 50% (97 women) in 2025. Today, 11 women act as Vice-Presidents.[4]

In this time of rapidly shifting geopolitics, we greatly appreciate the continued trust that the global business community, as well as states and state-owned enterprises, place in ICC's dispute resolution services, for cases large and small, across the sectors, and around the world.

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1 In the first edition of the Bulletin in 1990, Stephen R. Bond, then Secretary General of the ICC Court wrote in its Introductory Note: "In light of these new developments [i.e. increasing volume of cases and diversity of persons/entities resorting to ICC Arbitration, higher stakes, complexification of disputes and new economic sectors], the Court has decided to publish a periodical with the aim of providing clear and up to date explanations of its functions and current information on international commercial arbitration in general as well as on ICC arbitration in particular".

2 ICC releases preliminary 2025 dispute resolution statistics - ICC - International Chamber of Commerce. The full 2025 ICC Dispute Resolution Statistics will be released later this year.

3 ICC Arbitration Rules (1988).

4 See M. Philippe, Achieving Gender Equality on the ICC International Court of Arbitration - A Giant Step, *ICC Dispute Resolution Bulletin*, 2018-1.

35 Years of the ICC Bulletin
Reflections from a Global Community

Sara Nadeau-Seguin and Rafael Rincón
Co-Editors in Chief, ICC Dispute Resolution Bulletin

The Editorial Board is honoured to introduce this special edition of *ICC Dispute Resolution Bulletin*, which celebrates its 35th Anniversary. Thirty-five years ago, the ICC Bulletin was launched with a clear ambition: to serve as a shared platform where practitioners, arbitrators, academics, and institutional actors could exchange knowledge, develop best practices, and document global evolution of international arbitration.

When the first issue was published in 1990, international arbitration was already an established feature of cross-border trade and international law. However, the development of arbitration trends and practices remained concentrated largely in Europe and North America. Today, arbitration is global – geographically, professionally, and intellectually. Notwithstanding this evolution, significant challenges remain ahead.

To mark this anniversary, we invited our very own editorial board members, as well as senior and emerging leaders in the field of arbitration from around the world, to respond to four straightforward yet profound questions:

1. How has your practice of international arbitration evolved over the past 35 years?
2. How has the law of arbitration changed in your jurisdiction over the same period?
3. What personal or societal changes have you witnessed over the past 35 years?
4. *Quo vadis*? – Where do you see arbitration heading in the next 35 years, in your jurisdiction or region?

Their reflections form a collective narrative of how arbitration has matured, diversified, globalised, and adapted. In this anniversary editorial, the Bulletin is proud to present these reflections, offering a comprehensive overview of the central themes that have defined – and will continue to define – international arbitration.

We sincerely thank for their precious input:
Prof. Mohamed S. Abdel Wahab, Yves Derains, Khushboo Deshmukh, Fabien Gélinas, Katherine González Arrocha, Dominique Hascher, Vera He, Dyalá Jiménez, Kevin Kim, Fernando Mantilla-Serrano, Irene Mira, Alexis Mourre, Sulabh Rewari, Eric Schwartz, Mikaël Schinazi, Anne Secomb, Eduardo Silva Romero, Mireille Taok, Pierre Tercier, Sylvia Tee, Anne-Marie Whitesell, and Anran Zhang.

1. How has the practice of arbitration changed?

It was not difficult for our contributors to describe what had changed in international arbitration over the past 35 years. There was no shortage of ideas. As **Eric Schwartz** muses:

> "Over the last 35 years almost everything has changed – and yet, at its core, not so much has."

Five recurring themes emerge from the contributions received: greater professionalisation; the transformative impact of the use of technologies and AI; a decentralisation and globalisation; the greater scale and greater complexity of the disputes submitted to arbitration; and greater diversity and inclusion.

Welcome from the Editors in Chief

(i) From elite craft to global profession

A dominant theme emerging from the contributions received is the professionalisation and expansion of arbitration practice. The evolution from a niche practice to a highly specialised and professionalised field is a striking change that has marked our profession over the last generation.

Notably, **Fernando Mantilla-Serrano** describes the last 35 years in a single word: "professionalisation". What was once the preserve of "a select few initiated individuals" is now a structured, global profession supported by institutions, training programmes, academic literature, and specialised boutiques.

Yves Derains offers a similar perspective. In 1985, co-founding one of the first arbitration boutiques in Paris felt innovative, even experimental. He recalls that, 35 years ago, arbitrators often had other primary professions, whereas today, arbitration is a full-time occupation for many, with parties and counsel drawn from the largest international law firms and judges with increasing expertise overseeing proceedings. Arbitration has become a central – and highly competitive – field for global firms and independent practitioners alike.

Pierre Tercier reflects on the transformation of a once niche practice into a normal way of settling disputes worldwide. He notes:

> "What was once exceptional has become commonplace; arbitration is now a normal way of settling disputes."

Such transformation into a global discipline is not without merit. **Alexis Mourre** notes that arbitration has become a true system of international justice, to which most major transnational disputes are submitted. This can be explained by various reasons, such as neutrality, and the availability of trusted and specialised arbitrators able to resolve disputes from a truly international perspective. Above all, Mr Mourre highlighted the New York Convention, which ensures the recognition of arbitration clauses and the enforcement of foreign awards in more than 170 countries.

(ii) Technology: From fax machines to the rise of AI

Another recurring theme among our contributors is the transformative impact of technology, particularly artificial intelligence (AI), on international arbitration. Almost every contributor highlighted the technological revolution.

From the logistics standpoint, **Anne Secomb** points to the shift from paper files and courier correspondence to digital case platforms and virtual hearings. She recalls that when she started her career, blackberries were not even widely accessible to associates.

Eric Schwartz recalls a time before hard-copy submissions disappeared, before online databases, before ubiquitous email – a time when urgent communications arrived by fax and procedural conferences took place in person.

Today, hearings are frequently conducted virtually. **Sylvia Tee** describes the transformation as going from an analogue to a fully digital practice. **Mikaël Schinazi** goes a step further, identifying how AI and related technologies are fundamentally reshaping the profession, from document review to research, drafting, and strategic analysis. These tools enable practitioners to process information at unprecedented speed and scale, freeing up time for higher-value legal work and already reshaping workflows, team structures, and research methodologies.

(iii) Globalisation and decentralisation

Our contributors repeatedly emphasise that arbitration is now truly global. They observe a clear shift away from a few "traditional" seats towards a more decentralised and delocalised model, with multiple centres emerging across regions and hearings taking place in increasingly flexible formats, thereby broadening access and diversifying perspectives.

Arbitration has become more inclusive and representative of varied legal traditions, with increased diversity in terms of gender, generation, and industry. **Dyalá Jiménez** recounts how she began her career on ICSID-related work in Paris, before joining ICC and later returning to Costa Rica to establish her own independent arbitration practice. She notes that this trajectory would have been impossible without internationalisation.

Vera He and **Anran Zhang**, writing from Asia, describe the transition from "rule-taker" to "rule-maker", with Asian parties, counsel and arbitrators increasingly shaping proceedings, not simply participating in them. **Irene Mira** and **Khushboo Deshmukh** chart the dramatic rise of Singapore and Hong Kong as preferred global seats and, more broadly, the professional maturation of counsel and in-house lawyers across South and Southeast Asia.

Prof. Mohamed Abdel Wahab describes a similar evolution in the MENA region – from domestic practice to world-class institutional, counsel and arbitral capacity.

(iv) Greater scale and greater complexity

Practice has become more intensive and expensive.

Eric Schwartz highlights the inflation of document production, interim applications, expert evidence and procedural sophistication. Such rise is driven by, among others, increasingly high-value disputes and large law-firm teams.

Prof. Fabien Gélinas notes that the rise of large firms has brought financial metrics and commercial strategy into sharper focus – with both positive and challenging effects. In particular, he notes that this trend does not always promote greater efficiency in the arbitral process and may curb the ability of arbitration to meet the needs of small and medium-sized enterprises that engage in cross-border business. Yet at the same time, this shift has fostered greater integration between communities of practice that were once distinct as well as greater interpretation of private-law and public-law arbitration.

(v) Greater inclusion and diversity

Many contributors observe that the community itself looks different today.

Dominique Hascher offers a striking anecdote from his first ICC Commission meeting in 1990. At the time, the second issue of the Bulletin was in preparation. He recalls:

> "Ambassador Alain Plantey, then President of the Court, turned to me and asked: 'What strikes you when you look at this assembly?' I answered: 'Only one woman in the room'. He replied: 'Only white people in the room'. "

He states that he was fortunate to participate in opening up the secluded world of arbitration under the leadership of Ambassador Plantey, adding that:

> "The ICC Bulletin together with its regional supplements was the vehicle that gave visibility to those practitioners from distant horizons."

Today, the arbitral community is vastly more diverse – geographically, culturally, linguistically and generationally.[1] The ICC Commission on Arbitration and ADR now brings together experts and practitioners in the field of arbitration and ADR with currently over 1,300 members from over 100 countries. Just over 50% of these members are women, with 15 women and nine men sitting at the Commission's Steering Committee.[2]

Katherine González Arrocha and **Anne-Marie Whitesell** echo this point, highlighting growing leadership roles for women[3] and broader regional participation. According to Prof. Whitesell:

> "Although much progress remains to be done, as an academic who works with young lawyers, I witness their enthusiasm for the field and their dedication to improving it, which makes me extremely optimistic for the future of international arbitration."

While much remains to be done, diversity is no longer aspirational. It is structural and essential for ensuring a truly global network of practitioners.

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1 See also the ICC pledge to "[built] on its cutting-edge work on diversity, equity and inclusion in all aspects of dispute prevention and resolution" enshrined in the ICC Centenary Declaration on Dispute Prevention and Resolution.

2 On the occasion of the ICC Commission's centenary, Michael McIlwrath, then Chair of the Governing Body of ICC Dispute Resolution Services, shared his thoughts on Commission's role in worldwide dispute resolution in its first hundred years and in the future, see ICC Commission on Arbitration and ADR in the next 100 years: *Quo Vadis*, *ICC Dispute Resolution Bulletin* 2020-3. On diversity and inclusion, an ICC Commission Task Force prepared the ICC Guide for Disability Inclusion in International Arbitration and ADR.

3 On gender data at ICC Dispute Resolution Services, see e.g. M. Philippe, Achieving Gender Equality on the ICC International Court of Arbitration - A Giant Step and How Has Female Participation at ICC Evolved? (ICC Arbitrators, Court Members and Court's Secretariat), *ICC Dispute Resolution Bulletin*, 2018-3 and 2018-1.

2. How has arbitration law evolved?

Here, our contributors reflect on the global convergence around core principles, which may be due at least in part to the growing influence of the UNCITRAL Model Law.

(i) Global convergence around core principles

It is not surprising that a major theme is the harmonisation and modernisation of arbitration legislation worldwide.

Eduardo Silva Romero notes near-universal acceptance of foundational principles:

- the binding nature of the arbitration agreement;
- the separability of the arbitration agreement;
- the kompetenz-kompetenz rule; and
- the binding nature of arbitral awards.

Prof. Mohamed Abdel Wahab describes legislative modernisation across Egypt and the MENA region, paired with increasingly sophisticated judicial reasoning. According to Prof. Abdel Wahab:

> "We witnessed the rise of supportive and sophisticated judiciaries, with a change of judicial attitudes towards arbitration from suspicion to trust. More broadly, judicial attitudes have indeed shifted from uncertainty or occasional interventionism to a more clearly pro-arbitration stance. Courts in Egypt and in the MENA region have upheld arbitration agreements, affirmed the principles of separability, kompetenz-kompetenz, and the impartiality and independence of arbitrators, narrowed the scope of public policy considerations, and upheld the non-review of arbitral awards on the merits."

There are other examples of this pro-arbitration stance. **Yves Derains** details how the French 2011 Decree maintained a dualistic approach in arbitration and introduced the norms that gave way to innovative positions:

> "The arbitration clause is "substantively" valid as soon as it expresses the will of the parties, regardless of the law applicable to the contract. With the exception of very basic principles of due process, there are no mandatory rules of procedure that the parties and the arbitrators must respect. An award may be enforced even if it was annulled in its country of origin; a recourse for annulment of an award has no suspensive effect, etc."

Furthermore, the recent establishment of the International Commercial Chamber of the Paris Court of Appeal, which permits the use of English and has exclusive jurisdiction over international arbitration cases, further strengthens the arbitration-friendly reputation of France. He notes that the acceptance of core legal principles and modern judicial approaches are also evidenced in the rising impact of the UNCITRAL Model Law.

Finally, **Mireille Taok** emphasises the role of soft law guidance, evolving jurisprudence, and the influence of the New York Convention in bringing greater predictability and harmonisation. **Eric Schwartz** highlights the adoption of guidelines, handbooks, and best practices by organisations such as the IBA, which have contributed to the development of a more sophisticated and supportive jurisprudence.

(ii) Growing influence of the UNCITRAL Model Law and national reforms

Our contributors emphasise the harmonising effect of the UNCITRAL Model Law across multiple jurisdictions. In Latin America, Mexico, Colombia and Chile have adopted the UNCITRAL Model Law with certain amendments.

Dyalá Jiménez further notes that Costa Rica enacted in 2011 a UNCITRAL Model Law-based bill for international arbitration. She also notes that, in April 2025, a unique monistic approach was chosen for the arbitration regime in Costa Rica, which did away with certain local restrictions, especially the lack of clarity regarding the tribunal's powers to issue provisional measures and the mandatory stay of proceedings when preliminary decisions confirming jurisdiction were issued by the arbitrators and reviewed by the judiciary.

The same modernisation can also be found in Panama. **Katherine González Arrocha** recounts Panama's adoption of Decree Law No. 5 of 1999, inspired by the 1985 UNCITRAL Model Law. A key milestone came in 2004, when constitutional reforms recognised both kompetenz-kompetenz and the State's ability to enter into arbitration agreements. On 2013, a crucial amendment was adopted which modernised Panama's regime by regulating both domestic and international commercial arbitration in line with the 2006 UNCITRAL Model Law.

Singapore, as described by **Anne Secomb** and **Sylvia Tee**, modelled its 1994 International Arbitration Act on the UNCITRAL Model Law. Furthermore they also note that Singapore and Hong Kong review and update their respective arbitration laws on an ongoing basis. The most significant reforms have involved introducing provisions to adopt aspects of the 2006 amendments to the UNCITRAL Model Law, providing for the enforcement of orders made by emergency arbitrators, as well as permitting third party funding and outcome-related fee structures.

In Australia, significant changes were made to the International Arbitration Act in 2010 to adopt the 2006 UNCITRAL Model Law amendments, around the same period when uniform arbitration legislation based on the Model Law also came into force across all states and territories between 2010 to 2013.

In China, recent amendments to the Arbitration Law, which entered in force on 1 March 2026, introduced reforms to align the legislative framework with international norms and represent the first major changes since the law was first implemented in 1995.

In Korea, **Kevin Kim** similarly notes that Korean courts have become significantly more familiar with the law and practice of international arbitration. They now boast elite judges that are very capable of scrutinising arbitral awards in setting aside proceedings, and he proudly reports that Korea has become a very arbitration-friendly jurisdiction while maintaining the robustness of judicial review that is necessary for businesses to trust Korea as a high-integrity jurisdiction to invest.

Turning to India, since 1996, the country adopted provisions based on the UNCITRAL Model Law, modernising its arbitration framework. **Khushboo Deshmukh** remarks that several legislative reforms and amendments were thereafter enacted to encourage jurisprudential alignment with the global standards. She also notes that India's modernisation inspired its neighbouring countries, including Bangladesh, Sri Lanka, Nepal and Pakistan to align their domestic practice with global expectations.

In North America, **Prof. Fabien Gélinas** emphasises how Canada embraced the UNCITRAL Model Law early – even while federal diversity created implementation complexity. **Pierre Tercier** notes that Swiss arbitration legislation has been revised to allow for a more flexible approach to international cases, while maintaining a liberal regime and limited recourse against awards.

Finally, in the UAE, **Mireille Taok** brings our attention to Federal Law No. 6 of 2018, the country's first stand-alone arbitration law. Largely inspired by the UNCITRAL Model Law, it limited court intervention, introduced internationally recognised principles including competence-competence, party autonomy and separability, and brought greater clarity, efficiency, and predictability to UAE-seated arbitrations.

3. What personal or societal changes have you witnessed?

The law and practice of arbitration have undeniably changed over the past 35 years, so has the world around it. Our contributors reflect on broader societal changes, including the digital transformation, increased participation of women, the implementation of diversity and inclusion policies, and the normalisation of remote working.

(i) Digital transformation of work and life

Many contributors describe the rapid expansion of remote working, the expectation of uninterrupted connectivity, as well as the integration of AI and digital workflows. Although these advancements have enhanced accessibility, they have also diminished the distinction between professional and personal boundaries.

Numerous contributors also recognise the significant investment made in technological infrastructure across various regions, together with the global transition from paper-based to digital societies. Such investments have enabled certain countries to take the lead in implementing initiatives and leading with technological applications in the field of international arbitration and other areas.

Katherine González Arrocha recalls that when she joined the ICC Court in 1996, the Bulletin was still printed and all communications were sent by courier or fax – emails were, at the time, rare curiosities.

While **Khushboo Deshmukh** notes that arbitrators are now more open to receiving electronic submissions and virtual case management, **Eduardo Silva Romero** observes that this shift has also affected our professional lives; the most dramatic example of this being people having dinner at a restaurant who rather consult their smart phones than speak to or even look at each other.

(ii) Changing legal culture

Several contributors highlighted the cultural shifts that have transformed the practice of international arbitration.

Pierre Tercier remarks that what was once a field reserved for a few specialists, coming from legal practice, academia, and judiciary, is now becoming a general practice area for many law firms. In his opinion, this has prompted "the style [to change] drastically".

Yves Derains highlights how 35 years ago, most of the arbitrators had another job which provided them with social status:

> "To be an arbitrator was a secondary activity."

However, the professionalisation of the field and the competence of the judiciary demands that arbitrators devote time and effort to multiple complex disputes:

> "Consequently, being an arbitrator is often a full-time job nowadays."

Vera He recognises the growing sophistication of Asian parties in international arbitration. As the arbitration market in Asia has opened up and capacity has been built, users are more adept at navigating arbitration procedures and start driving demand for more tailored approaches. **Irene Mira** similarly notes that in-house counsel and users alike have become much more sophisticated and are therefore:

> "much more inquisitive when reading into laws and regulations and extremely strategic yet pragmatic in applying legal basis in their arguments."

Fernando Mantilla-Serrano points out that transparency and inclusion have become core values, "levelling the playing field". He emphasises that these principles can lead to positive developments, but also present challenges, often making procedures more rigid at the expense of the parties' interests.

Other contributors detailed additional challenges. **Eduardo Silva Romero** laments the impact that social media, via smart phones and similar devises, has had and continues to have on society's mores. He notes that younger generations are not reading books, when reading has traditionally been the means of transmitting Western culture and values. He asks:

> "How many books on legal theories have young international arbitration practitioners read?"

Furthermore, **Prof. Fabien Gélinas** references the erosion of shared values and the increasing political pressure on international adjudication processes. In light of recent global developments, he notes that we now see:

> "Powerful states mounting frontal attacks on international lawyers, judges and arbitrators."

He adds:

> "These developments are sobering, and optimism is hard to sustain. The silver lining for arbitration practitioners is that we remain in a position to safeguard core rule-of-law principles by rigorously and ethically doing what we do best. That is ensuring the full realisation of due process, regardless of political pressures."

(iii) Diversity and inclusion

Several contributors emphasise greater gender balance, growing regional representation and a clear generational renewal.

Prof. Mohamed Abdel Wahab emphasises there has been a visible impact of diversity and inclusion initiatives, with more women playing leading roles as counsel, arbitrators, experts and institutional leaders; and young practitioners rising through structured training programs and networks.

Mirelle Taok highlights how the profession has become more globally connected and increasingly conscious of inclusion. She concludes that:

> "Institutional policies and diversity pledges have supported this shift, alongside growing attention to sustainability, transparency, and ethical considerations."

Sylvia Tee comments on the greater gender diversity in the composition of arbitrators and a stronger appreciation for arbitrators with cultural backgrounds mirroring those of the parties.

Anran Zhang confirms this sentiment, emphasising that young people in Asia have been open to receive education in the West to broader their knowledge and English skills:

> "Confidence is the keyword in my observations. Asians in general have more confidence to participate in international arbitration, which seems to be traditionally dominated by the West."

Mikaël Schinazi notes how, from a sociological perspective, the arbitration community in Paris has changed profoundly. The city has become a truly international hub, attracting practitioners from all over the world.

> "One no longer needs to be a French lawyer trained in France to practice effectively in Paris. This increased openness has made the field richer, more diverse, and more intellectually stimulating. It has fostered a genuinely international community in which varied legal traditions and professional cultures coexist and interact daily."

Finally, most practitioners observe that there has been a significant increase in the number of academics and practitioners who combined local degrees with foreign post-graduate degrees in the field of dispute resolution and specifically international arbitration. This has led to the rise of new generations of multilingual and internationally attuned arbitration practitioners in multiple regions.

4. *Quo vadis*?

Looking to the future, contributors anticipate continued technological innovation, further legal reforms, and the expansion of arbitration into new fields. **Prof. Fabien Gélinas**, for example, notes that;

> "International arbitration is on a growth trajectory that is not about to slow down."

There is also consensus that sustaining the field's dynamism will require conscious efforts to nurture talent, embrace change, and maintain high standards of professional rigour and ethical responsibility.

Our contributors also point to aspects requiring particular vigilance:

- The risk of over-reliance on technology;
- The potential marginalisation of smaller cases; and
- The need to adapt to shifting geopolitical and economic dynamics.

(i) Artificial intelligence: promise and risk

Nearly all contributors foresee the opportunities and challenges that AI entails as playing a transformative role. **Eric Schwartz** observes that AI may drive profound structural changes in the practice of international arbitration over the next few years. **Sylvia Tee** notes that AI is likely to play an increased role in the arbitration process as the perennial push for quicker, cheaper forms of dispute resolution drives for AI tools.

Similarly, **Mireille Taok** observes that the UAE is likely to play a leading role in debates concerning the evolution of both arbitral and national court justice, the influence of algorithm designers, the emergence of disparities due to unequal capacities for integrating AI, and the delicate balance between tasks that may be entrusted to AI and those that must remain anchored in human judgment.

Prof. Mohamed Abdel Wahab observes that the MENA region will play a significant part in utilising technological innovations and using AI-assisted tools to support decision making in international arbitration. He believes that this will lead to the development of AI-based dispute resolution processes alongside human-based dispute resolution mechanisms, and that there will likely be a rise in hybrid systems and processes that integrate AI and human interfaces.

Alexis Mourre calls for institutional regulation and transparency. He cautions that:

> "The use of generative AI tools [carries] enormous potential for the improper delegation of their jurisdictional role by arbitrators."

Consequently, he argues that:

> "[This] can thus not be left unregulated by arbitral institutions, who should impose [arbitrators to provide] full information to the parties of the intended use of IA tools, and require – as for the use of administrative secretaries – that the parties consent to that use at the outset of the case."

The challenges posed by AI demand fundamental decisions from the arbitration community. In the words of **Eduardo Silva Romero**:

> "We all now reluctantly recognise [IA] will modify how we practice international arbitration; in any event, we (Humanity) will have, sooner rather than later, to make the ethical decision as to what kind of justice we (Humanity) want to have in the future to resolve human disputes: human justice, IA justice, or hybrid justice."

Among the many challenges that the increasing use of AI will pose, **Kevin Kim** notes the need for advocates to do more to establish themselves, since "AI is able to do more of the ground work". For this reason, he anticipates that:

> "The human skill in advocacy will become even more important, and it is important that Asian lawyers hone their craft even more deliberately."

(ii) The resurgence of investment contract arbitration

In a "return to the future" vision, several contributors foresee the restructuring of ISDS mechanisms, with possible revival of contract-based models. Notably, **Yves Derains** remarks that the criticisms against investment arbitration will result in an increase or second wave of contractual investment arbitrations.

Eduardo Silva-Romero also predicts a decline in investment treaty arbitration and a resurgence of investment contract arbitration.

(iii) Market segmentation and regional leadership

Contributors generally share the sentiment of a bright future for commercial arbitration, likely with a segmentation of the market. **Fernando Mantilla-Serrano** notes that large law firms will maintain a significant share of the "bet-the-company" cases for multinationals, while boutique firms will offer more flexible rates and fees. This will be accompanied by an increased number of full-time arbitrators, including young(er) practitioners.

Asia and the MENA region will continue to rise as arbitral hubs. **Vera He** notes that, with Asian parties becoming more involved in cross-border projects, there is an increasing need for dispute resolution that bridges the gap between common law and civil law practices. She remarks that ICC is well-placed to help develop integrated mechanisms that harmonise common law and civil law approaches. There is now a clear expectation for arbitration to be integrated with other ADR mechanisms, particularly mediation and expert determination. This reflects a broader shift towards hybrid or integrated dispute resolution models that better serve the practical and cultural needs of parties in the region.

Irene Mira predicts that arbitration will still be the world's preferred dispute resolution mechanism and that Asia will likely see more industry specific arbitration methods and rules that cater to niche economy sector.

Notwithstanding, **Sulabh Rewari** note that some jurisdictions still have a long way to go before they can catch up with leading jurisdictions in international arbitration, and that such jurisdictions need to take significant steps in order to be considered a credible, neutral and efficient seat for arbitrations. This will require concerted effort from the legislature, the judiciary, and practitioners.

(iv) Institutional stewardship

ICC and other institutions are expected to act as guardians of due process, ethics, transparency and integrity.[4]

Alexis Mourre highlights that arbitral institutions are the backbone of an international system of justice. Institutions have the duty to take the necessary measures to ensure that arbitration remains legitimate in the eyes of States and the broader public. This duty demands that institutions lead on several fronts:

- Institutions must strongly promote a culture of transparency: "An institution should be a house of glass for its users".
- Institutions should promote and enforce ethical rules for all players.
- Institutions should ensure that disclosures are properly made in accordance with the subjective standard "in the eyes of the parties" as established by the IBA Guidelines on Conflicts of Interest in International Arbitration.
- Institutions should, as ICC is doing, strongly encourage expedited resolution also for the most complex and difficult disputes. Expedited rules have proved to work well and do not affect the quality of the process or the award:[5] "They should become the norm rather than being an exception".

(v) Preserving the rule of law

Contributors observe that political scrutiny will persist. The legitimacy of arbitration will depend on fairness, independence and transparency.

For example, **Dominique Hascher** highlights the consolidation of the emergence of an international system of arbitral justice, which boosted international arbitration and ICC activities, as the major achievement of the last 35 years. Such internationalisation should be given unwavering support.

However, major challenges remain ahead. He notes that in Europe, the reputation of arbitration has come to the attention of political and judicial circles:

> "There is no longer room for parties to relinquish the benefits of an effective legal review before the member States courts, which is of the essence of the rule of law. The parties' choice for arbitration is challenged either with outlawing the arbitration agreement or submitting the insertion of the award subject to the European Court of Justice's definition of the rule of law. Thirty-five years later, the role and place of arbitration as the natural forum for international disputes should be reinvented."

Conclusion

The reflections of these distinguished contributors reveal a field in constant evolution, shaped by technological innovation, legal reform, globalisation, and societal change.

International arbitration has become more inclusive, professionalised, and sophisticated, yet it faces new challenges that will require adaptability, ethical reflection, and a commitment to the core values of flexibility, multiculturalism, and justice.

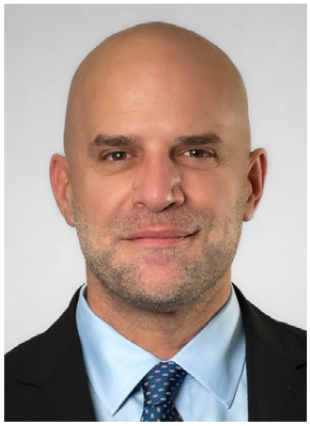
The future of international arbitration and ADR promises to be as dynamic and transformative as its past, and we look forward to continuing to report on these changes in the ICC Bulletin.

4 On the guardian role of arbitral institutions, see also C. Salomon, 2024 Ciarb Alexander Lecture, Guardian, Gatekeeper or Guide: The Role of Arbitral Institutions in Protecting the Integrity of the Arbitral Process, Promoting the Rule of Law, and Providing Access to Justice, *ICC Dispute Resolution Bulletin*, 2024-3.

5 See e.g. the new ICC Commission Report, Toolkit and Factsheet, which provide a comprehensive review of close to 800 expedited procedures, along with procedural guidance to arbitrators on how to successfully navigate expedited proceedings.

35 Rapid-Fire Questions to Alexander G. Fessas

Secretary General of the ICC Court and Director of ICC Dispute Resolution Services



Your current role

1. How would you describe your job to someone at a dinner party?

I help run a global business organisation and oversee how disputes are resolved around the world.

Think corporate management meets law meets international peacekeeping – just with contracts instead of helmets.

2. What's the best part of being Secretary General of the ICC International Court of Arbitration ("ICC Court")?

Hands down, the people one connects with.

3. And the most challenging?

The hours in the day are often not enough!

4. What does a typical day in your position look like (if there is such a typical day)?

Days are anything but typical, but they usually involve several meetings, a fair bit of decision-making and, often, travel. To make it work, one maintains flexibility and tries to remain available as much as possible.

Career path

5. What did you want to be as a child?

As a child I was drawn to history and archaeology. I studied law, not fully certain that I wanted to pursue a career as a lawyer, which I ultimately did, and have zero regrets.

6. Why did you start a career in arbitration?

I suppose it happened organically, and I credit my curiosity. I was recruited by a boutique firm that had a growing arbitration practice, I started developing an understanding of how business works, was good with languages and participated in the Vis Moot. I was also fortunate enough to have crossed paths with people who encouraged me to explore that direction.

7. When did you first join ICC?

In late 2011.

8. Why?

Again, curiosity. I wanted to understand how dispute settlement dynamics play out on a broader scale, and contribute.

9. If you could choose a song or tune for your arbitration career, what would it be?

Just Fine by Mary J Blige, or the *Rondo alla ingharese* by Beethoven.

10. Which professional achievements were most meaningful to you?

The expansion of our international footprint; and our success in ensuring business continuity during times of prosperity and challenge alike. Getting *Paris Arbitration Week* off the ground was pretty cool too.

11. What advice would you give to anyone interested in pursuing a career in international arbitration?

Early career choices are about exposure. Don't be afraid to accept challenges, and give them all you have.

At ICC

12. What is one innovation you are most proud of at ICC?

I would say that the success of ICC expedited arbitration was a tremendous breakthrough in our understanding of dispute settlement, procedural efficiency and valid outcomes. Many of the innovations we have since tested or launched would not have been possible without it.

13. What global trends do you see impacting international arbitration and dispute resolution?

Any trend that affects trade likely affects dispute resolution. Currently, the main ones relate to economic and industry reconfigurations, tech disruption but also changes in the dispute settlement lifecycle.

14. How does ICC adjust to these changes?

We confirm the recipe, adapt the menu, and revamp the kitchen.

15. What do most people not know about the ICC Court?

What most people don't realise is that the ICC Court never stops. Somewhere, at any given moment, a case is being reviewed, a memo is drafted, a decision is taken, or an issue is quietly resolved.

16. What changes have you witnessed and/or driven at the ICC Court Secretariat since you've joined?

The Secretariat has earned a place at the table when issues of importance on trade, dispute settlement or our profession are being debated. Today, the Secretariat is globally recognised for its expertise – and others very often follow what we do. Beyond that, I believe we are acknowledged for our innovation, and that is a source of pride.

Operational changes also come to mind. For instance, the gradual transformation from a centralised to a decentralised system of case administration (today, we manage cases from six offices in the Americas, Europe, the Gulf and Asia), but also the shift to using specialised technology to enhance user experience, productivity, and craft the future.

Expanding the capacity of ICC Dispute Resolution Services beyond the Secretariat and the ADR Centre has been equally important. Today, teams working on knowledge and education, thought leadership, business development, communication and promotion complement case management work our teams carry out around the world.

17. What words will best describe the ICC Court 35 years from now?

Innovation, reliability, excellence.

About arbitration

18. What is a common misconception about arbitration?

That it's a panacea.

19. What have you learnt from working with arbitrators from around the world?

The universal value of good judgment and fair-mindedness. Arbitrators help hold the fabric of international trade together.

20. What is the most surprising thing you have learned about international arbitration since joining ICC?

That legitimacy compels compliance. Most ICC arbitral awards are carried out voluntarily.

21. Which book should every arbitration practitioner read?

There are several. Thucydides' *History*, to understand conflict; Edward Hall's *Beyond Culture*, for the basics of intercultural communication; and any of Richard Susskind's recent works, in preparation for what is to come.

22. Which movie should every arbitration practitioner see?

Erin Brockovich.

23. Which quality is most underrated in an arbitrator?

Patience. Having a sense of humour is a close second.

24. Can you name the most surprising place where arbitration has taken you?

An undisclosed training facility at an undisclosed location.

25. Which three issues should users and institutions focus on to ensure that international arbitration will still be around in 35 years?

The survival of international arbitration is not a goal in itself. Instead, we anticipate evolving needs and expectations, and focus on how they can be best addressed.

On a personal note

26. Three things you cannot live without?

Music, good laughs, summer swims.

27. Your pet peeve?

Lights left switched on for no apparent reason.

28. Something most people do not know about you?

I sing fairly decently.

29. What is your favourite motto?

"Life is too short to collar soufflés."

30. One thing you wish you knew when you were 35?

See above answer 😊.

31. Your favourite part of the day?

Daybreak. It's magical.

32. Your favourite cities?

Los Angeles, Paris, Athens and Tokyo.

The ICC Bulletin

33. What would be your three words to describe the ICC Bulletin?

Quality. Reliability. Community.

34. How has the Bulletin aligned with ICC's mission for the past 35 years?

Since its inception, the Bulletin has operated as a bridge between theory and practice. It illustrates how arbitration provides access to justice and the rule of law, acts as an enabler of transparency on case management activity but also on how arbitrators address various issues of procedure and substance, and lastly showcases the strength and ties of the global disputes community.

35. How can the Bulletin continue to be a leading publication in dispute resolution over the next 35 years (through 2060)?

When the Bulletin first appeared, the printed medium was the primary way to share knowledge. As methods of engagement change and channels of communication multiply, the Bulletin has found ways to adapt and deliver beyond that traditional setting – its integration in ICC's Dispute Resolution Library on Jus Mundi and Jus AI is a good example of that change.

Beyond that, the strength of the Bulletin lies with the editorial board of external peers, working hand in hand with Stephanie Torkomyan, our Publications Manager, to produce high quality content, and the many contributors who publish in the Bulletin annually.

I am confident that, by maintaining engagement across different channels, with the support of colleagues from across the dispute resolution spectrum and by producing high quality content, the success of the Bulletin is guaranteed well into the 2060s.

Professor Dr Nael Bunni (1939–2025)

Dr Hélène van Lith
Secretary to the ICC Commission on Arbitration and ADR

Aisha Nadar
Vice-Chair, ICC Commission on Arbitration and ADR; Arbitrator, Mediator, Dispute Board Member; Advokatfirman Runeland AB

Professor Dr Nael Georges Bunni, one of the world's leading international construction arbitrators, passed away at the age of 86 in November 2025.

With his passion for effective resolution of disputes, and his determination, wisdom and fairness, Professor Bunni's was influential in deciding not only individual disputes, but also led the way in shaping arbitration in international construction matters.

As a chartered engineer and infrastructure insurance assessor, Professor Bunni was open to new thoughts, while steadfast in basic convictions. Seemingly without effort, he combined his brilliance, thoughtfulness, and understanding of matters, big and small, to promote dispute avoidance and ADR in construction, leaving us with a wealth of knowledge in articles, books, awards and adjudicative decisions.

Professor Bunni joined the ICC Commission on Arbitration and ADR in 1988. His contributions and expertise were instrumental in shaping the Commission's work, particularly in the preparation of the first edition of the Commission Report on Construction Industry Arbitrations, alongside Judge Humphrey Lloyd QC, published in 2001. When the second edition of this report was undertaken, he shared his expertise with the co-chairs and helped launch the updated report in 2019.[1]

When the Commission embarked on the revision of the ICC Dispute Board Rules, Professor Bunni was one of the main expert drafters,[2] thus ensuring that the new ICC DB Rules remained compatible with the FIDIC Model Contracts, as he continued to foster and further collaboration between ICC and FIDIC.[3]

Born in Kirkuk, Iraq, in 1939, Professor Bunni's achievements and prominence were made possible in part by him having in 1969 to bid farewell to his beloved Iraq, when he moved to Ireland, his wife Anne's home country. As Nael himself saw this, he was a man responding to his destiny, intellectual, practical and spiritual.

After spending nearly 60 years in Ireland, Nael considered himself to be as much Irish as Iraqi. As he recounted in *Insights on Construction Contracts and Insurance*:[4]

> "There is a wonderful proverb in Arabic which seems to apply throughout my life. It says '*tuqadiroun fatath-haku al aqdaar*', which translates to 'you plan, but destiny laughs'."

Professor Bunni will also be remembered for his generosity of spirit, his passion, his integrity, and his commitment to scholarship. Everyone who interacted with Nael saw a man doing great things in the world, sometimes in a difficult environment, while being generous to others with himself, his time and insights, which were often the results of his own thinking.

His legacy lives on not only in the principles he championed and the many colleagues he inspired throughout his remarkable career, but also through his children and his youngest daughter Lydia Bunni, who, following in Nael's footsteps, was appointed an Irish Delegate to the ICC Commission on Arbitration and ADR.[5] The ICC community honours his memory and remains deeply indebted for his valuable contributions.

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1 Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management (ICC, 2nd. ed., 2019) led by Aisha Nadar and Christopher Seppälä.

2 Alongside Pierre Genton, Aisha Nadar, Peter Wolrich, Christopher Newmark, Hannah Tümpel and Hélène van Lith.

3 2015 ICC Dispute Board Rules; N. Bunni, P. Wolrich, P. Genton, Drafters' Insights into the 2015 ICC Dispute Board Rules, *ICC Dispute Resolution Bulletin*, 2016-1.

4 Nael G. Bunni, Lydia B. Bunni, Risk and Insurance in Construction, (3rd ed., Routledge, 2022).

5 www.iccwbo.org/commission-arbitration-ADR

Professor Karl-Heinz Böckstiegel (1936-2025)

Yves Derains

Founding Partner, Derains & Gharavi, Paris: Honorary Chair, ICC Institute of World Business Law; Former Secretary General, ICC International Court of Arbitration

The international arbitration community has lost one of its most outstanding figures with the passing of Professor Karl-Heinz Böckstiegel on 19 December 2025.

Karl-Heinz was born in Engers, Germany, in 1936. His first experience with international arbitration was through ICC in the early 1960s, when he spent three months working for the then Secretary General of the ICC Court, Frederic Eisemann. The immediate result was the publication of an article on ICC Arbitration in disputes between private enterprises and states.[1]

Throughout his professional life, Karl-Heinz Böckstiegel maintained a close relationship with ICC. Not only was he one of the most in-demand ICC arbitrators, but he was also very active within the ICC Institute of World Business Law Council from 1999 to 2017.[2] However, his contributions to the ICC's work extended beyond arbitration, as evidenced by his presidency of the ICC Working Group on Air Law from 1979 to 2001.

During his long career as an arbitrator, Karl-Heinz served on tribunals that heard disputes involving parties from all over the world, and his name is attached to famous investment arbitration awards.[3]

As president of the tribunal, he conducted the proceedings admirably. He had a thorough understanding of the case and an impressive ability to summarise the main facts and legal issues. I was particularly fascinated by his ability to make rapid and firm decisions. This is especially necessary during hearings, where discussions can easily become uncontrollable and delay the entire process. I will never forget the expression on the lawyer's face who wanted to reopen the debate at the pre-hearing conference, just after the tribunal had ruled on a thoroughly discussed procedural issue, when he heard Karl-Heinz Böckstiegel simply say:

> "This was the tribunal's decision, not a proposal for discussion. Let's move on to the next item on the agenda."

I confess that I often used this formula many times in my own cases thereafter. He also invented the now famous "Böckstiegel method", which limits the time each side has to present their case and examine witnesses, while giving each party discretion over how to divide their time. This method is now used in almost all proceedings, with different degrees of strictness. However, few arbitrators use a chess clock when implementing it as he did.

Given his personality and drive, it is no surprise that he was successful in fulfilling particularly challenging missions. From 1984 to 1988, he presided over the Iran-U.S. Claims Tribunal in The Hague, guiding the institution through a difficult period. In the 1990s he served as panel chairman at the UN Compensation Commission in Geneva, set up by the UN Security Council to decide claims resulting from Iraq's invasion and occupation of Kuwait during the First Gulf War.

Karl-Heinz Böckstiegel will undoubtedly be remembered for his many prestigious roles,[4] such as Professor of international business law and Director of the Institute for Air and Space Law at the University of Cologne, co-founder of the German Arbitration Institute (DIS), President of the LCIA (1993-1997), and President of the International Law Association (2004-2006). He was particularly committed to promoting young academics in the field of international arbitration.[5] Those interested in arbitration who were fortunate enough to work with him will remember a generous, efficient, and smiling model of professionalism that is impossible to replicate.

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1 K.-H. Böckstiegel, "Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce", *American Journal of International Law*, Vol. 59, Issue 3, July 1965 , pp. 579-586.

2 www.iccwbo.org/icc-institute

3 Among many others: *Philip Morris Asia Limited v. The Commonwealth of Australia*; *Caratube International Oil Company LLP v. Republic of Kazakhstan*; *Chevron Corp. and Texaco Petroleum Corp. v. Republic of Ecuador*; *Noble Ventures, Inc v. Romania*; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*.

4 In 2019, Karl- Heinz Böckstiegel was awarded the GAR lifetime achievement award.

5 Karl-Heinz Böckstiegel Foundation promotes science and research as well as vocational training in the field of arbitration.

ASIA/PACIFIC

Japan

Is Procedural Order No. 1 an Order of the Arbitral Tribunal or a Procedural Agreement between the Parties?

Aiko Hosokawa
Partner and Co-Head of the International Dispute Resolution Practice Group, Oh-Ebashi LPC & Partners, Tokyo

Miriam Rose Ivan L. Pereira
Counsel and Co-Head of the International Dispute Resolution Practice Group, Oh-Ebashi LPC & Partners, Tokyo

This article analyses two recent Japanese court decisions – Tokyo District Court (2023) and Tokyo High Court (2025) – on whether Procedural Order No. 1 issued in an arbitration proceeding seated in Tokyo constituted an order of the arbitral tribunal or a procedural agreement between the parties. These decisions not to set aside the partial award reinforce Japan's pro-arbitration stance and its alignment with international arbitration practice.

1. Introduction

Japan has been solidifying its stance as a pro-arbitration country. Recent amendments to the Arbitration Act,[1] effective 1 April 2024, align it with the 2006 UNCITRAL Model Law and support the government's efforts to promote Japan as an arbitration seat. The judiciary recently echoed this approach: in 2023, the Tokyo District Court declined to set aside a partial award, and the Tokyo High Court upheld that decision.[2] These decisions, while unpublished, offer valuable insight into the significance of Procedural Order No. 1 and its possible implications on the validity of an award.

The case began before the amendment of the Arbitration Act, and while the procedural issues raised therein are complex and the rulings of the Japanese courts contain several points of interest under Japanese law, this article will focus only on the courts' discussion of the nature of Procedural Order No. 1.

2. Procedural background of the case

The dispute arose from the termination of a contract between a Japanese company and a foreign company. The contract contained an ICC arbitration clause. Nevertheless, in 2018, the foreign company sued the Japanese company and a related individual in its own country outside Japan. The Japanese company, on the other hand, initiated ICC Arbitration seated in Tokyo against the foreign company.

A final arbitral award was issued in the ICC Arbitration. The foreign company, however, maintained its lawsuit outside Japan. Thus, in 2021, the Japanese company and the related individual (collectively, the "Claimants") filed another Request for Arbitration ("RfA") with ICC, initiating a second ICC Arbitration seated in Tokyo against the foreign company. The same arbitrator who sat in the first ICC Arbitration was appointed as the sole arbitrator.

1 Act No. 138 of 2003, as amended. For further commentary, see e.g. C. Nakahara, K. Kawamura, S. Takahashi, Japan: Legal Reform on International Dispute Resolution – Entry into force of the Amended Arbitration Act and Singapore Convention Implementation Act, *ICC Dispute Resolution Bulletin* 2024-2, and K. Kobayashi, Recent Amendments to the Arbitration Act and the New Mediation Law concerning the Enforcement of International Mediation – Part I, and Recent Amendments to the Arbitration Act and the New Mediation Law concerning the Enforcement of International Mediation – Part II, Oh-Ebashi Newsletter 2023.

2 Tokyo District Court: Reiwa 4 (2022) (Chu) No. 1; Appeal before the Tokyo High Court: Reiwa 5 (2023) (Ra) No. 2747.

The foreign company filed an answer and requested an expeditious determination ("Expeditious Determination") of all the Claimants' claims (i.e. the immediate dismissal of specified claims or defenses without following the ordinary arbitration procedure).[3]

The arbitrator circulated drafts of the Terms of Reference ("ToR") and Procedural Order No. 1 ("PO1"). Following submission of preliminary comments by the parties, a case management conference ("CMC") was held, during which the ToR and the PO1 were discussed.

In the process of drafting the ToR, the Claimants' counsel added two new claims for breach of contract by the respondent (the "New Claims") aside from those listed in the RfA. After the CMC, the arbitrator circulated the final versions of the ToR and PO1 to the parties and then finalized them on the basis of their comments. The ToR was signed by the arbitrator and counsel for both parties, while PO1 was signed only by the arbitrator.

Notably, PO1 clearly stated that:

> "This Procedural Order is made *by virtue of the Arbitral Tribunal's inherent powers* to govern the proceedings and *not by way of an agreement by the Parties*, after providing the Parties with an opportunity to be heard." (Emphasis added.)

Aside from the foregoing declaration, the procedural schedule attached to PO1 expressly limited the scope of the Claimants' response to the request for Expeditious Determination to the matters contained therein. Similarly, the scope of the foreign company's reply was expressly limited to new facts asserted and/or evidence and documents submitted in the Claimants' response.

The Japanese company argued in its response that the New Claims were not subject to Expeditious Determination, while the foreign company argued in its reply that they were clearly subject thereto. After conducting a hearing on the Expeditious Determination, the arbitral tribunal issued a Partial Award on Expeditious Determination dismissing five claims (including the New Claims and all of the claims filed by the related individual) and held that the remaining claims would be resolved in the subsequent phase of the arbitration proceedings (the "Partial Award").

Thereafter, in 2022, in parallel with the arbitration proceedings, the Japanese company filed an application with the Tokyo District Court to set aside the Partial Award on the basis of various grounds, including that the arbitral tribunal conducted the arbitration proceedings in violation of the agreement of the parties to limit the scope of the Expeditious Determination to the claims specified in the RfA.[4]

3. Tokyo District Court's refusal to set aside the Partial Award on Expeditious Determination

The Japanese company argued that, since the procedural schedule attached to PO1 limited the scope of the Claimants' response to the request for Expeditious Determination to the matters contained therein, the parties had an agreement to limit the scope of the Expeditious Determination to the claims specified in the RfA, which did not include the New Claims added after the RfA.

The Japanese company claimed that the arbitral tribunal violated this agreement of the parties by deciding on and dismissing the New Claims in the Partial Award.

After hearing the case, on 10 November 2023, the Tokyo District Court rendered a decision rejecting the Japanese company's arguments and ruling as follows (the "Tokyo District Court Decision"):

- PO1 explicitly states that it was not created by agreement of the parties; and
- Beyond the language of PO1, there was no explicit discussion in the CMC about limiting the scope of the Expeditious Determination to the claims raised in the RfA.

Furthermore, the discussion during the hearing on the request for Expeditious Determination and the parties' arguments proceeded on the premise that the New Claims were not excluded from the scope of the Expeditious Determination.

3 Art. 22(1) of the then applicable 2017 ICC Arbitration Rules provided: "In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties". Para. 60 of the then applicable ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (Oct. 2017) stated that: "Any party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defenses, on grounds that such claims or defenses are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction ("application"). The application must be made as promptly as possible after the filing of the relevant claims or defenses". Identical provisions are included in Art. 22(1) of the current 2021 ICC Arbitration Rules and para. 110 of the latest ICC Note (1 Jan. 2021).

4 Art. 44(1)(vi) of the Arbitration Act provides that if the arbitration procedure is in violation of Japanese laws and regulations (or if the parties have reached an agreement on matters concerning the provisions in such laws and regulations that are unrelated to public order, the said agreement) is one of the grounds for setting aside an award.

The Tokyo District Court rejected the remaining grounds asserted by the Claimants and dismissed their application to set aside the Partial Award.

4. Tokyo High Court Decision – Citing a foreign case as precedent

The Japanese company appealed to the Tokyo High Court, citing foreign case law to contest the decision of the Tokyo District Court, notably the German case *OLG Frankfurt/Main* (2011),[5] to which the High Court referred to.

This foreign case similarly involved an action to set aside an arbitral award for an alleged breach of the parties' procedural agreements in relation to an arbitration seated in Germany and administered under the arbitration rules of the German Arbitration Institute ("DIS").

The Frankfurt Higher Regional Court held that both Procedural Order No. 10[6] and the Terms of Reference constituted procedural agreements between the parties, which the arbitral tribunal could override only with the parties' express consent.[7] The subject Procedural Order No. 10 contained the following wording:

> "The arbitral tribunal furthermore documents the parties' agreement as to the content of written submissions."[8]

However, the Tokyo High Court was not persuaded. In its Decision of 30 May 2025, it upheld the Tokyo District Court Decision pointing out again that, in this case, PO1 explicitly stated that:

> "This Procedural Order is made by virtue of the Arbitral Tribunal's inherent powers to govern the proceedings and not by way of an agreement by the Parties, after providing the Parties with an opportunity to be heard."

Citing German case law and in line with international arbitration practice, both the lower court and the appellate court in Japan ruled that Procedural Order No. 1 is an order of the arbitral tribunal and not a procedural agreement between the parties.

The Tokyo High Court ruled that PO1 cannot be interpreted as establishing a procedural agreement between the parties or incorporating their procedural agreement. In doing so, the High Court referred to a German law professor's article on the foreign decision,[9] noting that it was facing criticism in practice. It quoted the view that, generally, a procedural order does not constitute an agreement between the parties and that, even if both parties acknowledge the procedural order, it would not form a procedural agreement.

The article on the foreign decision advocated for a limited application of the decision, which should not be broadly interpreted to apply to procedural orders in general. In that case, the procedural order and Terms of Reference both explicitly represented an agreement of the parties.[10] Further, to prevent procedural orders from being interpreted as procedural agreements, the article recommended that the text of the procedural order explicitly state that the arbitrator reserves its discretion to amend the procedural order, and that if the parties wish to limit the arbitral tribunal's discretion, they should clearly agree to do so in writing.

5. Practical implications

No published Japanese court decision had previously discussed the nature of Procedural Order No. 1, which plays a significant role in laying down the basic procedural rules and roadmap of the arbitration proceedings. Although unpublished, the Tokyo District Court Decision and the Tokyo High Court Decision, which both interpreted PO1 as an order of the arbitral tribunal, will serve as reference for future Japanese court rulings in resolving challenges associated with procedural orders.

Importance of language in the procedural order and the reservation clause. The arbitrator in the ICC Arbitration can be seen to have followed the earlier advice by including in PO1 a reservation of discretion. The Japanese court rulings are thus in line with the arbitrator's intention.

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5 *OLG Frankfurt/Main*, 17 Feb. 2011, 26 Sch 13/10, BeckRS 2011, 21515.

6 Procedural Order No. 10 was the first procedural order for the quantum phase of the DIS case, which was bifurcated into the liability phase and the quantum phase. It is the equivalent of Procedural Order No. 1 in a standard arbitration procedure.

7 This decision was then upheld by the German Supreme Court, 2 Oct. 2012 (III ZR 8/11), German courts emphasise supremacy of party agreements over the arbitral tribunal's procedural discretion, *Financier Worldwide Magazine*, Special Report: International Dispute Resolution, Oct. 2013).

8 G. Wagner, M. Bülau, "Procedural Orders by Arbitral Tribunals: In the Stays of Party Agreements?", in J. Risse, G. Pickrahn, et al. (eds), *SchiedsVZ*, pp. 6-15.

9 Id.

10 Id.

Although it may not be very common (except perhaps in Germany) for a reservation of the arbitral tribunal's discretion to be included in a Procedural Order No. 1, given the Japanese court decisions – where such wording supported the view that PO1 is an order of the arbitral tribunal, and not a procedural agreement of the parties – it may become standard to include such wording in a Procedural Order No. 1 (and other procedural orders, if necessary) even for arbitrations seated in jurisdictions other than Germany and Japan. Nevertheless, even without a reservation clause, the authors are of the view that, absent exceptional circumstances, procedural orders should be interpreted as an exercise of the arbitral tribunal's inherent procedural discretion and should accordingly always be subject thereto.

Judicial recognition of international arbitration practice. Japanese courts rarely cite or refer to foreign case law not directly related to Japanese law in their decisions. The court rulings discussed in this article represent significant progress in the field of international arbitration, where international practice is an important consideration. The Japanese court decisions are consistent with international arbitration practice and can be praised for properly declining to set aside the subject partial arbitral award. Perhaps these decisions will shape similar discussions in set-aside proceedings before courts in other jurisdictions.

EUROPE

Bulgaria

Comprehensive Amendments to the Arbitration Framework

Angel Ganev
Partner, Djingov, Gouginski, Kyutchukov & Velichkov Law Firm, Sofia

On 1 August 2025, Bulgaria enacted its new Arbitration Act, introducing the most significant reform since 1988. Driven by concerns over abusive practices and decline in public confidence, the new framework strengthens oversight of arbitral institutions, limits *ad hoc* arbitration to disputes between commercial parties, and introduces uniform eligibility and disclosure obligations for arbitrators. A new Register of Arbitrations, which is intended to enhance transparency and regulatory supervision, raises questions regarding confidentiality and administrative influence. The amendments modernise the procedure by recognising electronic service and communication. They also expand annulment grounds, including public policy review and fraud-based challenges, and streamline recognition and enforcement of foreign awards by clarifying jurisdiction and timelines under the New York Convention. This article assesses the likely practical impact of these legislative changes on parties, counsel, arbitral institutions, and on Bulgaria's prospects as an arbitration seat.

1. Background and legislative context

The Law on Amendments and Supplements to the International Commercial Arbitration Act (LASICAA), published in State Gazette No. 63 of 1 August 2025,[1] represents the most far-reaching overhaul of Bulgaria's arbitration legislation since its initial adoption in 1988. The amendments are both symbolic and substantive: the very rebranding of the statute from the International Commercial Arbitration Act to the more inclusive Arbitration Act signals the legislature's intent to establish a coherent and unified legal framework governing all arbitration seated in Bulgaria, whether international or domestic.

The explanatory memorandum accompanying LASICAA[2] emphasises that reform was driven by a loss of public confidence following a series of high-profile domestic disputes,[3] where consumers and small businesses were drawn into arbitration agreements they scarcely understood. This phenomenon, particularly visible before 2017, eroded trust in arbitration as a fair mechanism of justice.

The 2017 reforms sought to address consumer abuse, by declaring disputes involving consumers non-arbitrable, but did not fully restore legitimacy.[4] By 2024, further concerns had emerged regarding inconsistent standards, insufficient transparency, and the absence of centralised and appropriate administrative and judicial control.

The government therefore undertook a comprehensive modernisation, guided by principles of integrity, accessibility, and accountability. In drafting LASICAA, the Ministry of Justice consulted with the Bulgarian Chamber of Commerce and Industry (BCCI), leading arbitral institutions (most notably the Arbitration Court to the BCCI and the Arbitration Court to the Bulgarian Industrial Association), and international experts familiar with the UNCITRAL Model Law. The stated aim was not to reinvent arbitration, but to align national practice with evolving European and international expectations of good governance in dispute resolution.

1 Law on Amendments and Supplements to the International Commercial Arbitration Act (2025), in force as of 1 Aug. 2025, with the exception of paras. 4, 5, 7 (item 4, regarding Art. 11(6)), para. 16 (item 2), and para. 24, which entered into force on 3 Dec. 2025; and paras, 12, 13 (item 2), 14 (item 2), 17(item 1, letter "a" and item 2), para. 19, para. 20 (item 2) and para. 27, which entered into force as of 3 March 2026.

2 Explanatory memorandum to the Law on Amendments and Supplements to the International Commercial Arbitration Act.

3 Decision No. 339 of 5 Dec. 2025, Supreme Court of Cassation in commercial case No. 279/2025, II Commercial Department; Decision No. 157 of 18 June 2025, Supreme Court of Cassation in commercial case No. 1473/2024, I Commercial Department.

4 Law on Amendments and Supplements to the Civil Procedure Code (2017), in force as of 5 Nov. 2017.

2. Core legislative changes

Narrowing the scope of *ad hoc* arbitration (Art. 4(2))

Under the previous regime, *ad hoc* tribunals were occasionally used to adjudicate consumer or employment disputes, often resulting in accusations of bias or procedural opacity. The new law confines *ad hoc* arbitration strictly to disputes between commercial entities of equal bargaining power. This realignment ensures that *ad hoc* mechanisms remain available for sophisticated commercial users, while also protecting weaker parties through the courts.

Establishment of a Register of Arbitrations (Arts. 6a-6e, 52-54)

Perhaps the most striking institutional innovation is the creation of a national electronic Register of Arbitrations, administered by the Ministry of Justice. The Register contains detailed information on arbitral institutions, arbitrators, and awards, including registration data, institutional rules, and basic case identifiers. Its purpose is to ensure transparency, traceability, and statistical insight into arbitration in Bulgaria. Both institutional arbitrations and *ad hoc* arbitrations are covered, as long as the place of arbitration is on the territory of the Republic of Bulgaria. In all cases, the respective heads of the arbitration institution and the arbitrator(s) are responsible for the registration.

Although welcomed in principle, the reform will require meticulous implementation. In December 2025, the Minister of Justice passed an ordinance specifying the procedure for registration, data protection, and public access. The success of this initiative will depend on balancing transparency with confidentiality, a perennial tension in arbitration.[5]

Apart from maintaining the Register, The Minister of Justice assumes a proactive regulatory role in other respects: monitoring compliance by arbitral institutions and ensuring observance of statutory standards. Institutions failing to comply may be removed from the Register, rendering their awards unenforceable. This approach departs from the traditional model of self-regulation.

Stricter eligibility criteria for arbitrators (Art. 11)

The LASICAA introduces uniform qualification standards for arbitrators. They must:

- have at least eight years of legal, academic, or equivalent professional experience, together with a clean disciplinary record.; and
- submit declarations of independence and impartiality prior to appointment and throughout the proceedings.

In addition, institutions are obliged to maintain and publish updated lists of arbitrators meeting these requirements. Such approach mirrors comparable systems in Austria and Poland, which emphasise transparency and professional accountability as prerequisites for public trust in private adjudication.

Modernised procedural rules and party guarantees (Art. 32)

LASICAA explicitly recognises electronic service and communication, aligning with international practice. It clarifies the standards of proof for delivery and notice, preventing disputes over procedural irregularities. New provisions also ensure effective representation, permitting parties to appear through licensed counsel or authorised representatives, and strengthen rules on preservation and disclosure of evidence, reflecting a growing trend towards procedural fairness and equality of arms.

New grounds for challenging arbitral awards (Art. 47)

The reform introduces two notable annulment grounds:

(i) contradiction with public policy (reinstated after being removed in 2017); and

(ii) the discovery of fraudulent or falsified evidence.

Although these provisions enhance judicial control, they also reopen debates about the proper boundaries between review and interference. The challenge for courts will be to apply these grounds narrowly, preserving finality – one of arbitration's defining virtues.

5 Ordinance No. H-2 on the Register of Arbitrations (2025), in force as of 3 Dec. 2025. From the outset, Ordinance No. H-2 has caused mixed reactions. It regulates the following main procedures: (i) registration or cancellation of registration of a permanent arbitral institution; (ii) registration of changes in the data relating to a registered permanent arbitral institution; (iii) registration of data concerning arbitral proceedings (regarding arbitral proceedings administered by a foreign permanent arbitral institution and *ad hoc* arbitrations); and (iv) issuance of various certificates and extracts from the register.

Recognition and enforcement of foreign awards (Art. 51)

The LASICAA clarifies jurisdictional competence and timelines under the New York Convention (1958), streamlining recognition and enforcement. It designates the Sofia City Court as the exclusive forum for exequatur proceedings and introduces procedural deadlines to reduce delay. These changes should reassure foreign investors that Bulgarian courts are committed to efficient and predictable enforcement.

3. Implications for arbitration practice

The reform aims to recalibrate the relationship between party autonomy and public oversight. For practitioners, several immediate implications emerge:

- **Due-diligence obligations**. Counsel must verify that the chosen arbitral institution is properly registered before commencing proceedings.
- **Selection of arbitrators.** Parties are encouraged to choose arbitrators with demonstrable experience and impeccable reputations, as eligibility is now subject to ministerial scrutiny.
- **Procedural predictability.** The new rules on service, representation, and enforcement bring greater uniformity, reducing procedural ambushes and technical challenges.

Bulgarian institutions will need to revise their rules, update codes of ethics, and invest in digital infrastructure to integrate seamlessly with the Ministry's Register. Lawyers and in-house counsel will also need to adapt – particularly in cross-border transactions – where confidentiality clauses are standard and registration may trigger disclosure concerns.

4. Implementation and remaining challenges

While the LASICAA constitutes a significant legislative achievement, it also introduces several controversial elements that may challenge Bulgaria's ambition to position itself as a modern and reliable arbitration seat.

At the structural level, the expanded oversight powers of the Minister of Justice have sparked debate about potential administrative interference. Although supervision aims to ensure transparency and integrity, it risks blurring the line between governmental control and arbitral independence – a cornerstone of international arbitration. This concern is amplified by the Minister's authority to inspect arbitration files and remove institutions from the Register, which could lead to perceptions of executive overreach.

The introduction of a mandatory Register of Arbitrations, while intended to enhance transparency, poses serious confidentiality and practical challenges. All arbitration proceedings seated in Bulgaria, including those administered by foreign arbitral institutions, must be registered, with details such as the parties' names and addresses, the arbitrators' professional backgrounds, procedural documents, and even the award itself. Failure to comply renders the award null and void. This rigid requirement may discourage foreign arbitral institutions and *ad hoc* tribunals from setting up in Bulgaria, given the associated administrative complexity and loss of confidentiality.

Parties may also face delays in the enforcement of arbitral awards, especially where registration formalities are not promptly fulfilled or where the Supreme Court of Cassation exercises its expanded discretion to stay enforcement without requiring security. This standard, based on the existence of "compelling written evidence", departs from international best practice and introduces unpredictability into the enforcement process – potentially encouraging tactical litigation.

Furthermore, the possibility to annul arbitral awards years after their issuance – based on newly discovered facts such as fraud or falsified evidence – creates prolonged legal uncertainty. While the aim is to preserve procedural fairness, this provision undermines the principle of finality, which remains central to the credibility and efficiency of arbitration. Unless carefully implemented and interpreted in line with international standards, the 2025 reform risks reducing Bulgaria's attractiveness as a neutral and efficient arbitration jurisdiction.

In the short term, practitioners should expect a period of adjustment: institutions must seek registration, arbitrators will need to update their professional profiles, and parties will have to ensure compliance in drafting arbitration clauses. Over time, if the system proves reliable, Bulgaria could benefit from enhanced credibility, foreign-investment confidence, and integration into the European arbitration mainstream.

5. Conclusion

The LASICAA represents an ambitious legislative milestone – yet one that walks a fine line between reform and overreach. While the stated aim is to strengthen public confidence and align Bulgaria with international standards, the practical effect may prove more complex and ambivalent.

The reform's most innovative elements – the Register of Arbitrations, the ministerial oversight of arbitral institutions, and the expanded annulment grounds – are double-edged. They promise greater transparency and accountability, but they also risk undermining the very autonomy and confidentiality that define international arbitration. The power of the Ministry of Justice to inspect arbitral files and remove institutions from the Register has raised concerns about executive interference in a process that must remain independent from governmental influence.

The rigid registration requirements, which extend to all arbitrations seated in Bulgaria (including those administered by foreign institutions) are equally troubling. This obligation, coupled with the potential nullity of unregistered awards, could deter foreign parties from selecting Bulgaria as an arbitration seat. In a field where perceptions matter, even a hint of administrative control or a loss of privacy could dissuade investors and counsel from anchoring their proceedings in Sofia.

International practitioners are increasingly expressing concern that the Bulgarian model could blur the boundary between supervision and control. Despite good legislative intentions, the fear is that Bulgaria may come to be perceived as a jurisdiction where arbitral independence is contingent upon ministerial approval, rather than less as a "safe" or neutral venue. This would undo years of integrating Bulgaria into the international arbitration mainstream.

The coming years will therefore be decisive. If the implementing regulation and judicial practice adopt a restrained, competence-enhancing approach – ensuring transparency without intrusion – Bulgaria could still emerge as a credible and modern arbitration seat. However, if administrative supervision evolves into substantive interference, the reform may achieve the opposite of its purpose: discouraging foreign arbitral institutions, eroding party autonomy, and casting doubt on the enforceability and finality of awards rendered in Sofia.

Thus, the 2025 reform stands as both an opportunity and a warning; it is a test of whether Bulgaria can modernise its arbitration framework while preserving the independence that gives arbitration its legitimacy.

ASIA/PACIFIC

Kyrgyzstan

Distinctive Features of the Reform for Setting Aside Arbitral Awards

Natalia Alenkina

Associate Professor, American University of Central Asia; Member, Scientific Advisory Council of the Supreme Court of the Kyrgyz Republic; Former Member, ICC International Court of Arbitration

This Kyrgyzstan's 2025 reform on setting aside arbitral awards departs significantly from the UNCITRAL Model Law. It is limited to disputes involving state bodies and state-owned entities, establishes a "dual-track" arbitration system – one for private parties and another for the state. It expands the powers of state courts and restricts arbitral autonomy. While the setting-aside mechanism remains unavailable for the majority of participants in arbitration, its application in disputes involving the state has the potential to significantly impact the outcome of arbitral proceedings.

1. Introduction

Background to the reform

The 2002 Arbitration Law of the Kyrgyz Republic did not originally provide any mechanism for challenging arbitral awards.[1] This design was intended to promote arbitration and shield it from judicial interference, resulting in a highly autonomous system. For a long time, this approach aligned with the need of legal development – state courts lacked sufficient understanding of arbitration – and reduced the risk of early judicial control turning procedural review into a *de facto* merits-based review, especially given the limited domestic expertise in international arbitration.[2]

Over time, however, it became clear that the absence of a setting-aside mechanism disrupted procedural balance. The losing party was left without any legal remedy, while the winning party retained uncontestable enforcement rights. The prevailing party could also be disadvantaged in cases where the award was only partially satisfactory. Moreover, under the New York Convention, the possibility to rely on prior annulment of an award at the seat is a significant procedural safeguard at the enforcement stage.[3]

Article V(1)(e) of the 1958 New York Convention cannot be directly applied in Kyrgyzstan, as domestic law provides no procedure to challenge arbitral awards. Consequently, parties cannot formally invoke annulment before national courts at the seat. In practice, while parties may attempt to raise objections at the enforcement stage, the absence of a clear procedural mechanism renders this safeguard largely theoretical in the Kyrgyz context.

This gap also distorted enforcement practice as parties attempted to sue arbitral institutions or invalidate actions of arbitral bodies, producing legally incoherent but symbolically significant disputes reflecting broader dissatisfaction.[4]

Until 2025, parties in Kyrgyzstan could not seek annulment of arbitral awards for procedural violations or invalid arbitration agreements. Procedural objections could only be raised at the enforcement stage in the jurisdiction where recognition and enforcement of the award were sought. As a result, the losing party had no opportunity to challenge the award once and for all at the time it was rendered. Instead, it was compelled to follow the winning party to every jurisdiction in which enforcement was pursued, thereby creating a significant imbalance in the parties' rights and available remedies.

1 Law of the Kyrgyz Republic No. 135 of 30 July 2002 "On Arbitral Tribunals in the Kyrgyz Republic."

2 See, in this regard, G. Born, International Commercial Arbitration, Ch. 12, para. [B][4].

3 Art. V(1)(e), New York Convention (1958). Kyrgyzstan is a party to the New York Convention. It entered into force for Kyrgyzstan on 18 March 1997.

4 See e.g. the Ruling of the Appellate Instance of the Bishkek City Court on 11 Dec. 2013 in the case concerning the claim of Halyk Bank Kyrgyzstan against the International Arbitration Court at the Chamber of Commerce and Industry of the Kyrgyz Republic "seeking recognition of the fact that a decision was rendered on a dispute not provided for and not falling within the terms of the protocol" (unpublished).

A "top-down" reform

On 23 May 2025, amendments to the Arbitration Law were adopted,[5] and formally presented as aligning Kyrgyz law with the UNCITRAL Model Law. At the same time, expert circles suggested that the reform may have been triggered by a specific arbitration involving a state entity, where the outcome necessitated judicial "correction".[6]

This dual motivation – harmonisation with international standards versus a pragmatic response to a concrete case – defines the reform's character.

Unlike earlier expert-driven initiatives that failed due to fears of excessive judicial review, the 2025 reform was initiated as a top-down measure led by the Ministry of Justice, which ensured its adoption. It thus represents not only a technical amendment but a redistribution of institutional control over arbitration.

2. Key provisions of the law

Despite its declared reliance on the UNCITRAL Model Law, the amended legislation contains significant deviations.[7]

a) Eligible applicants

The right to seek setting aside is limited to cases involving state bodies and state-owned entities.[8] At the same time, Kyrgyz law imposes no limits on the arbitrability of disputes involving public entities, which are common and often result in adverse outcomes for the state.

The Law therefore reflects an asymmetrical logic:

- In disputes between private parties, arbitral awards are not subject to setting-aside proceedings at the request of the parties.
- In disputes involving a state body or a state-owned entity, either party to the dispute may apply to the court for annulment of the arbitral award.

While disputes involving public funds or functions may justify heightened scrutiny, this approach introduces differentiated levels of judicial oversight, potentially weakening arbitral autonomy and contributing to the emergence of a "dual-track" arbitration system – one governing disputes between private parties and another governing disputes involving the state.

In the broader context of attempts to delegate certain public disputes (including tax and procurement matters) to arbitration, this model suggests conditional trust: jurisdiction is delegated, but control over outcomes is retained whenever state interests are affected.

b) Restriction to domestic arbitration

The Law can be interpreted as limiting the setting-aside mechanism to domestic arbitration only. This follows from consistent terminological distinctions: "domestic arbitral tribunals" ("*treteyskie*" courts) on the one hand, and "international" or "foreign" arbitration on the other.[9] The new procedure is expressly linked only to the former.

As a result, international arbitration seated in Kyrgyzstan remains devoid of any setting-aside mechanism, even in cases of serious procedural violations. This is difficult to reconcile with efforts to attract foreign investment and promote Kyrgyzstan as an arbitral seat. For an emerging economy, such an omission undermines investor confidence and risks the relocation of arbitration to jurisdictions with a more coherent balance between autonomy and judicial control.

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5 See Law of the Kyrgyz Republic No. 106 of 23 May 2025: On Amendments to the Law of the Kyrgyz Republic "On Arbitral Tribunals in the Kyrgyz Republic" (hereinafter "the Law").

6 This refers to a well-known case in which a ministry of the Kyrgyz Republic filed a claim against the International Arbitration Court at the Chamber of Commerce and Industry of the Kyrgyz Republic seeking to invalidate an arbitration clause in a services contract with a private company. Notably, the claim was brought against the arbitral institution rather than the contractual counterparty, although the dispute had been submitted to an arbitral tribunal constituted under that institution's rules. The court upheld the ministry's claim and declared the arbitration clause invalid. The court decision was not published.

7 See the Explanatory Memorandum to the draft law (in Russian and Kyrgyz), which states: "The adoption of the draft law will make it possible to ensure that participants in arbitral proceedings have the opportunity to challenge arbitral awards before courts of general jurisdiction. This will contribute to enhancing the effectiveness and impartiality of arbitration, as well as to the protection of the rights and legitimate interests of the parties".

8 Art. 28 of the Law of the Kyrgyz Republic "On Arbitral Tribunals in the Kyrgyz Republic".

9 Despite the fact that the Arbitration Law does not expressly distinguish between domestic and international arbitration (which may create the impression that it applies to both types of proceedings), a systemic interpretation of the legislation leads to a different conclusion. Procedural legislation differentiates these categories: (i) issues related to the recognition and enforcement of awards rendered by domestic arbitration tribunals, regulated by Chapter 46 that uses the term "domestic arbitral tribunals" awards; (ii) awards of international and foreign arbitration, regulated in Chapter 48 that employs the terminology "international (foreign) arbitration". This legislative differentiation indicates that the Arbitration Law is primarily intended to regulate domestic arbitration.

c) Jurisdiction over setting-aside applications

Article 36-1 provides that applications to set aside arbitral awards are submitted to courts at the "location of the arbitral tribunal" ("*treteyski sud*"). The Kyrgyz terminology is vague and the rule is conceptually flawed, reflecting the persistent confusion between an arbitral tribunal (a panel of arbitrators) and an arbitral institution.

A literal interpretation offers no workable criterion: the place of registration of the institution, its secretariat, or the physical location of arbitrators are all unsuitable, particularly in cases where the arbitral panel or institution is dispersed, as is typical in international institutional arbitration. While the Law formally applies only to domestic arbitration (e.g. disputes administered by the Arbitration Court at the Chamber of Commerce and Industry of the Kyrgyz Republic), this hypothetical illustrates why the terminology is conceptually problematic.

The only coherent solution would be to link jurisdiction to the seat of arbitration. Yet even this approach is problematic when the seat is designated broadly (e.g. "*Bishkek*" or "the Kyrgyz Republic"), leaving no clear territorial link to a specific court.

Ultimately, anchoring jurisdiction to the "location of the arbitral tribunal" as an institution contradicts the nature of institutional arbitration and undermines the legal significance of the arbitral seat. In extreme hypothetical cases, this could lead to the paradoxical results – such as considering annulment proceedings in a foreign jurisdiction – even though the Law applies only to domestic arbitration.

d) Time limits

The Law establishes an exceptionally short time limit for filing a setting-aside application: 30 days from the date of the award, notwithstanding the date of receipt by the parties. This sharply departs from Article 34 of the UNCITRAL Model Law, which provides a three-month period calculated from the date of receipt, and ignores the potentially significant gap between issuance and delivery, particularly in international and complex institutional arbitration.

Further uncertainty arises from the absence of rules on the effect of requests for interpretation, correction, or additional awards. As a result, the starting point of the limitation period in such cases remains unclear, creating a risk of losing judicial protection on purely formal grounds.

The Law broadly defines standing to seek setting aside as any party whose rights are affected by the award. The Law also sets a 30-day deadline for judicial review which, despite promoting efficiency, together with the lack of judicial specialisation in arbitration, casts doubt on the feasibility of thorough review in complex, especially foreign-related, disputes.

e) Provisions allowing review of the award

One of the most problematic features of the reform is that the Law effectively allows not only setting aside but substantive review of arbitral awards. Although arbitral awards are formally declared final, the revised Article 28 qualifies this principle by permitting exceptions "provided for by this article", which, on a systemic reading, opens the door to merits review within a procedure that should be limited to procedural defects.

This formulation erases the core distinction between setting aside and appellate review. In arbitration practice, annulment is an exceptional safeguard of procedural integrity, not a mechanism for reassessing substantive findings. Allowing state courts to review the merits turns the setting-aside procedure into a *de facto* appellate instance, undermining arbitral autonomy.

The risk lies not only in expanded judicial discretion but also in legal uncertainty. Without a clear procedural limitation, courts may engage in evidentiary assessment, contract interpretation, and reconsideration of arbitral tribunal's findings under the guise of legality review. As a result, setting aside loses its exceptional character and becomes an alternative merits-based forum.[10]

Rather than a classic annulment model focused on procedural legitimacy, the Law introduces elements of appellate control, weakening finality, reducing arbitration's efficiency, and increasing the risk of systematic judicial interference.

10 The first precedent has now been established: on 2 September 2025, the Leninsky District Court set aside an arbitral award rendered under the Rules of the ICAC at the CCI of the Kyrgyz Republic, effectively re-examining the merits of the award and assessing the arbitral tribunal's reasoning instead of limiting itself to a procedural review, thereby substituting arbitral standards with those of a state court.

f) *Ex officio* review by state courts

The Law empowers courts of first instance to examine *ex officio* issues that coincide in substance with grounds for setting aside arbitral awards:

- the parties' legal capacity when concluding the arbitration agreement;
- proper notification of the parties regarding the appointment of arbitrators and the proceedings;
- compliance of the tribunal's composition and procedure with the parties' agreement or applicable rules;
- the existence and scope of the arbitration agreement;
- the validity of the arbitration agreement;
- the arbitrability of the dispute under Kyrgyz law.

Such extensive *ex officio* review far exceeds the classical model of judicial supervision and effectively deprives parties of procedural autonomy. Parties lose the ability to waive objections to certain procedural defects and to control the scope of judicial intervention post-award.

Moreover, this design incentivises post-arbitral opportunism. A losing party may deliberately refrain from raising procedural objections during arbitration, expecting the court to identify them ex officio and set aside the award. This level of judicial activism fundamentally compromises the principle of procedural good faith and reduces arbitration's effectiveness as a final dispute resolution mechanism.

g) Consequences of setting aside an arbitral award

If the court finds fundamental defects (such as lack of capacity, invalid arbitration agreement, or non-arbitrability), it sets aside the award, leaving the dispute to be resolved by state courts. In other situations involving procedural irregularities, the Law allows the court to set aside the award and remit the case to arbitration for rehearing. This mechanism reflects a distinction between defects that undermine the legitimacy of the arbitral process itself and violations of a purely procedural nature that may be cured renewed arbitral proceedings.

This model departs from the pro-arbitration principle (*favor arbitrandum)* under UNCITRAL Model Law, under which courts may suspend annulment proceedings and allow tribunals to cure defects without annulling the award. In practice, annulment is an extreme remedy, as many defects – such as improper notice or denial of the right to be heard – are curable. Article 34(4) of the Model Law preserves the award's *res judicata* effect, avoids re-arbitration, and reduces costs and delays.

For Kyrgyzstan, where judicial intervention and formalism remain strong, this flexible and proportionate approach would be preferable. The current model instead incentivises procedural manipulation, encouraging losing parties to exploit minor irregularities that could otherwise be remedied.

h) Direct appeal of decisions on setting aside applications to the Supreme Court

The Law establishes a two-tier review system: decisions of courts of first instance on setting-aside applications may be appealed directly to the Supreme Court of the Kyrgyz Republic within three months.

Although this model formally diverges from the UNCITRAL Model Law's minimalist approach, it can be functionally justified. The Constitution of the Kyrgyz Republic requires the possibility of judicial review,[11] allowing legislative adaptation provided that control remains narrow and legal in nature, confined to errors of law and procedural defects.

If cassation were to be treated as a full second appeal, however, the balance between respect for the judicial system and arbitral autonomy is lost, and arbitration becomes absorbed into the ordinary judicial hierarchy, undermining its distinctiveness and finality.

11 According to Art. 100 of the Constitution of the Kyrgyz Republic, the procedural rights of participants in judicial proceedings, including the right to appeal decisions, as well as the procedure for exercising these rights, are determined by law. Art. 37 of the Civil Procedure Code, in turn, establishes the right of parties involved in a case to challenge judicial acts.

3. Conclusion

In conclusion, the Law takes Kyrgyzstan further away from the UNCITRAL Model Law standards on setting aside arbitral awards, by introducing:

- A selective approach to eligible applicants, limiting the procedure to disputes involving the state and state-owned entities;
- Mistrust of domestic arbitration, reflected in enhanced judicial control over both procedure and outcome;
- Ambiguous drafting allowing substantive review of arbitral awards;
- Broad judicial discretion and activism, including extensive *ex officio* review;
- Improper reference to the "location of the arbitral tribunal" ("*treteyskiy sud*") may lead to jurisdictional rejection in Kyrgyzstan, reflecting the terminological and conceptual issues of Article 36-1;
- A single cassation appeal to the Supreme Court, which formally simplifies the procedure but preserves risks of excessive control.

As a result, the setting-aside procedure remains effectively inaccessible for most arbitration participants. At the same time, domestic disputes involving public entities become highly risky: if courts review arbitral awards in a manner that extends to the merits, the outcome of the dispute may effectively be reconsidered at the annulment stage, thereby undermining the finality of the arbitral process. The involvement of the state may therefore be used strategically to mitigate arbitral risk. In the absence of clear rules on when state participation becomes relevant and what level of state ownership is sufficient, a party may seek to rely on the presence of a public entity to challenge or influence the arbitral process.

Although such innovations can be explained historically and politically, from the perspective of modern arbitration theory they impose significant constraints on party autonomy, the finality of awards, and the predictability of the arbitral process.

EUROPE

United Kingdom

Recent Judicial Decisions and Legislative Change

Jacob Grierson

Jacob Grierson is an English barrister and a French avocat. He is a founding partner of the international arbitration firm Anima Dispute Resolution, based in its Paris office, and is an Emeritus Council Member of the ICC Institute of World Business Law.

This article reviews major English court decisions from 2024-2025 concerning international arbitration and some key reforms in the Arbitration Act 2025. It analyses evolving standards for arbitrator disclosure, explores a landmark ruling of the Privy Council that refined the treatment of insolvency proceedings where arbitration agreements exist, and outlines the new statutory default position for the law applicable to arbitration agreements under section 6A of the 2025 Act. The article also considers recent cases granting anti-suit injunctions, and examines the courts' thorough response to jurisdictional challenges, which may be reassuring for those concerned by the 2025 Act's changes in that respect.

Introduction

The success of London as a place of international arbitration is well known. The ICC's latest published statistics show that cities in the United Kingdom (presumably mainly if not exclusively London) were chosen in 96 cases, more than in any other State.[1] Much of this is thanks to the Arbitration Act 1996 ("the 1996 Act"), which sets out a reliable but flexible framework for handling international arbitrations in England and Wales, providing court support where necessary but not stifling international arbitration through excessive court intervention.

The English courts have given full effect to the principles underlying the 1996 Act, in decisions such as *Lesotho Highlands Development Authority v. Impregilo SpA*[2] and *Premium Nafta Products Limited v. Fili Shipping Company Limited* ("*Fiona Trust*").[3]

It is also well known that, despite the success of the 1996 Act, the UK legislator decided last year to implement proposals to amend it. These had been made by the Law Commission of England and Wales, the independent statutory body which reviews and makes recommendations for reform of legislation.[4] The proposed reforms were implemented by the UK legislator with only relatively minor changes. The result is the Arbitration Act 2025 ("the 2025 Act"), which received Royal Assent on 24 February 2025 and the main substantive provisions of which came into effect on 1 August 2025.[5]

The purpose of this article is not to go (again) over the reforms introduced by the 2025 Act. It is instead to focus on certain areas (relevant to arbitration under the ICC Rules)[6] where English law has seen significant developments over the past 24 months, whether as a result of judicial decisions or the 2025 Act.

1 See ICC Dispute Resolution 2024 Statistics, p. 12. The author understands that the soon to be released ICC Arbitration statistics for 2025 will show that the United Kingdom was the second most preferred arbitration seat in ICC newly-registered cases.

2 *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43 (confirming arbitral tribunals' broad implied powers to order remedies, absent a contrary agreement).

3 *Premium Nafta Products Limited v. Fili Shipping Company Limited* [2007] UKHL 40 (establishing that arbitration clauses should be interpreted broadly, so as to include all disputes arising out of a contractual relationship, absent clear language to the contrary).

4 The Law Commission's final report has been very well summarised in Angeline Welsh KC's article in an earlier issue of this publication. See A. Welsh KC, Fine-Tuning: Review of the Proposed Reforms to the English Arbitration Act 1996, *ICC Dispute Resolution Bulletin*, 2023-3.

5 The Arbitration Act 2025 (Commencement) Regulations 2025.

6 This article will thus not consider the right to appeal against an arbitral award pursuant to Section 69 of the 1996 Act, which is disapplied by Art. 35(6) of the ICC Rules ("… By submitting the dispute to arbitration under the Rules, the parties … shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made").

Those areas are:

1. **The disclosure obligations of arbitrators**, considering *Aiteo Eastern E&P v. Shebah Exploration* and *V and N v. K*, which address when repeat appointments must be disclosed and how disclosure duties vary depending on the institutional context;
2. **Staying winding-up proceedings**, considering the Privy Council's landmark ruling in *Sian Participation v. Halimeda*, which has changed English law's approach to insolvency proceedings where arbitration agreements exist, establishing that winding-up petitions should be stayed only where debts are genuinely disputed on substantial grounds;
3. **The law applicable to arbitration agreements**, considering the new statutory default position for the law applicable to arbitration agreements under Section 6A of the 2025 Act, which now applies the law of the seat absent express agreement, thus reversing the UK Supreme Court's previous case-law;
4. **Anti-suit injunctions**, considering two recent cases, *UniCredit v. RusChemAlliance* and *Star Hydro Power Ltd v. National Transmission and Despatch Co Ltd*, which show that the English courts are ready and willing to grant anti-suit injunctions in a wide range of circumstances; and
5. **Review of jurisdictional decisions by arbitral tribunals**, considering a recent decision, *Tecnicas Reunidas Saudia for Services & Contracting Co. Ltd v. Petroleum Chemicals and Mining Company Ltd*, which has shown the English Court's approach to jurisdictional challenges to be robustly interventionist, which should be reassuring for those concerned by the 2025 Act's changes in that respect.

1. The disclosure obligation

One of the key obligations imposed by the ICC Rules is the duty of an arbitrator to disclose facts and circumstances which might be of such a nature as to call into question his or her independence in the eyes of the parties.[7] This is essential in order, among other things, to reassure users of arbitration that their disputes will be decided in a fair and unbiased way.

Yet, until relatively recently, this obligation had not been recognised by English law: the 1996 Act contained no such obligation; and none had been recognised by case-law until 2020, when the UK Supreme Court held in ***Halliburton Company v. Chubb Bermuda Insurance Ltd***[8] that:

> "unless the parties to the arbitration otherwise agree, arbitrators have a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias."[9]

The 2025 Act has codified this in a new Section 23A of the 1996 Act, which in fact goes further in that it requires disclosure not only of relevant circumstances of which the proposed arbitrator is aware but also of those of which they "ought reasonably to be aware":[10]

> "**23A Impartiality: duty of disclosure**
>
> (1) An individual who has been approached by a person in connection with the individual's possible appointment as an arbitrator must, as soon as reasonably practical, disclose to the person any relevant circumstances of which the individual is, or becomes, aware.
>
> (2) An arbitrator must, as soon as reasonably practical, disclose to the parties to the arbitral proceedings any relevant circumstances of which the arbitrator is, or becomes, aware.
>
> (3) For the purposes of this section –
>
> (a) "relevant circumstances", in relation to an individual, are circumstances that might reasonably give rise to justifiable doubts as to the individual's impartiality in relation to the proceedings, or potential proceedings, concerned, and

7 ICC Rules of Arbitration, Art. 11(2).

8 *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, summarised and commented on by S. Rowe and G. Petrova, Halliburton Company v. Chubb Bermuda Insurance Ltd: Failure to Disclose but No Bias, *ICC Dispute Resolution Bulletin*, 2021-1.

9 *Halliburton,* at para. 136 (per Lord Hodge). *Halliburton* related to an *ad hoc* arbitration.

10 The Supreme Court in *Halliburton* had left open the question whether an arbitrator should disclose relevant circumstances of which they ought reasonably to be aware, while nevertheless expressing the view that they probably should. See *Halliburton* at para. 107 (per Lord Hodge) and para. 162 (per Lady Arden).

> (b) an individual is to be treated as being aware of circumstances of which the individual ought reasonably to be aware."

In May 2024, which was after the publication of the Law Commission's final report but before the 2025 Act was enacted, the English High Court rendered judgment in the case of ***Aiteo Eastern E&P Company Limited v. (1) Shell Western Supply and Trading Ltd & Ors***.[11] The High Court had been presented with an application to set aside four awards by an ICC tribunal consisting of three very eminent arbitrators. The president of the arbitral tribunal (the "President") had failed to make timely disclosure of certain relations that she had (and had had) with the law firm representing one of the parties. The ICC Court had therefore decided to replace the President, pursuant to Article 14 of the ICC Rules.

The High Court judge, Jacobs J, agreed with the finding of the ICC Court that the President's engagements with the law firm had resulted in a real possibility of apparent bias. He nevertheless found that this had not resulted in "substantial injustice" (a condition *sine qua non* for an annulment application under s. 68 of the 1996 Act) in relation to three of the four awards, for reasons that will be touched upon below. In relation to the fourth award, he held that there had been substantial injustice but, instead of setting it aside, decided to remit the award to the arbitral tribunal for reconsideration.

Needless to say, the case is highly fact-specific. Yet the following findings are of general application.

1. The decision of the ICC Court did not create a *res judicata* preventing either of the parties from arguing that there had been no apparent bias.[12] Nevertheless, the English court should:

> "accord considerable respect to the decision of the ICC Court, and could not avoid being struck by the fact that this was one of the rare challenges that succeeded".[13]

On the other hand, the decision-maker should:

> "make up his or her own mind on the basis of the underlying facts, and … it would be wrong to reach a conclusion simply by reference to what the ICC Court had decided".[14]

2. The failure to make timely disclosure might have been the factor pushing the case over the line of apparent bias:

> "If there had been timely disclosure of the entire picture, as it developed, then it may be that the observer would consider that [the President] was on the right side of the line".[15]

In other words, the President's failure to disclose was in itself found to be an aggravating circumstance in deciding whether there was apparent bias.[16]

3. Where the court finds that there has been apparent bias, "substantial injustice" (a condition *sine qua non* for an annulment application under s. 68 of the 1996 Act, as explained above) should "normally be inferred as being 'inherently likely' or 'likely in the very nature of things"'.[17] However, there could be circumstances which rebut this inference.[18] Thus, the fact that the English High Court had rejected a separate jurisdictional challenge to one of the jurisdictional awards, pursuant to s. 67 of the 1996 Act and on a full rehearing, meant that any argument on substantial injustice must fail in respect of that award: a newly reconstituted tribunal would be bound by the High Court's decision.[19]

One year later, in June 2025, which was after the 2025 Act had received Royal Assent but before it had come into force, the English High Court rendered a decision in ***V and N v. K***.[20] An application had been made to the High Court to challenge an award made by LMAA arbitrators, in part based on the failure by one of the co-arbitrators to disclose previous appointments by the firm that had appointed him in this matter. The High Court found that the co-arbitrator in question:

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11 *Aiteo Eastern E&P Company Limited v. (1) Shell Western Supply and Trading Ltd & Ors* [2024] EWHC 1993 (Comm).

12 This was because the ICC Court was not "determining a legal right" and because its decision was "of a procedural character." *Aiteo*, paras 130 and 132.

13 *Aiteo*, para. 138.

14 Ibid.

15 *Aiteo*, para. 169.

16 The fact that the President had signed her acceptance papers only a few weeks after the *Halliburton* decision had been published was found to be another aggravating circumstance. *Aiteo*, para. 171.

17 *Aiteo*, para. 226.

18 Ibid.

19 *Aiteo*, para 230. Interestingly, the position might well have been different if the 2025 Act's amendments to s. 67 had applied, as these now mean that the English courts will no longer conduct a full rehearing on s. 67 applications. See further, section 5 of this article "Review of jurisdictional decisions by arbitral tribunal".

20 V *and N v. K* [2025] EWHC 1523 (Comm).

> "had no duty of disclosure of his previous [firm] arbitral appointments in the present case".[21]

The judge also went on to distinguish this case from *Aiteo* on the following bases:

- This was an LMAA arbitration. By contrast, *Aiteo* was a case where the arbitration had been subject to the ICC Rules, whose test for independence and impartiality "has an element of subjectivity";
- the ICC had already upheld the challenge to the arbitrator; and
- "the relevant engagements [in *Aiteo*] gave rise to a particularly close relationship which occurred during the currency of the arbitration".[22]

Although *V and N v. K* was a pre-2025 Act case, its reasoning should logically apply equally to cases covered by the 2025 Act because, as noted above, the 2025 Act codified the *Halliburton* disclosure obligation. Accordingly, there will be *no* automatic duty to disclose repeat appointments in LMAA arbitrations. However, there *will* be such a duty in ICC arbitrations, as has been made clear in *Aiteo*.

In other words, the general requirement for disclosure under English law (even post-*Halliburton* and the 2025 Act) is less strict than under the ICC Rules, which include an element of subjectivity in their disclosure test; but English law will enforce parties' obligation to respect the ICC Rules' standard for disclosure where they have agreed to arbitrate under the ICC Rules.

2. Staying winding-up proceedings

When an arbitration claim arises in the context of insolvency proceedings, a number of issues arise. One of those is whether the insolvency proceedings should be stayed pending the outcome of the arbitration proceedings. Until recently, the English courts had answered this question in the following way:

(i) Nothing in the 1996 Act actually requires a stay, because a creditor's winding up petition is not a "claim" within the meaning of s. 9 of the 1996 Act (the mandatory stay provision that corresponds to Art. 8 of the Model Law).

(ii) However, the English courts should (other than in exceptional circumstances) exercise their power under the UK insolvency legislation to stay winding-up proceedings where an arbitration claim has been commenced, in order to give effect to the policy underlying the 1996 Act.[23]

The effect of this was that a creditor with a debt that was not genuinely disputed on substantial grounds would have to wait for its claim to be decided in arbitration before being able to proceed with a winding-up petition.

The courts of the British Virgin Islands (the "BVI") have taken a different view, and the English courts have now decided that the BVI courts' approach is in fact the better one.

In ***Sian Participation Corp (In Liquidation) v. Halimeda International Ltd***,[24] the Privy Council (acting as the final court of appeal for the BVI) held that:

> "*Salford Estates*, and the cases which have followed it, were wrong to introduce a discretionary stay of creditors' petitions … where an insubstantial dispute about the creditors' debt is raised between parties to an arbitration agreement."[25]

The reasons for this decision are well encapsulated in the following paragraph of the *Sian Participation* judgment:

> "92. None of the general objectives of arbitration legislation (efficiency, party autonomy, pacta sund servanda and non-interference by the courts) are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds. To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble and expense for no good purpose. Party autonomy and pacta sunt servanda are not offended because seeking a liquidation is not something which the creditor has promised not to do. And by ordering a liquidation the court is not resolving anything about the debt, nor interfering with the resolution of any dispute about it".[26]

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21 *V and N v. K*, para. 106

22 *V and N v. K*, para. 136.

23 See the Court of Appeal's judgment in *Salford Estates (No 2) Ltd v. Altomart Ltd (No 2)* [2014] EWCA Civ 1575, followed in a number of cases, but now overturned by the *Sian Participation* judgment discussed below.

24 *Sian Participation Corp (In Liquidation) v. Halimeda International Ltd* [2024] UKPC 16.

25 Id. at para. 88.

26 Id. at para. 92.

Accordingly, under BVI and (as will be explained below) English law, the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement is now as follows:

> "whether the debt is disputed on genuine grounds".

If it is, then the court should in general stay the liquidation proceedings. If the debt is *not* genuinely disputed on substantial grounds, then the fact that it is subject to an arbitration agreement will not, in itself, amount to a sufficient ground to stay the liquidation proceedings.

Although Sian Participation concerned questions of BVI law and was decided by the Privy Council acting as the final court of appeal for the BVI, the Privy Council held that their finding should apply also in English law.[27] They were able to do this because the judges of the Privy Council are the same as the judges in the UK Supreme Court, which is the final court of appeal for questions of English law (among others).

3. The law applicable to arbitration agreements

The English courts have given much thought over the past few years to the question of the law applicable to arbitration agreements, particularly where (as is usually the case) the arbitration agreement is not covered by an express choice of law but is contained in an agreement (the "matrix contract") that does contain a general choice of law clause. In such circumstances, should the law applicable to the arbitration agreement be the same as the law that applies to the matrix contract, or should it rather be the law of the seat of the arbitration?

The position under English law had previously been unclear, as there had been decisions going both ways:

- in ***C v. D***, the Court of Appeal had found that the law of the seat should apply;[28]
- in ***Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA***, by contrast, the Court of Appeal had found that the law of the matrix contract should in general apply (although not in that particular case).[29]

The position was subsequently settled by the UK Supreme Court, in favour of the law applicable to the matrix contract. In 2021, the UK Supreme Court decided in ***Enka v. Chubb*** that:

> "iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the [matrix] contract will generally apply to an arbitration agreement which forms part of the contract.
>
> v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.
>
> vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration will be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration." [30]

In other words, the law applicable to the matrix contract would generally apply to the arbitration agreement in which it was contained, save in certain exceptional cases. In *Enka v. Chubb*, that resulted in Russian law being applied to the arbitration agreement in an ICC arbitration seated in London.

The same logic underlying the judgment in *Enka v. Chubb* was re-applied, the following year, by the Supreme Court in ***Kabab-Ji***, leading it to find that the governing law of the matrix contract (English law) applied to the arbitration agreement in an ICC arbitration seated in Paris.[31] That case aroused much

27 *Sian Participation*, paras. 124-125.

28 *C v. D* [2007] EWCA Civ 1282.

29 *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ 638.

30 *Enka Insaat ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38 at para. 170 (per Lord Hamblen and Lord Leggatt).

31 *Kabab-Ji SAL v. Kout Food Group* [2021] UKSC 48. See e.g. C. Florin, P. Martin, Europe, United Kingdom: Towards a Harmonised Framework for Determining the Governing Law of an Arbitration Agreement, *ICC Dispute Resolution Bulletin* 2022-1, p. 39; W. Jo-Mei Ma, Harmonising Judicial Approaches to Determining the Law of the Arbitration Agreement, *ICC Dispute Resolution Bulletin* 2023-1.

interest, in part because the French courts reached a diametrically opposite view in respect of the exact same question and set of facts, finding that French rather than English law should apply to the arbitration agreement.

While the *Enka v. Kabab-Ji* rule may have been correct as a matter of English conflict of law rules, it risked creating uncertainty in cases where the parties have not expressly selected the law governing their arbitration agreement but have (expressly or impliedly) selected the law applicable to the matrix contract. This could have significant practical consequences. As explained in an article that this author published at the time that the reforms were being discussed, the *Enka* rule would, for example,:

> "[not] enable a claimant's lawyer to advise it, with sufficient certainty, as to which law will govern its argument that its counterparty's parent company is bound by the arbitration agreement."[32]

Accordingly, the Law Commission (after some initial hesitation) proposed to amend the 1996 Act so as to reverse the Supreme Court's decision in *Enka v. Chubb* (for the period going forward).[33] This has resulted in the following addition to the 1996 Act, made by s. 1 of the 2025 Act:

> **"Section 6A Law applicable to arbitration agreement**
>
> (1) The law applicable to an arbitration agreement is –
>
> (a) the law that the parties expressly agree applies to the arbitration agreement, or
>
> (b) where no such agreement is made, the law of the seat of the arbitration in question.
>
> (2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not constitute express agreement that that law also applies to the arbitration agreement.
>
> (3) Subsection (1) does not apply to an arbitration agreement derived from a standing offer to submit disputes to arbitration where the offer is contained in –
>
> (a) a treaty, or
>
> (b) legislation of a country or territory outside the United Kingdom.
>
> (4) In this section –
>
> "legislation" includes any provision of a legislative character;
>
> "treaty" includes any international agreement (and any protocol or annex to a treaty or international agreement)."

The result is that, for a non-treaty-based arbitration, unless the Parties have expressly agreed that a particular law applies to the arbitration agreement, that agreement will be governed by the law of the seat of the arbitration, regardless of whether there has been a choice of law to govern the matrix contract.

This will bring much greater clarity to English arbitration law, provide greater legal certainty for those who choose London as a place of arbitration, and avoid the considerable delay and costs caused by disputes over the law applicable to the arbitration agreement. It will also bring English arbitration law into line with the majority of other arbitration laws,[34] as well (of course) as Article V(1)(a) of the New York Convention.[35]

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32 J. Grierson, "Two Brief Comments on the Law Commission's Proposed Reform of the Arbitration Act 1996", *Journal of International Arbitration* 39, no. 6 (2022), 765 at 772.

33 See A. Welsh KC, supra note 4, at p. 76.

34 See M. Scherer, J.O. Jensen, "Towards a Harmonized Theory of the Law of Governing the Arbitration Agreement", *Indian Journal of Arbitration Law* (2021) Vol. X Issue 1, finding that 51% of jurisdictions reviewed applied the law of the seat to the arbitration agreement (in cases where there was no explicit selection of the law governing the arbitration agreement).

35 New York Convention, Art. V(1)(a) provides that recognition and enforcement of an award may be refused on the following ground among others: "The parties to the [arbitration] agreement … were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made [i.e. the law of the seat]" (emphasis added).

4. Anti-suit injunctions

The English courts have for many years been issuing anti-suit injunctions to prevent parties from disregarding their obligations under arbitration agreements by ordering them not to proceed with litigation before foreign courts. Indeed, the Court of Appeal in 1995 made it clear that they should normally be granted in such circumstances:

> "The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."[36]

The future of English anti-suit injunctions was put in doubt by the Court of Justice of the European Union's judgment in *West Tankers*,[37] which held that the issuing of such injunctions to prevent proceedings before the court of other EU members states was incompatible with the Brussels Regulation.[38] However, the UK's exit from the EU has meant that the English courts have regained in full their ability to issue such injunctions.

Two recent judgments of the English courts have confirmed that the anti-suit injunction is indeed very much alive and thriving in England.

In ***UniCredit v. RusChemAlliance***,[39] the English courts were faced with a request for an anti-suit injunction to prevent a party from proceeding before the courts of Russia in breach of an agreement to arbitrate their disputes in Paris. The Supreme Court held that the English courts had jurisdiction to grant an anti-suit injunction because (applying the *Enka* rule discussed above) English law governed the arbitration agreement. And it held that it was appropriate to issue such an injunction despite the fact that the only connection between the dispute and the English courts was that English law had been selected to govern the underlying contract.

The English courts' willingness to grant anti-suit injunctions in relation to arbitration agreements providing for arbitration outside of England and Wales may surprise some. However, it is likely to remain of mainly academic interest, because the new Section 6A of the amended Arbitration Act 1996 (cited above) will have the effect that arbitration agreements providing for arbitration outside England and Wales will no longer be subject to English law except where the parties have explicitly agreed that English law should govern such agreements, which is likely to be the case in only a small minority of agreements. The English courts will thus no longer have jurisdiction to grant anti-suit injunctions in relation to the vast majority of arbitrations seated outside England and Wales.

More recently still, the Court of Appeal has confirmed that the English courts have the power to issue anti-suit injunctions to prevent parties from bringing pre-emptive attacks in foreign jurisdictions against London-seated awards, and that it is appropriate for the courts to do so.

In ***Star Hydro Power Ltd v. National Transmission and Despatch Co Ltd***,[40] one of the parties to the arbitration, a Pakistani power purchaser, applied to the Pakistani courts for the non-recognition and non-enforcement of those parts of an LCIA award that were in favour of the other party, a South Korean owned independent power producer ("IPP"). The IPP applied to the English courts for an anti-suit injunction to prevent the power purchaser from continuing the Pakistani proceedings. The High Court refused the application but the Court of Appeal allowed the IPP's appeal, finding that the application to the Pakistani courts was a "full-throated challenge" to the award and therefore in breach of the arbitration clause and the exclusive jurisdiction of the English court in relation to such a challenge, such that it should be restrained by an anti-suit injunction.[41] The matter is currently pending an appeal to the Supreme Court.

36 *Aggeliki Charis Cia Maritima SA v. Pagnan SpA (The Angelic Grace)* [1995] 1 *Lloyds Rep* 87(per Leggatt LJ).

37 Case 185/07 (2009), *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc*. See e.g. J. Grierson, "Comment on *West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.p.A. (The Front Comor)*", (2009) 26 *J. Int. Arb.* 6.

38 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1 ("Brussels I"). Brussels I has since been amended and is now known as "Brussels I Recast".

39 *UniCredit Bank GmbH v. RusChemAlliance LLC* [2024] UKSC 30.

40 *Star Hydro Power Ltd v. National Transmission and Despatch Co Ltd* [2025] EWCA Civ 928

41 Id. at paras 65-66 (per Phillips LJ).

These two judgments demonstrate the enthusiastic willingness of the English courts to police compliance with arbitration clauses, even in cases where the connection with England is relatively weak: anti-suit injunctions were granted in a case where the arbitration clause provided for arbitration in Paris and in a case where the offending proceedings were (at least on their face) enforcement proceedings under the New York Convention. Some might question whether the English courts' enthusiasm has not led them to go a bit too far in these cases.

5. Review of jurisdictional decisions by arbitral tribunal

One of the most hotly debated aspects of the reform of the 1996 Act was the question whether a challenge of an arbitral tribunal's jurisdiction before an English court should be limited to an appeal rather than a full ("*de novo*") hearing. The recommendation made by the Law Commission in its final report has been followed by the UK legislator.[42]

Section 11 of the 2025 Act provides as follows:

> "**11 Procedure on challenge under section 67 of the Arbitration Act 1996**
>
> In section 67 of the Arbitration Act 1996 (challenging the award: substantive jurisdiction), after subsection (3A) (as inserted by section 10(3)) insert –
>
> '(3B) Rules of court about the procedure to be followed on an application under this section may, in particular, include provision within subsection (3C) in relation to a case where the application –
>
> (a) relates to an objection as to the arbitral tribunal's substantive jurisdiction on which the tribunal has already ruled, and
>
> (b) is made by a party that took part in the arbitral proceedings.
>
> (3C) Provision is within this subsection if it provides that subject to the court ruling otherwise in the interests of justice –
>
> (a) a ground for the objection that was not raised before the arbitral tribunal must not be raised before the court unless the applicant shows that, at the time the applicant took part in the proceedings, the applicant did not know and could not with reasonable diligence have discovered the ground;
>
> (b) evidence that was not put before the tribunal must not be considered by the court unless the applicant shows that, at the time the applicant took part in the proceedings, the applicant could not with reasonable diligence have put the evidence before the tribunal;
>
> (c) evidence that was heard by the tribunal must not be re-heard by the court.
>
> (3D) Subsection (3B) does not limit the generality of the power to make rules of court."

In other words, the English court rules will be reformed so as to provide for a system (essentially) of review rather than rehearing of jurisdictional challenges in circumstances where the challenge is made by a party who participated in the arbitration and the arbitral tribunal has already ruled on the jurisdictional objection.

Shortly before the 2025 Act entered into force, the English High Court was faced with a challenge to jurisdiction in ***Tecnicas Reunidas Saudia for Services & Contracting Co. Ltd v. Petroleum Chemicals and Mining Company Ltd***,[43] in relation to an award rendered by an ICC tribunal. The challenge was made on the basis that the arbitration agreement in fact provided for *ad hoc* arbitration rather than ICC Arbitration. Bryan J (applying a *de novo* approach because the reforms under the 2025 Act did not yet apply)[44] found that the agreement did indeed provide for *ad hoc* arbitration. The decision turns on the interaction between different contractual documents forming the contract between the parties, and is therefore fact-specific.

42 The recommendation made by the Law Commission in its final report has already been well explained in A. Welsh KC's article, see supra note 4.

43 *Tecnicas Reunidas Saudia for Services & Contracting Co. Ltd v. Petroleum Chemicals and Mining Company Ltd* [2025] EWHC 1785.

44 Bryan J held that "the award that is the subject of the challenge is not entitled to any particular status or weight", *Tecnicas Reunidas*, para. 202.

However, one point of more general application arose in the challenge. The party resisting the challenge argued that the question whether the arbitration should be subject to *ad hoc* or ICC Arbitration was not a question of jurisdiction but rather a "procedural matter". Unsurprisingly, Bryan J rejected this argument, finding that:

> "Whether an arbitration agreement is a submission to *ad hoc* arbitration or an ICC arbitration is not a question of procedural irregularity. It is a matter going to the terms of the agreement to arbitrate itself and as such is jurisdictional."[45]

It is reassuring that, despite the English legislator's decision to modify the courts' approach to jurisdictional challenges in certain circumstances, the English courts are showing a robust willingness to exercise full control over such issues. This is clearly important to protect the legitimacy of international arbitration.

Conclusion

The reform of the 1996 Act has been broadly welcomed by arbitration practitioners, both for the open and efficient way in which was conducted and for the limited number of changes made to what was already a highly successful act. Recent case-law by the English courts should also be broadly welcomed: for its support for the ICC's insistence on the importance of full disclosure (*Aiteo*); for its business-friendly decision to allow creditors to proceed with insolvency proceedings, rather than requiring them to wait for arbitration proceedings to be completed, where the debt is not genuinely disputed (*Sian Participation*); and for taking a robust interventionist approach to jurisdictional challenges (*Tecnicas Reunidas*). Some may consider that the English courts have gone a bit too far in relation to anti-suit injunctions (*UniCredit* and *Star Hydro*) but many will welcome the fact that the English courts are protecting parties' rights under arbitration agreements.

45 *Tecnicas Reunidas*, para. 188(3). Bryan J found support for this in the "fundamental differences between an *ad hoc* arbitration and ICC arbitration", namely in relation to (a) the waiver (or not) of the right to appeal and (b) the method of appointment of the arbitrators, *Tecnicas Reunidas*, para. 199(4).

EUROPE

France

Proposals for Arbitration Reform: Opportunity, Promise, and Risk

Clément Fouchard
Partner, Reed Smith, Paris; President, ICC France Arbitration and ADR Committee

A reform initiative proposes a far-reaching overhaul of French arbitration law, including the introduction of an "Arbitration Code" and the quasi-unification of domestic and international arbitration regimes. A working group report recently submitted to the Minister of Justice contains valuable adjustments and modernisation efforts, but several proposals may disrupt a stable and internationally acclaimed framework. This article highlights some of the key proposals and emphasises the importance of coherence, clarity, and practitioner consultation to preserve France's status as a leading arbitral venue.

Introduction

On 20 March 2025, a working group report (the "Report") was submitted to the Minister of Justice proposing a significant reform of French arbitration law.[1] The reform initiative takes the form of 40 proposals and a draft "Arbitration Code" and has generated significant debate within the French and international arbitration community, with opinions ranging from broad support to deep reservations about the initiative's method and substance.

Fast-track reform of French arbitration law: The need to preserve coherence

Following receipt of the Report, the Minister announced a three-step timetable: (i) an initial decree in autumn 2025 addressing so-called "consensus" issues (a draft decree was eventually released on 12 December 2025 with the launching of a public consultation on the reform of arbitration law until 20 January 2026);[2] (ii) a cycle of consultations in spring 2026 on more sensitive and structural questions; and (iii) a codification in autumn 2026.

This method raises two concerns:

- Any reform of arbitration law presupposes that the legislator first determines the main structural orientations, e.g. whether domestic and international arbitration should remain distinct or be unified. Addressing technical provisions before clarifying these underlying structural choices reverses this logic.
- Any large-scale modification should be preceded by (i) an evaluation of the effectiveness of the 2011 framework, as mandated to the working group;[3] and (ii) a broader consultation across all impacted communities, including arbitration users (as mentioned, the Ministry of Justice has initiated a public consultation).

Ensuring that the quality and consistency of the French legal arbitration framework remain attractive will be challenging within the current timetable.

1 The Report was prepared by a Working Group co-chaired by Justice François Ancel and Professor Thomas Clay, comprising professors, lawyers, institution representatives and a judge (see p. 2 of the Report). The Report is available at "Groupe de travail sur la réforme du droit français de l'arbitrage, sous la co-présidence de F. Ancel et T. Clay, Rapport et propositions de réforme" (March 2025) La Documentation française. The below references to articles correspond to those in the draft Arbitration Code. All English translations of the proposals are from the author.

2 https://www.justice.gouv.fr/actualites/actualite/consultation-reforme-du-droit-larbitrage

3 See the engagement letter ("Lettre de mission") dated 12 Nov. 2024 attached to the Report, p. 131.

Why reform, and why now?

The 2011 Decree providing the framework of French arbitration law was the product of nearly a decade of cross-professional consultation. It is widely regarded as both successful and stable, and is largely supported by well-settled case law[4] and practice.

Nevertheless, in the context of increased international competition among arbitral seats, the Ministry of Justice has deemed it appropriate to reassess the regime.[5] In that context, the Report aims to enhance the readability, accessibility and international attractiveness of French arbitration law.

The law is always susceptible to improvement, and French arbitration law is no exception. Beyond the question of whether a reform is appropriate, the Report's proposals offer an opportunity for the arbitration community (in France and beyond) to consider potential adjustments and improvements.[6]

1. Structural reform – Codification and unification

The core of the proposal comprises the introduction of an "Arbitration Code" and the quasi-unification of the domestic and international arbitration regimes.

a - An Arbitration Code

The Report's first proposal – its most emblematic – aims to consolidate scattered provisions into a single 130-article Code, primarily by extracting rules from the French Code of Civil Procedure (CPC), with the stated objective of improving the readability, accessibility and international influence of French arbitration law. It also constitutes an institutional affirmation of the autonomy of arbitration.

This proposal has triggered strong reactions among scholars. Supporters highlight the pedagogical value and international readability that codification may bring.[7] Critics argue that the supposed current "dispersion" of applicable rules is overstated and that removing arbitration from the CPC – "*sa place naturelle*"[8] – would be both unnecessary and potentially destabilising.[9] At this stage, the debate appears largely academic. The only concrete risk arising from decoupling arbitration from civil procedure that the legislator will need to address is the uncertainty surrounding any potential gap-filling function of the CPC provisions.

b - Functional dualism or quasi-monism?

The Report proposes aligning domestic arbitration with the more flexible rules of international arbitration, as part of a shift towards a quasi-monist regime (proposal No. 3).

This alignment operates in both directions, with rules traditionally applicable to international arbitration being transposed to domestic arbitration, and vice versa.

On the one hand, the abandonment of dualism could be viewed as the culmination of case law that has increasingly promoted harmonisation between the two regimes[10] (Art. 1506 of the CPC already lists a significant number of common rules).

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4 French case law has not always been unanimously praised; one example is the intensity of international public policy control (see e.g. M. Kecsmar, French Courts' Recent Approach to Violation of International Public Policy: Towards a More Balanced Control of Awards?). On this point, the working group's report does not take a position and leaves it to case law to find the right balance (see Report, at p. 28).

5 See e.g. the UK's adoption of a new Arbitration Act in February 2025. On the subject, see J. Grierson, P. Rosher, G. Stephens-Chu, "La réforme du droit anglais de l'arbitrage" (2024) Vol. 3 *Rev. arb.*, 801, 803; A. Welsh KC, "Fine Tuning: Review of the Proposed Reforms to the English Arbitration Act 1996", *ICC Dispute Resolution Bulletin,* issue 2023-3.

6 This is consistent with the feedback received from in-house lawyers who were consulted via an ICC France questionnaire: while most respondents expressed doubts about the urgency of a broad reform, they favoured targeted clarifications and practical improvements, particularly with regard to post-award litigation (a recurring criticism relates to the excessive length of annulment proceedings).

7 J. Jourdan-Marquès, Chronique d'arbitrage : vers une réforme du droit français de l'arbitrage ? (31 Mar. 2025), *Dalloz. actu.*, D. Mainguy, "De la nécessité d'un Code de l'arbitrage - Libres propos", (2025) *JCP Act.*, 877; E. Loquin, D. Mouralis, "Le projet de réforme du droit français de l'arbitrage" (2025), *RTD Com.*, 603.

8 Ch. Jarrosson, "Faut-il un Code de l'arbitrage ?" (2025) *JCP Doctr.*, 616, para. 13

9 See also M. Audit, "La réforme du droit de l'arbitrage : un voyage en terre inconnue - Libres propos" (2025) *JCP, Act.*, 590; L. d'Avout, "Faut-il isoler l'arbitrage dans un code français dédié ?" (2025) *Dalloz*, 1698; M. Barba, "Un code pour l'arbitrage" (2025) *Dalloz*, 945; S. Bollée, "Vers une réforme du droit de l'arbitrage ?" (2025) *Dalloz*, 960 ; L. Larribère, "Codifier pour autonomiser : la proposition de Code de l'arbitrage" (15 Apr. 2025) *Gaz. Pal.*, No. 14, 12.

10 See, on the convergence of the compétence-compétence principle in domestic and international arbitration, Cass. civ. 1re, 26 Oct. 2011, No. 10-15.968, confirming that the priority rule whereby the arbitral tribunal has exclusive jurisdiction to rule on its own competence applies as a procedural rule of French arbitration law, subject only to the manifest nullity or inapplicability of the arbitration agreement. See also, on the convergence of procedural standards governing arbitrators' duties, particularly independence and impartiality, see CA Paris, 11 Jan. 2022, RG No. 19/19201, reaffirming that an arbitrator's duty of disclosure constitutes a fundamental procedural guarantee, assessed by reference to objective doubts as to independence or impartiality, and enforced by the annulment judge in line with standards developed in international arbitration, without differentiation based on the domestic or international nature of the arbitration.

On the other hand, it has been rightly observed that the nature of disputes and parties in domestic and international arbitration differ in meaningful ways. Extending the liberalism of international arbitration to domestic disputes –[11] for example by removing the writing requirement for arbitration agreements (proposal No. 11, Art. 21), or abolishing the suspensive effect of setting-aside proceedings (proposal No. 33, Art. 83) – could prove detrimental, particularly to weaker or less sophisticated parties.

Conversely, the extension of domestic rules to international arbitration presents its own risks. For instance, the rule requiring an odd number of arbitrators, which currently applies only to domestic arbitration, would be extended to international arbitrations seated in France (proposal No. 16, Art. 26). As commentators have noted,[12] parties to an international contract who wish to provide for an even-number tribunal would no longer be able to choose France as the seat of their arbitration. This may be seen as a step backwards, potentially at the expense of the attractiveness of Paris as an arbitral seat.

That said, and notwithstanding the stated objective of quasi-unification, the proposed reform maintains several structural differences between domestic and international arbitration:

- **The draft Arbitration Code maintains a dual public policy standard.** Domestic arbitration remains subject to internal public policy and international arbitration is reviewed exclusively through the prism of international public policy.
- **International arbitration continues to benefit from a delocalised and autonomous treatment.** This includes the non-application of domestic rules on arbitrability and capacity, and the centralisation of judicial support and review before specialised chambers of the Paris Court of Appeal.

The reform therefore does not eliminate dualism, but rather transforms it into a functional dualism, in which convergence of rules coexists with enduring normative and conceptual differences.

2. Other key substantive proposals

This contribution does not allow for an in-depth analysis of all the proposals in the report and the 130 articles of the draft Arbitration Code. It therefore focuses on a series of key proposals likely to be of broad interest, particularly to the international arbitration community.

a - The definition of internationality

The Report seeks to modernise the definition of international arbitration by replacing "interests of international trade" ("*intérêts du commerce international*") with "international economic interests" ("*intérêts économiques internationaux*") and by broadening the category of "usages" that arbitrators may apply beyond commercial practices (proposal No. 10, "*Article préliminaire*").

The Report contends that this broader formulation better reflects contemporary commercial and investment disputes. However, current case law does provide a stable and workable definition and has never, for example, given rise to issues concerning the internationality of investment arbitration. Moreover, introducing a new wording may risk shifting the focus from the underlying transaction to the dispute – an adjustment that has not been thoroughly assessed.

b – The definition of an award

The Report proposes codifying the definition of an arbitral award to reflect established case law and expressly recognise the validity of electronic awards (proposal No. 12, Art. 17). This welcome proposal reflects and reinforces the modernisation of arbitration procedure, echoing developments in civil procedure on the subject.

However, one observation is that the proposal should clarify how electronic awards interact with *exequatur* practice, for example, whether a hard-copy version is required.

11 M. Audit, supra note 9, at 870.

12 E. Loquin, D. Mouralis, supra note 7, at para. 55.

c – Conditions relating to arbitrators

In addition to the proposed uniformised requirement for an odd number of arbitrators mentioned above, the Report also provides that:

> "when the arbitral tribunal sits in France, the role of arbitrator shall be performed by a natural person who has legal capacity".[13]

While this proposal may be seen as a step backwards from the liberal approach adopted by the 2011 reform and as an unnecessary constraint on French-seated arbitration, in the era of generative AI, there is value in achieving legal clarity and delineating the interaction between human judgement and technology, including in online or algorithm-assisted arbitration.

d – Clarification of the negative effect of the competence-competence principle

The draft clarifies the negative effect of the competence-competence principle to reinforce the primacy of arbitral jurisdiction:

> "When a dispute covered by an arbitration agreement is brought before a court of the State, that court shall declare itself incompetent. It *may* nevertheless retain its own jurisdiction when:
>
> 1° the arbitration agreement is manifestly void or manifestly inapplicable, and
>
> 2° the arbitral tribunal has not been constituted on the date on which it rules. The court of the State may not raise its lack of jurisdiction of its own motion".[14]

The proposed wording is clearer than Article 1448 CPC, which uses a cumbersome double negative.[15] However, the choice of the verb "may" (rather than the affirmative tense used in Art. 1448: "the State court declares itself incompetent unless …") is questionable, as it suggests that the court has a discretion rather than an obligation to decline jurisdiction.

e – Role and powers of the supporting judge

The Report proposes a significant reinforcement of the role and powers of the supporting judge ("*juge d'appui*"). Under French law, the supporting judge's mandate is generally restricted to two areas:

(i) the constitution of the arbitral tribunal (i.e. modalities of appointment, refusal to appoint an arbitrator when the arbitration agreement is manifestly void or inapplicable, challenges); and

(ii) extensions of time limits.

The Report extends this role to the following matters:

(iii) prevention of denial of justice (proposal No. 29, Art. 16);

(iv) ensuring respect for party equality and party autonomy (proposal No. 29, Art. 15);

(v) addressing situations of impecuniosity (proposal No. 19, Art. 33); and

(vi) enforcement of conservatory or provisional measures ordered by the arbitral tribunal (proposal No. 29, Art. 41).

These proposals are justified by the desire to enhance the efficiency of arbitral proceedings, which is a legitimate objective. One may nonetheless question whether increasing judicial intervention is the only, or even the best, means of achieving it.

Impecuniosity is one of the most difficult issues to address. Arbitration's private and fee-based nature places the financial burden of the proceedings on the parties, which may restrict access to the arbitral tribunal for a party unable to pay its share of the costs.

The Report provides that when a party's inability to pay effectively deprives it of access to the arbitral tribunal, and when the arbitration institution has not found a solution allowing the proceedings to continue under its auspices, a party may apply to the supporting judge for:

> "any measure that may enable the arbitration to proceed".[16]

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13 Proposal No. 17, Art. 27: "Lorsque le tribunal arbitral siège en France, la mission d'arbitre est exercée par une personne physique jouissant de sa capacité juridique …".

14 Proposal No. 24, Art. 23 (emphasis added) : "Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'État, celle-ci se déclare incompétente. Elle peut néanmoins retenir sa propre compétence lorsque : 1° la convention d'arbitrage est manifestement nulle ou manifestement inapplicable, et que 2° le tribunal arbitral n'est pas constitué à la date à laquelle elle statue. La juridiction de l'État ne peut relever d'office son incompétence …".

15 "Where a dispute covered by an arbitration agreement is brought before a court of the State, that court shall decline jurisdiction unless the arbitral tribunal has not yet been seized of the matter and the arbitration agreement is manifestly void or manifestly inapplicable."

16 Proposal No. 19, Art. 33: "En cas d'impécuniosité de l'une des parties privant effectivement celle-ci de son accès au tribunal arbitral et lorsque, le cas échéant, le centre d'arbitrage n'a pas trouvé de solution permettant de maintenir la procédure sous son égide, le juge d'appui peut être saisi par une partie aux fins de prononcer toute mesure de nature à permettre la mise en œuvre de l'arbitrage".

This proposal deserves credit for confronting impecuniosity head-on. French case law considers that the invocation of impecuniousness is not, in itself, sufficient to characterise the manifest inapplicability of the arbitration clauses.[17] This means that, if the initiation of arbitration proceedings fails due to a lack of remedy provided for the financial difficulties alleged by one party, the arbitration agreement may be found inapplicable. The real challenge lies therefore in defining the remedies (and lack of) to the financial difficulties of the impecunious party.

The proposed measures are diverse:

- adapting the arbitration clause to reduce costs (e.g. by appointing a sole arbitrator instead of three);
- replacing the designated institution with a less expensive or less distant one;
- challenging an arbitrator causing a financial deadlock;
- ordering reduced-cost proceedings; or
- ordering the respondent to advance costs or establishing a special fund to support impecunious parties.

In this context, it is legitimate to question whether the national judge is best placed to intervene. Is it realistic to expect the supporting judge, who has traditionally had limited resources, to succeed where an experienced arbitral institution has failed? Moreover, the proposal inherently creates tensions with the principle of party autonomy.

Enforcement of conservative or provisional measures ordered by the arbitral tribunal. Under French law, decisions ordering conservatory or provisional measures do not fall within the definition of an arbitral award and therefore cannot be granted *exequatur*. This significantly limits the effectiveness of measures issued by arbitral tribunals or emergency arbitrators compared with those ordered by state courts.

Based on Articles 17H and 17L of the 2006 UNCITRAL Model Law, the Report allows any party to request the supporting judge to order enforcement of a protective or provisional measure decided by the arbitral tribunal (proposal No. 29, Art. 41). The judge must grant the request unless enforcement would seriously prejudice the rights of a party or would violate international public policy in international arbitration or domestic public policy in domestic arbitration.

This proposal appears legitimate, particularly given the limitations of Article 1449 CPC, which allows recourse to state courts for interim measures only before the arbitral tribunal is constituted (unlike the ICC Arbitration Rules that allow such recourse before state courts after the constitution of the arbitral tribunal "in appropriate circumstances"[18]). Once the arbitral tribunal is constituted, parties may no longer seek provisional measures from state courts. It is therefore essential that conservative or provisional measures ordered by arbitral tribunal be enforceable.

f – Single arbitration for multi-contract disputes

The Report provides that:

> "Unless the parties agree otherwise, claims based on or related to several contracts may be brought in a single arbitration proceeding, pursuant to one or more arbitration agreements, provided that those agreements are compatible and that there is a connection such that it is in the interest of justice to hear and determine them together".[19]

The purpose is to allow a single arbitral tribunal to hear disputes arising from contract groups. The advantages of the proposal are clear: enhance procedural efficiency; reduce the risk of contradictory awards; and reflect the reality of complex contractual matrices (e.g. EPC, project-finance structures, supply chains, franchise networks). This is particularly relevant in *ad hoc* arbitration. In institutional arbitration, the institution's rules would govern.

17 P. Giraud, "Impécuniosité d'une partie : créativité, subsidiarité et pragmatisme, note sous Cass. civ. 1re, 28 septembre 2022", (2023), *Rev. Arb.*, 160.

18 Art. 28(2) of the ICC Arbitration Rules: "Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof".

19 Proposal No. 25, Art. 25 : "À moins que les parties en conviennent autrement, des demandes fondées sur plusieurs contrats ou en relation avec plusieurs contrats peuvent être formées dans une procédure arbitrale unique, en application d'une ou de plusieurs conventions d'arbitrage, à condition que ces conventions soient compatibles et qu'il existe entre les demandes un lien tel qu'il soit de l'intérêt d'une bonne justice de les faire instruire et juger ensemble".

However, the provision is succinct and does not establish a sufficiently clear regime for multi-contract arbitration. The "connection" ('*lien*") and "interest of good justice" ("*interêt d'une bonne justice*") criteria are vague and likely to generate disputes. Furthermore, ICC practice shows that chronology and procedural sequencing are often determinative,[20] yet the draft text ignores temporal issues entirely.

g – Hearing of the arbitrators by state courts

Among the various novelties, the Report provides for the possibility for the supporting judge or the setting-aside court to:

> "hear the arbitrator or obtain his written statements".[21]

Here, the court would use this power in situations where the arbitrator's independence or impartiality, their ability to act, or the authenticity of the signature on the award is in question.

The prospect of hearing arbitrators has drawn significant criticism, including concerns over potential breaches of the confidentiality of deliberations. One may also question the effectiveness of the rule in the absence of any sanction should an arbitrator fail to appear. If this provision is retained, such power should be subject to strict safeguards: hearings should be strictly limited to independence issues; priority should be given to written observations; and explicit protection of the secrecy of deliberations should be ensured.

h – Post-award litigation

An autonomous procedural regime for setting aside actions

A major component of the reform is the establishment of an autonomous procedural regime governing actions to set aside arbitral awards before the Court of Appeal. The Report begins with the observation that, procedurally, annulment proceedings are currently treated as ordinary appellate litigation, despite their fundamentally different function.

The proposed reform aims to reflect the specific characteristics of setting-aside actions (i.e. limited review, absence of second-instance procedures, and close interaction with the arbitral process) by removing them from the general framework of appellate civil procedure and subjecting them to a dedicated set of rules expressly designed for arbitration-related disputes.

Such autonomous regime is characterised by:

- **The procedural architecture of setting-aside proceedings.** The draft Arbitration Code establishes a self-contained procedural sequence, with an early and mandatory procedural conference, the fixing of a binding timetable, and a concentration of submissions and grounds. It limits procedural incidents and restricts the ability of parties to introduce new arguments or maneuvers at a late stage, thereby reinforcing the principle that annulment is not an open-ended forum for re-litigation. The Code also provides for specific rules governing the admissibility of claims and evidence, as well as for the possibility for the court to adapt the procedure to the needs of the case, within the confines of this arbitration-specific framework.
- **Tailored judicial powers and sanctions reflecting the arbitration context.** In addition to targeted civil fines for failure to comply with procedural obligations, the draft Arbitration Code empowers the Court of Appeal to sanction abusive setting-aside actions more effectively, including through substantial financial penalties. It also facilitates procedural dialogue between the court and the parties, and, where appropriate, with the arbitral tribunal itself, notably by allowing the court to invite corrective action by the arbitral tribunal in order to avoid annulment.

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20 See e.g. The Secretariat's Guide to ICC Arbitration (ICC, 2012), Chapter 3, at 3-344: "The Secretariat will proceed differently depending on (i) whether all parties are participating in the proceedings and an Answer has been submitted by any respondent(s) and (ii) whether any party raises an objection to the claims arising out of more than one arbitration agreement". See also A.-M. Whitesell, E. Silva Romero, Multiparty and Multicontract Arbitration: Recent ICC Experience in *Complex Arbitrations: Perspectives on their Procedural Implications*, *Special Supplement, ICC International Court of Arbitration Bulletin* (2003); S. Greenberg, J. Ricardo Feris, C. Albanesi, Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience, in B. Hanotiau, E.A. Schwartz (eds.), Multiparty Arbitration, *Dossier VII, ICC Institute of World Business Law*, 2010.

21 Proposal No. 30, Arts. 35 and 109. Art. 35: "Il appartient à l'arbitre, avant d'accepter sa mission, de révéler toute circonstance susceptible d'affecter son indépendance ou son impartialité. Il lui est également fait obligation de révéler sans délai toute circonstance de même nature qui pourrait naître après l'acceptation de sa mission. En cas de différend sur le maintien de l'arbitre, la difficulté est réglée par le centre d'arbitrage ou, à défaut, tranchée par le juge d'appui saisi dans le mois qui suit la révélation ou la découverte du fait litigieux. Le juge d'appui peut procéder à l'audition de l'arbitre ou recueillir sa déclaration écrite". Art. 109: "La cour peut procéder à l'audition de l'arbitre ou recueillir ses déclarations écrites".

Taken together, these features highlight a clear conceptual shift: setting-aside proceedings are no longer conceived as ordinary appellate litigation, but as a distinct form of judicial control within the arbitral system, aimed at safeguarding procedural integrity without undermining the finality and effectiveness of arbitral awards.

Action for the unenforceability ("*inopposabilité*") of foreign awards

The Report proposes introducing an action for unenforceability against foreign awards that are manifestly contrary to international public policy (proposal No. 32, Art. 72). The purpose is to deprive the award of its *res judicata* effect and to allow a party who fears recognition or enforcement in France to bring a preventive action.

The mechanism of this remedy, which supplements an annulment action that is unavailable when the seat of arbitration is abroad, raises several questions. Articles 71 and 72 suggest that the procedure would mirror *exequatur*, i.e. a non-adversarial *ex parte* application before the "*tribunal judiciaire*" limited to a *prima facie* review, and followed by an appeal before the Paris Court of Appeal with broader review powers.

However, the usefulness of the *ex parte* phase is questionable given the extremely limited scrutiny at first instance. Most applications would likely be rejected, thereby shifting the real examination to the appeal stage – an appeal that is not suspensive. Moreover, the lack of coordination between the applications for *exequatur* and "*inopposabilité*" could lead to parallel proceedings before different judges, with a real risk of contradictory decisions given the organisation of the Parisian courts.[22]

The Report is also silent on the consequences of rejecting an "*inopposabilité*" application. If such a dismissal is deemed to imply *exequatur*, the applicant would be discouraged from resorting to the mechanism. Conversely, if it is not deemed to imply *exequatur*, it would be incoherent for the judge to conclude that the award is not manifestly contrary to international public policy without that finding affecting enforceability.

Suspension of the setting aside proceedings and remittance of issues to the arbitral tribunal

A more promising proposal is one allowing a judge to stay setting-aside proceedings and remit specific issues to the arbitral tribunal to regularise the award for enforcement purposes (proposal No. 38, Art. 82).

Inspired by the 2006 UNCITRAL Model Law (Art. 34(4)), the idea is to "save" awards wherever possible.[23] This mechanism would reaffirm the primary role of the arbitral tribunal in the arbitral process. It would allow the arbitral tribunal to consider public-policy arguments that had not been initially raised, to provide reasons for an element of the decision that had previously lacked reasoning, or to complete a missing formal requirement that would otherwise render the award vulnerable.

Conclusion - A call for broad consultation

The reform initiative is driven by the legitimate ambitions of clarity, accessibility, competitiveness and effectiveness. It contains valuable technical updates to streamline procedures. However, the core structural proposals – creating an autonomous code and unifying domestic and international regimes – entail risks for a system that is both respected and resilient, raising questions about the appropriateness of a sweeping structural reform.

As mentioned, a draft decree was released on 12 December 2025, with the launching of a public consultation on the arbitration law reform until 20 January 2026. This initiative is to be welcomed. Only the broadest possible consultation can provide the reform project with the nuanced feedback necessary for the adoption of sound rules. It remains to be seen whether the contributions are numerous enough to allow for the development of guiding principles for the future of French arbitration law.

22 Under the draft Arbitration Code, recognition or enforcement of an international arbitral award is ordered by the Judicial Court of Paris (Art. 69). Appeals against decisions ruling on recognition, enforcement or unenforceability of foreign awards fall within the exclusive jurisdiction of the Paris Court of Appeal (Art. 79). This framework creates a risk that proceedings relating to *exequatur* and to inopposabilité may be heard by different Parisian courts without procedural coordination.

23 Art. 34(4) of the Model Law: "The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside".

The Extension of Arbitration Agreements to Third Parties in France
Where Do We Stand ?

Samantha Nataf

Samantha Nataf is a member of the Paris, New York and Israel Bars, and regularly serves as counsel, arbitrator and legal expert. Her work spans the aerospace, construction, defense, energy, mining, and telecoms sectors, across Europe, Africa, the Middle East, and Southeast Asia. Samantha's expertise extends to conflicts of laws and jurisdiction, jurisdictional challenges, and the enforcement of awards in France and internationally. She is a member of the Council of the ICC Institute of World Business Law, and a former member of the ICC International Court of Arbitration.

France has long embraced a liberal, arbitration-friendly approach, grounded in substantive "material rules" of international arbitration. Emerging from landmark decisions in the 1980s, the mechanism of extension of arbitration agreements to non-signatories allows arbitral jurisdiction over entities that have not signed the underlying contract, but are deemed to have been directly involved in its negotiation, performance, or termination. This methodology, which seeks to identify the "true parties" behind corporate structures and contractual arrangements. It has attracted both praise for enhancing the efficiency in complex multiparty disputes and criticism for potentially stretching the traditional notions of consent and privity. While French courts have traditionally inferred consent (often tacitly) based on the non-signatory's conduct and assumed knowledge of the arbitration agreement, recent case law reveals a trend towards more explicit reasoning and substantiated decisions.

1. Introduction

France has played a significant role in the development of modern international arbitration, and its courts are widely regarded as being among the world's most arbitration-friendly jurisdictions.[1] This pro-arbitration stance has fostered the development of a liberal set of rules permitting the extension of arbitration agreements to non-signatories under certain circumstances.

Extending arbitration agreements to non-signatories promotes coherence and efficiency in multi-party and multi-contract disputes, helping to avoid inconsistent decisions and serving the interests of the sound administration of justice. As put by the Paris Court of Appeal in the 1990s:

> "Efficiency commands that the arbitrator may be seized of all the economic and legal aspects of the dispute concerning the parties involved in order for him to apprehend their respective liability in the context of their mutual relations".[2]

Such liberal approach has attracted both praise and criticism. Supporters highlight its efficiency in resolving complex disputes and ensuring consistency. Critics contend that it undermines fundamental principles of party consent and privity of contract. It may also lead to enforcement difficulties in jurisdictions that are hostile to the French approach.

The purpose of this article is to provide an overview of the rule of extension of the arbitration agreement as applied by French courts since the 1980s', with a focus on recent case law developments. The analysis is confined to international arbitration as defined in the

1 F-X. Train, "L'extension de la clause compromissoire – Chronique des années 2012-2017", *Rev. Arb.*, 2017, p. 389. Translation by the author, original in French: "*Paris est probablement la place d'arbitrage la plus favorable dans le monde à l'extension de la clause compromissoire*". See also E. Gaillard, "L'apport de la pensée juridique française à l'arbitrage international", *Journal du Droit International*, 529 (2017).

2 Paris Court of Appeal, 15 May 1990, *Société Charphil v. Société Topkapi et Sonetex*, No. 90/001030: "*Que l'efficacité commande que l'arbitre puisse être saisi de tous les aspects économiques et juridiques du litige concernant les parties qui y sont impliquées afin qu'il puisse appréhender les responsabilités de chacun dans le cadre de leurs relations réciproques*". See also Paris Court of Appeal, 7 Dec. 1994, *Rev. arb.* 1996, p. 245, stating that the arbitration agreement extends to third parties directly involved in the performance of the contract so that the arbitrator may be seized of all the economic and legal aspects of the dispute ("*afin que l'arbitre puisse être saisi de tous les aspects économiques et juridiques du litige*").

French Code of Civil Procedure.[3] It excludes the distinct mechanism of transmission of the arbitration agreement through assignment of rights.

After setting out the methodological framework within which the rule emerged (**2.**) and its scope (**3.**), the article discusses recent case law (**4.**). The article concludes by highlighting challenges to the French extension rule abroad, where different consent standards may hinder enforcement (**5.**).

2. The material rule methodology

Unlike other jurisdictions, French courts do not resort to conflict of laws rules to determine the law applicable to the arbitration agreement.[4] They have developed an autonomous body of substantive rules directly governing international arbitration agreements, known as the "material rules of international arbitration".[5] According to the formula adopted in the *Dalico* case (1993):

> "by virtue of a material rule of international arbitration law, the arbitration agreement is legally independent from the main contract in which it is contained directly or by reference and its existence and effectiveness are determined according to the common intention of the parties without reference to a national law, subject to the mandatory rules of French law and international public policy".[6]

The French courts' choice of the material-rule method flows from the idea that international arbitration is a transnational dispute resolution system that must follow its own set of rules favouring its efficiency in all circumstances and not depend on the vicissitudes of local laws. The French material rules regime is broad and encompasses all questions concerning the validity, scope, transmission, and effects of arbitration agreements that may arise before a French court.[7] The regime applies regardless of the seat of arbitration and regardless of the law governing the merits.[8]

This does not mean that an arbitration agreement will always be valid. Rather, it means that the parties' intention to arbitrate – which courts closely scrutinise – will prevail over any national rule that might undermine arbitral jurisdiction.

Based on this approach, French courts have developed rules favouring the effectiveness of arbitration agreements, such as the rule according to which arbitration clauses are not subject to any formal requirement.[9] It is in this context, entirely independent of any conflict-of-laws reasoning, that the rule of extension has emerged.

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3 See Art. 1504 of the French Code of Civil Procedure, and Paris Court of Appeal, 5 March 2025, n°24/17958, which state that: "the case law on contractual groups of contracts cannot be extended to domestic arbitration since it would be contrary to the requirement of acceptance of the arbitration agreement". ("*La jurisprudence sur les ensembles contractuels ne peut être étendue en droit de l'arbitrage interne pour être contraire à l'exigence d'acceptation de la clause compromissoire*").

4 See e.g. Section 6A of the 2025 English Arbitration Act: "The law applicable to the arbitration agreement is a) the law that the parties expressly agree applies to the arbitration agreement, or b) where no such agreement is made, the law of the seat of the arbitration in question". Likewise, Art. V(1)(a) of the New York Convention subjects the validity of the arbitration agreement to the law chosen by the parties and in the absence thereof, to the law of the seat of arbitration.

5 The starting point of the French construction was the landmark *Hecht* decision, Court of Cassation, 4 July 1972, No. 70-14.163, *Journal du Droit International* 1972, p. 843, note B. Oppetit. See also Paris Court of Appeal, 13 Dec. 1975, *Menicucci*, *Journal du Droit International* 1977, p. 107, note E. Loquin; *Rev. Arb.*, 1977, p. 147, note P. Fouchard.

6 Court of Cassation, 20 Dec. 1993, Dalico Contractors v. Municipalité de Khoms El Mergeb, No. 91-16.828, *Journal du Droit International* 1994, p. 432, E. Gaillard, p. 690, E. Loquin, *Rev. Arb.* 1994, p. 116, H. Gaudemet-Tallon: "*en vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique*".

7 See e.g. among others, the principle of independence of arbitration agreements, Court of Cassation, 7 May 1963, *Gosset*, the prohibition for States/state entities to rely on their domestic law to avoid an arbitration agreement, Court of Cassation, 2 May 1966, Jean Galakis v. France; the principle of transmission of the arbitration agreement in a chain of contracts without further consent, Court of Cassation, 6 Feb. 2001, No. 98-20.776, or the rule of extension of the arbitration agreement to non-signatories involved in the performance of the contract in which it is contained.

8 Court of Cassation, 30 March 2004, Unikod, *Rev. arb.* 2005, p. 961, note C. Seraglini.

9 Court of Cassation, 3 June 1997, Prodexport v. Clergeau (now FMT Productions) ("Prodexport I"), *Rev. Arb.*, 1998, p. 537; Court of Cassation, 20 Dec. 2000, *Rev. Arb.* 2003, p. 1341. Art. 1507, Code of Civil Procedure: Transl: "the arbitration agreement is not subject to any formal requirements". ("*La convention d'arbitrage n'est soumise à aucune condition de forme*").

3. The scope of the material rule of extension of arbitration agreements to third parties

Sometimes mistakenly referred to as the "group of companies doctrine", the rule on extension emerged in the context of non-signatory entities within a corporate group, following the ***Dow Chemical*** award, which was upheld by the Paris Court of Appeal in 1983.[10] However, the notion of corporate group soon lost relevance, hence the misnomer "group of companies" doctrine, and the focus shifted instead to the non-signatory's direct involvement in the performance of the contract containing the arbitration clause.

In its current form, the non-signatory extension rule was articulated in the ***Korsnäs Marma*** decision (1988), in which the Paris Court of Appeal held – in a formulation it has barely departed from since then: [11]

> "[T]he arbitration agreement inserted in an international contract has a validity and efficiency of its own that command to extend its application to the parties directly involved in the performance of the contract and in the disputes that may arise therefrom [*first condition]*
>
> whenever it can be assumed from their situation and activities, that they were aware of the existence and scope of the arbitration agreement, notwithstanding the fact that they did not sign the contract in which it was contained. [*second condition*]"

The mechanism is analogous to an implicit ratification of the arbitration clause, inferred from the third party's conduct. It applies to a wide range of actors, including corporations and their shareholders, states and state-owned entities, as well as subcontractors. The analysis centres on the behaviour of the non-signatory, while the intention of the original signatories is rarely considered. In practice, this approach seeks to uncover the true parties to the contract containing the arbitration clause, behind complex legal and corporate structures.

French courts have applied this rule in a rather far-reaching manner. As reflected in French decisions, two conditions must be satisfied for an arbitration clause to be extended.

- **With respect to the first condition** (i.e. the involvement of the third party): even limited involvement in the performance of the contract containing the arbitration clause has sometimes been deemed sufficient to justify the extension.
- **With respect to the second condition** (i.e. the non-signatory's knowledge of the arbitration clause): French courts have consistently presumed such knowledge to exist based on objective factors, such as the non-signatory's position and activities, without verifying the third party's actual knowledge of the arbitration clause.[12]

A good illustration of this approach is the well-known ***Jaguar*** case (1994), in which the Paris Court of Appeal extended the arbitration clause to the signatory's subsidiary "Jaguar France" holding that it was "directly interested in the dispute" and had taken the initiative to translate the agreement containing the arbitration clause.[13]

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10 Paris Court of Appeal, 21 Oct. 1983, Société Isover Saint Gobain v. Société Dow Chemical France et autres ("*Dow Chemical*"); *Rev. arb.* 1984, p. 98, note A. Chapelle.

11 Paris Court of Appeal, 30 Nov. 1988, *Rev. arb*, 1989, p. 69, note P.Y. Tschanz: *"[L]a clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d'en étendre l'application aux parties directement impliquées dans l'exécution du contrat et dans les litiges qui peuvent en résulter, dès lors qu'il est établi que leur situation et leurs activités font présumer qu'elles ont eu connaissance de l'existence et de la portée de la clause d'arbitrage, bien qu'elles n'aient pas été signataires du contrat la stipulant*". See also Paris Court of Appeal, 15 May 1990, *Société Charphil v. Société Topkapi et Sonetex*, No. 90/001030 and 1219; Paris Court of Appeal, 7 Dec. 1994, *Jaguar*, *Rev. arb.*, 1996, p. 250, note Ch. Jarrosson; Paris Court of Appeal 17 Dec. 1997, *SA Fred et Pétilon v. SA Laboratoire du Docteur Payot*, *RJDA* 4/98, n°539; Paris Court of Appeal, 5 May 2011, No. 10/04688; Court of Cassation, 25 June 1991, *Rev. arb.* 1991, p. 453; Court of Cassation, 27 March 2007, Sociétés ABS et AGF Iart v. Société Amkor Technology et a, *Rev. arb.*, 2007, p. 785; Paris Court of Appeal, 7 May 2009, No. 08/02025; Paris Court of Appeal, 26 Feb. 2013, *Rev. arb.*, 2014, p. 82; Paris Court of Appeal, 18 Dec. 2018, No. 16/24924; Paris Court of Appeal, 26 Nov. 2019, No. 18/20873; Paris Court of Appeal, 1st March 2022, N° RG 20/13575.

12 See F.X. Train, supra note 1.

13 Paris Court of Appeal, 7 Dec. 1994, *Rev. arb.*, 1996, p. 250, note by Ch. Jarrosson. See also Paris Court of Appeal, *SA Fred et Pétilon v. SA Laboratoire du Docteur Payot*, supra note 11, where the Paris Court of Appeal characterised direct involvement, referencing "the extensive correspondence submitted into evidence between the parties ... which shows that this company was the regular interlocutor of Fred Pétilon and was closely involved in the matters at hand, suggesting that it was aware of the arbitration clause" (translation by the author).

Some later decisions do not even refer to the non-signatory's presumed knowledge of the arbitration clause. One example is the ***ABS*** case (2007), in which the Court of Cassation ruled on the extension of an arbitration agreement of an electronic components' sale contract signed by an American company to its French subsidiaries. The Court held that:

> "the effect of the international arbitration clause extends to parties directly involved in the performance of the contract and the disputes arising from it".[14]

The subsidiaries' involvement – deemed sufficient to extend the clause – arose primarily from their role in securing the signatory's approval of electronic components.

While subsequent decisions have followed the same objective approach,[15] others have continued to refer to the non-signatory's knowledge or acceptance of the arbitration clause, taking care to establish a higher level of involvement.[16] Commentators have observed a degree of inconsistency in French case law on this issue,[17] and some have strongly criticised the approach of the French courts.[18]

It is also worth noting that an extension may also occur where a third party's involvement in a contract containing an arbitration clause primarily arises from the performance of their own contract. For example, the arbitration clause of the main contract has been extended to a subcontractor involved in the performance of the main contract,[19] even where the subcontract contained an incompatible arbitration clause.[20]

In such circumstances, given that the subcontractor's involvement primarily stems from a separate contract, one may question whether it can truly be deemed to have consented to the arbitration clause of the main contract. The answer is affirmative, as confirmed by the Paris Court of Appeal in 2018:

> "The fact that the third party's involvement in performing the contract containing the arbitration clause arises from obligations under another contract … does not preclude that such involvement results in the extension of the arbitration clause to that third party". [21]

Another interesting example of the French approach is provided by the ***Abela*** case (2010), which concerned the extension of an arbitration clause contained in a corporation's articles of association to third parties who were not shareholders of the company. In principle, formalities are required to become a shareholder bound by the articles of association, and mere tacit consent is insufficient to confer this status on third parties to the company. Yet, the Court of Cassation agreed to the extension of the arbitration agreement to third parties that had:

> "behaved as the true shareholders of the company, even appointing members of the board, agreeing on the designation of the chairman, and representing themselves as shareholders in official documents".[22]

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14 Court of cassation, Alcatel Business Systems and AGF IART v. Amkor and Anam Semiconductor ("*ABS*"), 27 March 2007, 04-20.842, *Rev. arb.* 2007, p. 785, note J. El Adhab: "*[m]ais attendu que l'effet de la clause d'arbitrage international s'étend aux parties directement impliquées dans l'exécution du contrat et les litiges qui peuvent en résulter*".

15 Paris Court of Appeal, 7 May 2009, *Suba France*, n° 07/21973; Paris Court of Appeal, 5 May 2011, No. 10/04688; Paris Court of Appeal, 16 Oct. 2018, *Rev. arb.* 2019, p. 891; Paris Court of Appeal, *Rotana*, 2 March 2021, RG n° 18/1689; Court of Cassation, 7 Nov. 2012, 11-25.89.

16 See e.g. Paris, 18 Dec. 2018, No. 16/24924; Court of Cassation, 26 Oct. 2011, No. 10-17.708.

17 F-X. Train, supra note 1.

18 See P. Mayer, "Les limites à la séparabilité de la clause compromissoire", *Rev. arb.*, 1998 p. 359; V. Heuzé, "Arbitrage international : quelle raison à la déraison?", *Recueil Dalloz* 2011, p. 2880; A. Mourre, V. Chessa, "Walking the Extra Mile on the 'Extension' of the Arbitration Agreement to Non-Signatories? A French Perspective", in *Arbitration as Balanced Administration of Justice, Essays in Honour of Piero Bernardini* (Brill, 2024), p. 345; C. Debourg, "La clause d'arbitrage et les non-signataires: retour sur l'extension *ratione personae* de la clause d'arbitrage en droit français", *Rev. arb.* 2024, p. 11.

19 Court of Cassation, 26 Oct. 2011, No. 10-17.708, JCP G 2011, 1432, note by C. Seraglini.

20 Paris Court of Appeal, *SA Mabruk Oil Operations c/ société Maridive Oil Service et autre*. See F-X. Train, supra note 1.

21 Paris Court of Appeal, 18 Dec. 2018, No. 16/24924: "*La circonstance que l'implication du tiers dans l'exécution du contrat stipulant la clause compromissoire résulte d'obligations contractées en vertu d'un autre contrat – en l'occurrence le MOU -, n'exclut pas que cette implication emporte extension de la clause compromissoire à ce tiers*".

22 Joseph Abela Family Foundation (JAFF) v. Albert Abela Family Foundation (AAFF), Albert Abela Corporation (AAC), Roundhill Trust, Rosehill Foundation, Bärbel A., Marlon Pietro A., Albert Martin A., Court of Cassation, 6 Oct. 2010, 08-20.563,: "s'étaient comportés comme les véritables actionnaires de la société, désignant même des membres du conseil d'administration, s'accordant sur la désignation du président et se disant eux-mêmes actionnaires dans des documents officiels ; qu'elle en a justement déduit qu'ils ne pouvaient légitimement prétendre être étrangers à la clause compromissoire, dont ils ne pouvaient ignorer la teneur et qu'ils avaient implicitement acceptée compte tenu de leur immixtion dans le fonctionnement de la AAC".

In light of such conduct, the Court of Cassation upheld the ruling of the Court of Appeal, finding that:

> "[the third parties] could not legitimately claim to be strangers to the arbitration clause, whose terms they could not reasonably have ignored and which they must be deemed to have implicitly accepted in view of their involvement in the functioning of the [company]". [23]

The significant interference in the company's management justified extending the clause. Other decisions have extended the arbitration agreement of articles of association on the ground that the drafting of the clause was broad enough to include current and future shareholders.[24]

It is important to keep in mind that, when hearing an action to set aside an award (or, in the case of a foreign award, an appeal against an enforcement order), the Paris Court of Appeal conducts a full review of the arbitrators' decision on jurisdiction.[25] The Court exercises absolute control over the award's findings on jurisdiction and reassesses all factual and legal elements of the case.[26] French courts will not hesitate to set aside or deny enforcement to awards that have wrongly declined jurisdiction.[27]

4. The emphasis on consent in recent years – Towards a more stringent approach?

In recent years, perhaps due to the criticism of certain commentators,[28] the Paris Court of Appeal has placed greater emphasis in its decisions on the notions of consent and acceptance of the arbitration agreement.[29] However, this does not necessarily mean that French courts have adopted a more restrictive approach. Rather, the Paris Court of Appeal appears to be aiming for greater clarity, explaining that, while consent may be tacit and implied by conduct, it still needs to be properly characterised.

The recent decisions tend to be longer and more extensively reasoned, placing greater emphasis on the role played by third parties in the negotiation, performance, and/or termination of the contract, based on all the factual elements in the record.[30]

Reference is also more constantly made to the "acceptance" of the arbitration agreement, rather than to the mere " knowledge" of the clause, as was the case in certain earlier decisions. [31] Acceptance, however, still remains presumed and is inferred from the party's conduct.

For instance, in the ***Kout Food*** decision (2020),[32] the Paris Court of Appeal closely scrutinised the factual record to establish the "active participation" of the party "Kout Food Group" in the performance of the franchise agreement. The Court noted, among other factors, that Kout Food Group had effectively:

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23 Ibid. "*qu'elle en a justement déduit qu'ils ne pouvaient légitimement prétendre être étrangers à la clause compromissoire, dont ils ne pouvaient ignorer la teneur et qu'ils avaient implicitement acceptée compte tenu de leur immixtion dans le fonctionnement de la AAC*".

24 Paris Court of Appeal, 25 Jan. 2022, No. 20/12332.

25 Pursuant to Art. 1520(1), French Code of Civil Procedure. Transl.: "1. *The arbitral tribunal wrongly declared itself competent or incompetent*". ("*1° Le tribunal arbitral s'est déclaré à tort compétent ou incompetent.*")

26 See e.g. Paris Court of Appeal, 13 June 2023, RG n° 21/07296 : Transl: "For the purposes of this provision, it is for the set-aside judge to review the arbitral tribunal's decision on jurisdiction – whether the tribunal found itself competent or incompetent – by examining all legal and factual elements relevant to assessing the scope of the arbitration agreement. This review excludes any revision of the merits of the award" ("*Pour l'application de ce texte, il appartient au juge de l'annulation de contrôler la décision du tribunal arbitral sur sa compétence, qu'il se soit déclaré compétent ou incompétent, en recherchant tous les éléments de droit ou de fait permettant d'apprécier la portée de la convention d'arbitrage, ce contrôle étant exclusif de toute révision au fond de la sentence*". See also, Paris Court of Appeal, 9 Sep. 2025, RG n° 22/19221.

27 This represents a point of divergence with Swiss law, since the Federal Tribunal does not review the factual findings relied on by arbitrators to establish jurisdiction. See Federal Tribunal, 4 Sep. 2023, 4A_144/2023.

28 See supra note 18, P. Mayer, V. Heuzé, A. Mourre, V. Chessa.

29 See e.g. Paris Court of Appeal, 23 June 2020, RG n° 17/22943; Paris Court of Appeal, 23 Nov. 2021, n° 18/22323; Paris Court of Appeal, 6 Dec. 2022, *Eckes-Granini Group cl M. W.*, n° 21/11615; Paris Court of Appeal, 13 June 2023, RG n° 21/07296; Paris Court of Appeal, 16 Sep. 2025, RG n° 23/18252.

30 Id.

31 Id.

32 Kout Food Group Company v. Kabab-Ji S.A.L Company, Paris Court of Appeal, 23 June 2020, RG n° 17/22943, confirmed by Court of Cassation, 28 Sep. 2022, No. 2020.260.

- replaced the franchisee in performing the contract;
- deployed personnel to carry out its obligations;
- represented itself as the franchisee;
- paid the contractual fees;
- received the invoices in its own name; and
- been involved in discussions concerning the termination of the contract.

This decision also drew an interesting distinction between the extension of the arbitration agreement itself and the extension or transfer of the contract in which it is contained.[33]

Although the scope of the arbitration agreement is governed by the French substantive rules, the transfer of the underlying contract obligations and/or the rights arising therefrom may also depend on the law governing that contract. Consequently, the first issue falls within the review powers of French courts in annulment or enforcement proceedings, whereas the second does not. This approach is justified by the separability of the arbitration agreement. This means that, in theory at least, an arbitral tribunal could acknowledge jurisdiction over a third party and later find that it is not a party to the underlying contract.[34] In practice, however, the non-signatory will generally be regarded as having effectively ratified or acceded through its conduct both to the underlying contract and the arbitration agreement, as French courts have sometimes pointed out.[35]

In the case ***Eckes-Granini Group cl M. W.*** (2022), a Russian award was refused enforcement because the arbitrator had insufficiently established consent to the arbitration clause. In that case, the arbitral tribunal had extended the arbitration clause to former corporate officers. The Paris Court of Appeal held that their consent to arbitration was not sufficiently demonstrated and that their involvement as corporate officers, and thus as corporate representatives, was insufficient to establish an intention to be personally bound.[36]

The attention paid to the characterisation of consent is also reflected in the ***MCB*** case (2023),[37] which involved a complex set of contracts governing a construction project, with multiple parties and their subsidiaries.

The Paris Court of Appeal emphasised two guiding principles for interpreting the parties' intent with respect to arbitration agreements:

(i) **the principle of good faith interpretation of contracts ("*intérprétation de bonne foi des conventions*"):** a party cannot evade obligations freely undertaken ("*librement consentis*"), even if expressed in a confusing manner ("*exprimés de manière maladroite ou confuse*"); and

(ii) **the principle of effective interpretation ("*effet utile*"):** when parties include an arbitration clause in their contract, it must be presumed that their intention was to establish such a mechanism.

These principles support a broad interpretation of arbitration agreements and demonstrate the careful attention that French courts devote to the question of consent. Consistent with its previous decisions, the Paris Court of Appeal also reaffirmed, in this decision, that the existence of multiple contracts containing distinct arbitration clauses between various parties does not, in and by itself, demonstrate an intention to exclude the extension of the arbitration clause.

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33 Paris Court of Appeal, 23 June 2020, RG n° 17/22943: Transl. "But the question of the transfer to KFG of the substantive rights and obligations contained in the Agreements – which determines the extent of the company's liability and lies beyond the annulment court's review under risk of a full merits reconsideration – is entirely separate from the issue of extending the arbitration clause. The latter enabled the arbitrators to declare themselves competent with respect to KFG and constitutes the ground for annulment provided under Art. 1520(1), French Code of Civil Procedure" ("*Mais la question de la transmission à KFG des droits et obligations substantiels contenus dans les Accords, qui permet de déterminer l'étendue de la responsabilité de cette société et qui échappe au contrôle du juge de l'annulation de la sentence sous peine de révision au fond, n'entretient aucun rapport de dépendance avec celle de l'extension de la clause compromissoire, qui a permis aux arbitres de se déclarer compétent à l'égard de KFG et qui constitue le grief d'annulation prévu par l'article 1520 1° du code de procédure civile*". See also, C. Seraglini, in *JCP G,* 2011, 1432.

34 In Switzerland, the Federal Tribunal clearly states that the non-signatory is bound by both the arbitration agreement and the underlying contract. See Federal Tribunal, 4 Sep. 2023, 4A_144/2023, as translated: "This case law is grounded in the principles of good faith and allows to infer, from a party's conduct, its intention to adhere to a contract it has not signed and to be bound by the arbitration clause contained therein". ("*Cette jurisprudence est fondée sur les règles de la bonne foi ; elle permet de déduire du comportement d'une partie la volonté d'adhérer à un contrat qu'elle n'a pas signé et de se soumettre à la clause arbitrale qui y figure*").

35 See decisions where the third party was found to be bound both by the arbitration clause and the agreement: Court of Cassation, 25 June 1991, *Cotunav*, No. 90-11.485, *Rev. arb.* 1991, p. 453, note P. Mayer; or Paris Court of Appeal, 13 June 2023, *Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SA*, n° 21/07296. By performing the obligations stipulated in the contracts, the third parties effectively ratified the contracts.

36 Paris Court of Appeal, 6 Dec. 2022, *Eckes-Granini Group cl M. W.*, n° 21/11615.

37 Paris Court of Appeal, 13 June 2023, *Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SA*, n° 21/07296. See also, Paris Court of Appeal, 21 Oct. 2025, RG n° 24/04967.

The circumstances were different in the case ***World Natural Resources*** (2025), which some commentators have suggested may signal a move toward stricter requirements for extension.[38] The case concerned a complex offshore oil project off the coast of the Republic of Congo, involving multiple parties and contracts. Although the non-signatories had been indirectly involved in the project – primarily through financing – their participation was deemed insufficient to establish consent to arbitration. The arbitral award, upheld by the Paris Court of Appeal, found that several factors were incompatible with an expression of tacit consent, including:

- The third parties' involvement in the project was indirect, stemming solely from their financial participation through a loan agreement, which contained its own arbitration clause.
- It was not established that the third parties had specifically negotiated or performed the contract containing the arbitration agreement.
- The multiplicity and diversity of arbitration clauses across the various agreements – each addressing a specific aspect of the project – indicated that the non-signatories' involvement in the overall project could not be interpreted as consent to the particular arbitration agreement in question.
- The contract containing the arbitration clause explicitly provided that nothing therein conferred on any party the power to impose obligations on third parties, and that no provision could be enforced by a non-party.

Accordingly, the mere participation in discussions relating to the overall project or to other agreements within it could not be interpreted as an acceptance of the contract's arbitration clause, which the claimants sought to extend. That said, the recent emphasis on consent should not be understood as a shift in the French courts' position, but rather as an attempt to consolidate and clarify previous case law.

In international arbitration, consent to arbitration is presumed and should be inferred from a party's voluntary and direct involvement in the performance of a contract containing an arbitration agreement.[39] French courts will obviously consider expressions or indications of a contrary intention to rebut the presumption of acceptance of the arbitration clause.[40]

However, there is no overarching systematisation. Instead, the courts take a case-by-case approach, and carefully analyse the contractual architecture, the nature and scope of the transaction, the profiles and relationship of the parties, and their conduct during negotiations, performance, and/or termination. This holistic assessment enables the courts to determine whether a non-signatory can be bound by the arbitration agreement based on the overall circumstances.

A careful review of French decisions since the 1980s in fact shows that, despite a reasoning that appears at times elliptical, the courts never lose sight of the need to infer tacit consent from the surrounding circumstances.

5. Conclusion – Issues raised abroad

With respect to the broader picture and the enforceability of awards applying the rule of extension, some foreign jurisdictions have adopted the French rule (e.g. Switzerland), while others remain reluctant to do so (e.g. the UK).

Although the Swiss Federal Tribunal has adopted the French rule, its decisions refer to the principle of privity of contracts and place more emphasis on the consent of the third party.[41] The Federal Tribunal also specifies that the rule is based on good faith and that its application must remain the exception.[42]

38 Paris Court of Appeal, 16 Sep. 2025, *World Natural Resources v. Mercuria*, RG n° 23/18252; L. Larribère, "Le cantonnement de l'extension de la convention d'arbitrage dans l'arbitrage international", *Gaz. Palais*, 18 nov. 2025.

39 The presumption of knowledge or acceptance of the arbitration agreement has been justified by the idea that, since international arbitration is the standard method for resolving international commercial disputes, any party engaged in international trade should be presumed to be aware of such agreements. While this justification may seem somewhat far-fetched, the needs and characteristics of international commerce have warranted a departure from domestic rules originally designed for purely national relation, necessitating the creation of specific rules. See P. Mayer, V. Heuzé, *Droit international privé* (9th ed., 2007), no. 20.

40 See e.g. Paris Court of Appeal, 23 Oct. 2012, No. 12/04027.

41 See e.g. 4A_144/2023, para. 6.3: Transl. "the third party that involves itself in the performance of the contract containing the arbitration agreement is presumed to have adhered to it, by concluding actions, if its intention to be a party to the arbitration agreement can be inferred from this involvement". (French original: "*le tiers qui s'immisce dans l'exécution du contrat contenant la convention d'arbitrage est réputé avoir adhéré, par actes concluants, à celle-ci si l'on peut inférer de cette immixtion sa volonté d'être partie à la convention d'arbitrage*".) :

42 Ibid. Transl. "This case law is based on the principles of good faith; it allows one to infer from a party's conduct the intention to adhere to a contract that the party has not signed and to submit to the arbitration clause contained therein. In this regard, circumstances occurring after the conclusion of the arbitration agreement may be taken into account … However, such intent cannot be assumed lightly. Case law generally emphasizes the need to consider the particular nature of the arbitration agreement. In particular, the waiver of state judicial proceedings entails a significant limitation of recourses, which should not be readily admitted … In other words, the intention to submit to arbitration must appear clear and unambiguous" (French

In the UK, the *Food Kout* case –[43] and before it the *Dallah* case –[44] have highlighted the potential difficulties to which the rule of extension may lead abroad. Under the new English Arbitration Act adopted in 2025, where the parties have not expressly chosen a law to govern the arbitration agreement, the law of the arbitration seat applies.[45] Accordingly, future French awards extending arbitration agreements may become enforceable in the UK. It remains to be seen, however, how the UK courts will apply this provision and what scope they will accord to the law of the seat.

The material rules method aim (in theory at least) at avoiding the uncertainties resulting from the determination and application of a connecting factor. It also aims at ensuring a uniform regulation of international arbitration favoring its effectiveness and predictability. Such a result, however, can only be achieved when material rules have their origin in an international instrument.

Adopting an international instrument to govern the substantive validity and scope of international arbitration agreements could be envisioned to reduce uncertainties associated with the conflict of laws analysis and achieve greater consistency, in the interest of an efficient resolution of multi-party and multi-contracts disputes.

original: "*Cette jurisprudence est fondée sur les règles de la bonne foi; elle permet de déduire du comportement d'une partie la volonté d'adhérer à un contrat qu'elle n'a pas signé et de se soumettre à la clause arbitrale qui y figure; dans cette mesure, des circonstances postérieures à la conclusion de la convention d'arbitrage peuvent être prises en considération … On ne saurait toutefois admettre à la légère une telle volonté. La jurisprudence relève de manière générale qu'il faut avoir égard à la nature particulière de la convention d'arbitrage. La renonciation à la justice étatique implique en particulier une restriction importante des voies de recours, qui ne doit pas être admise … En d'autres termes, la volonté de se soumettre à l'arbitrage doit ressortir de façon claire et non équivoque*".)

43 S. Nataf, "Jurisdiction over Non-signatories, the Irreconcilable Approaches of French and English Courts. Case Note on: (i) English Court of Appeal Decision of 20 January 2020 and (ii) Paris Court of Appeal Decision of 23 June 2020", *ASA Bulletin*, 2020, pp. 894. On the *Kout Food* Supreme Court decision, see C. Florin, P. Marin, Europe, United Kingdom: Towards a Harmonised Framework for Determining the Governing Law of an Arbitration Agreement, *ICC Dispute Resolution Bulletin* 2022-1.

44 See F-X. Train, "L'affaire Dallah ou de la difficulté pour le juge anglais d'appliquer le droit français, note sous Paris, Pôle 1 – Ch. 1, 17 février 2011 et Cour suprême du Royaume-Uni, 3 novembre 2010", *Rev. Arb.*, 2012, p. 374. For commentaries in English,.see Grierson, M. Taok, "Dallah : Conflicting Judgments from the U.K. Supreme Court and the Paris Cour d'Appel, *Journal of International Arbitration* 28 (Issue 4), Aug. 2011; and P. Mayer "The Extension Of The Arbitration Clause To Non-Signatories – The Irreconcilable Positions Of French And English Courts", *Am U. Int'l L. Rev,* 27 No 4, 2012.

45 Section 6A, 2025 English Arbitration Act provides: "The law applicable to the arbitration agreement is a) the law that the parties expressly agree applies to the arbitration agreement, or b) where no such agreement is made, the law of the seat of the arbitration in question".

Anchoring Stability – Navigating Politics Through the Rule of Law

Professor Stavros Brekoulakis
Michael & Laura Hwang Chair in International Arbitration, National University of Singapore; Vice-President, ICC International Court of Arbitration

As the world's economic order and geopolitical dynamics fluctuate, businesses are increasingly compelled to change the way they operate and manage risks. Amid such disruptions and uncertainties, lawyers must also re-evaluate the way they work with businesses from dispute prevention and resolution standpoint. During the 2025 Singapore Convention Week 2025, the ICC event Is There Any Port in a Storm? Dispute Prevention and Resolution in a Geopolitical World explored ways for businesses and law stakeholders in Asia to adapt and ensure business continuity in times of current challenges, and featured a keynote speech by Professor Stavros Brekoulakis.

Introduction

While a good colleague remarked yesterday that geopolitical themes have become the "new ESG" in arbitration, perhaps suggesting that the topic is already overplayed – I take a different view.

It is entirely right that our community should engage with global developments, particularly those that directly affect international commerce and, by extension, our field. ICC's choice of theme this evening is therefore both timely and necessary, and I propose to offer my views on these broad but important matters.[1]

I will first explain how we got ourselves into this storm by revisiting how a rules-based order emerged in the 20th century, and how it is now under unprecedented strain (**1.**).

My claim is that what we are witnessing is not just geopolitics, but a deeper intellectual struggle over how the world should be organised. I will then look for that elusive port in the storm. My suggestion is that our lodestar must remain the idea of the rule of law (**2.**).

I will finally mention the significant role Asia, and particularly Singapore, can play as a source of innovation and legitimacy (**3.**).

1. Let us begin with history.

After the Second World War, something remarkable happened. Faced with devastation and uncertainty, lawyers and policymakers sought to do two things:

(i) build rules; and

(ii) create institutions capable of governing cross-border economic activity.

The ambition was clear. For trade to flourish, it needed to be shielded from the protectionism of national politics. It had to follow what we have come to describe as a "rules-based international order".

The cornerstones of that order

In the late 40s, the Bretton Woods system produced the IMF and the World Bank. The GATT followed, with its simple yet transformative promise to cutting tariffs and opening trade. In the 1990s, the WTO took over, strengthening the rules and creating a dispute resolution system with appeals. Around this grew a dense web of bilateral treaties, regional pacts, and mega-agreements, such as the ASEAN Free Trade Agreements,[2] and today's Regional Comprehensive Economic Partnership (RCEP).[3]

And, of course, the ICC, has played a vital by supporting and promoting global trade through the standardisation of commercial practices worldwide.

1 This article is an edited version of the author's keynote speech during the event organised by ICC Dispute Resolution Services and the ICC Singapore Arbitration Group on 27 August 2025. Following the keynote speech, a discussion on "Geopolitical Trade Tensions – Key Considerations for Businesses to Protect Against and Manage Disputes" was moderated by Samantha Tan and included the following speakers: Marion Smith KC, Pradyumna Mysoor, King Chan and Dr Minli Tang, with closing remarks from Steven Westervelt.

2 https://asean.org/free-trade-agreements-with-dialogue-partners/. See also the WTO Regional Trade Agreements Database: ASEAN Free Trade Area (AFTA) .

3 https://asean.org/our-communities/economic-community/integration-with-global-economy/regional-comprehensive-economic-partnership-rcep/

Importantly, these new rules and institutions were complemented by a system of international justice operating outside domestic courts and offering what national systems could not: a neutral and reliable forum for global commerce. The ICSID Convention (1965) provided a dedicated mechanism for investor-state disputes. The WTO Appellate Body became the ultimate referee of trade disputes. And the ICC International Court of Arbitration set the standard for trusted commercial dispute resolution.

This was never a seamless order; it was a patchwork of treaties, tribunals, and institutions. But it worked. It delivered stability, growth, and development. Most importantly, it embedded the idea that trade should be governed by law, not power, bringing us closer than ever before to an international rule of law.

A growing disconnect between the legal order and political order

As we sit here in 2025, we are witnessing a growing disconnect, a wedge, between the legal order built for trade and investment and the political order that now resists it. No one in this audience needs reminding that this rules-based order is now under serious, and perhaps existential, strain.

Some examples only illustrate the point:

- Excessive tariffs are being imposed in open violation of WTO rules.
- The WTO Appellate Body has been rendered defunct, and thus trade violations increasingly occur with increasing impunity.
- States are withdrawing from foundational treaties: the Energy Charter Treaty, once the most litigated investment treaty in the world, is collapsing as the EU and its member states withdraw *en bloc*, declaring (contrary to the text) that its sunset clauses will not bind them.
- The European Commission is directing member states to disregard decisions of international arbitral tribunals and to refuse to pay awards that resulted directly from binding treaty obligations, as illustrated in the *Micula*[4] and the *Antin*[5] cases.
- Most recently, both the ICJ and the Inter-American Court of Human Rights affirmed that states have binding obligations under international law to take positive measures to protect the environment. Yet, it is highly unlikely that any government will be willing to take these opinions of highest international courts with any seriousness.

None of this will sound unfamiliar; we read about it daily. But my claim is that these developments are underpinned by something much deeper.

2. The intellectual struggle currently underway.

Ten years ago, much of the criticism of international adjudication and trade law was largely procedural. Debates focused on party-appointed arbitrators, or the scope of treaty standards such as expropriation and fair and equitable treatment.

Today, however, the criticism strikes at the foundation itself. What is under attack is the very premise that States should be bound by trade rules and that businesses should have recourse to independent tribunals.

A new argument has emerged. It asserts that political and regulatory risks, such as tariffs, expropriations, and sudden policy changes, are inherent to doing business. If you do not like it, buy insurance, go to the national courts. But do not expect international law to protect you or international tribunals to give you a remedy.

As I argue, this sort of fundamental criticism is not transient; it reflects deeper intellectual and normative disagreements about how global affairs should be organised. Critically, what lies at the heart of this contestation is a fundamental battle over the very meaning of the rule of law.

The rule of law has always been a fluid doctrine, more ideal than blueprint. Yet, for centuries it has rested on two pillars:

4 Micula v. Romania (I), Judgment of the Court of Justice of the European Union (Fifth Chamber) (C516/22), 14 Mar. 2024.

5 Infrastructure Services (Antin) v. Spain, Decision of the European Commission on the Measure State Aid SA.54155 (2021/NN) Implemented by Spain – Arbitration Award to Antin, 24 Mar. 2025.

(i) **The supremacy of law over arbitrary power** – going back to the Magna Carta and the English tradition of constraining the Crown through common law.

(ii) **Independent justice as a check on the executive** – rooted in the French Revolution that brought two remarkable changes in law: (i) the idea of separation of powers; and (ii) the creation of administrative courts with authority to review governmental acts.

The overarching principle of these two ideas is clear. Sovereign authority must itself be held to account.

Long before modern constitutions, jurists wrestled with this truth. Grotius argued that kings could be liable for their deliberate wrongs. Erasmus went further, defending the legal grounds for regicide (arguments Shakespeare later dramatised in Richard III and Macbeth). And Gentili – Oxford's great Regius Professor – made the point with striking clarity in 1600: Unless we wish to make sovereigns exempt from the law and bound by no statutes and no precedents, there must be someone to remind them of their duty and hold them in restraint. That someone was the court, judges entrusted with the authority to enforce the law against sovereign power.

Translated into the realm of trade, this idea of the rule of law meant two things:

(i) States were bound by international economic rules, and

(ii) States' actions, including tariffs and expropriations, could be reviewed by independent tribunals.

This was this vision of the rule of law that guided international trade and business all these decades. It is precisely this traditional vision that is now being contested by an emerging intellectual movement that sees the rule of law not as a constraint on power, but as an expression of democratic sovereignty – the will and voice of the people, expressed through elected governments. Under this idea of rule of law, any external constraint imposed by trade rules and international tribunals staffed by "technocrats" and "lawyers in secrecy" is not the realisation of the rule of law but its betrayal.

I should say that this view does not reject all limits on State power. But it insists that those limits should not undermine a State's ability to govern in the public interest in areas of public policy such as energy transition or economic and public health regulation. The claim is that international trade law has gone too far, restricting governments' capacity to act for the common good.

We are thus left with two competing visions of the international rule of law:

(i) One in which law constrains power through neutral adjudication and binding obligations; and

(ii) Another in which the international rule of law serves as an expression of democratic will, where the public interest prevails over private rights.

So where does this leave us? What can be done in the face of this reimagining of the rule of law?

The starting point must be that we, international lawyers, cannot simply accept this new concept of the rule of law as an act of political will. That would be abandoning one of the greatest legacies of the twentieth century. The traditional conception, i.e. law restraining power and justice above politics, was not perfect, but it was transformative. It held governments accountable beyond their borders, gave investors confidence, and ensured that commerce was ruled by law, not by today's transactional, brutal politics.

That achievement matters. And it is worth defending. But we must also acknowledge that the system overreached. Trade and investment treaties were often drafted in sweeping terms, detached from State realities, giving the impression that private arbitrators could override public policy with limited accountability. Some corporate claims, whatever their legal basis, appeared tone-deaf, challenging health regulations, environmental laws, even crisis measures. Coupled with opaque proceedings, the system too easily appeared to be an insider's game rather than a mechanism for neutral justice.

If we are to defend the rule of law as our guiding principle for international trade and commerce, we must do so by improving it. It is not enough for it to be fair; it must also be perceived as legitimate.

3. What role can Asia, and Singapore in particular, play in shaping the future?

Asia matters – not just as an economic hub – but as a source of ideas and legitimacy. Indeed, as traditional trade powers in the West retreat from multilateralism and resort to transactional, bilateral politics, the paradox is that this retreat is driving a different dynamic elsewhere.

Across Asia, states are forging new alliances and, in the process, building a new brand of multilateralism. Far from fading, rules-based cooperation is gaining strength outside the West, with Asia emerging as a standard-bearer for the legitimacy and resilience of the international legal order.

Asia is no longer at the margins; it is the centre of gravity of the global economy. It hosts the largest trade pact in history, the Regional Comprehensive Economic Partnership (RCEP), which covers nearly one-third of the world's population and is anchored in ASEAN's tradition of consensus and pragmatism. If Asia holds firm to these commitments, resisting the temptation of tariffs and protectionism, the world will take notice. It is time for Asia not only to participate, but to lead, by showing that confident adherence to the international legal order remains possible, even as others turn away.

In international dispute resolution, Singapore is already leading the field. With the memorandum signed only earlier this week between the Ministry of Law and ICSID, Singapore has become the first country in the world to host local offices of all five World Bank Group organisations, as well as of all the leading arbitration institutions, including the ICC, SIAC, ICSID, PCA, WIPO and the AAA. This is a remarkable achievement of leadership.

But Asia's role is not limited to upholding the international legal order by example. It can also improve it. Asia has the opportunity to provide intellectual leadership, not simply to operate within a system designed elsewhere, but to shape a better vision of international rule of law. A vision that preserves the idea that trade and investment must be governed by law, while also learning from the legal excesses of the past. A vision that is more balanced, and therefore more widely trusted.

And it is trust that brings about legitimacy, and legitimacy that anchors stability. Rules can only carry authority if they are trusted, and they are trusted only when they are seen as principled, inclusive, and fair.

For the international order to survive, it must rest not on the power of one region, but on a shared global commitment. This is why Asia's role is critical. By drawing on its economic centrality and its traditions of moderation, Asia can help restore the balance between power and principle, sovereignty and law, politics and justice.

So, is there a port in the storm? My answer is this: **the port is the rule of law**, anchored not only in treaties and tribunals, but in the collective trust of the global community.

We are not there yet. Like Odysseus leaving Troy, we still have storms and challenges ahead. But if we succeed, then even in the roughest geopolitical times we will find not only a port, but more importantly a compass.

Requiem for Civil Law in International Arbitration?

Eduardo Zuleta

Independent Arbitrator, Arbitration Chambers, New York; Member of the ICSID Panel of Arbitrators designated by the Chair of the ICSID Administrative Council and President of the World Bank Group; Member of the ICCA Advisory Board; Former Vice-President, ICC International Court of Arbitration; Member, ICC Institute of World Business Law

This article, which is an edited version of the author's keynote speech at the 23rd ICC Miami Conference on International Arbitration, examines how the perceived increasing influence of Anglo-American procedural practices – often described as "Americanisation" – has shifted Latin American international commercial arbitration away from its civil law roots. The author traces the historical rise of U.S. influence, from the spread of large American law firms to the adoption of common law-style procedures, and highlights how these imported practices affect key aspects of arbitration: language, evidence, witness testimony, expert use, and the application of substantive law. Ultimately, the author calls for a reinvigoration of Latin America's civil law heritage within arbitration, encouraging practitioners and tribunals to reclaim approaches that prioritise substantive law, contextual legal reasoning, and procedural models aligned with the region's legal culture.

Introduction

Mozart composed his Requiem in 1791, and when he passed in December of that year, the work was still unfinished. His disciple and student Franz Xaver Süssmayr is said to have completed the work but, as you may know, there is considerable debate as to which parts are Mozart's own and which are Süssmayr's, particularly but not exclusively in the *Lacrimosa* segment of the Requiem where Mozart seems to have written only eight bars.

Many years ago, when I started my practice in arbitration, *Fouchard Gaillard Goldman on International Commercial Arbitration* was the book to go to, the most revered work on international arbitration law and practice; and *The Guide to the ICC Rules of Arbitration*, by Yves Derains and Eric Schwartz was by far the most respected book. Today everything is about Gary Born's treatise, even in arbitrations in LATAM.

As early as 2003, Professor Roger Alford referred to the "Americanisation" of international arbitration as a topic that is casually discussed over drinks, but rarely in a formal setting such as a symposium. "Americanisation" is an unpleasant term, at least from my viewpoint, as it equates "America" with the United States of America and we, from Mexico to the Patagonia, are whatever the then dominant European or North American countries wanted us to be: "Latin America", "Ibero America", "Ibero Luso America".

Be that as it may, Professor Alford observed that the term "Americanisation" reflected the unprecedented level of U.S. influence in international arbitration, which he attributed to nine factors:

- the rise of the Anglo-American law firm;
- the increase of U.S. legal training for non-U.S. lawyers;
- the influence of the common-law adversarial model on arbitration advocacy style;
- the increased acceptance of U.S. discovery practices;
- recent developments in choice of law issues;
- the U.S. influence in the selection of the venue;
- the U.S. mechanism of reference to published precedent;
- the widespread adoption of English as the *lingua franca* of international arbitration; and
- the over-representation of U.S. nationals at major arbitration institutions.

What is the so-called "Americanisation"?

According to George M. von Mehren in a seminal article written in 2012 it is:

> "the role played by American (or, more accurately, Anglo-American) procedural tools in international arbitration – and the style used by advocates in those proceedings".

Prior to World War II and for a considerable period afterwards, the U.S. was not involved in international commercial arbitration. Cross-border disputes were not part of American legal practice.

Indeed, when the League of Nations produced two major international arbitration agreements widely adopted by the international community – the *1923 Protocol on Arbitration Clauses* and the *1927 Convention on the Execution of Foreign Arbitral Awards* – the U.S. never became a party to either agreement. International commercial arbitration developed primarily on the continent of Europe, with France, Germany and Switzerland participating in a significant number of cross-border arbitrations. Many of those arbitrations were administered by ICC.

Even in LATAM, mostly under the influence of European countries, several countries adopted arbitration laws early on.[1] Even at a regional level, there were efforts to create uniform arbitration provisions such as the Treaty of International Procedural Law ("*Tratado de Derecho Procesal Internacional*"), signed in Montevideo, on 11 January 1889, on the rules on enforcement of arbitral awards and judicial decisions; or the famous Convention on International Private Law, signed in Havana, Cuba, on 20 February 1928 (also known as "*Codigo Bustamante*").

The most significant political development affecting arbitration post-World War II was decolonisation. Some of the newly decolonised countries possessed underground petroleum reserves. Many of the concession agreements between former colonial governments and oil companies contained arbitration clauses, which had been inserted at the request of the oil companies' lawyers.

American law firms were hired to represent the petroleum companies because of their expertise in litigation, case management and documentation, despite their lack of arbitration experience. Law firms in the United States were much larger than European law firms. Typically, having between 70 and 100 lawyers was considered immense compared to European firms. Moreover, U.S. firms had experience litigating antitrust cases, which similar to the oil concession cases, were document intensive. U.S. lawyers also represented the governments of decolonised countries against the petroleum companies in international commercial arbitration.

The Iran-United States Claims Tribunal, that was to operate under the *UNCITRAL Arbitration Rules*, with modifications necessary to carry out the Algiers Agreement, led to, of course, private claimants becoming intimately involved in the arbitration proceedings. As a result, thousands of U.S. lawyers gained direct exposure to the international arbitration of commercial disputes under the UNCITRAL Rules.

Of course, U.S. lawyers participating in international commercial arbitration brought and used U.S. litigation skills. Thus, international arbitration seemed to move towards U.S. style of litigation. This has resulted, inter alia, in a multiplication of procedural disputes and jurisdictional objections, and in the adoption of U.S. style cross-examination and document production practices.

What is of most concern is that this procedural style is applied in arbitrations with no connection to the United States; and there is an increasing emphasis of procedure over substance at the cost of abandoning the study of the applicable law, comparative law and administrative law.

The question here is:

> "Are we applying, and should we apply, these practices in LATAM arbitrations, particularly in the so-called 'intra Latin American Arbitrations' (i.e. between Spanish, Latin American, Brazilian and/or Portuguese parties)?"

Let us have a look at some of the key issues we should reflect on when deciding whether to adopt the Anglo-Saxon approach to procedure in arbitration.[2]

1 For example, Colombia (Law 105 of 1890), Chile (Constitution of 1823), Brazil (Constitution of 1824) and Ecuador (Constitution of 1878).

2 My comments will refer exclusively to international commercial arbitration. Investments arbitration is a different area where the rules and the applicable law (basically international treaties) are the subject matter of different studies and approach.

a) Language of the arbitration

If all relevant documents are in Spanish or Portuguese, why should we adopt a dual language arbitration (Spanish-English, Portuguese-English), with the attendant costs and delays, particularly if the award is to be issued in both languages? In a significant number of cases, the dual language approach is taken because either because the party-appointed arbitrator, counsel or both, do not speak Spanish or Portuguese.[3]

b) Document production

I agree with Juan Fernández-Armesto that the "most dangerous words in the world of arbitration" are found in the *IBA Rules on the Taking of Evidence in International Arbitration* ("IBA Rules") which require production requests to include "a narrow and specific requested category of documents". Document production requests have become, in practice, the most sophisticated instrument of torture developed in the 20th century. The words "any and all documents" is nowadays the norm in document production requests that may include 100 or more requests by a party. The *Armesto schedule* is a good effort to further limit the scope of requests, but it has proven insufficient in many instances.[4]

Yves Derains, in a 2006 article,[5] proposed that the requesting party should bear the burden of proof for any issue on which it seeks document production from the opposing side. In other words, a tribunal may deny the request for document production if the requesting party does not bear the burden of proof on the issue for which it seeks documents. This approach, which would avoid the avalanche of documents in the arbitral proceedings, was supported by civil law practitioners but strongly rejected by common law commentators. One of the arguments against Yves' proposal was that neither the IBA Rules nor the commentaries by the IBA Subcommittee provide for this "blanket rule".

Three comments in relation to this proposal and the ongoing debate within arbitral tribunals:

1. The proposal, at least as I read it, is not a "blanket rule" but a factor for the tribunal to consider when deciding on the relevance of the document.
2. The proposal seems to be an acceptable practice in civil law jurisdictions.
3. The criticism largely stems from the view that the IBA Rules aim to bridge the gap between the common law and the civil law traditions regarding evidence.[6] However the IBA Rules reference rules rooted in the common law tradition and alien to the tradition of civil lawyers.[7]

c) Witness testimony

We all seem to have adopted the Anglo-Saxon approach to witness testimony.

On the one hand, we often fail to question the number and extent of witness testimonies, or the usefulness of calling a witness for cross examination on matters (i) that are clearly irrelevant for the decision; (ii) in which the documentary evidence would suffice; or (iii) where it is clear that the witness has no direct knowledge of the facts of the case (e.g. in construction disputes, the general supervisor oversees multiple projects but is not really involved in any).

For U.S. lawyers generally, witnesses are key evidence in the proceedings and documents may be less relevant. Moreover, I have heard allegations that documents without a witness are not sufficient because the witness provides "context" to the documents. Lawyers in LATAM, on the contrary, are suspicious of witnesses, particularly when the witness is an employee or officer of the party and is thus perceived as having an interest in the case.[8]

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3 The most extreme example I have experienced was in a case involving an English-speaking claimant and a Spanish speaking respondent. All the relevant documents were in Spanish. Claimant submitted that Spanish should be the language of the arbitration because its counsel was Spanish and the documents were in Spanish. The respondent, a state entity, requested the arbitration to be conducted in English because its counsel was a U.S. law firm. At the end, the parties agreed to a dual language arbitration with the obvious increase in time and costs.

4 See e.g. M. Riofrio Piché, Document Production: the Armesto Schedule (https://jusmundi.com/, 21 Nov. 2025).

5 Y. Derains, Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint, *ICC International Court of Arbitration Bulletin*, Special Supplement 2006: Document Production in International Arbitration.

6 It is to be noted, however, that the review committee for the 2020 amendments to the IBA Rules only included one practitioner based in LATAM, and the other regional practitioners involved were members of international law firms. The 2010 working group included no LATAM-based lawyers. The review subcommittee included just two members from LATAM.

7 E.g. Art. 9 regulates the objections based on "privilege" and specifically "attorney client privilege" an institution that is alien to the civil law tradition in our region where the rule is "professional secrecy." It is not uncommon to see in arbitrations pleadings of "privilege" citing civil laws containing rules on "professional secrecy" and interpreting them as if they were rules on privilege typical of a common law tradition.

8 Art. 25(5), ICC Rules allows a decision by the arbitral tribunal based on documents only, not on witnesses only.

On the other hand, arbitral tribunals seem reluctant to call witnesses who have not already provided testimony even if they are relevant to deciding the case. In a recent ICC case, the parties debated whether, at one party's request, the tribunal could summon witnesses who have not testified and who were under the control of the other party. The party opposed to the calling of the witnesses invoked books and articles from Anglo-Saxon commentators indicating that there was no practice in international arbitration allowing a party to request the tribunal to call witnesses under the control of the other party.

The tribunal, considering the circumstances of the case and the *lex arbitri* of the venue – a country in the region – decided, on the one hand, that there was no such a practice in international arbitration, and on the other, to call the witnesses for interrogation by the tribunal followed by questions from the parties.

Arbitrators tend to include "boilerplate" provisions in Procedural Order No. 1 for Anglo-Saxon style cross examination despite knowing that the lawyers appearing before the tribunal are not trained in that type of interrogation.

As an arbitrator, it is difficult to decide what is more frustrating:

- A cross-examination where the lawyer is more interested in scoring points than assisting the tribunal, continuously interrupts the witness for a "yes" or "no" answer without allowing any explanation from the witness; objects to the questions from the counterparty because the question is not related to the cross-examination; or
- Excellent civil law lawyers struggling to perform an Anglo-Saxon style cross-examination when they could do an excellent job under the rules of examination of witnesses to which they are used to in civil practice.

Not to mention those cross-examinations where the witness is required to read documents and confirm what the documents say. Few arbitrators control this practice under the reasoning that "it is his or her time".

d) Experts appointed by the arbitral tribunal

The ICC Rules allow for the appointment of experts by the tribunal. This is a standard practice in LATAM, but tribunals are reluctant to appoint experts and rather proceed under what they now consider a "traditional" approach, more in line with the U.S. practice, i.e. that the parties appoint the experts.

e) Substantive law

But the area of most concern, at least in my mind, is the application of substantive law. Juan Armesto was right when he observed in his interview with Eduardo Silva Romero, that it is strange for a civil law trained arbitrator to be appointed in a case where the applicable law is civil law, but not the opposite. Common law trained arbitrators are frequently appointed to decide on arbitrations where the applicable law is civil law.

Likewise, U.S. counsel is frequently appointed by LATAM clients to represent them in cases where the applicable law is the civil law of a country in the region. Professor Zachary Douglas was asked in a recent interview why this happens. The response was that clients seek efficiency and knowledge of the procedure by the arbitrator and counsel, but pay little attention to the applicable law.

This gives rise to several issues that I am just going to highlight given the limited time.

First, the responsibility for pleading of the law, which should rest with counsel for the parties, is often delegated to experts in the applicable law. Therefore, rather than hearing counsel plead the law, the arbitrators are faced with a situation where the experts are the ones putting the law to the tribunal. This may lead to absurdities. I remember one case where the president was French, the co-arbitrators were civil lawyers from the same country as the country of the applicable law and the tribunal was presented with expert evidence on the issues of applicable law. Highly costly and totally ineffective. In another case, after the expert presented its report and was cross examined, the tribunal asked a question and the party, politely but firmly, objected under the ground that the question was not within the scope of the legal expert report.

Second, the conflict between contract interpretation based on the "four corners of the contract" and the rules of contract interpretation in the civil codes of the region create serious difficulties at the time of tribunal deliberation. Often, the tribunal ends up compromising based solely or mainly on the text of the contract – which follows the Anglo-Saxon approach to interpretation – when a strict application of the rules of interpretation may lead to a different result.

Moreover, comparative law analysis is being abandoned. Comparing the governing law to similar provisions in the laws of other countries in the region or to the UNIDROIT Principles of International Commercial Contracts either to test the applicable law or to convince the parties that the solution is a general or universal one in different legislations is rare. Even in cases when the applicable law has been heavily influenced by the law of another jurisdiction and the party invokes legal authorities (e.g. jurisprudence) from such other jurisdiction, the tribunal is asked to disregard that legal authority on grounds that is not precedent authority from the national courts of the underlying applicable law. Conversely, the jurisprudence of the courts of the jurisdiction of the applicable law is invoked as binding precedent, even though in many jurisdictions, three uniform decisions of the highest court only constitute "probable doctrine".

Third, many LATAM countries a have a special regime for administrative contracts, which may be subject to private law, to a special administrative regime or to a combination of both. Generally, a contract is an administrative contract *ratione personae*, because if it is entered into by a public entity, or *ratione materia*, because of the purpose of the contract. Their interpretation requires not only a clear understanding of the constitutional and administrative organisation of the given State but also a deep appreciation for the contractual regime governing contracts entered into by the State, a State entity, or entered into for the performance of a public service. While this area of law is related to investment arbitration (because the local law has effects in investment cases), it should not be conflated with the governing laws and principles applying in investment arbitration.[9]

Conclusion – An unfinished requiem for civil law

This should not be taken as a criticism to U.S. law firms or U.S. counsel; it is a natural tendency of humans to gravitate towards zones where we feel comfortable. Moreover, several U.S. law firms have now excellent lawyers trained in civil law, who are able to plead sophisticated issues of such law.

This is a criticism to us, civil lawyers in LATAM, who have a great tradition in arbitration; who can very well consider arbitrators in LATAM who are brave enough to apply rules that are more familiar to our culture, law firms in our region with expertise to conduct cases without copying or imitating the model of U.S. law firms.

Law firms in the region are undervalued by publications such as *Chambers and Partners* that consider, as far as LATAM law firms are concerned, "dispute resolution", as a category that ranges from the minor collection disputes to the handling of multi-million dollar arbitrations, and who refuse to accept that there are regional firms that have a Latin American wide practice. But rankings are irrelevant and as the late Johnny Veeder used to say, you should not pay attention to rankings, unless you are ranked.

What is relevant is that the ICC Rules are the truly international rules of arbitration – not paying tribute to any particular arbitration culture – but like a constitution, they are broad enough for us to adapt and reclaim the arbitral proceedings that are familiar to us; to plead, interpret, and apply the substantive law (including administrative law); and to issue awards where substance prevails over procedure, based on knowledge of the law, rather than adopting the opinion of a legal expert.

If we are able to reflect on how to follow this path, the requiem for civil law, like Mozart´s Requiem, will remain unfinished, and we could leave it where it is and start correcting the paths for arbitrations involving parties in LATAM. If we are not brave enough, we may simply continue imitating others and conclude the requiem – a requiem that would deprive us from part of our identity the same way the attempts to conclude Mozart´s Requiem have failed to preserve the identity of the author.

9 What the tribunal has to apply in a commercial cases involving an administrative contract are the text of the contract and the laws applicable to the administrative contract. A breach of contract by the administration is a breach of contract by the administration, and it could not be excused, for example, by claiming, as seen in some pleadings and even in commercial arbitration awards, that there was no breach because the conduct of the State was not arbitrary or did not violate principles of fair and equitable treatment.

The Future Role of the Seat in International Arbitration

Professor Christophe Seraglini

Christophe Seraglini is an Avocat à la Cour and a Professor of Law teaching International Arbitration, Private International Law, and International Contract Law at Université Paris-Saclay. He heads the International Arbitration Group in the Paris office of Freshfields LLP.

On 9 February 2026, the Arbitration Academy, founded in 2011 by the Comité français de l'arbitrage (CFA) and renowned for its summer courses in Paris for students from around the world, held its 3rd Winter Lecture, featuring Prof. Christophe Seraglini as the guest lecturer.

This lecture explores the evolving role of the arbitral seat in international arbitration and challenges the two traditional (and rather extreme) conceptions that have long shaped scholarly debate: the highly state-centred approach and the radically delocalised view. Both visions, though influential, prove inadequate when confronted with users' expectations and contemporary arbitral practice. Building on this observation, the lecture develops a third path – the "voluntarist approach" – which recognises the seat as a legal anchor grounded in party autonomy. The seat determines the scope of arbitral procedural rules, influences the law governing the arbitration agreement and guides the effect of annulment decisions rendered at the arbitration seat. By reframing the seat as a deliberate and coherent point of legal connection, this approach seeks to increase predictability, legitimacy and harmony in international arbitration, aligning the arbitral process more closely with the needs and legitimate expectations of its users.

Introduction[1]

What is – or what should be – the role and significance of the seat in international arbitration? This topic has long divided the arbitration community and remains the subject of active debate.

I begin this discussion with an observation: Arbitration Weeks and similar promotional events are proliferating globally. From the well-established Paris Arbitration Week – which celebrated its 10th anniversary – to the more recent London and New York Arbitration Weeks, cities or jurisdictions are vying for the attention of the arbitration community with increasing vigour.

This level of investment prompts a key question: Why would cities or jurisdictions compete so actively to be chosen as arbitral seats if such choice was truly random, insignificant, or without real consequence? What exactly are these jurisdictions or cities targeting and promoting?

It would not be unreasonable to posit that they do so in order to position themselves as the preferred seats for international arbitration and to persuade their users of their suitability. But how, and on what basis? What do they seek to advance? Their hotels? Their cuisine? Their cultural attractions? Or, perhaps more fundamentally, is their appeal not rooted in the assurance of a reliable, neutral,[2] flexible, and protective legal framework for arbitral proceedings? As Gary Born notes:

> "there are a number of legal and practical consequences that follow from the selection of an arbitral seat, making this one of the most important aspects of any international arbitration agreement".[3]

My purpose today is to assess the value and scope of this proposition.

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1 The author would like to thank the Arbitration Academy, its President Professor Diego P. Fernández Arroyo and its Secretary-Generals Carine Dupeyron and Julien Fouret, for granting him total freedom in the choice of this lecture's topic. This mark of confidence was even more appreciated as, when submitting the idea of the topic, the author pointed out that his views would probably not be in line with the prevalent French doctrine. The author takes this, at least, as a sign of trust and open-mindedness. The author would also like to thank Anne-Lise Ménagé and Aida Amor for their help in the preparation of this lecture. This article largely preserves the oral style typical of any lecture.

2 R. Goode, "The Role of the *Lex Loci Arbitri* in International Commercial Arbitration", *Arbitration International*, Vol. 17, Issue 1, 2001, p. 32: "The seat is typically fixed in a place where neither party has a place of business, e.g. the shores of Lake Leman. That location is not selected for its hotel facilities or charming setting, but essentially because of the parties' confidence in the *neutrality* of the forum, the quality of the Swiss Private International Law (FSPIL) and the competence of Swiss jurists, arbitrators and judges (the same applies to Paris, London, Stockholm and other places)" (emphasis added).

3 G. Born, *International Arbitration and Forum Selection Agreements, Drafting and Enforcing*, Chapter 3, "Drafting International Arbitration Agreements" (7th ed., 2025), p. 81.

Indeed, this proposition is not unanimously supported. In France, leading commentators question the significance of the seat, asserting that the seat is only of relatively minor, or even negligible, importance. For instance, Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman maintain that the choice of seat is more often driven by practical concerns rather than fundamental legal considerations. They argue that:

> "the value of the seat as a connecting factor is still relatively low, as it is often chosen for reasons of geographical convenience or neutrality in relation to the parties. Further, where the choice has been made by the parties themselves, the legal considerations on which it is based are often somewhat superficial".[4]

Yet, it is also equally as common to encounter the view that the seat carries significant and direct legal consequences, particularly in matters of legal and judicial assistance, supervision and control by local courts.[5] So, where does the truth lie?

Over the decades that have witnessed arbitration rise to pre-eminence in the resolution of international commercial disputes, two extreme, and radically opposed, conceptions of the seat's role in international arbitration have been advanced:

- *On the one hand*, a strongly localised conception, based on the idea of the sovereign power of the state to administer justice; and
- *On the other hand*, a radically delocalised vision, in which the seat almost disappears, functioning only peripherally as arbitration is considered to be a separate and fully-fledged international legal order.

As in many debates, reality has proven to be far more nuanced than either existing conception suggests. The most appropriate understanding of the seat likely lies somewhere between these two polarised views that have been largely contradicted by reality. It has long been widely accepted that an arbitrator does not act as a judge or an agent of the state of the seat, and may therefore legitimately depart from the law of the seat (in appropriate circumstances). Albeit, the reality of arbitral practice has also challenged complete delocalisation. That is, the notion that the seat's supervisory role is limited and that arbitral proceedings are divorced from any national legal order. Both extremes have proven and still prove to be excessive and problematic. The contemporary challenge is to identify another approach – one that more accurately reflects the true function and value of the arbitral seat.

Thus, after critically examining why these two extreme positions cannot be considered either accurate or satisfactory (**1.**), I will propose exploring a third approach, in the hope of establishing the seat's rightful importance and clarifying its legal consequences (**2.**). This alternative approach recognises the seat as a voluntary and meaningful point of legal connection – one that is firmly rooted in party autonomy and carries genuine legal implications.

1. From the strongly localised conception of international arbitration to the chimera of complete delocalisation: Two theories challenged by reality

A – The strongly localised conception of international arbitration

(i) Presentation

In 1967, Francis Mann developed a theory known as *lex facit arbitrum* (i.e. the law makes the arbitrator).[6] This theory relied on the idea that the resolution of disputes is a prerogative normally exercised by the state through its national courts. Therefore, when an arbitration proceeding takes place within the territory of a state, the arbitrator exercises its function by delegation of that state's prerogative. It follows that the authority of the arbitrator and its arbitral award derives from this delegation of sovereign power.

Francis Mann considered that every system of private international law is a system of national law, asserting that "[i]n the legal sense, no international commercial arbitration exists".[7] Therefore, arbitration enjoys only functional independence, not structural autonomy.

4 Ph. Fouchard, E. Gaillard, B. Goldman, *International Commercial Arbitration*, Part 2, Ch. I, "The Autonomy of the Arbitration Agreement" (1999), pp. 227-228, paras. 433-434.

5 G. Born, supra note 3, p. 82.

6 F.A. Mann, "*Lex Facit Arbitrum*", in P. Sanders (ed.) *International Arbitration: Liber Amicorum for M. Domke* (Martinus Nijhoff, 1967).

7 Ibid. p. 159.

Francis Mann further considered that the law makes the arbitrator, not the reverse. Therefore, arbitration is necessarily tied to a national legal order – it is an institution of the state, the exercise of which requires a legal basis derived from the state's own legal system. In this regard, the seat is the "juridical center of gravity"[8] of the arbitration:

- Arbitrators are assimilated to judges of the seat;
- The law of the seat is the source of the procedural rules (*lex fori*);
- Arbitrators must follow the private international law rules of the seat; and
- The courts of the seat have jurisdiction to review the award that derives its authority from the law of the seat.

This theory reinforced the concept of "nationality"[9] in international arbitration, where an award could be considered part of the legal system of a specific state, that of the seat, and therefore treated as such in other jurisdictions.[10]

(ii) Criticism

This theory may initially have provided a measure of clarity and stability since it offers the convenience of having a single law that can be readily identified and applied to every aspect of the arbitral process. However, this approach is too simplistic and fails to reflect the realities of international arbitration. It manifests an overly jurisdictional view of international arbitration, which does not align with the contractual and international character of arbitral practice. Accordingly, it is now widely acknowledged that this theory is outdated and obsolete.

In their article, "The Proper Role of the Seat in International Commercial Arbitration: A Minimalist Perspective", Diego Fernández Arroyo and Luca Radicati di Brozolo describe this theory as:

> "the fruit of a positivistic and jurisdictional mindset (equally) devoid of reflection in reality, insofar as it postulates that a dispute settlement mechanism can only be legally considered as such and have legal effects if it is rooted in a domestic legal system".[11]

I fully endorse their view that:

> "[t]here is no legal or logical basis why arbitration should be the expression of a single legal system, in the same way that domestic court proceedings and judgments are inextricably linked to the legal order of their respective forum".[12]

In reality, the law of the seat does not automatically apply to the arbitral tribunal, nor is the tribunal inherently, by its nature, tied to the legal order of the seat. There is no innate or intrinsic authority of the seat over an arbitration proceeding. The clearest evidence of this is the parties' freedom to select any seat they wish, without constraint. Therefore, the legal system of the seat enjoys no natural authority over the parties or arbitrators; if it possesses any authority – more correctly described as jurisdiction or a legal title to apply – it arises solely from its designation, generally by the parties, as the seat of their arbitration. To be more specific, several weaknesses can be identified in the strongly localised theory.

First, this theory neglects the autonomy of the parties and, by doing so, tends to excessively limit party autonomy and, consequently, a key feature of international arbitration, which is its flexibility. When the parties choose a seat, their choice carries certain legal consequences, as I will explain later. However, these consequences must be circumscribed. In particular, the choice of seat does not transform the arbitrator into

8 As theorised by authors such as M. Dunmore, "Chapter III: The Award and the Courts, The Seat: Its Influence on Proceedings and Enforcement", in C. Klausegger, P. Klein, et al. (eds), *Austrian Yearbook on International Arbitration 2015*, p. 379: "Following this, an award must be tied to a seat to be enforceable, there cannot be a seatless award despite parties conferring power to an award through agreement. Such an award will be unenforceable under Article I of the NYC and other conventions for lacking a *juridical center of gravity*" (emphasis added).

9 As theorised by authors such as M. Rubino-Sammartano, *International Arbitration: Law and Practice* (3rd ed., Juris Net Llc, 2014). Chapter 4 on the nationality of arbitration discusses, among other topics, the criteria for establishing the nationality of an arbitration, pp. 97-130.

10 X. Liao, Delocalized Arbitration: The Weakening Role of the Seat of Arbitration, *Journal of Social Science and Humanities*, Vol. 5, Issue 1, 2023, p. 119, para. 2.2.2. One might consider that this view is that of the New York Convention when it tells us that recognition and enforcement of the award may be refused if the award has been set aside or suspended by a competent authority of the country in which that award was made: New York Convention, Art. 5(e): "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that … (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

11 D.P. Fernández Arroyo, L. G. Radicati di Brozolo, "The Proper Role of the Seat in International Commercial Arbitration: A Minimalist Perspective", in *Arbitration as Balanced Administration of Justice: Essays In Honour of Piero Bernardini* (Brill, Nijhoff, 2024), p. 2.

12 Ibid.

a judge of that state who, in exercising its role, must be assimilated to a judge of the seat and therefore required to act as such. The seat does not become the arbitrator's forum by virtue of this choice. For example, it is widely accepted today that the arbitrator is not bound to follow the rules of private international law of the seat.

Second, the strongly localised theory conflicts with the international nature of arbitration. Francis Mann considered that the seat was the source of the arbitral award's legal validity. But the award does not derive its legitimacy or legality from the legal system of the seat; it remains autonomous from that legal order. In theory, it would even be entirely possible to envisage an arbitration proceeding, and therefore an award, without a seat. Some states, such as France, have pushed this logic of the autonomy of the award from the legal order of the seat to such an extent that an award set aside at the seat may nonetheless be enforced in another jurisdiction. If I largely disagree with this solution, it is not because the award is a product of the legal order of the seat, but rather, as I will explain later, because, in my view, it undermines the necessary legal certainty that arbitration should serve.

B – The radically delocalised vision of international arbitration

(i) Presentation

On the other hand, another radical view has emerged and sought to promote international arbitration as an autonomous, self-sufficient, legal order that operates outside any national legal order. Consequently, it advocates for a drastic minimisation of the role of the seat.

This view was predominantly developed in France by scholars and, it can be argued, by courts. At the very least, it may be said that certain court decisions have fuelled it.

Among the advocates of this theory, we can refer to Berthold Goldman, who initially advocated for a transnational arbitral legal order, envisioning awards as being attached to the international business community governed by the *lex mercatoria*, rather than to any single state.[13] To a lesser extent, we could also mention Emmanuel Gaillard.[14]

My objective today is not to debate the existence or the precise contours of this purported autonomous arbitral legal order. Rather, I will focus on the conclusion that many of its supporters draw regarding the role – or should I say the virtual absence of any role, of the seat.

This radically delocalised vision holds, in particular, that the law of the seat does not govern the arbitration agreement, that arbitrators are not required to comply with the arbitral law of the seat, and that a review of the award by the courts at the seat should have no legal effect outside that jurisdiction. The idea is rather that:

(i) international commercial arbitration is subject to sufficient self-regulation, whether under the rules adopted by the parties themselves or under the rules adopted by the arbitrators; and

(ii) control by states should only be at the stage of recognition and enforcement of the arbitral award.

In France, this approach extends significantly beyond the *Dalico* solution, which established the autonomy of the arbitration agreement from any specific state law,[15] and culminated in landmark decisions such as *Hilmarton*[16] and *Putrabali*.[17] In these cases, the French courts held that:

- *First*, an international arbitral award is an autonomous international judicial decision, neither integrated into the legal order of the seat[18] nor attached to any specific state legal system;[19] and
- *Second*, as a direct consequence, such an award may be enforced in France even after having been set aside by the courts at the seat of arbitration.[20]

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13 B. Goldman, "The Law of International Companies", *Journal du Droit International/Clunet*, Vol. 90, 1963, pp. 386-389.

14 E. Gaillard, Legal Theory of International Arbitration (Martinus Nijhoff, 2010), pp. 24-33.

15 Court of Cassation, 1st Civil Chamber, 20 Dec. 1993, 91-16.828, *Dalico*: "*la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international*".

16 Court of Cassation, 1st Civil Chamber, 23 March 1994, 92-15.137, Hilmarton.

17 Court of Cassation, 1st Civil Chamber, 29 June 2007, 05-18.053, Putrabali.

18 *Hilmarton*, supra note 16: "*une sentence internationale qui n'était pas intégrée dans l'ordre juridique de cet Etat* (Etat du siège) *… de sorte que son existence demeurait établie malgré son annulation et que sa reconnaissance en France n'était pas contraire à l'ordre public international*".

19 *Putrabali*, supra note 17: "*la sentence internationale, qui n'est rattachée à aucun ordre juridique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées*".

20 Ibid.: "*la société … et fondée à se prévaloir des dispositions du droit français de l'arbitrage international, qui ne prévoit pas l'annulation de la sentence dans son pays d'origine comme cause de refus de reconnaissance et d'exécution de la sentence rendue à l'étranger*".

Philippe Pinsolle interprets the French *Putrabali* decision as an endorsement of the recognition of an autonomous arbitral legal order, arguing that, with this ruling, "the Cour de cassation provided a firm theoretical foundation for this solution".[21]

If taken to the extreme, this logic would lead to proposing the abolition of annulment proceedings. Consistent with this approach, the 2011 reform of French arbitration law introduced a mechanism that allows the parties to waive, in advance, their right to set aside an award.[22]

(ii) Criticism

Although this view of international arbitration is probably partially accurate, in the sense that international arbitration is not, by nature, tied to a state legal order, it has proven to be deeply problematic in practice with regard to the status attributed to the seat.

While it disregards the fact that arbitration cannot function – let alone remain an efficient and therefore attractive mode of dispute resolution – without the consent and support of states,[23] this view also leads to problematic proposals.

First, it denies any authority to the law of the seat to govern the arbitration agreement – as, indeed, to "any state law", according to the wording used in French case law – unless that law has been expressly chosen by the parties (which is rare). The arbitration agreement should, on the contrary, be governed by material rules of international arbitration. But this results in a discordant and rather unpredictable treatment of the arbitration agreement.

Indeed, the law that the arbitrator will apply to resolve issues relating to the validity and effects of the arbitration agreement, and therefore to its jurisdiction, will be different from that applied by the requested judge who will apply its own law to consider the same issues, even where that law takes the form of substantive rules which, whatever one may say, remain substantive rules of national origin. For example, the substantive rules of international arbitration set out by French courts remain French substantive rules. I do not believe that French judges claim to speak for the rest of the world.

To put it simply, the French substantive rules are not transnational substantive rules. Contrary to what some authors have suggested, they are therefore neither the indication nor the product of the existence of an arbitral legal order.

Besides, this theory leads to abandoning any attempt to harmonise solutions that a conflict-of-laws approach seeks to achieve, with each judge applying its own law to assess the validity and effects of the arbitration agreement. It amounts to a *lex fori* approach that fosters international inconsistency among decisions.

Second, the delocalised theory promotes the idea that no value or weight should be given to an annulment of an award at the seat outside its territory. The problem is that this solution does not serve predictability and paves the way for potential misuse of the exequatur procedure.

Regarding this last point, the example of the *Putrabali* case is particularly telling. The first award, rendered in 2001, was set aside by the English courts, leading to a new arbitration and a new award rendered in 2003. It was only after receiving this second award, which ordered it to pay certain sums to *Putrabali*, that the French party, Rena Holding, decided to seek enforcement in France of the first award. Since there was nothing to "enforce" strictly speaking in France under this first award, it is clear that this request was solely made to prevent the recognition of the second award in France. This objective was achieved. Before the Court of Cassation, *Putrabali* argued, among other things, that the French party had failed to act in accordance with procedural fairness. The court did not even deem it necessary to respond to this argument. However, the outcome remains surprising. The second award (which the English courts considered to have correctly applied English law) was denied enforcement in France, even though the parties had chosen England as both the seat of the arbitration and the law governing the merits. Moreover, this second award would likely have been recognised in jurisdictions outside of France.[24]

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21 Ph. Pinsolle, "The Status of Vacated Awards in France: The Cour de cassation Decision in Putrabali", *Arbitration International*, Vol. 24, No 2, 2008, p. 277.

22 Art. 1522, French Code of Civil Procedure: "*Par convention spéciale, les parties peuvent à tout moment renoncer expressément au recours en annulation*" (as translated: "By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside").

23 D. P. Fernández Arroyo, L. Radicati di Brozolo, supra note 11, p. 2.

24 P. Volken, A. Bonomi, G.P. Romano (eds.), *Yearbook of Private International Law*, Vol. 14 (Sellier & De Gruyter, 2012–2013), para. 33, p. 49: "In the rest of the world it is the second award that is recognised".

More generally, this solution puts the party which has lost in an arbitration in a very difficult position. The award may be tainted with substantial defects. If a party then wants to protect itself against this defective award with international effect, it cannot achieve this with the annulment action before the court of the seat. Instead, it may have to fight in all states where the winning party in the arbitration seeks for the recognition and enforcement of the annulled award. How can one pretend that this solution serves predictability and security?

This solution leads to an additional problem: by allowing multiple awards on the same dispute to coexist, each of them being potentially enforceable outside the country of the seat (since no weight is given to the annulment decision pronounced at the seat), it promotes a "first come, first served" logic that seems regrettable, and that will likely benefit, for practical reasons, the party seeking enforcement of the first (annulled) award. Furthermore, it can result in the same parties receiving conflicting arbitral outcomes in different parts of the world over the very same dispute.

Above all, this solution renders annulment proceedings completely useless. Indeed, exequatur proceedings would be sufficient if the annulment decision had no more value than a decision denying exequatur in the state of the seat. However, this is not what users of international arbitration desire. It appears rather that users value the existence of a mechanism for controlling the award at the seat, and expect that such control should carry global effect.

The 2025 Queen Mary University Survey on International Arbitration (the "Queen Mary University Survey") reveals that 61% of respondents to the survey consider that awards annulled at the seat should not be enforceable in other jurisdictions.[25] This indicates that, from an international perspective, the French approach is widely regarded as unsatisfactory. More broadly, the prospect of enforcing an award that has been annulled at the seat appears to attract little support among users.

This may be why the ongoing reform of French arbitration law is reconsidering the possibility for the parties to waive in advance their right to set aside an award.[26] This option has not been utilised once in the past fifteen years, according to the Working Group.[27] This clearly demonstrates that it was not requested by the users and did not make France a more attractive arbitral seat.[28] For its part, Belgium, which initially embraced a high degree of delocalisation with the Act of 27 March 1985 providing, under Article 1717 of the Belgian Judicial Code, that a losing party in arbitration could not challenge an award if at least one party had its seat or registered office outside of Belgium, later reversed course and repealed this provision, having realised that it deterred, rather than attracted, parties from choosing Belgium as the seat of arbitration.

More generally, the Queen Mary University Survey casts serious doubt on the idea that the seat of arbitration is of little significance to parties.[29] Therefore, can we really believe Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman when they say that:

> "the value of the seat as a connecting factor is still relatively low, as it is often chosen for reasons of geographical convenience or neutrality in relation to the parties. Further, where the choice has been made by the parties themselves, the legal considerations on which it is based are often somewhat superficial"?[30]

I don't think so.

First, one might wonder why there are ultimately few places that are regularly chosen as arbitral seats if legal considerations are of little importance. In that case, why not regularly change seats, just as one likes to change vacation destinations, in order to discover new countries and new cultures?

Second, I could draw on my own experiences with clients when they consider drafting their arbitration agreement, which tends to contradict Philippe Fouchard, Emmanuel Gaillard, and Berthold Goldman's assertion. However, I will not ask you to take my word for it.

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25 2025 International Arbitration Survey – The path forward: Realities and opportunities in arbitration, pp. 2, 13.

26 Art. 1522, French Code of Civil Procedure.

27 Working Group on the reform of French arbitration law, under the co-chairmanship of F. Ancel and Th. Clay, Rapport et Propositions de Réforme (March 2025), Proposal No. 19, p. 55: "*l'absence de tout exemple en près de quinze ans de pratique montrait que cela ne correspondait pas à un besoin*" (as translated: "the absence of any examples in nearly fifteen years of practice showed that there was no need for it").

28 Ibid. p. 55: "*Ainsi, la possibilité de renoncer au recours en annulation semble présenter désormais plus d'inconvénients que d'avantages, de sorte qu'il est préférable de supprimer cette faculté*" (as translated: "Thus, the possibility of waiving the right to appeal for annulment now seems to present more disadvantages than advantages, so that it is preferable to remove this option").

29 The Queen Mary University Survey underscores that the seat can significantly impact the conduct of the proceedings. Its analysis of preferred seats revealed that "[t]he factors influencing preference for seats, as confirmed by interviewees, were consistent with those singled out by respondents to our previous surveys. These include support for arbitration by local courts, neutrality and impartiality of the local legal system and national arbitration law and a strong enforcement track record", supra note 25, p. 6.

30 Ph. Fouchard, E. Gaillard, B. Goldman, supra note 4.

Instead, I prefer to refer to the Queen Mary University Survey. The survey makes it clear that the choice of the seat is crucial for users; it states that:

> "the factors influencing preference for seats, as confirmed by interviewees, were consistent with those singled out by respondents to our previous surveys. These include support for arbitration by local courts, neutrality and impartiality of the local legal system and national arbitration law and a strong enforcement track record".[31]

Recently, sanctions have also attracted attention, with 30% of respondents saying that geopolitical or economic sanctions would impact their choice of seat.[32]

Where does this leave us? This leads us to reassess the role that should be attributed to the seat in international arbitration in order to meet the legitimate needs and expectations of the users of this dispute resolution mechanism.

And what if the question has been incorrectly framed? The role of the seat is denied by invoking the autonomy of international arbitration from national legal systems as a reaction to Francis Mann's theory. But is this really the question being asked – or the right lens through which to view the issue? Let us now adopt a different perspective.

2. The legitimate role of the seat as an expression of party autonomy: the "voluntarist approach"

A – Presentation

To ask "Is every international arbitration procedure necessarily linked to a given national legal system?"[33] is to miss the central point of the debate. A simple affirmative answer to this question is easily refuted. However, the fundamental issue is not the existence of a connection to a legal system, but the source of its legitimacy. The true question, therefore, should be:

> "What gives a particular jurisdiction the legitimacy and authority to govern a specific arbitration?"

It is submitted that the proper role of the seat of arbitration lies neither in an inherent anchoring of arbitration to the seat justified by state sovereignty nor in a complete delocalisation of arbitration, as both of these polarised visions are untenable, insofar as they fail to reflect the practical realities of modern arbitration. As I noted in my introduction, a third path can be explored, which proposes to recognise the seat as a voluntary and meaningful point of legal connection, firmly rooted in party autonomy. This should enable us to properly identify the legal consequences of the parties' choice of seat in accordance with the parties' legitimate expectations, especially regarding the arbitration agreement, the overall procedural regime, and the effect of an annulment of the award at the seat.

Our starting point is the following: one can agree that party autonomy should be a guiding principle in international commercial arbitration. Further, it is true that arbitration is a private mechanism that could almost operate independently. However, it requires the support of states, their laws and their courts, in order to be fully effective and attractive to the parties involved. In this regard, the choice of a seat is an important consideration for the parties. The parties will look for a place where they can expect well-established arbitral law and practice, reliable solutions on arbitration issues, and satisfactory support and supervision of arbitration by local courts. And on this point, the parties can exercise their full autonomy. As with the law applicable to their contract, their freedom of choice is unlimited.

As noted by Diego Fernández Arroyo and Luca Radicati di Brozolo:

> "In fact, most domestic legal systems now contain a rule – often unwritten and not always clearly perceived – which establishes the ambit of application of their respective arbitration laws (i.e. the body of rules specifically governing arbitration, including international arbitration) and the jurisdiction of their courts over certain arbitration-related matters. Specifically, the rule provides that the forum's arbitration law only applies to arbitrations seated in the forum and that the forum's courts will only exercise oversight jurisdiction (the jurisdiction of the juge d'appui and the review of awards) with respect to those arbitrations".[34]

31 Queen Mary University Survey, supra note 25, p. 7.

32 Ibid. pp. 2, 5, 10-11. See e.g. p. 10: "30% of respondents who answered the question said they chose a different seat to ensure that their dispute could be arbitrated".

33 O. Sandrock, "To Continue Nationalizing or to De-Nationalize? That Is Now the Question in International Arbitration", *American Review of International Arbitration*, Vol. 12 Issues 3-4, 2001.

34 D.P. Fernández Arroyo, L. Radicati di Brozolo, supra note 11, p 4.

Thus, when parties choose a seat, they choose "the arbitration laws and the jurisdiction of the courts over certain arbitration-related matters".[35] The choice of the seat is therefore an exercise of party autonomy that must carry legal effect.

Far from being a decorative or peripheral choice, the seat crystallises the exercise of the parties' contractual freedom. When the parties choose a seat, they are not merely selecting a location; they are choosing the legal environment in which their arbitration will take place, i.e.:

- a legal framework for their arbitration with an established philosophy of arbitration, with rights and protections, and with the potential assistance or oversight (e.g. control over the award) of national courts; and
- with the legal constraints that accompany that choice (e.g. the mandatory rules of the seat related to arbitration).

To put it differently, the parties choose the legal environment in which they, and the arbitrators, can exercise their freedom regarding their arbitration, within the limits put by the law of the seat. They consciously accept, or at least should consciously accept, all the implications (including the constraints) that come with their choice. This choice should be respected, just as when parties choose a law to govern their contract on the merits (with its associated pros and cons).

One must acknowledge that the constraints are generally quite limited. Indeed, most states, and especially those seeking to attract arbitration proceedings on their territory, leave the parties broad freedom to govern the arbitral process according to their preferences, both regarding the procedural aspects and the merits.

In general, apart from mandatory rules aimed at protecting fundamental principles and interests, the state of the seat does not insist on the application of its rules in arbitral proceedings. The rules contained in its arbitration law are mostly discretionary and allow the parties to govern their arbitration as they wish, either directly or by deferring to other sets of rules (e.g. rules of arbitral institutions). This is largely true for the procedural rules applicable to the proceeding, the private international law rules, and for the rules applicable to the merits, etc. Many aspects of an arbitral proceeding are not even dealt with by the law of the seat, allowing the parties or the arbitrators to deal with them quite freely.

The state of the seat may also allow the parties to waive in advance the intervention of its courts. This may concern the supporting judge, whose powers (e.g. appointing or challenging arbitrators or extending time limits) may be delegated to an arbitral institution, a third-party authority, or even the judge responsible for reviewing awards, as is permitted in France. The parties are free to decide whether to make use of these options.

But their choice, with all of its features and constraints, should be respected, of course, not only by the arbitrators but also by the judges (of the seat and of other states). If the parties have chosen a relatively "restrictive" seat, they know, or ought to have known, what to expect. Here again, a parallel can be drawn with the choice of the law applicable to the contract, which is free, not always wisely exercised, but, once made, is considered binding on the parties.[36]

Of course, the parties' choice should be respected for what it is, no more and no less: i.e. only with regard to the arbitration law and the assistance and supervision of the courts. As rightly pointed out by Diego Fernández Arroyo and Luca Radicati di Brozolo:

> "In choosing the seat the parties usually do so on the basis of its arbitration law and of the attitude of its courts towards arbitration. They do not imagine that that law will be applied in its entirety, also to issues not specifically governed by its arbitration law".[37]

The law of the seat should generally not be applied to issues not directly related to arbitration, especially since it would lead to applying provisions and solutions that have not been enacted for arbitration but rather for the domestic courts and/or the domestic legal system. These authors give the compelling example of *res judicata*: the provisions of domestic law on this issue are generally not made, and therefore not suited, for arbitration. For these issues, arbitrators should probably resort to international arbitration practice and sources.[38]

In short, there is indeed an element of localisation of an arbitral proceeding, entirely rooted in party autonomy.

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35 Ibid.

36 Therefore, the parties' choice of a seat must be dealt with in accordance with the scope that the parties intended to give to it. If they choose a law other than that of the seat to govern their proceeding or their arbitration agreement, something that the law of the seat generally allows subject to its public policy rules, one may regret this and consider that this choice is unwise, but it must be given effect.

37 D. P. Fernández Arroyo, L. Radicati di Brozolo, supra note 11, p. 8.

38 See e.g. the International Bar Association (IBA) report on Res Judicata in International Arbitration (2025) at p. 6 "domestic law criteria for res judicata have been developed in the context of domestic court judgments and are not always properly suited for international arbitration proceedings". See also the International Law Association (ILA), Final Report on Res Judicata and Arbitration, *Arbitration International*, Vol. 25 Issue 1, March 2009, p. 67.

B – Practical consequences

Let us now turn to the concrete consequences of this proposal on several issues: namely, on the procedural rules of the arbitration, the law applicable to the arbitration agreement, and the effect that should be recognised to the annulment of the award at the seat.

My comments here should equally apply to arbitrators and to state judges who may be called upon to rule on these issues. In this respect, some international harmony may be achieved in the resolution of these issues.

(i) The procedural rules

The procedural rules of arbitration of the seat should be applied, taking into account the freedom that the law of the seat generally grants to the parties (or the arbitrators) to choose other rules to govern their arbitration proceedings. In other words, it should apply to areas covered by the *lex arbitri*, with the freedom generally granted by it to the parties and/or arbitrators to resort to another set of rules. Based on the same logic, the arbitrator should not feel compelled to apply the rules of private international law of the seat since the law of the seat grants the arbitrators considerable freedom in this regard.

(ii) The arbitration agreement

One may hesitate when determining which choice of the parties carries the most weight in relation to the arbitration agreement: their choice of the law to govern the main contract, or their choice of arbitral seat? Due to the dual nature of the arbitration agreement, at the intersection of substance and procedure, it is difficult to interpret the parties' intentions in one direction or the other.

If one focuses on its procedural dimension, considering that the object of the arbitration agreement is to establish an arbitral procedure, they will tend to opt for the law of the seat. However, if one focuses instead on the contractual aspect of the arbitration agreement, which is stipulated for a contractual relationship and remains linked to the contract on various issues, they will tend to opt for the law chosen by the parties to govern their contract.

In arbitration practice, the hesitation seems to lie between these two options, with some arbitrators favouring the law of the seat and others favouring the law of the main contract to govern the arbitration agreement. As for the parties, they sometimes clarify the matter in their dispute resolution clause. But here again, in my experience, when they do so, there are two trends: some parties will expressly state that the law applicable to the contract also applies to the arbitration agreement; others will specify that the law of the seat will also govern the arbitration agreement.

The English example is a good illustration of this divergence. Following the recent 2025 reform, the UK has clarified its approach to the law applicable to arbitration agreements by introducing section 6A to the Arbitration Act. Under this provision, unless the parties expressly agree otherwise, the law governing the arbitration agreement is the law of the seat of arbitration.[39] This brings an end to the uncertainty left by *Enka v. Chubb*, which previously required courts to determine whether the parties had chosen a law for the arbitration agreement and, if not, to default to the law most closely connected, a solution that often led to the application of the law of the underlying contract.

In the UK, the change has been welcomed as improving both predictability for parties and the overall efficiency of English-seated arbitrations. This change could be seen as exemplifying the "voluntarist approach", illustrating how the law of the seat expresses the parties' contractual freedom and their deliberate choice of the legal framework to govern their arbitration.

Incidentally, it should be noted that French law already recognises the parties' right to choose a national law to govern their arbitration agreement, provided that they do so expressly. Why then does it decline to infer their implied intention through their choice of seat? In this regard, in its *Kout Food* decision, the Court of Cassation was not entirely clear on this point. Indeed, after referring to the need for an express choice by the parties for a national law, it nevertheless stated that:

> "the choice of English law as the law governing the contracts … was not sufficient to establish the common intention of the parties to submit the effectiveness of the arbitration agreement to English law, in derogation from the substantive rules of the seat expressly designated by the contracts".[40]

39 UK Arbitration Act 2025, Art. 1, introducing Art. 6(A) on the Law applicable to arbitration agreement.

40 Court of Cassation, 1st Civil Chamber, 28 Sep. 2022, 20-20.260, Kout Food: "*le choix du droit anglais comme loi régissant les contrats, … ne suffisaient pas à établir la commune volonté des parties de soumettre l'efficacité de la convention d'arbitrage au droit anglais, par dérogation aux règles matérielles du siège de l'arbitrage expressément désigné par les contrats*".

This raises two questions:

- *First*, was it the parties' choice of seat that led the court to apply French substantive rules, suggesting that those rules would not have applied had the seat been elsewhere?
- *Second*, does this indicate that, in the view of the court, the choice of seat may now influence the law governing the arbitration agreement?

It is too early to say that this was the intention of the court, especially since it seems to go against the approach developed since the *Dalico* ruling. However, even if some ardent defenders of the *Dalico* doctrine immediately opposed this idea, such a shift ought to be welcomed.

Would this be detrimental to the French substantive rules of international arbitration? No, since these rules will continue to apply when the seat of the arbitration is in France, at least when the parties have not submitted their arbitration agreement to another law. And the French judge will still be empowered, in cases where French substantive rules are not applicable as the law of the seat, to reserve the application of French rules and principles that it considers fundamental or of public policy in international arbitration.

(iii) The annulment of the award at the seat

The French position reflected in *Putrabali* and *Hilmarton* is problematic. It risks creating scenarios where contradictory awards involving the same parties coexist, thereby fostering unpredictability and legal insecurity for the parties. The Queen Mary University Survey indicates that a vast majority opposes such an approach.[41] On the contrary, the parties prefer to have a mean of control of the award at the seat and an eventual annulment decision producing an effect outside the territory in which it was rendered. Accordingly, giving effect (albeit not blindly) to the annulment decision of the court at the seat would enhance predictability and ensure greater consistency in the system.

One may object, but how to fight against abusive annulments, against so-called "exotic" annulments? Yet what exactly is meant by that? Are we referring to *Hilmarton*, involving a Swiss court annulment, or *Putrabali*, which concerned an annulment by an English court? If these are the paradigmatic examples, then one must ask for more compelling illustrations to substantiate the purported advantages of the French approach.

Besides, there is no need to resort to the *Putrabali* solution to tackle this problem. A judgement annulling an arbitral award should be treated like a classic foreign judgment. It should be eligible for recognition in the country where enforcement of the annulled award may be sought, provided that it satisfies the conditions for recognition of judgments laid down by that country. If it were inequitable, or abusive, it would not be recognised.

As stated in certain American court rulings, deference to the decision of the court of the seat annulling an arbitral award is not required if the decision violated basic notions of justice or offended public policy of the state in which enforcement is sought.[42] And it is enough to address the problem of "exotic" annulments.

C – Addressing the likely criticism

A straightforward criticism towards the voluntarist approach could be that parties do not always choose a seat.

The answer to this criticism is simple: by not designating a seat, the parties may be taken to have deliberately delegated that determination to the institution through their acceptance of its rules.[43] Stated differently, where the parties have expressly selected an institution and agreed to be governed by its rules, the institution's subsequent designation of the seat ultimately derives, albeit indirectly, from party autonomy. One may reasonably consider that the parties choose an arbitral institution with confidence in its ability to administer the arbitration efficiently and to make an appropriate decision as to the choice of the seat.

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41 Queen Mary University Survey, supra note 25, p. 2: "The majority of respondents (61%) consider that awards annulled at the seat should not be enforceable in other jurisdictions".

42 This principle is firmly established in US federal case law interpreting Art. V(1)(e), New York Convention. The leading cases are Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción ("*Pemex*"), Chromalloy Aeroservices, Inc. v. Arab Republic of Egypt ("*Chromalloy*"), and TermoRio S.A. E.S.P. v. Electranta S.P. ("*TermoRio*"). In *Pemex*, the US District Court for the Southern District of New York refused to defer to the Mexican court's annulment of an ICC award, holding: "I find that under the standard announced in TermoRio, the decision vacating the Award violated 'basic notions of justice,' and that deference is therefore not required". In *Chromalloy*, the US District Court for the District of Columbia enforced an award annulled by the Egyptian court, holding: "A decision by this Court to recognize the decision of the Egyptian court would violate [the] clear U.S. public policy" in favour of enforcement of binding arbitration clauses". In *TermoRio*, the D.C. Circuit established the standard that "[t]here is a 'narrow public policy gloss on Article V(1)(e) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the United States.' ... In the absence of evidence that the nullification proceedings or nullification judgment 'violated any basic notions of justice to which we subscribe', the public policy gloss could not save a nullified award".

43 See e.g. Art. 18(1), ICC Arbitration Rules (2021): "The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties".

But what about *ad hoc* arbitrations? Parties can act somewhat carelessly and agree to *ad hoc* arbitration while omitting a designation of the seat. How, then, can we maintain that the role of the seat is grounded in party autonomy? In such cases, it falls to the arbitral tribunal to determine the seat. Again, this may be understood as the parties' deliberate delegation of the decision to the tribunal, reflecting that the determination of the seat was not a priority for them; this intention likewise merits respect.

In reality, directly selecting the seat and delegating that decision are distinct scenarios, but both share the same foundation: the parties' power to decide or not. It is this exercise of party autonomy that confers legitimacy on the seat that is designated. Does a seat chosen through delegation carry any less legitimacy than one designated directly? This point may be debated, especially when the choice is made by the arbitral tribunal. But this does not mean that the seat ceases to have any role to play.

Conclusion

To conclude, the future role of the seat in international arbitration should not be to dominate the process, nor vanish into irrelevance. A more balanced approach places party autonomy at the forefront, ensuring that the parties' legitimate expectations are respected, as party autonomy lies at the heart of international arbitration. This is the reason why I call it the "voluntarist theory/approach".

The seat should be:

- a voluntary point of legal connection;
- chosen directly or indirectly by the parties; and
- serving as a safeguard of procedural coherence and legitimacy.

Rather than weakening the seat, we should recentre it around party autonomy.

This approach affords more respect to the contractual nature of arbitration, which remains essentially a mechanism serving the parties and, therefore, must seek primarily to meet their legitimate expectations.

One should always bear in mind that arbitration is more about parties' needs and expectations than about the preferences, inclinations (or even, sometimes, egos) of arbitrators or arbitration scholars.

International Investment Arbitration: Towards an Age of Maturity?

Mohamed Shelbaya

Partner, Gaillard Banifatemi Shelbaya Disputes, Lecturer at l'Ecole de Droit de Sciences Po, Paris

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This article examines the historical evolution of international investment arbitration, tracing its development from infancy through adolescence and towards a possible age of maturity. It highlights how the system has oscillated for more than two centuries between expansion and backlash, beginning with the slow and gradual emergence of substantive standards of treatment and the beginning of an investor-State dispute settlement (ISDS) framework in its "infancy" phase (pre-1990), and later accelerating during its "adolescence" phase (1990–2009) through the exponential rise of international investment agreements (IIAs), and expansive interpretations of the substantive standards of protection by investment tribunals. The adolescence phase triggered widespread criticism from States and civil society, prompting significant recalibration. Since 2010, States have concluded far fewer IIAs, terminated two-thirds as many agreements as they have concluded, and adopted language in their new agreements designed to constrain the broad interpretation of substantive standards. While these new IIAs and recent case law suggest a move toward greater predictability and narrower interpretations of the standards of protection, the article questions whether this moment represents a true "maturity" or merely another pendular swing in the continuing evolution of the regime.

Introduction

In the Hegelian Dialectic, history evolves like a pendulum that swings between a "thesis", and a reaction to this thesis, the "antithesis", until it reaches equilibrium at a "synthesis", or keeps oscillating, until it finds such an equilibrium, alternating as it does between the two extremes.

International investment law, including investment arbitration, much like international law more generally, has experienced such oscillations over the course of the past two centuries. Perhaps, a few quotes relating to different periods of these two centuries best encapsulate these oscillations.

First, a thesis, testifying to a US Senate subcommittee in relation to foreign investments in the 19th century, US Assistant Secretary of State Adolf Berle noted:

> "The past movements of capital have been regarded as, frankly, imperialist. We are still liquidating many of the 19th century messes which were occasioned by the somewhat violent and not too enlightened moves of capital. As nearly as one can see it, the object would seem to be capital movements which are worked out not merely because some concessionaire wishes to make a profit but following the more careful plans of the various governments involved with a view to the development of the country".[1]

This assessment of European gunboat diplomacy and of colonial powers imposing their interpretation of international law on weaker nations through foreign intervention may today seem ironic coming from a senior US official, but it is nevertheless a fairly accurate assessment of the framework governing foreign investments during the 19th century.

1 T. St John, *The Rise of Investor-Sate Arbitration: Politics, Law and Unintended Consequences* (Oxford University Press, 2018), p. 61.

Second, the antithesis, is the principle of non-intervention and the principle of national treatment as it was affirmed, not just through the Calvo doctrine but also in the words of the arbitrator in *Rosa Gelbtrunk v. Salvador*:

> "A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own, is to be considered as having cast in his lot with the subjects or citizens of the state in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that state, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in the same manner as the subjects or the citizens of that state".[2]

This principle was especially important for newly independent States:

> "Many of the poorer states have accepted foreign investment at the expense of economic, and therefore political, independence. It is all very well to say that nationalization is possible, providing prompt and adequate compensation is paid. In reality this renders any major economic or social programme impossible, since few states can produce the capital value of a large proportion of their economies promptly. It is common for the poorer economies to be subjected to foreign ownership to a great extent, and the analogy of private law ownership clashes sharply with the desire of states to govern their own economies".[3]

A foreign investor is thus to be left to assume the risk of his investments (much like he alone enjoys its fruits), subject to the national law of the host State and its remedies.

Third, another thesis, came in the form of the minimum standard of treatment of aliens under customary international law (MST) that inter alia guaranteed foreign investors a minimum level of protection that may be higher than that afforded to locals if the national law of the host State was deemed outrageously deficient. This standard was truly minimal as held in *Neer v. Mexico*:

> "[T]he treatment of an alien, in order to constitute international delinquency should amount to outrage, to bad faith, to willful neglect of duty, or to insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[4]

Fourth, an antithesis to the minimal nature of MST, was the very broad understanding of fair and equitable treatment articulated by investment tribunals in the early days of the twenty-first century:

> "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities …".[5]

A new and deemed expectation is thus created and protected: new, because it is completely different in nature and in scope from the minimal *Neer* test, let alone the principle of national treatment; deemed, because it is disconnected from the reality of what the relevant investor actually believed, or could have reasonably believed when making its investment, as well as from the economic reality that stability and transparency of this kind are not typically associated with the high returns for which the relevant investor was hoping. Indeed, it is telling that the tribunal in this case lists at least six expectations that the investor had without any explanation of the basis of such expectations at the time of the investment. Rather, the tribunal seems to have simply deemed that these expectations are inherent to the activity of investing.

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2 *The Claims of Rosa Gelbtrunk and the "Salvador Commercial Company"*, et al (El Salvador, United States), 2 May 1902 and 8 May 1902, Vol. XV p. 464.

3 I. Brownlie, *Principles of Public International Law* (3rd ed., Clarendon Press, 1979), p. 537.

4 *Neer v. Mexico*, 15 Oct. 1926, 4 RIAA 60.

5 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, para. 154.

Fifth, perhaps the most interesting of the swings of the pendulum can be illustrated by the speech given by the Canadian Prime Minister, Mark Carney, on 20 January 2026 at the 56th Annual Meeting of the World Economic Forum, Davos 2026, in which he decried:

> "For decades, countries like Canada prospered under what we called the rules-based international order. We joined its institutions, we praised its principles, we benefited from its predictability. And because of that we could pursue values-based foreign policies under its protection.
>
> *We knew the story of the international rules-based order was partially false. That the strongest would exempt themselves when convenient. That trade rules were enforced asymmetrically. And we knew that international law applied with varying rigour depending on the identity of the accused or the victim.*
>
> *This fiction was useful.* And American hegemony, in particular, helped provide public goods: open sea lanes, a stable financial system, collective security and support for frameworks for resolving disputes.
>
> So, we placed the sign in the window. We participated in the rituals. And we largely avoided calling out the gaps between rhetoric and reality.
>
> This bargain no longer works.
>
> Let me be direct: We are in the midst of a rupture, not a transition".

Coming a full circle from the US complaining of European foreign intervention in the 19th century, it was the turn of the other half of the West to decry US hegemony. This speech, which garnered much global attention, was not notable because of its message; the message itself is banal to most of the world's population as it repeats what they have long thought and affirmed. Rather, it was notable because it was being delivered by the highest-ranking official of one of the leading capital-exporting countries in a quasi-official forum addressing a global audience.

These quotes trace a body of international investment law that has emerged slowly and very gradually over decades, if not centuries. This body of rules finds its roots in mechanisms and concepts that developed in the 19th and 20th centuries. This was the infancy phase of international investment law which could be said to have ended in 1989 (**1.**). It ended in 1989 because the concepts and mechanisms that slowly developed over decades, like the substantive standards of protection and the emergence of ISDS, took a marked and clear turn towards exponential growth as of 1990. This year marks therefore the beginning of the adolescence phase.

Much like a human adolescent struggling to process rapid growth, turbulent emotional and social changes and yet who is overly confident in their own views, during the adolescence phase, international investment law witnessed a qualitative and quantitative exponential growth between 1990 and 2009, whose scale was impressive, even if the results it produced may have been less so (**2.**).

Finally, the stabilisation of the network of IIAs and the progressive adoption of more balanced tests for standards of treatment that started in 2010 may have marked the beginning of the maturity phase or, more pessimistically, merely another swing of the pendulum that will soon move again (**3**.).

1. Pre-1990: Infancy

During this phase, the rules governing the protection of foreign investments evolved gradually over at least two centuries, but not in a linear fashion. Rather, the arc of the evolution of international investment law swung like a pendulum between actions and reactions. Gunboat diplomacy triggered the Calvo doctrine, which itself gave way to the emergence of MST (**A.**), before finally the emergence of a direct right of action to foreign investors through ISDS provisions (**B.**).

A –The emergence of substantive standards

As noted by Taylor St John, the roots of international investment law can be traced to the practice of the six leading capital-exporting countries of the 18th, 19th and early 20th centuries that accounted for the vast majority of foreign trade: Belgium, England, France, Germany, the Netherlands, and later, the US.[6]

Although the foregoing observation is subject to the rather important caveat that both the term "trade" and "foreign", much like the term "capital-exporting", are rather contestable in this context given that the bulk of the transactions concerned would have taken place within the same empire, between the centre of the empire and the colonies of this empire, and would have, for all relevant purposes, been protected by the local law and force of the empire. While there was no need for

6 T. St John, supra note 1, p. 54.

special rules for investments in territories falling within the empires of these countries, such a need existed for trade between these States, which was sometimes governed by treaties that could be deemed early versions of the modern investment treaties, or for trade with less powerful States that are not officially part of any given empire.[7]

During this period, gunboat diplomacy was frequently used for the settlement of investment disputes: capital-exporting powers resorting to the use of force as a means of enforcing their preferred interpretation of international law.[8]

As a reaction, capital-importing States that did not want foreign interpretations of international law used as a means to threaten their sovereignty adopted variations of the Calvo doctrine. This doctrine advanced in 1868 by the Argentine jurist Carlos Calvo rested upon the core proposition that aliens should not be entitled to any rights or privileges not accorded to nationals.[9] The Soviet Union adopted this doctrine in the wake of the Russian revolution, arguing that its expropriation of assets owned by foreign nationals was justified as it was non-discriminatory and the same measures applied to Soviet nationals.[10] A few years later, Mexico adopted a variation of the Calvo doctrine into its constitution, providing that aliens may not own property or be granted concessions in Mexico except after "considering themselves as Mexicans in respect of such property" (i.e. entitled to treatment no more favourable than that granted to nationals).[11]

Continuing with the pendulum swinging between thesis and antithesis, the Calvo doctrine was countered by the emergence of the international minimum standard of treatment of aliens (MST) in the first half of the 20th century. This standard, which was best articulated in the *Neer v. Mexico* decision of 1926, emerged as a safeguard affording a minimum protection to foreign nationals in a given State, even if the law of that State did not extend these protections to nationals. The standard, as its name suggests, is by design a minimal standard and sets a high threshold for a measure to breach it:

> "[T]he treatment of an alien, in order to constitute international delinquency should amount to *outrage*, to *bad faith*, to *willful neglect of duty*, or to insufficiency of governmental action so far short of international standards that *every reasonable and impartial man would readily recognize its insufficiency*".[12]

Although this standard is not specific to investment protection and governs the treatment of foreign nationals more generally, it was adopted in the context of international investment law in the form of the fair and equitable treatment (FET) standard. As was noted in 1967 in the OECD Draft Convention on the Protection of Foreign Property and the Resolution of the Council of the OECD on the Draft Convention:

> "4.(a) the phrase 'fair and equitable treatment', customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that – subject to essential security interests [see Article 6 (i)] – protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international

7 K. Miles, *These Origins of International Investment Law: Empire, Environmental and the Safeguarding of Capital* (Cambridge University Press, 2013), pp. 19-21: "[I]n much discourse, little mention is made of the law prior to the advent of the modern network of bilateral investment treaties. The frequent, but fleeting, references to the signing of the first such treaty in 1959 between Germany and Pakistan only serve to compound the sense that this is the starting point of the law. A historical exploration of international investment law, however, reveals a far more complex picture … It is a matter of historical fact that the international rules on the protection of foreign-owned property originated in the reciprocal arrangements of European nations. These states possessed relatively equal bargaining power and sought to secure minimum standards of treatment for their citizens engaging in investment activity within the region. The transformation into international investment law, however, changed the character of these rules fundamentally. It was this process of applying these standards to non-European states that became inextricably linked with colonialism, oppressive protection of commercial interests, and military intervention. And as a result of this shift in practice, foreign investment protection law moved from a base of reciprocity to one of imposition"; The Entry into Force of Bilateral Investment Treaties (BITs), IIA Monitor No. 3 (2006) International Investment Agreements: "The first ever BIT was concluded on 25 November 1959 between Germany and Pakistan and entered into force on 28 April 1962 …".

8 T. St John, supra note 1, p. 55.

9 P. Julliard, *Calvo Doctrine/Calvo Clause* (Max Planck Encyclopaedia of Public International Law, 2007), para. A.2.

10 R. Dolzer, U. Kreibaum, C. Schreuer, *Principles of International Investment Law* (3rd ed., Oxford University Press, 2022), p. 109.

11 Art. 27, Mexican Constitution: "[O]nly Mexicans by birth or naturalization and Mexican corporations have the right to acquire ownership of lands, water and their appurtenance, or to obtain concessions for working mines or for the utilization of waters or mineral fuel in the Republic of Mexico. The Nation may grant the same rights to aliens, provided they agree before the Ministry of Justice to consider themselves as Mexicans in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto, under penalty, in case of non-compliance, of forfeiture to the Nation of property so acquired" (emphasis added).

12 *Neer v. Mexico*, 15 Oct. 1926, 4 RIAA 60 (emphasis added).

> law. The standard required conforms in effect to the 'minimum standard' which forms part of customary international law".[13]

Nevertheless, as will be discussed below, during the adolescence phase, FET ended up morphing, at least temporarily, into a much broader standard whose threshold is much lower than MST.

Other standards of protection, such as compensation for expropriation, emerged during the same period. Famously, the formula for such compensation was articulated in a letter from the US Secretary of State, Cordell Hull, to the Mexican Government in the context of the Mexican expropriation of American agrarian interests in the 1930s.[14]

> "Excellency: During the recent years the Government of the United States has upon repeated occasions made representations to the Government of Mexico with regard to the continuing expropriation by Your Excellency's Government of agrarian properties owned by American citizens, without *adequate, effective and prompt compensation being made therefor"*.

This formula was then adopted in most of the early bilateral investment treaties[15] and continues to be used today, although, as will be discussed later, the scope and meaning of expropriation and of the compensation required for it expanded rather significantly in the adolescence phase.

B – Diplomatic protection and the emergence of ISDS

Substantive standards of protection need a forum before which they may be exercised. For much of the infancy phase (i.e. up to 1990), and indeed even during the first decade of the adolescence phase from 1990 to 2000, the default forum before which a foreign national would exercise its rights was the domestic courts of the host State. This is clear from the World Bank Report on the Legal Framework for the Treatment of Foreign Investment of 1992.

Part V of the Report on the Settlement of Disputes provided that the default process for the resolution of disputes was the national courts:

> "[I]n case negotiations fail, the courts of the host State will normally and unless otherwise provided have jurisdiction over disputes arising out of investments made in the country. In most countries, it is however possible for States and foreign investors to refer their differences to such alternative mechanisms as conciliation or binding arbitration".[16]

As noted by the tribunal in *Daimler v. Argentina*, up to the 1990s, international arbitration was perceived as an exceptional mechanism that was sometimes agreed to by States in the context of discreet contracts with important investors, but not as a matter of practice in IIAs.

> "1991 was a time when the distinction between 'treaty claims' and 'contract claims' as inaugurated by the AAPL v Sri Lanka award (facilitating the direct access of private investors to ICSID tribunals) remained obscure. As a consequence, dispute resolution clauses were still predominantly perceived in the context of international contracts, whether 'state contracts' or otherwise, between a private foreign investor and a sovereign state".[17]

The State of the foreign investor, however, was not without additional recourse. If the investor could not exercise their rights before the domestic courts of the host State, it was still open for his State of nationality to exercise its own right through diplomatic protection in seeing its national not injured by another State. Diplomatic protection thus served as the precursor to investor-State dispute settlement as a means of securing international reparation for injuries inflicted by a State upon a foreign national, albeit in a form that is fundamentally different for several reasons.

Unlike modern ISDS mechanisms, diplomatic protection is not a right of the foreign national themselves, but rather of their State of nationality. In other words, in exercising diplomatic protection, a State is merely

13 OECD Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention (1967). The Draft Convention, even though never in force, has historical importance for investment treaty policies.

14 The Secretary of State to the Mexican Ambassador (Castillo Nájera) (1938) (emphasis added).

15 Art. 3, Sweden-Egypt BIT (1978); Art. 5, UK-Korea BIT (1976); Art. 6, Singapore-Sri Lanka BIT (1980).

16 Legal framework for the treatment of foreign investment, Vol. II, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment (1992), para. 50.

17 *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 Aug. 2012, paras. 220-221.

asserting its own right, the right to ensure – in the person of its subjects – respect for the rules of international law.[18]

As a consequence of this fact:

- Only the State of nationality may decide whether or not to claim diplomatic protection;
- It has no obligation to exercise this right even if the investor requests that it exercise it;
- The investor possesses no control over the claim; and
- The State of nationality may use any funds awarded as compensation at its discretion and has no duty to share all or part of these sums with the injured investor.[19]

In other words, putting aside contractual rights to arbitration given to an investor in a concession agreement, like the oil concessions of the 1940s-1950s, or some other direct contractual relationship between the host State and the investor, during the 18th, 19th and much of the 20th century, an investor's only recourse in case of injury caused by the host State was the domestic courts of that State. This same framework continued to apply for much of the rest of the 20th century, although the adoption of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") in 1965 introduced the idea of an investor state dispute settlement mechanism.

The preamble of the ICSID Convention recognised that:

(i) disputes can arise between States and nationals of other States and not just between States; and

(ii) that "while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases".[20]

In other words, the ICSID Convention itself described international litigation or arbitration as an exceptional forum for resolving investor-State disputes and recognised that the default forum for such disputes would remain the courts of the host State.

It did not take long, however, for bilateral investment treaties (which started to be concluded in the very late 1950s with the first one on record appearing to be the Germany-Pakistan BIT of 1959) to include ISDS provisions. The first such BIT appears to be the Chad-Italy BIT (1969), whose Article 7 provided that:

> "Any investment dispute subject to this Agreement, which would be between a Contracting State (or any institution or organization dependent or controlled by the same State) and physical or juridical person having the nationality of another State, shall be subject to the jurisdiction of the International Center for the Settlement of Investment Disputes, Washington under the Convention of 18 March 1965. Any dispute between the two States concerning the interpretation or application of the present Agreement, shall be settled through diplomatic channels".[21]

Gradually, over the course of the 1970s and 1980s, more IIAs with ISDS provisions were concluded.[22] These treaties also started using the existence of ISDS mechanisms as a means to reduce State-to-State disputes arising from foreign investments. For example, with the memory of the Suez crisis still fresh, the Egypt-UK BIT (1975) relegated diplomatic protection to a back-up option that is only exercisable if ISDS fails for lack of jurisdiction or failure by the award debtor to comply with the award.[23]

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18 The Mavrommatis Palestine Concessions (1924), PCJ Series A. No. 2: "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law"; Nottebohm case (*Liechtenstein v. Guatemala*), Judgement of 6 April 1955: "Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State".

19 Mixed Claims Commission, US-Germany, Administrative Decision No. V (1924): "Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested to do so by such national. When on such request a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control it is governed not only by the interest of the particular claims but by the largest interests of the whole people of the nation and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. Even if payment is made to the espousing nation in pursuance of an award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake, or protect the national honor, at its election return the fund to the nation paying it or otherwise dispose of it".

20 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

21 Art. 7, Chad-Italy BIT (1969).

22 Based on the data of the UNCTAD International Investment Agreements Navigator, 283 II, as concluded in the 1970s and 1980s included ISDS.

23 Egypt-UK BIT (1975): "Reference to International Centre for Settlement of Investment Disputes. (1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as 'the Centre') for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting party and a national or company of the other Contracting Party concerning

In a nutshell, the infancy phase of international investment law was characterised by the very slow and gradual emergence of substantive standards of treatment of foreign investors and the beginning of an ISDS framework allowing investors a direct right of action against the host State. This process was not only gradual, but also formed through a series of actions and reactions by capital-exporting countries and capital-importing countries.

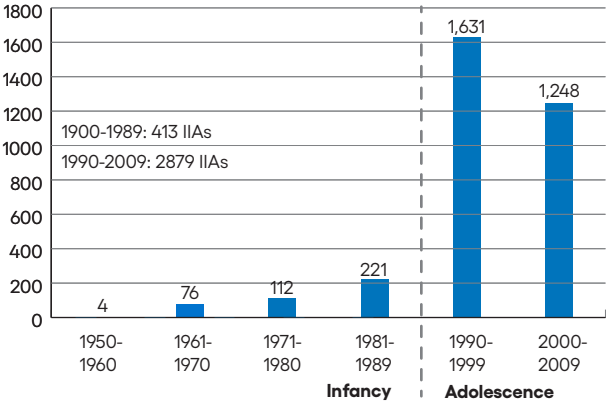
2. 1990-2009: Adolescence

In sharp contrast to its slow growth during the infancy phase, international investment law developed exponentially in the twenty years between 1990 and 2009 (**A.**), as States concluded a vastly larger number of IIAs and a number of investment tribunals interpreted the substantive standards of protection in an ever-broader fashion (**B.**).

A – The exponential growth of IIAs

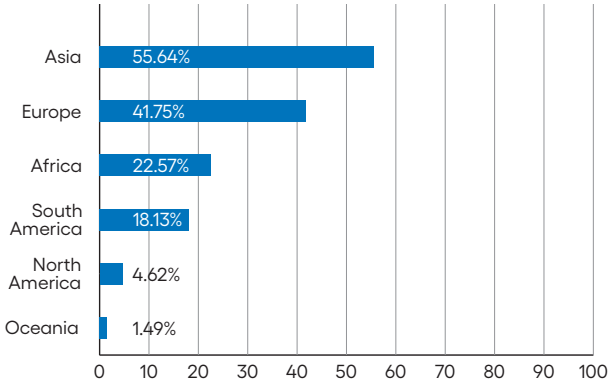
Although one can only count some 413 IIAs in the 20th century from 1900 until 1989, in the short twenty years that followed, between 1990 and 2009, some 2,879 IIAs were concluded, an almost 600% increase in less than 20% of the time.[24]

Number of IIAs by decade from 1900 to 2009



During this period, the IIAs were very European-centric with 55.6% of all IIAs concluded involving at least one European party, followed by Asia with 41.7% and Africa with 22.6%.[25] To be clear, these percentages compare each time the total number of IIAs with the number of IIAs including at least one party from the relevant continent and accordingly do not add up to a full 100%. This suggests that, during this period, European countries that were no longer able to count on former colonies or geopolitical power to protect their trading interests abroad, especially in Asia and Africa, were keen on setting up a new framework through which to protect these interests.

Geographical dynamics of IIAs between 1990-2009



B – The broadening of standards of treatment

The growth of international investment law was not just quantitative but also substantive. Not only the number of IIAs increased exponentially but also a number of tribunals construed the standards of treatment in an ever-broader fashion.

(i) The emergence of the autonomous standard for FET and the protection of legitimate expectations

As noted, during the infancy phase, the fair and equitable treatment (FET) standard emerged from, and was therefore defined by reference to, customary international law and more specifically the MST. This much was clear from the text of the OECD Draft Convention on the Protection of Foreign Property and the Resolution of the Council of the OECD on the Draft Convention.

an investment of the latter in the territory of the former … Neither Contracting Party shall pursue through diplomatic channels any dispute referred to the Centre unless (a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre, or (b) the other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal" (emphasis added).

24 This data is based on the UNCTAD International Investment Agreements Navigator.

25 Ibid. The methodology adopted for calculating this data is as follows: whenever an international investment agreement involves, for example, one European party and one Asian party, it is counted simultaneously as a European Agreement and as an Asian Agreement.

This gave FET a limited scope and set a high threshold for a finding that it has been breached, as illustrated by the *Neer* test. During the adolescence phase, a number of tribunals, notably those constituted under NAFTA and other treaties that reference customary international law, continued to read FET in this way.[26] Other tribunals, however, read it as an autonomous standard that is not anchored to customary international law and that should be construed on its own terms. Notably, the tribunal in *Tecmed v. Mexico* found that:

> "The Arbitral Tribunal considers that this provision of the Agreement [fair and equitable treatment], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment".
>
> "The Arbitral Tribunal understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described above is that resulting from an autonomous interpretation, taking into account the text of Article 4(1) of the Agreement according to its ordinary meaning (Article 31(1) of the Vienna Convention), or from international law and the good faith principle, on the basis of which the scope of the obligation assumed under the Agreement and the actions related to compliance are to be assessed".[27]

Many, if not most, other tribunals construing FET language that is not explicitly linked to customary international law followed suit and adopted the autonomous approach.[28] Even some tribunals applying NAFTA, and thus bound by the interpretive note issued by its Contracting States, the Free Trade Commission Notes of Interpretation of 2001 on the MST,[29] found that the minimum standard of customary international law has evolved in such a way that it is now almost equivalent to the autonomous test of FET.[30]

The trouble, however, with this expansion is that the language "fair and equitable" treatment has very little substance when it is decoupled from customary international law, and thus from the practice of States.[31]

The terms "fair" and "equitable" have very little intrinsic normative meaning as they are inherently ideological concepts. If one tries to define what is fair and what is equitable without guidance from some other source, this only leaves the ideology of the tribunal to fill that void. What is fair to a devout capitalist may seem unthinkable to a committed socialist and abhorrent to a communist and vice versa. This is especially relevant in the context of a standard such as FET that will often be invoked to assess the legitimacy of governmental action as it relates to private enterprise. Even putting aside socio-economic ideological clashes, the legitimacy and priority to be given to evolving environmental and public health considerations over the expectations of investors and profitability of investments is also a deeply political and inherently ideological question.

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26 See e.g. *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, para. 128: "The effect of the Commission's interpretation is that 'fair and equitable treatment' and 'full protection and security' are not free-standing obligations. They constitute obligations only to the extent that they are recognised by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA tribunals in *Metaclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (30 Aug. 2000), *S.D. Myers, Inc. v Government of Canada* (13 Nov. 2000) and *Pope & Talbot, Inc. v Canada*, Award on the Merits, Phase 2 (Apr 10, 2001) may have expressed contrary views, those views must be disregarded".

27 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, paras. 154-155.

28 See e.g. *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Award, 17 March 2006, para. 309; *OKO Pankki Oyj and others (formerly OKO Osuuspankkien Keskuspankki Oyj and others) v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 Nov. 2007, para. 230.

29 Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001): B.1. "1. Article 1105(1) prescribed the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens".

30 See e.g. *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98.

31 In this regard, it should be noted that the relevant practice for the purposes of *opinio juris* is the practice of States and not, as sometime tribunals seem to have suggested, the "practice" of other arbitral tribunals; only State practice is a source of international law. As was noted by an author, "[a]lthough some writers (rather ambiguously) seem to be listing international judicial decisions and awards as examples of state practice, it is clear that this is not the case. The reason is simple: decisions and awards 'emanate from tribunals that are created or appointed by but act independently from States.' Thus, it is misguided to suggest that since the authority of tribunals derives from state consent, arbitral awards are indirectly evidence of the practice of the states which have mandated the tribunal to apply international law. It does not matter that tribunals derive their jurisdiction from states' agreements. Awards are the product of tribunals, not states. For this reason, awards are not evidence of state practice. Similarly, what matters is the opinio juris of states, not that of arbitrators" (P. Dumberry, "The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law", 33(3) *Journal of International Arbitration* (2016), p. 273; see also, M. Wood, *Special Rapporteur, ILC, Second Report on Identification of Customary International Law*, Sixty-sixth session (Geneva, 5 May, 6 June and 7 July-8 August 2014), UN doc. A/CN.4/672, pp. 31-46; International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law, in Final Report of the Committee on the Formation of Customary Law: Conference Report 18 (London 2000), pp. 18-19.

Tribunals have therefore tried to come up with a guiding list of considerations, if not an actual test for FET. For example, in *Rumeli Telekom A.S. v. Republic of Kazakhstan*, the tribunal found that FET covers:

> "The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following concrete principles: *the State must act in a transparent manner; the State is obliged to act in good faith; the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking in due process; the State must respect procedural propriety and due process*. The case law confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations".[32]

These lists only provided limited assistance to tribunals trying to give substance to FET independently of customary international law or to parties trying to construe them. What can be said of what is "fair" and "equitable" can equally be said of what is "untransparent", "unjust" or "idiosyncratic". Defining what is fair as being that which is not "unjust" does not get us very far. Similarly, many areas of governmental action, such as any procedures set up by a State to regulate the granting of a given license or permit, are by design "idiosyncratic" to most other States. "Transparency" is equally ideological, as evidenced by the lack of statutes similar to the US Freedom of Information Act in most other States. Indeed, an examination of the exceptions to disclosure provided in this act evinces the inherently political nature of a person's expectation as to how much they are entitled to know about the inner workings of a given government. Worse still, when transparency or consistency are read as regulatory stability, this not only adds an ideological component whose source is unclear but also confuses very different concepts.

This lack of clarity meant that different tribunals have applied FET very differently, even while all purport to apply the same standard and the same list of criteria.

Accordingly, at least during the adolescence phase, it was very difficult for counsel, let alone the parties, to predict with any degree of confidence how a tribunal might read the FET standard, until a tribunal was actually in place and its members identified.

(ii) Indirect expropriation and the emergence of the sole effects doctrine

Historically, the concept of expropriation meant the taking by the State of some or all of a person's ownership rights over an asset. In the 1980s, a number of Iran-US tribunals expanded the concept to *de facto* expropriation to deal with the fact that the Iranian Revolutionary Guard Corps had not formally taken the title to the investments in question, but typically seized the projects and appointed managers to run them.[33]

This *de facto* expropriation was not really an expansion of the concept of expropriation as much as it was an application of the concept to cases where the State *de facto* took over the main attributes of property, namely possession and control, even if it left the title intact.

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32 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 609 (emphasis added).

33 *Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others, IUSCT Case No. 24*, Interlocutory Award (Award No. ITL 32-24-1), 19 Dec. 1983, paras. 66-74: "It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated. However, it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner" … in one respect the situation in this case is comparatively simple. There can be little doubt that at least at the end of January 1980 the Claimants had been deprived of the effective use, control and benefits of their property rights in Shah Goli. By that time the Ministry of Housing had appointed Mr. Erfan as Temporary Manager of Shah Goli to direct all further activities in connection with the Project on behalf of the Government. This appointment was made pursuant to the decree of the Revolutionary Council, adopted on 14 July 1979, called Bill for Appointing Temporary Manager or Managers for the Supervision of Manufacturing, Industrial, Commercial, Agricultural and Service Companies, either private or public. The succinct language of this act makes it clear that the appointment of Mr. Erfan as a Temporary Manager in accordance with its provisions deprived the shareholders of their right to manage Shah Goli. As a result of these measures the Claimants could no longer exercise their rights to manage Shah Goli and were deprived of their possibilities of effective use and control of it … It has therefore been proved in the case that at least by the end of January 1980 the Government of Iran had interfered with the Claimants' property rights in the Project to an extent that rendered these rights so useless that they must be deemed to have been taken; *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, IUSCT* Case No. 7, Award No. 141-7-2, 29 June 1984, p. 11: "While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owners, and the form of the measures of control or interference is less important than the reality of their impact. In the present case, the Claimant and the Government appointed manager of TAMS-AFFA managed to cooperate sufficiently well in mid-1979 so that such appointment could not be considered an act depriving the Claimants of its property. However, the developments of late 1979 and early 1980, particularly the complete absence of answers to letters and telexes and of any communication from TAMS-AFFA to the Claimant, effectively ended such cooperation and deprived the Claimant of its property interests in TAMS-AFFA. If any doubt remained about this question in early 1980, it has been removed by the absence of new developments and the passage of time".

The true expansion of expropriation, however, came when the *Metaclad* tribunal (2000)[34] adopted the so-called "sole effects doctrine" as the test for indirect expropriation, according to which the State need not have ha'd the intent to take the property of an investor (and indeed the purpose behind its conduct may be irrelevant) as long as the conduct of the State had the effect of depriving the investment of its value.

The *CME v. Czech Republic* tribunal (2001)[35] and the *Tecmed v. Mexico* tribunal (2003)[36] then also found that an expropriation of the investment occurred even though the title to, and the possession and control of, the investment in question remained with the investor, simply because a regulatory measure rendered the investment not profitable.

It should be noted that the cases that actually made a finding of expropriation despite the investor retaining title, control and possession of the investment are very much in the minority. Some tribunals declined to find expropriation precisely because the investor retained the attributes of property even if the value of its investment was impaired (e.g. *CMS v. Argentina*, *Sempra v. Argentina*)[37] or because the State's intent was to regulate in exercise of its police powers (e.g. *Methanex v. USA*, *Saluka v. Czech Republic*, *Invesmart v. Czech Republic*).[38] Even those tribunals that endorsed the sole effects doctrine as a matter of principle mostly found that its conditions were not met (*LG&E v. Argentina*).[39] Nevertheless, even if the sole effects doctrine did not apply in practice in many cases, the backlash that it triggered cannot be underestimated.

There is a meaningful difference between the Iran-US Claims Tribunal cases of the 1980s and the sole effect cases of the adolescence phase. In *Starrett* (1983) and *Tippetts* (1984), the Iranian government had appointed state managers, physically seized control of facilities, and effectively ousted the investors from any meaningful management or control of their enterprises. The investor was not merely harmed economically – they were literally locked out. These cases are better characterised as de facto expropriation – the State did not take the legal title, but it took everything else: physical possession, management control, and operational authority.

In the adolescence cases, the situation is different:

- In *Metalclad* (2000), the investor retained title to its land and was never physically dispossessed – the municipal government refused to grant a construction permit, and an ecological decree was subsequently issued in respect of the area.
- In *Tecmed* (2003), the investor owned and managed a hazardous waste facility, and it continued to own it and manage it – Mexico refused to renew its operating licence.

In these cases, one needs to adopt an esoteric conception of the word "taking" to find a taking, as the State was in no way enriched. "Taking" becomes synonymous to "destruction". Pushed to its limit, the sole effects doctrine would mean that mere accidental conduct, for example, an explosion in a state-owned factory damaging neighbouring buildings owned by an investor, can qualify as expropriatory because it had the effect of destroying the value of a nearby investment.

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34 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, paras. 103-105: "Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State". A precursor to this idea may also be found in *Antoine Goetz et consorts c. République du Burundi*, ICSID Case ARB/95/3, para. 130.

35 *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, 13 Sep. 2001, paras. 150-151, 153: "150. The Treaty's provision regarding 'deprivation' tracks the broadest expropriation provisions in bilateral investment treaties, specifically, and in international law, generally. A 'deprivation' thus occurs under the Treaty whenever a State takes steps 'that effectively neutralize the benefit of the property for the foreign owner.' Such expropriations may be deemed to have occurred regardless of whether the State 'takes' or transfers legal title to the investment. It is also immaterial whether the State itself (rather than local investors or other third parties) economically benefits from its actions. These rules arise under the well-established principle that State interference with an investor's use of property should be deemed an actionable 'deprivation' regardless of the form that the interference takes".

36 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 113: The Agreement does not define the term "expropriation", nor does it establish the measures, actions or behaviours that would be equivalent to an expropriation or that would have similar characteristics. Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as *de facto* expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government.

37 See e.g. *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 262-265; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 Sep. 2007, para. 285 the sole effects doctrine (e.g. *S.D. Myers, Pope & Talbot, Lauder v. Czech Republic*) ultimately dismissed the expropriation claim.

38 See e.g. *Methanex Corporation v. United States of America*, Award on Jurisdiction and Merits, 3 Aug. 2005, para. 7 of part IV(3); *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Award, 17 March 2006, paras. 262-265; *Invesmart v. Czech Republic*, UNCITRAL Award, 26 June 2009, paras. 497-504.

39 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, paras. 198-200. Further, many cases that are typically cited as supporting the sole effects doctrine (e.g. *S.D. Myers, Pope & Talbot, Lauder v. Czech Republic*) ultimately dismissed the expropriation claim.

Even worse, if combined with a subjective view of the substantial deprivation test that looks at the effect of the measure through the lens of the investor only, the essence of expropriation can be further reduced. If the explosion in question has only damaged the property of the investor (but this factory was already teetering at the edge of bankruptcy and thus had to go into liquidation because it could not afford the repair costs), the accidental explosion turns into unlawful expropriation, even when there is objectively minimal physical damage to the property. The concept of expropriation thus loses its essence and its distinction from FET, even if FET is read broadly, becomes unclear.

Part of the debate is perhaps obscured by terminology. The dichotomy between direct and indirect expropriation as well as the term "sole effects" mask the fact there are three, and not two, different mechanisms at play:

- If the State takes the legal title of the asset from the investor, there is direct expropriation and the matter is clear.
- The concept of expropriation must, however, be capable of encompassing cases where the State, for all practical purposes, takes the attributes of property as a matter of fact, even if it leaves the formal title with the investor as a matter of law. This is indirect expropriation or *de facto* expropriation. Situations such as these must be captured by the concept of expropriation as otherwise form would prevail over substance.
- Where the expansion of the case law has caused backlash is the further step pursuant to which expropriation occurs even though, both as a matter of law and as a matter of fact, the State has not taken any of the attributes of property from the investor, but rather through its conduct destroyed (or, worse, significantly impaired) the value of its asset. These cases are referred to as indirect expropriation or sole effects cases, but they really represent a "value-based" concept of expropriation.

This value-based expropriation assesses the legitimacy of governmental action exclusively through its effect on the value of the asset; something that neither policy makers nor those who elected them could understand. It also leads to results that are very hard to reconcile with the roots of the concept of expropriation, its etymology or its common sense meaning. Historically, compensation for expropriation was justified by the State taking for its benefit or that of its people the investor's asset. The idea that situations where the State (or society) does not benefit from the asset being called expropriation is understandably puzzling. It may be countered that expropriation is itself not unlawful and that the issue is merely compensation. The value-based case law, the argument would continue, is thus justified in only looking at the impact of the measure on the value since the only question is one of compensation. This argument, however, puts form over substance in the same way that only admitting direct expropriation would. It also imposes on the State an "obligation to preserve the investor's profits" that is akin to a sovereign guarantee of commercial viability of investments that finds no basis in law or in commercial realities.

In short, during the adolescence phase, States have concluded some 2,879 IIAs between 1990 and 2009, and this exponential growth was then compounded by an expansive reading of the substantive standards of treatment, leading to results that many would argue were not foreseeable for these States. This was especially true given that the bulk of these IIAs was concluded before 2000, at a time before the expansive case law of the 2000-2009 period became well known and understood.[40]

It did not take long for the backlash to investment law to appear. As early as 2001, *The New York Times* described NAFTA arbitral tribunals in the following terms:

> "their meetings are secret, their members are generally unknown, the decisions they reach need not be fully disclosed, yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged".[41]

The same article presented NAFTA as a system designed to protect corporation at the expense of public policy:

> "It is clear that investors have gained a shield far more powerful than almost anyone had imagined when NAFTA was written in the early 1990s. 'There is no doubt that these measures represent an expansion of the rights of private enterprises vis-à-vis government', said Prof. Andreas F. Lowenfeld, an international trade expert at the New York University School of Law. 'The question is: is that a good thing?' … Critics say that the corporate victories have spawned even bolder and broader challenges, each one further undermining public policy".[42]

40 Up to 2000, there were only some 35 investment cases available, most of which were not public at the time.

41 A. Depalma, NAFTA's powerful little secret; Obscure tribunals settle disputes, but go too far, critics say, *The New York Times* (2001).

42 Ibid.

In 2014, *The Economist*, far from being an anti-capitalist magazine, published an article entitled "Governments Are Souring on Treaties to Protect Foreign Investors", in which it noted ironically that:

> "If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process of known as 'investor dispute settlement' or ISDS".[43]

Similarly, in 2015, the *Guardian* also published an article entitled "The obscure legal system that lets corporations sue countries", in which the authors complained that:

> "Investors have used this system not only to sue for compensation for alleged expropriation of land and factories, but also over a huge range of government measures, including environmental and social regulations, which they say infringe on their rights. Multinationals have sued to recover money they have already invested, but also for alleged lost profits and 'expected future profits'. The number of suits filed against countries at the ICSID is now around 500 – and that figure is growing at an average rate of one case a week. The sums awarded in damages are so vast that investment funds have taken notice: corporations' claims against states are now seen as assets that can be invested in or used as leverage to secure multimillion-dollar loans. Increasingly, companies are using the threat of a lawsuit at the ICSID to exert pressure on governments not to challenge investors' actions".[44]

The pendulum, it seems, had swung too far in one direction, and it was time for it to revert in the opposite one.

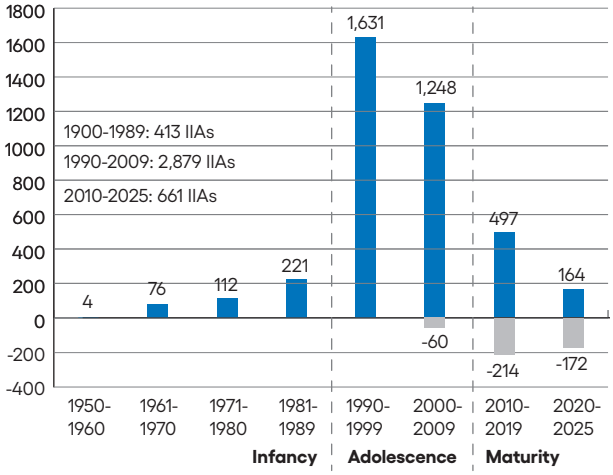
3. 2010-2025: Maturity?

In the aftermath of the adolescence phase, the past 15 years were marked by States – almost all of them, regardless of whether they are capital-exporting or capital-importing – concluding significantly less IIAs, terminating two-thirds as many IIAs as they concluded during these 15 years, and adopting language in their new IIAs designed to constrain the broad interpretation of substantive standards that had emerged in the adolescence phase. The predominant trend in the case law has also shifted towards less broad constructions of these standards even under the old IIAs that did not feature the new constraining language.

A – Stabilisation of the IIA network

The net IIAs, meaning for any given period the newly concluded IIAs minus the terminated ones, dropped from 2,819 net IIAs in the period from 1990 to 2009,[45] to a mere 275 net IIAs in the period from 2010 to 2025, more than a 90% decrease. This is because during the last 15 years, only 661 IIAs were concluded,[46] and some 386 IIAs were terminated.

Number of IIAs by decade from 1950 to 2025



43 The arbitration game. Governments are souring on treaties to protect foreign investors, *The Economist* (2014).

44 C. Provost, M. Kennard, The obscure legal systems that lets corporation sue countries, *The Guardian* (2015).

45 This number results from the subtraction of the number of IIAs that were terminated between 1990 and 2009, namely 60 IIAs, from the number of IIAs that were concluded during this same period, namely 2,879 IIAs.

46 This data is based on the UNCTAD International Investment Agreements Navigator.

While discerning policy on the basis of statistics is always perilous, an image nevertheless appears clearly based on these numbers.

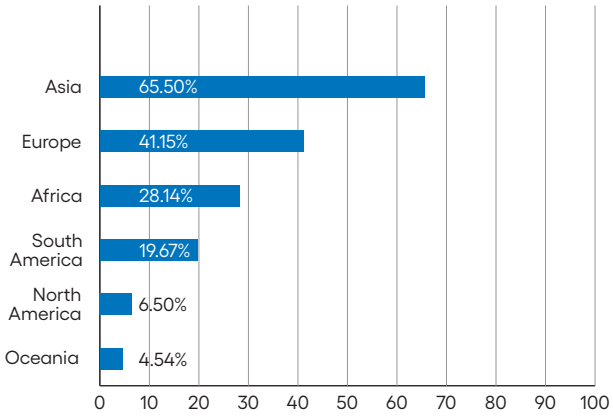
The net number of IIAs of the 2010-2025 period cannot be explained by natural decline. In other words, it would be hard to argue that, by 2009, most IIAs that could have been concluded (conservatively, some 7,000 IIAs) were already in force by then (as only some 3,292 were in force by 2009).[47]

It should be noted however that the 386 IIAs that were terminated between 2010 and 2025 include the 130 intra-EU BITs that were terminated by the Plurilateral Agreement of 5 May 2020, adopted by EU Member States following the *Achmea* decision of the European Court of Justice of 2018.[48] These 130 terminated BITs do not reflect a systemic rejection of IIAs, but a policy shift that is specific to the EU itself. Nevertheless, this still leaves some 256 terminated IIAs during the last 15 years, an alarmingly high number especially when contrasted to the fact that during the same period only 661 new IIAs were concluded.

Another relevant factor is that on 1 December 2009, with the entry into force of the Treaty of Lisbon, the EU gained exclusive competence over foreign direct investment as part of the Common Commercial Policy. As of that date, all IIAs between the EU and a third State were decided primarily by the EU Commission. Given that Europe was, by far, the continent driving the increase in IIAs during the adolescence phase, the sharp decrease in IIAs as of 2010 could very well be explained in part by the Commission's cautious approach to IIAs.

It is also relevant to note the geographical dynamics of these new IIAs. During the period from 2010 to 2025, it was Asia, rather than Europe, that led the pack with some 65.5% of agreements involving at least one Asian country, with Europe's share of all IIAs concluded during this period dropping to 41.13%.

Geographical dynamics of IIAs between 2010-2025



It is not just the number of IIAs concluded and terminated that is notable; the substance of the IIAs also evinces a reaction by States to case law that they seem to have deemed excessive.

B – The adoption of a more balanced definition of standards of treatment

(i) Reining-in fair and equitable treatment

The past 15 years have seen a significant limitation on the scope of the FET standard, first by arbitral tribunals, then by States through their new IIAs.

During this phase, more tribunals have focused the FET test on the protection of legitimate expectations and away from the list-approach that included broader and more ideological concepts. As noted by the *Novenergia* tribunal, citing the *Electrabel* tribunal:

> "First and foremost, the Tribunal agrees with the Respondent that the FET's primary element is the legitimate and reasonable expectations of the Claimant. The Respondent cites the arbitral tribunal's observation in the *Electrabel* award, according to which 'It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations'".[49]

47 If one assumes, conservatively, a total of 120 countries worldwide (instead of the actual 195 countries to account for minuscule economies and multilateral agreements), full IIA coverage would require each country to conclude an agreement with 119 others. To avoid double counting, the total number of IIAs necessary for complete coverage would therefore be 120 multiplied by 119 and divided by two resulting in 7,140 potential IIAs. This figure is significantly higher than the 3,292 IIAs concluded between 1990 and 2009 with a difference of roughly 3,000 IIAs.

48 *Slowakische Republik v. Achmea BV*, Judgment of the Court (Grand Chamber), 6 March 2018.

49 See e.g. *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, para. 7.75; *Novenergia v. Spain*, SCC Arbitration 2015/063, Award, 15 Feb. 2018, para. 648.

Perhaps the appeal of the protection of legitimate expectations as the primary (if not the only) real component of FET is that, if it is properly construed, it would be the least ideological component of FET.

Notions of good faith, fairness, justice, and propriety all require an agreed frame of reference or, alternatively, recourse to the tribunal's personal beliefs. Holding someone to their bargain does not. The tribunal needs to only satisfy itself that the bargain indeed exists and that it was infringed without formulating any value judgment on its part as to whether the bargain was a good one. It is therefore perhaps natural that this more objective component gained particular importance in the context of FET when the latter is read as an autonomous standard.

In turn, the test for the protection of legitimate expectations was clarified and made focused on only protecting those expectations that were:

- objectively reasonable;
- created by the State to induce the investment:
- relied on by the investor in order to make the investment; and
- then inappropriately frustrated by the State.

The *Silver Ridge* tribunal, for example, sets out the process for assessing legitimate expectations as follows:

> "Against this background, the Tribunal will discuss the Parties' various arguments subsequently and offer its own assessment of these arguments. In its analysis, the Tribunal will proceed in three steps: First, the question is to be addressed whether the conduct of the host State gave rise to any expectations, and if so, whether these expectations were legitimate and reasonable in the circumstances of the case (ii). Secondly, the Tribunal will examine whether the investors relied on these expectations in making their investments in the host State (iii). Thirdly, it must be clarified whether the host State frustrated these expectations by its subsequent conduct (iv)".[50]

Another example of the limitation of the broad scope of FET is the increased focus in the case law on the need for evidence of the investor's reliance on the relevant expectation when it made its investment.[51]

The case law also clarified that for an expectation to be objectively reasonable, the investor must have conducted its due diligence on the relevant framework and its possible evolution at the time of the investment[52] (although arguably one should distinguish the fact of whether or not due diligence was conducted, which is an issue of reliance, from the quality of such diligence which goes to the reasonableness of the expectation).[53]

Perhaps this issue of the need for the investor to have conducted its due diligence at the time of the investment best illustrates the divergence between the adolescence phase and the maturity phase. In the maturity phase, the need for due diligence is not seriously contested, but the debate has shifted to the extent of such due diligence.

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50 *Silver Ridge v. Italy*, ICSID Case No. ARB/15/37, Award, 26 Feb. 2021, para. 422.

51 See e.g. *Peter Allard v. Barbados*, PCA Case No; 2012-06, Award, 27 June 2016, paras. 217-218: "Reliance by the investor on the host State's representations is an essential element of a claim of breach of the FET standard based on the notion of legitimate expectations. The reliance criterion requires that the investor's decisions to invest be made in reliance on representations made to him by the State, including both his initial investment decision and also further investment decisions, such as a decision to inject additional capital into an ongoing project. In each case, a breach of the FET standard may arise if the State later acts in a manner contrary to its representations. However, the investor will be able to claim for damage in respect of only the part of its investment that was made after and in reliance on the State's representations"; *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08/AA629, para. 462: "In line with the standard set out above, a State fails to accord FET if it does not respect the legitimate expectations which the investor held at the time of the making of the investment. This raises the question of the scope of protection of the investor's legitimate expectations. The Tribunal finds that the main components of the doctrine of FET and legitimate expectations are helpfully summarised by the tribunal in *Antaris v. Czech Republic*. To qualify as legitimate, the investor's expectations must be based on assurances (i) given by the State in order to encourage the making of the investment; (ii) addressed specifically to the investor; and (iii) that are sufficiently specific in content. In addition, an investor must establish that it placed reliance upon the assurance …".

52 See e.g. *Antin v. Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 para. 537: "Second, the investor's expectations must be assessed at the time of the investment's making. Accordingly, the Tribunal must consider when the investment was made, what the circumstances were at the time and the information that the investor had or should reasonably have had, had it acted with the requisite degree of diligence (considering its expertise). In carrying out this assessment, tribunals must attempt to place themselves at the time of the investment and consider the information and conditions available at such time, and to refrain from appraising the investor's expectations with the benefit of hindsight"; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 494-495: "If the general legislation is to be regarded as a source of an investor's legitimate expectations, the investor must demonstrate that it has exercised appropriate due diligence and that it has familiarized itself with the existing laws. The decision in *Electrabel* laid considerable emphasis upon what the investor knew at the time when it made its investment; the investor's expectations were to be assessed considering the "information that the investor knew and should reasonably have known at the time of the investment …'".

53 Y. Banifatemi, M. Shelbaya, "Arbitrage international - Chronique des sentences arbitrales", *Journal du droit international, Clunet* (No. 1), janv. 2022, Chronique 2, II. A.

For example, in *OperaFund v. Spain*, the majority of the tribunal had found that Spain frustrated the investor's legitimate expectations to immutable tariffs as offered by a regulation, RD 661/2007, at the time of the investment.[54] The tribunal further added that the investor had conducted the necessary due diligence required for his expectations to be deemed legitimate.[55] Professor Philippe Sands dissented on the findings of the majority on liability on the grounds that the due diligence conducted by the investor was not sufficient as:

> "The obligation to 'inquire in advance' is not a high standard, yet the record before the Tribunal shows that it is not one that the Claimants have met. *Indeed, the evidence before the Tribunal shows that the Claimants made no inquiry at all in advance of their investments as to the prospects of RD 661/2007, or its Article 44(3), being changed*. This is despite the fact, as noted, that by the time OperaFund and Schwab made their investments (July 2008 and April 2009 respectively):
>
> (i) RD 661/2007 had been preceded by a multitude of changes in the previous decade (and at least one of those acts, RD 436/2004, had an analogous 'stabilisation' clause to Article 44(3) of RD 661/2007).
>
> (ii) The Spanish Supreme Court had ruled in March 2007 that a Royal Decree could be changed, and there could be no expectation that it would not be.
>
> (iii) EU rules were known to be evolving, and
>
> (iv) A global financial crisis was underway".[56]

Indeed, tribunals started to use the phrase "circumspect and reasonable investor" to denote that an investor should foresee changes to the framework governing its investment as may be dictated by the evolution of the State's regulatory needs:

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54 *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 Sep. 2019, paras. 481, 484.

55 Ibid. paras. 485-487: In view of this applicability of RD 661/2007 for the Claimants' investments, it is not determinative how relevant Claimants' reliance on the Cuatrecasas Due Diligence Report of October 2007 was. However, the Tribunal notes that RD 661/2007 was the only regulation analysed by that Report, which – while prepared for the benefit of Deutsche Bank was the developer – was later shared with the Claimants. The Tribunal agrees with the decision in *Novenergia* accepting the requirement of "an adequate due diligence prior to making its investment", was met when it held that the investor did, in fact, "carry out a reasonable analysis of the Spanish regulatory framework prior to its investment". It also agrees with the assessment of the tribunal in *Antin* which held that "it must consider when the investment was made, what the circumstances were at that time and the information that the investor had or should reasonably have had, had it acted with the requisite degree of diligence (considering its expertise). In carrying out this assessment, tribunals must attempt to place themselves at the time of the investment and consider the information and conditions available at such time, and to refrain from appraising the investor's expectations with the benefit of hindsight. It also agrees with the reasoning of the *Antaris* tribunal that the absence of 'real due diligence' on the part of the investors would vitiate a legitimate expectation claim. However, the Tribunal does not see a lack of due diligence by the Claimants. Both Claimants did what could be expected under the circumstances and at the time of their investments by a prudent investor. Claimants' reliance on a Legal Opinion by Cuatrecasas was also sufficient at least in confirming their expectations, because the Tribunal cannot see what other better means of information they could have obtained than that provided by what seems to have been the most competent law firm for these matters in Spain. The Tribunal also does not see a conflict of interest in the law firm's acting first for Deutsche Bank or later as Claimants' counsel in these proceedings. Rather, in view of its earlier engagement in this highly complex matter, it seems understandable that its advice was used later as well. In that context for the relevance of the information provided it is irrelevant whether such information was provided to Deutsche Bank or to Claimants directly. The Claimants had no reason to think that the Report for Deutsche Bank was incorrect or was outdated by the time they became aware of it. Further, a direct contact by Claimants, who were not familiar with the details of the relevant parts of Spanish law, to the Spanish authorities would certainly not have been able to provide better information. In particular, it has not been shown and cannot be argued that any further steps to achieve information would have resulted in an expectation that new measures which later were issued in 2014 were to be issued by the State which would fundamentally withdraw the assurances and benefits provided by the State such as in RD 661/2017. This reliance on RD 661/2007 is not changed by the answer given by Claimants and bank-witness during the hearing to the question raised by Arbitrator Sands whether they had inquired about possible future changes of the regulations. There was no need for such an enquiry by Claimant, because Article 44(3) expressly excluded such changes by the words 'shall not affect facilities for which the commissioning certificate had been granted'. This conclusion is not altered by Respondent's arguments related to the alleged understanding of other participants in the RE market (many of which have brought claims against Spain), Respondent's views of EU state aid law, and the Claimants' internal documents that Respondent argues show awareness of regulatory risk".

56 *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, Dissent of Professor Philippe Sands on Liability and Quantum, 13 Aug. 2019, para. 27 (emphasis added). See also, *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Dissent of Professor Philippe Sands, paras. 10-11: "[A]s noted above, the only expectations which are protected under the CT (and other investment treaties) are those which are objectively 'reasonable' and would therefore be shared by a 'prudent' investor. A tribunal must therefore carry out an objective assessment of an investor's expectations and not merely accept them as being protected by the treaty. Despite acknowledging this (Award, para. 638) and carrying out such an assessment in its analysis of the absolute stability expectation (Award, para. 660-679) the majority makes no mention of the requirement when considering nature, scope or effect of the relative stability expectation. Nor does the Majority consider the impact which the Claimants' *total* failure – on the basis of the evidence before the Tribunal – to have conducted any materially meaningful legal or financial due diligence prior to making its investment might have. Moreover, it is not for a tribunal to concoct an expectation on the part of an investor in the absence of any clear evidence before it as to what exactly that expectation may be. In this regard, one would have expected the Tribunal to have had before it evidence of a legal due diligence in relation to the risk of regulatory change, having regard to a series of judgments of the Spanish Supreme Court which made it crystal clear that, as a matter of Spanish law, the investor could have no expectation of a right of stability in relation to its investments: the judgements, all available publicly and available to the Claimants' advisers, put the investor on notice that changes had already occurred, and might do so again in the future, without a right of recourse under Spanish law. One might have also expected the Tribunal to have had some evidence before it of a financial or economic due diligence, exploring the consequences that different possible changes in the rate of return might have for the long term viability (and profitability) of the investment ...".

> "The Tribunal accepts the Claimant's evidence that '[t]he certainty provided by the fixed feed in tariffs for a 20-year period was a critical factor in justifying decisions to invest in solar plants in Italy' and that, in making the decision whether to invest in Italy's renewable energy sector, it 'relied on the entire legislative and contractual regime offered by Italy to induce investment in renewable energy'. *Yet, this merely proves that the Claimant intended to rely on the FIT being fixed for 20 years. As explained … the Tribunal's task of identifying relevant legitimate expectations calls for an objective assessment as to whether the circumstances, from the perspective of a circumspect and reasonable investor, justify the conclusion that the Respondent has made specific commitments regarding the stability of the incentivization system created by the pertinent legislative acts and energy accounts*".[57]

Nevertheless, despite this evolution in the case law, States went further in their IIAs, with some, such as the US[58] and Canada,[59] labelling the FET provision as "Minimum Standard of Treatment" and clarifying their view that MST did not evolve to become as broad as the adolescence case law suggested. Others, such as the EU, kept the FET language and label, but set a test for FET that is essentially the same as the *Neer* test.[60] Others, such as India[61] and the African Union,[62] removed all FET language and replaced it with due process in accordance with customary international law, protection against targeted discrimination, manifestly wrongful grounds and manifest arbitrariness. China went even further by limiting the FET language to due process in accordance with customary international law.[63]

These models are not merely models and have indeed been followed in practice through adopted treaties, such as CETA, USMCA, and in several recent FTAs and BITs.[64]

What is notable about these texts is that they emanate from the governments of States that, together, dominate international trade, while including both capital-exporting and capital-importing States that seem only unified by their rejection of the case law of the preceding twenty years. Indeed, the language of some of these treaties is directly addressing this case law.

For example, the EU Model BIT (which on this point is very close to the US and Canadian Models) provides:

> "1. Each Party shall accord in its territory to covered investments and to investors of the other Party with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 5.
>
> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 through measures or series or measures that constitute:
>
> (a) *denial of justice* in judicial or administrative proceedings; or
>
> (b) *fundamental breach of due process*, including a fundamental breach of transparency in judicial and administrative proceedings; or
>
> (c) manifest arbitrariness; or
>
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or

57 See e.g. *Silver Ridge v. Italy*, ICSID Case No. ARB/15/37, Award, 26 Feb. 2021, para. 436; *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Award, 21 July 2017, para. 667: "[I]n other words, what would have been the legitimate and reasonable expectations of a reasonable investor in the position of the Claimants here at the time they made their investment".

58 Art. 5, US Model BIT (2004); Art. 5, US Model BIT (2012); Art. 14.6, USMCA (2020).

59 Art. 8, Canada Model BIT (2021).

60 "Treatment of Investor and of Covered Investments" of the EU Model (2023).

61 Art. 3.1, India Model BIT (2015): "No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through (i) a denial of justice in any judicial or administrative proceedings, or; (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv) manifestly abusive treatment, such as coercion, duress and harassment".

62 Art. 17, AfCTA Draft Investment Protocol (2013): "Administrative and Judicial Treatment. 1. Each State Party shall ensure that, in administrative and judicial matters, investors and investments of another State Party are not subject to treatment which constitutes a fundamental denial of justice in criminal, civil, and administrative adjudicative proceedings, and evident denial of due process, a manifest arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings. 2. For greater certainty, Paragraph 2 shall not be interpreted as equivalent to fair and equitable treatment. For further certainty, Paragraph 1 includes the minimum standard of treatment under customary international law and does not allow for an interpretation and application of such standard that would go beyond the elements contained in Paragraph 1".

63 See e.g. Art. 11.4, China-Nicaragua FTA (2023); Art. 8.5, China-Mauritius FTA (2019); Art. 12.5, China-Korea FTA (2015).

64 Art. 8.10, CETA; Art. 14.6, USMCA; see also e.g. Art. 12.5, China-Republic of Korea FTA (2015); Art. 9.6, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018); Art. 14.7, Australia-Indonesia CEPA (2019); Art. 10.5, Regional Comprehensive Economic Partnership Agreement (2020).

(e) *abusive treatment* such as harassment, duress or coercion". [65]

This definition of FET is notable in that it relies on a "closed list" as explicitly noted in these models[66] and not an enumerative list of examples. It also puts the threshold very high by requiring, for example, that the breach of due process be "fundamental" or that the arbitrariness be "manifest" or that the discrimination be not only "targeted" but also on "manifestly wrongful grounds".

In fact, the Canadian Model explicitly addresses prior case law by explaining that arbitrariness can only be found:

> "when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact".

In so doing, the States are clarifying that concepts such as arbitrariness cannot be used to assess the soundness of a regulatory measure or policy adopted by the State, but rather that they can only be used to ensure that the purpose of the measure was indeed to regulate, however poorly or misguidedly, in view of the tribunal.[67]

The protection of legitimate expectation was entirely discarded as a component of FET in all these models, and their closed nature precludes it from playing any role in the tribunal's assessment, except in the case of the EU BITs. The EU Model, while still excluding legitimate expectations as a component of FET, notes that:

> "When determining a breach of paragraph 2, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment that created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated". [68]

In other words, frustration of legitimate expectations cannot itself be a breach of FET, but rather an element to take into account in order to assess one of the components of FET, such as targeted discrimination, whose other conditions must also be satisfied. What is more, the text still adopts a strict test for what counts as legitimate expectations that is consistent with the predominant case law of the maturity phase.

It remains to be seen whether this evolution will be resisted in case law, as had happened in NAFTA cases following the adoption of the Free Trade Commission Notes of Interpretation Note in 2001 on the MST,[69] or whether it will be taken into account even when applying the earlier versions of the relevant IIAs since the basic language of FET has not changed between models.

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65 "Treatment of Investor and of Covered Investments" of the EU Model (2023); Annotations to the Model Clauses of the EU Model BIT under "Treatment of Investor and of Covered Investments".

66 Art. 8.10, CETA; Draft Interpretation Note of CETA on Art. 8.10: "Treatment of Investor and of Covered Investments" of the EU Model (2023); Annotations to the Model Clauses of the EU Model BIT under "Treatment of Investor and of Covered Investments": "To begin with, paragraph 2 provides a closed list of improper and reprehensible State conduct that would constitute a violation of the standard. Element (a)-(e) have been distilled from arbitral jurisprudence and are widely regarded by tribunals, at this point of development of the FET obligation, to form its content. Paragraph 3 provides that, in determining a breach of paragraph 2, a tribunal may consider whether a Party made a specific representation to induce investments that created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, and which the Party subsequently frustrated. It follows that legitimate expectations may only be treated as a relevant consideration when assessing an allegation of violation of the FET standard through any of the (a)-(e) elements, and not as a standalone element that in itself would give rise to a violation of the FET standard" (emphasis added).

67 For a tribunal finding that arbitrariness allows an assessment of the soundness of a regulatory measure or policy adopted by the State, see e.g. *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Award, 11 Dec. 2013: "In other words, for a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors". For tribunals finding that arbitrariness cannot be used to assess the soundness of a regulatory measure or policy adopted by the State, see e.g. *Silver Ridge v. Italy*, ICSID Case No. ARB/15/37, Award, 26 Feb. 2021, para. 450: "In the context of its reasonableness assessment, it is not for the Tribunal to decide whether the host State made the right choice in selecting and prioritizing public policy objectives, but rather to determine whether the reasons relied upon by the host State in order to justify its conduct are, under the circumstances, plausible public policy objectives ..."; *Mamidoil Jetoil v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, para. 787: "If the State defines reasonableness of the tax law by the maximization of revenue, it is entitled to do so. The approach does not amount to unlawfulness under international law, and the Tribunal has no authority to replace the State's policy rationale by its own"; *Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Poland*, PCA Case No. 2014-31, Award, 16 Feb. 2017, paras. 268-270.

68 Annotations to the Model Clauses of the EU Model BIT under "Treatment of Investor and of Covered Investments".

69 Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001), B.1. See e.g. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 Oct. 2002, paras. 121, 122, 125; *Pope & Talbot v. Government of Canada*, Award in Respect of Damages, 31 May 2002, paras. 54-66; *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, paras. 212-213; *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98.

(ii) Quasi-universal rejection of the sole effects doctrine

During the period from 2010 to 2025, more tribunals rejected the sole effects doctrine (although many had already rejected it during the adolescence phase as well)[70] and more specifically declined to make a finding of indirect expropriation in circumstances where the investor retained title, possession and control of its investment, even if the value of this investment was substantially and permanently impaired by a governmental measure.[71] For example, in *Mathias Kruck v. Spain*, the tribunal found that:

> "Circumstances where an investor retains legal title, possession and control of its investment, and its essential complaint is that it is receiving less income from the investment than it had the right to expect, do not necessarily constitute an expropriation. 'Expropriation' connotes a taking of the whole or a substantial part of an investment or a degree of interference with the enjoyment of the rights of ownership or control that is tantamount to such a taking. To extend the notion of 'expropriation' to all instances of the impairment of the enjoyment of an investment or the disappointment of expected benefits does not service to international law and deprives the drafters of treaties and contracts of the utility of a valuable concept".[72]

Much more relevantly, States adopted language in their new IIAs, which is designed to reduce (and sometimes entirely eliminate) the expansion of the concept of expropriation that took place during the adolescence phase.

First, with respect to the subject matter of the expropriation, new IIAs, such as US BITs, Canadian FIPAs and Chinese BITs, expressly confirm that the only investments that may be expropriated are "property rights".[73] This excludes contractual rights from the scope of the expropriation provision, as they are personal rights and not property rights. While this clarification may have gone without saying in the infancy phase, many tribunals had interpreted expropriation provisions during the adolescence phase as extending to all rights, including personal rights such as contractual rights.[74]

Second, with respect to the form of expropriation, new IIAs either take the extreme route of excluding indirect expropriation altogether, such as Brazilian BITs that limit expropriation to cases of "formal transfer

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70 See e.g. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 199; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award 16 Dec. 2002, para. 142.

71 See e.g. *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 191-192.

72 *Mathias Kruck v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum of 14 Sep. 2022, para. 291; *GPF GP S.à.r.l v. Poland,* SCC Case No. 2014/168, Award, 29 April 2020, paras. 460, 465-467: "The Tribunal first observes that it agrees with the legal test of indirect expropriation set forth by the Respondent, according to which a State's measures qualify as indirect expropriation if (i) they result in a total or a near-total destruction of the investment's economic value; (ii) they deprive a foreign investor of the control over the investment; and (iii) the effect of these measures is permanent … First, the Prior Measures did not result in the total or near total destruction of the Claimant's investment. Before it demolished the Barracks, the Claimant was perfectly able to develop the Property in accordance with the 2005 WZ Decision, i.e., the perpetual usufructuary was authorized to build one or two storeys over ground with a maximum height of 5-11m. The Claimant's investments (the mortgage, the shares, the loans, the option agreement) therefore was not 'valueless' as the Claimant was able to develop the property and eventually derive profit from it. The Claimant and its predecessors failed to develop the property in accordance with the PUA and the 2005 WZ Decision, because of their aspiration to pursue a more ambitious project. Thus, any alleged damage resulting from the Claimant and its predecessors' change of development strategy is not caused by the Respondent. The City legitimately refused to issue a new WZ Decision in 2009, because the project contemplated by Parkview Terrace between 2007 and 2009 did not comply with the PIU and the recommendations of the Warsaw Conservator. Thus, the Prior Measures did not result in the total deprivation of the investment's value. In other words, the Claimant has failed to satisfy the first prong of the test set out in paragraph 460 above. This is sufficient to dismiss the Claimant's indirect expropriation claim. For the sake of completeness, the Tribunal notes that the second prong of the test is not met either, as the Prior Measures did not deprive the Claimant of control over its investment. Prior to the termination of the PUA, the Claimant and its predecessors were in full control of the Property and were able to develop the Property in accordance with the 2005 WZ Decision".

73 See e.g. Art. 9.4, Canada Model FIPA (2021): "A measure of a Party cannot violate this Article unless it expropriates a covered investment that is a tangible or intangible property right under the domestic law of the Party in which the investment was made"; Art. 7, China-Tajikistan BIT (2024); Annex 11-B, China-Nicaragua FTA; Annex B, China-Mauritius FTA (2019); US Model BIT (2012): "2. An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment".

74 See e.g. *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, paras. 163-164; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, para. 98: "It is also well established that an expropriation is not limited to tangible property rights. As the panel in *SPP v. Egypt* explained, 'there is considerable authority for the proposition that Contract rights are entitled to the protection of international law and the taking of such rights involves an obligation to make compensation therefore'"; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, para. 128: "Turning first to the identification of the property at stake, the Tribunal considers that the allegedly expropriated property is Saipem's residual contractual rights under the investment as crystallised in the ICC award. Bangladesh has not put forward convincing arguments that such rights should not be considered expropriable rights"; *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007, paras. 7.5.4-7.5.6: "This proposition is incorrect. There can be no doubt that contractual rights are capable of being expropriated, a number of treaty cases have arisen out of contractual disputes. The same act that may violate a treaty may also violate a contract, or both the treaty and the contract. The fact that there is overlap does not prevent a tribunal from considering the act as a possible treaty breach. Further, whether a given act was in breach, or was thought by one of the parties to be in breach".

of title or ownership rights",[75] or, more commonly and perhaps more appropriately, simply exclude the sole effects doctrine or value-based expropriation, while still protecting investors from *de facto* expropriation. This is the case of US BITs, Canadian FIPAs, EU BITs, and Chinese BITs. These IIAs exclude the sole effects doctrine by expressly providing that:

> "the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred."[76]

These IIAs also typically provide that:

> "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, *non-discriminatory measures* by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations".[77]

By (i) excluding genuine regulatory conduct from the scope of the expropriation provision (even where such conduct is misguided or erroneous), and by (ii) expressly rejecting the sole economic impact of a measure as a test for indirect expropriation, these new IIAs essentially confirm that indirect expropriation is designed to capture situations of *de facto* expropriation. These are situations where the formal title remains with the investor, but the attributes of property, such as possession or control, are taken by the State through its conduct. This returns the concept of indirect expropriation to that adopted in the early case law of the Iran-US Claims tribunals, such as *Starrett* and *Tippetts*, when formal title to the investment remained with the investor, but the State took over the possession and control of the investment.[78]

While FET and expropriation were selected above as examples to illustrate the evolution in international investment law, similar trends can be observed in respect of the other standards of protection, such as full protection and security (FPS) and most-favoured-nation provisions (MFN), and in respect of ISDS provisions.

With respect to FPS, although some tribunals during the adolescence phase had construed FPS as extending to legal protection[79] (and thus merging it with FET for all practical purposes), it is now essentially settled that FPS is both (i) limited to physical protection, and (ii) a best-efforts obligation – something that the new IIAs made explicit.[80]

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75 See e.g. Art. 7, Brazil Model BIT (2015): "For greater certainty, this article only provides for direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or ownership rights"; Art. 7.5, Brazil Ethiopia BIT (2016).

76 Annex 8-A, CETA. See also, Art. 5, Russia-China BIT (2025); Annex 8-B, Canada-Korea FTA (2014); Art. 13.10, Canada-Indonesia CEPA (2025); Annex 10.11, Canada-Honduras FTA (2013); Annex 9.11, Canada-Panama FTA (2010); Art. 11, Canada-UAE BIT (2025); Art. 17.10, Canada-Ukraine Modernised FTA (2023); Art. 8.35.2, Eurasian Economic Union-Vietnam FTA (2015); Annex 11-B, China-Nicaragua FTA (2023); Annex 8-C, Pacific Alliance-Singapore FTA (2022); Annex 14-B, UK New Zealand FTA (2022); Annex 13-B, UK-Australia FTA (2021); Annex 7-B, Republic of Korea-Indonesia CEPA (2020); Annex B, Chapter 8 China Mauritius FTA (2019); Annex 8-B, Peru-Australia FTA (2018).

77 Emphasis added. See e.g. Annex "Expropriation" of the EU Model BIT (2023); Art. 9.3, Canada FIPA (2021): "A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, even it has an effect equivalent to direct expropriation"; Art. 13.10 of the Canada-Indonesia CEPA (2025); Art. 11, Canada-UAE BIT (2025); Art. 7, China-Tajikistan BIT (2024); Annex I of the Canada-Australia BIT (2024); Art. 17.10, Canada-Ukraine Modernised FTA (2023); Annex 3, China-Hong Kong CEPA Investment Agreement (2017); Art. 8.35.2, Eurasian Economic Union – Vietnam FTA (2015); Annex 11-B, China-Nicaragua FTA (2023); Annex 8-C, Pacific Alliance – Singapore FTA (2022); Annex 14-B, UK New Zealand FTA (2022); Annex 13-B, UK-Australia FTA (2021); Annex 7-B, Republic of Korea-Indonesia CEPA (2020); Annex B, Chapter 8, Mauritius FTA (2019); Annex 8-B, Peru-Australia FTA (2018).

78 *Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others, IUSCT Case No. 24*, Interlocutory Award (Award No. ITL 32-24-1), 19 Dec. 1983, paras. 66-74; *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award No. 141-7-2, 29 June 1984, p. 11.

79 See e.g. *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408: "The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security. The cases referred to above show that full protection and security was understood to go beyond the protection and security ensure by the police. It is only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under a BIT"; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, para. 729: "The Arbitral Tribunal adheres to *Azurix* holding that when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments".

80 See e.g. fn 2 of Art. 8, Canada Model FIPA (2021): "For greater certainty, full protection and security refers only to the physical security of an investor and their covered investment"; Art. 14.6.2(b), UMSCA: "full protection and security" requires each Party to provide the level of police protection required under customary international law"; "Treatment of Investors and of Covered Investments" in EU Model (2023): "4. For greater certainty, 'full protection and security' refers to the Party's obligations to ensure the physical security of investors and covered investments"; Art. 7.6, Republic of Korea – Indonesia CEPA (2020); Art. 2, Bahrain-Hungary BIT (2024); Art. 4, India-Uzbekistan BIT (2024).

Similarly, with respect to MFN provisions, in the aftermath of *Maffezini*,[81] some tribunals construed MFN provisions, not as anti-discrimination clauses prohibiting effective treatment of the investors of the Contracting States that is less favourable than the effective treatment granted to the investors of third states, but rather as "provision-importation devices" allowing investors, after the dispute has arisen and the impugned conduct taken place, to "import" from other treaties any substantive standards or dispute resolution provisions that the investor deems more helpful to its case thus creating a patch-work bespoke IIA that is only applicable to this dispute.[82]

In other words, one party to the legal relationship, the investor, would be allowed to determine alone, with hindsight, the rules of conduct that should apply retroactively to assess the State's liability. In fact, at the time of the relevant conduct, the bespoke IIA would not have yet been created (and thus would not have been knowable by the State), as the investor would not have yet determined which provisions from what may be a vast and diverse network of IIAs should apply. Any construction leading to this outcome would essentially imply that investment treaties are not legal norms for they would fall short of the very definition of a rule of law.[83] During the maturity phase, arbitral tribunals have increasingly rejected this approach. For example, out of the 27 cases issued between 2010 and 2025 addressing the question of whether MFN can be relied upon to import dispute settlement provisions,[84] 20 cases rejected such importation.[85] States also concluded IIAs which expressly provide that:

- the term "treatment" in the expression most-favoured treatment does not extend to "dispute settlement procedures provided for in other international agreements"; or "substantive provisions included in other international agreements" and "that it was never intended" to do so; and
- what is required for a breach of MFN is an actual measure (e.g. law, regulation, decision etc.) that provides some better treatment to other foreign investors".[86]

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81 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 25 Jan. 2000, paras. 53-64.

82 See e.g. *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 3 Aug. 2004, para. 103; *Gas Natural SDG, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, para. 49; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, para. 55; *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Jurisdiction, 25 May 2006, para. 103; *National Grid PLC v. The Argentine Republic*, Decision on Jurisdiction, 20 June 2006, para. 93; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 5 Oct. 2007, para. 132.

83 J. Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on law and Morality* (1979), pp. 213-214: "Let us, therefore return to the literal sense of the "rule of law". It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it. As was noted above, it is with the second aspect that we are concerned: the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for confirming is his knowledge of the law. Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it".

84 (**1**) *ICS Inspection and Control Services Ltd v. The Argentine Republic (I)*, PCA Case No. 2010-9, Award on Jurisdiction, 10 Feb. 2012, para. 326; (**2**) *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 Aug. 2012, para. 199; (**3**) *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, paras. 397, 403; (**4**) *Sanum Investments Limited v. Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, 13 Dec. 2013, para. 358; (**5**) *Natland Investment Group NV, Capamera Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. The Czech Republic*, PCA Case No. 2013-35, Partial Award, 20 Dec. 2017, para. 291; (**6**) *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 Feb. 2017, para. 103; (**7**) *Itisaluna Iraq LLC and others v Republic of Iraq*, ICSID Case No ARB/17/10, Award, 3 April 2020, para. 148; (**8**) *Enrique Heemsen and Jorge Heemsen v. The Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 Oct. 2019, para. 408; (**9**) *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 Aug. 2019, para. 219; (**10**) *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal,* ICSID Case No. ARB/15/21, Award, 5 Aug. 2016 (RLA-71), paras. 134-135; 141-143; (**11**) *H&H v. Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 358; (**12**) *Junefield Gold v. Republic of Ecuador,* PCA Case No. 2023-35, Partial Award on Jurisdiction, 2 June 2025, para. 297; (**13**) *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China,* ICSID Case No. ADM/21/1, Award, 16 Feb. 2023, para. 211; (**14**) *Carlos Sastre and others v. United Mexican States,* ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 Nov. 2022, para. 206-207; (**15**) *Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/18/3, Award, 5 Nov. 2021, para. 167; (**16**) *Ansung Housing Co., Ltd. v. People's Republic of China,* ICSID Case No. ARB/14/25, Award, 9 March 2017, paras. 138-141 (**17**) *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Cas,e No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, paras. 120-121 ;(**18**) *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 7.9.1; (**19**) *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 17 Nov. 2025; (**20**) *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application under ICSID Rule 41(5), 30 Sep. 2022 para. 111; (**21**) *Gracia Gargour and Marie-Louise Gargour v. State of Libya (I)*, PCA Case No. 2019-31, Award, 9 June 2023; (**22**) *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25; Award, 14 Dec. 2023, para. 393; (**23**) *Idris Yamantürk and others v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Award, 31 Aug. 2020, para. 253; (**24**) *UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, paras. 162-163; (**25**) *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 Dec. 2012, para. 186 (**26**) *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 Oct. 2011, para. 72; (**27**) *Impregilo S.p.A. v. Argentine Republic (I)*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 108.

85 See cases **1** to **20**, supra note 84.

86 See e.g. EU Model Agreement (2023): "Non-discriminatory treatment. … 2. Each Party shall accord to investors of the other Party and to covered investments treatment no less favourable than that it accorded, in like situations, to investors of a third country and to their investments, with respect to operation in its territory … 5. For greater certainty, the 'treatment' referred to in paragraph 2 does not include dispute settlement procedures provided for in other international agreements. 6. For greater certainty, substantive provisions in other international agreements concluded by a Party with

Finally, even with respect to dispute resolution provisions, States reacted in their new IIAs to the multiplicity of proceedings in respect of the same impugned conduct (and the corresponding increase of the chances of success of the investor) that had resulted from the right that was recognised by some tribunals in the adolescence phase for shareholders to bring claims for reflective loss.

New IIAs thus include provisions barring such potential multiplicity by clarifying that in case of claims for reflective loss (i.e. claims for the diminished value of a parent's shareholding arising when its subsidiary incurs a loss) both the shareholder and its subsidiary must waive the right to bring any other arbitral proceedings, regardless of the legal basis of, and the law applicable in, these other proceedings, in respect of the same impugned conduct.[87] Some IIAs, such as the EU-Singapore FTA and the 2023 EU Model in general, go further by also requiring that all other shareholders in the subsidiary, even minority shareholders, not have pending claims (or have obtained a final award) in respect of said measure.[88]

Conclusion

It is difficult to assess objectively the evolution of international investment law described in this article. Too little perspective may place too much emphasis on a given trend that ends up being temporal, too much perspective may give the impression that there is no evolution at all since, today, we seem to be on our way back to where we were in the 1980s, with a return to MST, non-value-based expropriation, and MFN as a non-discrimination tool as opposed to a provision-importation device.

This is, however, the nature of pendular evolutions. One can only judge them retrospectively and with just the right amount of perspective, which involves discerning and delineating the correct scope of the necessary context. Too short term a focus, and each minor trend may seem like a revolution. Too long term a context, and it may seem we are not moving at all.

The trichotomy between "infancy", "adolescence" and "maturity" may be somewhat artificial, especially when it comes to construing case law because the case law during each phase is not uniform; one can find broad cases in the maturity phase and strict cases in the adolescence one. The trichotomy is nevertheless useful in illustrating the predominant trend during each phase and in gaining an overall sense of the evolution of international investment law as a whole.

This leaves the question of the current phase we find ourselves in over the past 15 years. This article, somewhat optimistically, refers to this phase as that of the maturity of international investment law. In other words, the emergence of a "synthesis" in the Hegelian sense as opposed to just another reaction. This is because the new IIAs and the predominant case law have maintained an adequate level of investment protection (e.g., did not return to the days of national treatment), while adopting standards of protection that are less likely to:

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a third country do not in themselves constitute the 'treatment' referred to in paragraph 2. Measures of a Party pursuant to those provisions may constitute such treatment and thus give rise to a breach of this Article" (emphasis added); Belarus-Hungary BIT (2019), Art. II: "... Each contracting Party shall in its territory accord to investors of the other Contracting Party and their investments treatment no less favourable than it accords, in like situations, to investors of a third country or to their investments with respect to the operation, conduct, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. 3. For greater certainty, the 'treatment' referred to in paragraph 2 does not include procedures for the resolution of investment disputes between investors and States provided for in other international investment treaties and other agreements. Substantive obligations in other international investment treaties and other international trade agreements do not in themselves constitute 'treatment' and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Contracting Party pursuant to these obligations".

87 See e.g. Art. 8.22, CETA; Art. 13.25, Canada-Indonesia CEPA (2025); Art. 11.20, China-Nicargua FTA (2023); Art. 14.26, Australia-Indonesia CEPA (2019); Art. 14.D.5, USMCA; Art. 19.4, Australia-China FTA (2015).

88 See e.g. EU Model Agreement (2023) "Multiple Proceedings"; Art. 3.7, EU-Singapore FTA (2019).

(i) interfere with the legitimate need of States to regulate their economies freely; or

(ii) require tribunals to be forced into injecting their own socio-economic conceptions into the assessment of the legitimacy of governmental actions.

Nevertheless, other signals may be read as suggesting that we are simply headed towards the antithesis of the adolescence phase, which would be equally unsustainable and therefore requiring further oscillation in the opposite direction in the future.

Notably, the increased use of security exceptions in IIAs is perhaps a worrying trend that may signal a transition to a State-centric antithesis. Security exceptions are provisions by which the Contracting States to a treaty seek to exclude from the scope of this treaty and/or from the possible bases of State liability a class of State measures that are related to a defined set of protected State interests (typically essential security interests, which is understood by States *latu sensu* to include not only issues of physical security but also economic interests and regulatory interests such as the protection of health and the environment).[89]

There are more than 530 provisions on security exceptions in IIAs that are currently in force. While initially a practice developed by the US, an increasing number of other States now include security exceptions or similar provisions in their IIAs, with India leading the trend with 86 provisions, far ahead of the US (47) and Turkey (32).[90] The trend is both accelerating in terms of quantity and expanding in terms of the scope of the autonomy it grants to States. More than 60% of the security exceptions currently in force (335) were adopted between 2007 and 2025, and about 45% of these provisions include explicit self-judging language – that is, language permitting the State invoking the security exception to determine for itself whether the exception applies.[91]

A significant portion of security exceptions currently in force include an explicit statement according to which:

> "For greater certainty, if a Party invokes [the security exception] in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies [the American variant]".[92]

Or:

> "Where the Party asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by [the security exception], any decision of such Party taken on such security considerations and its decision to invoke [the security exception] at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. Such a conduct shall not be open for review by any arbitral tribunal [the Indian variant]".[93]

The worry arising from provisions such as these is that they risk transforming IIAs into optional documents. If the State retains the discretion to decide (i) for itself and (ii) ex post facto whether any particular measure falls within the scope of the treaty, then, practically speaking, this State is not really bound by the treaty in any meaningful way. States are clearly free to agree to this outcome, a freedom they seem to increasingly exercise. However, this outcome does not appear to be sustainable in the long term, and another swing of the pendulum, at least in respect of security exceptions, is perhaps inevitable.

89 M. Shelbaya, "Security Exceptions", 39(2) *ICSID Review – Foreign Investment Law Journal* (2024), pp. 263–283.

90 India, the US and Turkey are followed by Japan (31), Canada (28), Mauritius (27), Finland (24), Singapore (22), the Czech Republic (22), Korea (22), China (20), UAE (16), Israel (12) and Qatar (12).

91 These statistics are based on treaties concluded up to 31 Dec. 2025.

92 See e.g. Trade Promotion Agreement between the United States and Peru (signed 12 April 2006, entered into force 1 Feb. 2009) (US-Peru TPA), Art. 22.2; Trade Promotion Agreement between the United States and Colombia (signed 22 Nov. 2006, entered into force 15 May 2012) (Colombia-US TPA), Art 22.2; Trade Promotion Agreement between the United States and Panama (signed 28 June 2007, entered into force 31 Oct. 2012) (US-Panama TPA), Art. 22.2; Trade Promotion Agreement between the United States of America and Korea (signed 30 June 2007, entered into force 15 March 2012) (US-Korea TPA), Art. 23.

93 See e.g. Brazil-India BIT (2020) and Annex I(ii) Security Exceptions; see also, Belarus-India BIT (2018) Annex I(ii) Security Exceptions.

Legal Disputes in the Art World

Shen Yi Thio, SC

Shen Yi Thio is the Joint Managing Partner at TSMP Law Corporation in Singapore. His academic and professional qualifications include a Master of Arts from the University of Cambridge; Barrister at Law (Middle Temple), England; Advocate and Solicitor Supreme Court of Singapore; and Master of the Bench of The Honourable Society of The Middle Temple, England. He served as the President of the Law Society, and as Vice-President of the Senate of the Singapore Academy of Law from 2015-2016.

On 23 January 2026, the author was a panelist at the ICC Dispute Resolution Services and ICC Singapore joint event ICC Art & Arbitration, which took place at the Singapore's Whitestone Gallery.

The art world, with its veneer of culture and glamour, often conceals a complex and turbulent reality. Beneath the polished surfaces of galleries and auction houses lies a market that is frequently opaque and under-regulated, making it fertile ground for conflict. These disputes go beyond commercial disagreements. From fragile partnerships between artists and galleries to high-stakes battles over authenticity, ownership, legacy, and artistic integrity, the financial stakes are significant, as are the reputational and historical implications. The article maps the tensions between artists, galleries, collectors, institutions and estates, and also considers why arbitration and mediation are increasingly becoming the preferred tools in an ecosystem where confidentiality, expertise, and reputation are paramount. As transactions grow more global and technology reshapes the creative process, the disruptive impact of AI on ideas of authorship and intellectual property is set to raise new legal questions and challenges to market participants.

Introduction

This article explores the intricate web of legal disputes that define the modern art world, examining the tensions that arise between its key players: artists and their galleries (**1.**), galleries and their collectors (**2.**), and major institutions and the estates of artists (**3.**). With reference to some of the disputes that have found their way into the public arena, we survey the core legal concepts at play-from contract law and copyright to fraud and negligence (**4.**). We then venture into the new frontier of artificial intelligence (**5.**) and its disruptive impact on authorship and intellectual property, and consider why alternative dispute resolution (ADR) methods like arbitration and mediation are becoming increasingly vital for resolving these sensitive and high-stakes conflicts (**6.**).

1. Artist vs. gallery: A precarious partnership

The relationship between an artist and a gallery is foundational to a successful career, yet it is inherently fraught with tension. While ostensibly a partnership, the power dynamics, particularly between an emerging artist and an established gallery, are often unbalanced. Many disputes stem from a lack of clarity in their agreements.

A primary source of conflict is financial transparency. Artists may be left in the dark about who purchased their work and for how much (because one never pays the sticker price), leading to suspicions of unclear accounting or that the gallery may be using nominees to secretly buy works and flip them at a higher price to make a profit. With less established artists and smaller galleries, Informal or vague contracts also create ambiguity around the extent of the gallery's exclusivity. This can lead to disputes when an artist feels the gallery is failing to provide adequate promotion and exposure, and subsequently resorts to selling work directly from their studio, which can undercut the gallery and cause price asymmetry, and worse, price confusion, in the market.

Pricing strategy is another classic battleground. Galleries typically prefer slow, controlled price growth to build a stable, long-term market for their artists. Conversely, artists, especially those gaining traction, may desire rapid price increases to capitalise on their

newfound popularity. This conflict highlights the power imbalance in the market; large, influential galleries can effectively lock an artist in, controlling their career trajectory and favouring certain artists over others with little transparency or accountability. As artists ascend from "emerging" to "blue-chip", the nature of these disputes evolves.

For emerging artists, conflicts are often about survival and trust. For established, blue-chip artists, they are about control and the careful management of their long-term market value and legacy. While artists trade a degree of autonomy for the stability and platform a gallery provides, the potential for conflict never disappears; it simply becomes quieter and more consequential.

2. Gallery vs. collector: The politics of access and control

If the artist-gallery dynamic is a partnership, the gallery-collector relationship is a delicate dance of supply, demand, and influence.

Galleries act as gatekeepers, controlling access to the most coveted artworks, while collectors seek not only to acquire the best pieces but also to enhance the value of their investments. This tension often revolves around access. Loyal, long-term collectors can become incensed when they are denied a coveted piece in favour of a new, high-profile buyer or a prestigious museum. From the gallery's perspective, they are entitled to act in their self-interest, either maximising profits, reeling in a new client, or burnishing their credibility by selling museum quality pieces.

On the other hand, a primary concern for galleries is the practice of "flipping," where a collector quickly resells a work at auction for a significant profit. This can destabilise an artist's nascent market and is viewed as a betrayal of the gallery's efforts to cultivate a serious collector base. To combat this, galleries may pressure collectors to hold works for a fixed period or blacklist those who are known to flip. Leaving aside issues such as access or "flipping", there is another tension between gallery and buyer. Collectors may feel manipulated because their interests depart from the galleries' interests. They may question whether they are receiving full and frank disclosure about a work's condition, provenance, edition size or where the work stands in the artists' oeuvre.

The gallery's advice, which can have a profound impact on a collector's decisions, may be perceived as serving the gallery's interests, rather than the collectors. Post-sale issues, such as damage in transit or the discovery of previously undisclosed condition problems, can further sour the relationship and lead to legal claims.

3. Institutions vs. estates: The battle for legacy and authenticity

When an artist dies, the stewardship of their life's work often passes to an estate or foundation. This creates a new and complex dynamic, particularly in their relationship with museums and other cultural institutions. At its core, this is a conflict between narrative control and curatorial independence.

- An artist's estate is typically focused on protecting the artist's reputation, preserving their original intent, and maintaining the market value of their work.
- A museum, however, seeks the freedom to interpret and present the work in new, sometimes critical or revisionist, contexts.

Who gets to define an artist's historical meaning? This question becomes particularly contentious when an institution plans an exhibition that the estate feels misrepresents or damages the artist's legacy.

Perhaps the most high-stakes battleground is authentication. Artist-endowed foundations have historically held immense power in determining which works are genuine. A refusal to authenticate can adversely affect the value of an art piece.

The Andy Warhol Art Authentication Board, for example, faced numerous lawsuits from collectors who alleged the board was manipulating the market and engaging in anti-competitive practices by refusing to authenticate various works. One prominent lawsuit, filed by collector Joe Simon-Whelan, accused the board of antitrust violations (*Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts, Inc.*).[1] The legal costs and reputational damage arising from such lawsuits ultimately led the Warhol board disbanding in the early 2010s. The authentication boards for Jean-Michel Basquiat and Keith Haring soon followed suit. These boards now issue only non-binding scholarly opinions, a testament to the legal risks involved in making definitive pronouncements on authenticity.

1 *Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts, Inc.*, No. 07 Civ. 6423 (S.D.N.Y. May 26, 2009); see e.g. J. Backer Laird, Joe Simon-Whelan drops antitrust suit against Warhol Foundation (Lexology, 7 Dec. 2010).

Another notorious example is the Mark Rothko estate scandal of the 1970s.[2] Shortly after the artist's death, his appointed executors-one of whom had close ties to Marlborough Gallery-sold and consigned hundreds of paintings to the gallery at drastically undervalued prices. Rothko's children sued, and the court found the executors guilty of a massive breach of trust and self-dealing. The case became a landmark ruling on the fiduciary duties of estate executors and a stark warning about the potential for conflicts of interest in the art world. This case illustrates how the opacity of the art market enables fraud and defalcation of this nature.

Any executor who is appointed by the artist on the basis that they understand the art world is also likely to be deeply connected with the stakeholders in the art world, thereby creating real potential for conflict and self-dealing.

4. Key legal issues in art disputes

The diversity of disputes in the art world is underpinned by a range of established legal principles.

- **Contract law**, whether it is a detailed agreement between a gallery and an artist or a simple invoice for a sale, governs the rights and obligations of the parties. Disputes often arise from breaches of these contracts or from claims of misrepresentation, mistake, or fraud during the formation of the agreement.
- **Property law** becomes critical in situations like the insolvency of a gallery, determining who has title to artworks that may have been consigned but not yet sold; or delivered, but not yet paid for.
- **Principles of agency** are also central, as galleries almost always act as agents for their artists, creating fiduciary duties of loyalty and care.
- **Trust law** normally governs the actions of artist foundations and estate executors, as seen in the *Rothko* case, imposing strict duties to act in the best interests of the beneficiaries.

a – Fraud, forgery, and misrepresentation

Questions of authenticity and provenance are a constant source of litigation. A spectacular example is the case of *De Sole v. Knoedler Gallery* (2015).[3] The once-venerable New York gallery sold dozens of previously unknown works purportedly by Abstract Expressionist masters like Mark Rothko and Jackson Pollock. When the paintings were revealed to be forgeries created by a painter in Queens, buyers sued the gallery for fraud and misrepresentation. The case highlighted the gallery's willful ignorance in the face of red flags about the works' dubious provenance and ultimately led to the gallery's collapse.

Proving forgery in a criminal (as opposed to civil) case can be difficult, and is often unable to cross the beyond reasonable doubt threshold. Proof relies on a fragile triad of evidence:

- provenance;
- connoisseurship (art-historical analysis); and
- scientific testing.

Provenance can be fabricated, art-historical judgments are subjective, and scientific tests can be inconclusive for more modern works.[4] The infamous story of Han van Meegeren, the Dutch forger who successfully duped experts-and Hermann Göring-with his fake Vermeer paintings during World War II, illustrates that even seasoned experts can be fooled.[5]

Misrepresentation need not involve outright forgeries. The long-running legal battle between Russian oligarch Dmitry Rybolovlev and Swiss art dealer Yves Bouvier centered on allegations of fraudulent price inflation. Rybolovlev accused Bouvier, whom he had engaged as a facilitator/broker, of secretly marking up the prices of 38 masterpieces by hundreds of millions of dollars.

2 New York Court of Appeals, *In re Estate of Rothko*, 43 N.Y.2d 305 (1977).

3 *De Sole v. Knoedler Gallery* 139 F. Supp. 3d 618 (S.D.N.Y. 2015).

4 See *R v. Gant and Siddique* [2017] VSCA.

5 The van Meegeren affair is a masterclass in deception. He was accused of selling Vermeer's "Christ with the Adulteress" to the Nazi Reichmarschall Hermann Göring. To defend himself against charges of treason for selling a national treasure to the Nazi regime, van Meegeren said he wasn't a traitor, but a forger, a crime far less serious. To prove his outlandish claim, he created another fake Vermeer, "Jesus Among the Doctors", in front of witnesses, while in custody. His forgeries were meticulous. He would buy obscure 17th-century paintings, wash off the original paint, and use period-correct pigments. These were mixed with a modern plastic resin (phenol-formaldehyde) in order to age and harden the paint when the canvases were baked. They were then rolled to create authentic-looking cracks. His forgeries were so convincing that he duped the era's leading art historians. Subsequent forensic chemical analysis revealed the modern materials, vindicating his defence. Van Meegeren was acquitted of treason but convicted of forgery, and sentenced to one year's imprisonment. He became a folk hero in the process, and died before he could start his sentence and also before he could appeal.

While Bouvier maintained these were legitimate profits, the dispute, which spanned multiple jurisdictions and also embroiled Sotheby's, exposed the opacity of high-end art transactions. In 2024, New York jury found in favour of Sotheby's on all counts, and they were vindicated of all misconduct.[6]

Misrepresentation claims cover a wide spectrum.

- Conversely, in Singapore's *Eng Hui Chieh David v. Opera Gallery* (2009),[7] a collector's claim of misrepresentation over the edition number of a Rodin sculpture was dismissed. A key factor can be the specific promises made during a sale.
- In *Baumann Xaioyan v Tong Lian Joo* (2011),[8] a buyer successfully sued after discovering some works were fakes, basing her claim on the seller's explicit 'no fakes' undertaking.
- In *Qatar Investment v. John Eskenazi* (2022),[9] a high-profile case involving purportedly ancient art, the England and Wales High Court ordered the rescission of the sale after the objects were found to be modern copies.

b – Negligence and the duty of care

Art experts, authenticators, and auction houses can be sued for negligence if they fail to exercise a reasonable standard of care in their professional opinions.

In *Thwaytes v. Sotheby's* (2015),[10] a seller sued the auction house for negligence after it assessed and catalogued his painting as being by a "follower of Caravaggio". The work, which sold for £42,000, was later attributed by a scholar to Caravaggio himself and being an original, it was valued in the millions. The court, however, ruled in Sotheby's favour, finding that the auction house had not been negligent and that there were no "red flags" at the time that should have prompted further investigation. The case highlights the difficulty of holding experts liable for what are often subjective judgments in a field where new discoveries can upend long-held scholarly consensus.

c – Copyright and fair use

Copyright law is a policy compromise designed to balance the private incentive for creators (creating a limited monopoly over their work) with the public benefit of accessing and building upon that work. In the art world, this balance is frequently tested.

- A well-known case is that of *Rogers v. Koons* (1992),[11] where artist Jeff Koons created a sculpture directly based on a photograph by Art Rogers. Koons claimed his work was a parody of contemporary culture's banality, but the court rejected his 'fair use' defense, finding it was a clear and commercial misappropriation of a protected expression.
- In contrast, in *Cariou v. Prince* (2013),[12] the court found that most of Richard Prince's alterations to a photographer's images of Rastafarians were 'transformative' enough to constitute fair use, as he had imbued the originals with new expression, meaning, and aesthetic.
- More recently, the U.S. Supreme Court's decision in *Andy Warhol Foundation v. Goldsmith* (2023)[13] narrowed the transformative use defense. The Court held that the Foundation's commercial licensing of a Warhol print based on a Lynn Goldsmith photograph was not fair use. The reasoning focused heavily on the commercial nature of the use: because the Foundation licensed the image to a magazine for a story about the musician Prince-a purpose substantially similar to that for which Goldsmith's original photograph would be used-it functioned as a direct market substitute, undermining Goldsmith's copyright.

6 *Accent Delight International v. Sotheby's*; see e.g. E. Kinsella, Sotheby's Cleared of Fraud in Suit by Russian Billionaire Dmitry Rybolovlev (https://news.artnet.com/, 30 Jan. 2024). D. Mangan, Sotheby's wins art fraud lawsuit by Russian oligarch Rybolovlev (https://www.cnbc.com/, 30 Jan. 2024).

7 *Eng Hui Chieh David v. Opera Gallery* [2009] SGCA 49.

8 *Baumann Xaioyan v. Tong Lian Joo* [2011] SGHC 178.

9 *Qatar Investment v. John Eskenazi* [2022] EWHC 3023 (Comm).

10 *Thwaytes v. Sotheby's* [2015] EWHC 36 (Ch).

11 *Rogers v. Koons* 960 F.2d (2d Cir. 1992).

12 *Cariou v. Prince* 714 F.3d 694 (2d Cir. 2013).

13 *Andy Warhol Foundation v. Goldsmith* 598 U.S. 508 (2023).

The global nature of the art market means copyright and trademark battles are fought across jurisdictions. A major recent example is *Donnelly v. Anand* (2022),[14] where the acclaimed artist KAWS (Brian Donnelly) brought a successful suit against a group for infringing his copyright and trademarks. The case resulted in a permanent injunction against the defendants and an order to pay over US$4 million in damages, underscoring the powerful legal tools available to artists to protect their intellectual property from unauthorised reproduction and sale.

Beyond the economic rights of reproduction and distribution, copyright law in many jurisdictions also recognises "moral rights". These rights are tied to the artist's personality and reputation, and typically include the right of attribution (the right to be identified as the creator) and the right of integrity (the right to prevent distortion or modification of the work that would harm the artist's honour). These rights protect the personal link between creators and their work, ensuring their legacy is respected even after the work is sold.

d – Insurance and valuation disputes

The high value of art makes insurance a critical but contentious area. Disputes often erupt over the valuation of a lost or damaged work. For example, in *Quorum v. Schramm* (2002),[15] a key issue was whether a stolen painting's value should be assessed at its market price or its higher replacement cost.

Insurers may also decline coverage entirely, citing policy exclusions or arguing that the policyholder no longer had an insurable interest because legal title to the artwork had already passed to a buyer, as was contended in cases like *Zurich American v. Felipe Grimberg Fine Art* (2019).[16]

5. The new frontier: AI and art law

The rise of generative artificial intelligence has thrown a new set of complex legal questions at the art world. Chief among them is the issue of authorship. Can an AI-generated image be copyrighted?

- The U.S. Copyright Office, in the case of the graphic novel "Zarya of the Dawn",[17] ruled that while the text and arrangement created by the human author were protectable, the individual images generated by the AI tool Midjourney were not, as they lacked sufficient human authorship. The Office likened the use of the AI to commissioning a visual artist, where the prompt-giver is not the author of the resulting work.
- However, a court in China took a different view in *Li v. Liu* (2023),[18] granting copyright protection to an image created using Stable Diffusion. The court found that the plaintiff's detailed prompts and iterative adjustments reflected sufficient creative choice and judgment to meet the requirement of originality. These conflicting approaches highlight the legal system's struggle to apply traditional, human-centric concepts of creativity to a new technological paradigm.

Another major legal battleground is the use of copyrighted images to train AI models. A wave of class-action lawsuits, such as *Andersen v. Stability* (2023)[19] have been filed by artists against AI developers including Stability AI, Midjourney, and Anthropic.

Stock photo companies have also taken legal action, with *Getty Images v. Stability AI* (2023)[20] being a prominent example. The plaintiffs argue that scraping millions of images from the internet without permission to train commercial AI products constitutes mass copyright infringement on an unprecedented scale. In response, the AI companies have mounted a fair use defense, arguing that the training process is transformative and does not create a market substitute for the original works.

14 *Donnelly v Anand* 21-cv-09562 (SDNY Sept 22, 2022).
15 *Quorum v. Schramm* [2002] 2 All E.R. (Comm) 147.
16 *Zurich American v. Felipe Grimberg Fine Art* (No. 18-CV-3136 (JPO), 2019 WL 4640391 (S.D.N.Y. Sept. 24, 2019).
17 U.S. Copyright Office Registration No. VAu001480196.
18 *Li v. Liu* (2023) Jing 0491 Min Chu No. 11279 (Beijing Internet Ct.).
19 *Andersen v. Stability AI* (2023) 744 F. Supp. 3d 956.
20 *Getty Images v. Stability AI* [2023] EWHC 2863 (Ch).

These landmark cases are in their early stages, but their outcomes will have profound implications for the future of both AI development and copyright law, forcing us to redefine the boundaries of creativity, authorship, and fair use in the digital age.

6. The path to resolution: Arbitration and mediation

Given the sensitive nature of art disputes, involving significant sums of money, fiercely protected reputations, and subjective questions of taste, it is no surprise that many in the art world seek to avoid public court battles.

Arbitration and mediation are far more attractive alternatives in managing the disputes that may arise. The primary benefit is confidentiality. The *dramatis personae* of these disputes are often the rich, (in)famous, and powerful, all of whom have a vested interest in keeping their conflicts out of the headlines.

Public litigation, especially provenance and forgery disputes, can also negatively impact the market value of an artist's work, and sabotage the value of a collection.

Furthermore, ADR allows parties to select a neutral expert – a specialist in art law or art history – to adjudicate the dispute, rather than relying on a judge who may have no background in the art market, or worse, no artistic sensibilities. These processes can also be more flexible and faster than traditional litigation, helping to preserve ongoing business relationships.[21]

The main constraint however, is that the ability to arbitrate or agree to some other form of ADR is that they are themselves creatures of contract:

(i) Even if there is a contract, there may not be an arbitration clause present.

(ii) Some of the disputes, for example the class action disputes concerning the training of AI models, arise outside contract law or independently of a contractual relationship, and by definition, there would be no prior arbitration agreement.

The first issue is more easily dealt with. If arbitration is seen as a better and more effective dispute resolution mechanism, more awareness of its benefits through education and public discourse would encourage parties to embed this in their contracts.

And for both issues above, even where an arbitration agreement is absent, after a dispute arises, given that arbitration agreement is a contract, the parties can agree to refer their dispute to confidential arbitration, instead of defaulting to the publicity of a court process.

Conclusion: A call for clarity

Legal disputes in the art world are as diverse and complex as the art itself. They reveal a market grappling with tensions between culture and commerce, transparency and secrecy, and tradition and innovation. From an artist fighting for their fair share to a collector questioning a multi-million-dollar purchase, these conflicts underscore the need for greater clarity and professionalism in an industry that has long relied on handshakes and mystique.

While the law provides a framework for resolving these disputes, the high costs and reputational risks of litigation are pushing the market towards more fit-for-purpose practices. The most effective way to manage these conflicts is to prevent them from arising in the first place. This requires clearer contracts that explicitly set out the rights and obligations of all parties, better education for artists and collectors on the legal intricacies of the market, and a greater reliance on expert-led dispute resolution processes that prioritise discretion, confidentiality and preservation of relationships.

As the art world continues to evolve, particularly with the advent of new technologies like AI, the need for a robust and adaptable legal framework has never been more apparent.

21 For further reading, see D. Plant, We Must Talk Because We Can - Mediating International Intellectual Property Disputes (ICC, 2008); Final Report on Intellectual Property Disputes and Arbitration, *ICC International Court of Arbitration Bulletin*, Vol. 9 No. 1, 1998; and ICC Intellectual Property Roadmap 2020.

"The Truth about Cross-Cultural B2B Relationships"
Lessons for International Arbitration

Colleen Parker Bacquet
Counsel, ICC International Court of Arbitration

The Truth about Cross-Cultural B2B Relationships is a six-part global report ("Report") that is the result of a strategic collaboration between ICC, Jus Connect, and McCann Truth Central. Based on a global business survey, the Report explores the role of emotion, culture and behavior and their impact on B2B relationships. The series not only demonstrates the importance of these variables in business relationships, but provides practical guidance in the form of clear recommendations for action. While the focus of the Report is on B2B interactions generally, it also provides valuable insight that can be applied in the diverse practice of international arbitration.

Introduction

Crossborder business relationships are often described in terms of contracts, strategy, and measurable outcomes. Yet, as revealed by *The Truth about CrossCultural B2B Relationships* Report, these relationships are shaped just as profoundly by emotion, culture, and behavioural expectations. Based on desk research,[1] it provides insight into the influence of cultural factors on the approach taken to forming and maintaining long-term, successful business relationships. The Report also challenges longstanding assumptions about how international business operates and why disputes arise.

For arbitration practitioners, the research offers more than context – it provides a lens through which to understand how parties arrive at arbitration and why their experiences of the process may differ. Arbitration does not occur in an emotional vacuum; it is part of a broader relational trajectory, often emerging at the lowest emotional point of a collaboration. Recognising this allows those involved in dispute resolution to better anticipate user expectations, manage cultural and behavioural divergence, and ultimately design processes that acknowledge the human realities behind commercial conflict.

Part 1: "Emotion in Business"

The first part of the Report series fundamentally reframes how international business relationships should be understood. It rejects the long-standing assumption that B2B decision-making is predominantly rational, contractual and data-driven, and instead demonstrates through global quantitative and qualitative research that emotion plays a central role through the lifecycle of cross-border commercial relationships. Using examples from the extensive interviews conducted, the Report illustrates that business relationships are not emotionally neutral transactions but evolving human interactions shaped by anticipation, optimism, happiness, excitement and disappointment.

The Report maps emotional responses across eight stages of the B2B relationship journey, from identifying the business need, supplier selection, contracting, onboarding and nurturing long-term relationships, through friction and challenges, adjustments, and to the ultimate decision whether to renew or terminate the collaboration.

Emotional intensity is highest at the early stage of the relationship, often before tangible results materialise because of the promise of the future collaboration, driven by optimism, excitement and opportunity. As the relationship progresses, emotions become increasingly volatile, turning into frustration when expectations are not met. The Report identifies the "friction and dispute" phase as the lowest emotional point, where feelings of fear, concern and loss of control usually appear. This emotional downturn occurs precisely

1 See The Truth about Cross-Cultural B2B Relationships - Part 1, at p. 2: "1,701 new quantitative surveys with business leaders, and over 20 in-depth interviews with global experts in B2B relationships".

when the commercial and strategic stakes are highest, with significant financial, reputational, and relational consequences for both sides.

One of the most striking findings is that happiness, not fear, is the dominant emotion in successful B2B relationships. Emotional positivity is strongly correlated with better business outcomes, including relationship longevity and success. In fact, 43% of respondents identified personal and emotional benefits, such as pride, confidence, and professional satisfaction, as the primary markers of success, outweighing 21% of respondents who emphasised purely financial considerations. This challenges the assumption that economic incentives alone sustain long-term business cooperation, an insight that may help reframe questions about dispute avoidance and resolution.

At the same time, the Report highlights that emotional risk is systematically underestimated in B2B relationships due to the long-standing assumption that B2B decision-making is predominantly rational. Decision-makers often assume that the objective criteria of detailed contracts will mitigate the emotional volatility involved in said relations, however, the data suggests the opposite. In international settings, where cultural differences influence how emotion is expressed, managed, and interpreted, misalignment in emotional expectations, for example, around communication styles, responses to conflict, or notions of respect, can create tensions even where contractual frameworks are strong.

As a result of these findings, the Report emphasises that emotional and cultural fluency must be considered core business competencies. Businesses can address these needs by implementing emotional intelligence training for business leaders and regular check-ins with partners to ensure that emotional attention and engagement remain high, especially during the phases where some people naturally tend to disengage, such as finalizing contracts, scope of work, and onboarding. Finally, the Report encourages the involvement of other departments such as legal and marketing to ensure attention to detail and engagement in the moments that matter most.

Why it matters for international arbitration

In-house counsel may be unsurprised by the finding that disputes, including arbitration, typically arise precisely at the emotional down point in the relationship, when optimism has collapsed into distrust and the parties feel disappointed or wronged.

By the time the dispute materialises into arbitration, emotions are not only present but heightened, shaping how parties perceive facts and engage with the process.

The Report's findings suggest that many arbitration users arrive at the process already operating under intense emotional strain, often because of cultural misunderstanding. What one party views as normal practice may be experienced by the other as aggressive, disrespectful, or bad-faith conduct, depending on cultural expectations around communication. Rather than simply resolve a conflict, arbitration becomes another stage in the emotional trajectory of the business relationship.[2]

The emphasis on emotional intelligence in the Report demonstrates that arbitrators are not merely *'judges'* of legal disputes, they are the ones in charge of a process that affects profoundly how parties experience justice. If disputes are not purely legal breakdowns but failures in managing emotional and relational risk, then arbitration practitioners may benefit from understanding that, even after the case is resolved, an ongoing relationship may benefit from an assessment of preventative strategies that can be implemented to avoid discord going forward.

Part 2: "Cultural Fluency in Business"

Rather than treating culture as a matter of national etiquette or surface-level customs, the second part of the Report series reframes it as a set of behavioural preferences that directly shape how business relationships are formed, managed, and repaired. The study's core argument is that cultural fluency reduces friction not by eliminating differences, but by anticipating them and working with them deliberately.

The research shows that while cultural tendencies may be more prominent in some countries than others, there is no single "national" way of doing business. Instead, every market contains a mix of behavioural preferences. This explains why international business failures often occur even when parties believe they have "done their cultural homework" by learning about a country's general norms. The Report rejects the idea of country-based stereotypes as a reliable guide for business behaviour and instead invites parties to explore and discover the cultural preferences of their client or supplier to adapt behaviour to suit the relationship.

2 See e.g. K. Gajaseni. Acta Non Verba: Justice and Cultural Sensibility in Global Dispute Resolution, *ICC Dispute Resolution Bulletin*, 2025-1; and ICC Toolkit for Arbitrators in Expedited Procedures (2026), section 2.4 "Cultural expectations and other considerations".

The Report identifies four broad cultural segments based on behavioural preferences in business relationships, which reflect different approaches to risk, structure, hierarchy, flexibility, communication, and conflict. They are not personality types, but rather contextual business behaviours, meaning the same individual or organisation may lean toward different segments depending on the circumstances:

- **"The Strategic Balancer"** is the largest cultural behaviour group in B2B relationships. Direct in their approach to communication, and less likely to worry about causing offense at the expense of clarity, Strategic Balancers seek partners that are transparent and able to display a proven track record at the outset of a business relationship. On the other hand,
- **"The Pragmatic Realists"** prefer structure and detail in business relationships but are the most likely to give a little flexibility in a contract if it helps both client and supplier ultimately reach a deal. For its part,
- **"The Decisive Custodian"** recognises the benefit of being decisive and in control in B2B relationships: they check the details of contracts and are the first to act when a project is going off track to avoid creating bigger problems for their business later in the process.
- **"The Innovative Explorer"** represents only around 1 in 5 people in business. They champion open communication and creativity, valuing emotional chemistry and co-creation over rigid structures, and viewing business relationships as collaborative partnerships that thrive on flexibility and shared success.

Following from these findings, it appears that misunderstandings in business frequently arise not from bad faith or incompetence, but from misaligned assumptions about how business "should" be conducted. For example, one party may interpret detailed contractual controls as a sign of distrust, while the other sees them as the foundation of a respectful and serious relationship.

Crucially, the study links cultural fluency to the entire B2B lifecycle. The different cultural segments influence how parties approach supplier selection, contract negotiation, onboarding, day-to-day relationship management, and responses to conflict. When cultural preferences are not understood early, friction accumulates and surfaces later at moments of stress, such as missed milestones or performance issues. By contrast, when preferences are identified upfront and revisited over time, relationships are more resilient and long-lasting.

The Report also highlights that businesses tend to underestimate the role of ongoing communication. Indeed, even highly detailed agreements cannot compensate for a lack of cultural alignment. As a result, cultural alignment emerges as a necessary complement to legal certainty.

This may be achieved by encouraging investment in cultural training and behavioural preferences, learning how to ask questions and recording observations about how new business contacts prefer to do business. New technology, including AI, may be a helpful resource to identify behaviour and cultural segments. However, these tools must be used to inform human judgment, not replace it. Furthermore, the study also encourages an earlier involvement of legal and operational teams to help manage differences before they harden into disputes.

Why it matters for international arbitration

For international arbitration, Part 2 offers a powerful explanatory framework for why disputes arise and why they so often escalate into arbitration, typically dealing with the aftermath of cultural misalignment rather than its prevention.

The identification of cross-cutting cultural segments helps explain why parties to the same contract can experience the dispute process very differently. A Strategic Balancer may expect procedural flexibility and dialogue, whereas a Pragmatic Realist may prioritise efficiency and closure. These differences influence not only settlement dynamics, but also how parties engage with arbitrators and the arbitration procedure.

While arbitration practitioners may be accustomed to engaging with counsel and tribunals from different cultural backgrounds, they would be better served by focusing attention on how parties communicate, escalate issues, and frame their positions, rather than relying on generalised cultural scripts.

Finally, Part 2 implicitly challenges those who engage and promote arbitration to reflect on how they approach the process. If disputes are often rooted in misaligned expectations about structure, flexibility, and authority, then arbitral procedure itself can either reinforce or alleviate those tensions. Procedural choices, such as how rigidly timelines are enforced, how tribunals communicate with parties, and how escalation is managed, may resonate very differently across cultural segments. An awareness of these dynamics can contribute to more effective case management, improved party engagement, and greater confidence in the legitimacy of the arbitral process.

Part 3: "Contracts or People?"

The third part of the Report series delves deeper into how contracts and people play a role in delivering business success or, potentially, creating friction and business disputes. It tries to answer a fundamental question in international commerce:

> "What really determines success or failure in business deals: the contract or the people behind it?"

The study shows there is not a consensus answer. Drawing on survey data from 1,700 senior business leaders and legal professionals, the study found that respondents are split almost exactly 50/50 between those who believe that business deals are primarily the result of weak contracts or poorly defined scope, and those who attribute failure to breakdowns in relationships between people. This divide reflects fundamentally different assumptions about how business risks should be managed, how trust is built and what a contract is fundamentally for:

- **For one group, the contract is the primary stabilising force in the relationship**. It is seen as a mechanism for certainty, accountability, and protection. From this perspective, clarity, structure and rigidity are virtues. A Nigerian respondent explicitly described contracts as a "shield", allowing businesses to terminate when obligations were not met, without the need to renegotiate.
- **For the other group, the contract is a framework for collaboration and a reference to guide future interactions**. It is understood that it is not a fixed rulebook, given that business realities change overtime. From this perspective, the contract does not mark the end of negotiation, but rather the start of ongoing adaptations and adjustments once the relationship has been formally started. As one international arbitration lawyer in the US said of some clients: "the signing of a contract is no more than an invitation to start trying to revise it". In this point of view, rigid reliance on contractual terms may be perceived as destructive to long-term value.

The study shows that these differences extend beyond attitudes toward contracts themselves and into expectations about how people should interact. Some business leaders define strong relationships in terms of predictability and adherence to agreed procedure, whereas others associate successful relationships with adaptability. Neither approach is superior, but friction and problems arise when parties assume that their own definition of good practice is shared.

The Report illustrates how these discrepancies in viewpoints often surface when pressure in the business relationship increases, for example when performance falters. At that point, disagreement about whether to insist on contractual compliance or to renegotiate collaboratively can quickly escalate into conflict. What one side sees as reasonable enforcement may be seen by the other as bad faith.

Part 3 also highlights that most businesses are internally inconsistent. Within the same organisation, different teams may have opposing views between structure and flexibility. Without coordination, the internal differences can be projected outwards and create confusion which ultimately might lead to undermine trust.

It is because of this that the Report recommends businesses to:

- To mix teams and profiles for increased effectiveness, thus giving greater flexibility to departments and individuals.
- Identify internally, and for the client, of preferences towards structure and flexibility so that individuals can adapt their approach to avoid future frictions.
- Be aware of the need for experts and specialists at different times of the emotional rollercoaster involved in the B2B journey to avoid future misalignments.

Why it matters for international arbitration

For international arbitration, Part 3 offers a particular lens through which to understand how disputes reach the arbitral stage. Arbitration often arises when parties have fundamentally different beliefs about what the contract was supposed to do. One party may approach the tribunal expecting strict enforcement of agreed terms, while the other arrives expecting recognition of relational context, adaption, or commercial reality.

The Report explains why these disputes are often accompanied by mutual incomprehension and frustration. Parties are not merely arguing about contractual interpretation, they are implicitly arguing about competing philosophies of business. Arbitration, in this sense, becomes the place where philosophies collide.

This has implications for how arbitration is conducted and experienced. Arbitrators trained primarily in doctrinal analysis may instinctively privilege contractual structure, while parties from more relationship-oriented backgrounds may perceive the process as overly formal. Part 3 therefore reinforces the importance of procedural and cultural sensitivity in arbitral practice, while emphasising that these preferences can also be personal and do not always adhere to strict cultural expectations or clichés.

Part 4: "Win-Win vs. Win-Lose"

The fourth part of the Report series examines how business across jurisdictions understand, experience, and resolve disputes once commercial relationships begin to fracture. The study reveals an important finding about the current commercial context in which we are operating: global business disputes are growing at roughly twice the rate of global trade. While international trade increased by approximately 13% between 2013-2017 and 2018-2022, the number of newly registered arbitration cases rose by nearly 29%, representing an estimated US$80 billion in new disputes annually.

A central point in the Report is how attitudes towards disputes vary significantly across regions and cultures. In some markets, particularly in some parts of North America, disputes are viewed as a routine and acceptable feature of doing business. Whereas in other regions, such as Europe, disputes are more commonly perceived as a disruption or failure of the business relationship, with a strong preference for early settlement. These differences in attitude influence how contract and dispute clauses are drafted at the negotiation stage and later how disputes are handled once they arise.

The Report further identifies how most business leaders (82%) agree in principle that suppliers and customers need to succeed together, but also shows there is often neglect of how deals might falter. During contract negotiations and onboarding – the stages at which dispute clauses are typically drafted – emotional engagement is at its lowest. Business leaders are focused on momentum, delivery, and the promise of future success, and are therefore less inclined to dwell on worst-case scenarios.

Based on research from psychology and behavioural science, the study finds that attention is linked to emotion. When emotions are either strongly positive or strongly negative, attention is high. Adding to this, it is also human nature to assume the best and avoid spending time contemplating worst-case scenarios. These conclusions help explain why dispute clauses lack details or are under-prepared despite their critical importance later in the business.

When business deals go wrong and disputes arise, business leaders aim to find a mutually beneficial resolution, this is why the Report recommends creating room in early discussions and negotiations for win-win solutions. Of the 1,700 senior business leaders and legal professionals respondents to the survey:

- **77% preferred amicable solutions,** categorised as interest-based strategies, focused on reconciling the basic interests of disputants through problem-solving negotiations, fostering better outcomes and stronger relationships.
- **52% preferred rights strategy,** determining who is right through legal proceedings or arbitration, often resulting in higher costs and possibly straining relationships.
- **29% preferred power-based strategies,** resolving disputes based on who has more power through leverage or threats, which may include guerilla tactics.

Why it matters for international arbitration

The data shows that most parties arrive at arbitration after exhausting interest-based solutions. Arbitration is therefore not a first-choice dispute resolution mechanism but instead a necessity when collaboration or compromise has failed.

The Report emphasises how a well-crafted contractual dispute clause reduces the likelihood of disputes in business deals and breakdowns in the relationship. It further recommends business leaders to avoid adding the last minute "midnight clause", i.e. provisions that are copied from earlier contracts rather than a strategic choice – and instead recommends maintaining high levels of attention during critical phases such as the contract drafting and negotiation. Furthermore, it recommends building teams of individuals, such as contract lawyers and arbitration experts, who find the contract negotiation stage emotionally engaging.

This has an important effect on how the arbitration proceedings are conducted. Arbitrators that recognise this context may be better placed to manage proceedings in a way that invites opportunities for settlement and reinforce the win-win solution that parties on their own failed to achieve.

Establishing specific moments in the procedural timetable for potential settlement discussions or mediation may open the parties to the possibility of finding such win-win outcomes. Similarly, drafting arbitration agreements to provide for mediation or negotiation windows as a pre-arbitral step may facilitate cooperation rather than conflict.[3]

Part 5: "Siloed Departments Limit Business Success"

The fifth part of the Report series dives into how working in departmental silos can create friction and challenges in relationships between clients and suppliers. This occurs when departments operate in isolation, often seeing only part of the business process, which leads to inconsistencies as projects transition through different phases of the B2B emotional roller coaster.

The Report starts with the observation that B2B relationships are long, complex and involve multiple stakeholders over time. Responsibility for managing relationships typically shifts through different departments that operate sequentially rather than collaboratively. This may encourage uneven emotional engagement across the B2B journey. For example:

- **Legal and finance teams** are highly visible and involved during contract negotiations but are not usually involved during delivery and relationship management, even though many disputes arise from misalignment in the contractual terms;
- **Teams responsible for delivery and relationship management** often inherit contractual obligations without knowledge or understanding of the negotiations from which they arose.

This misalignment increases the probabilities of issues escalating into disputes.

While delegation is rational and normal in B2B relationships, the Report shows that it creates blind spots when specialists in different stages of the relationship are isolated from broader strategic decision-making and when senior leaders disengage precisely at the stages that require attention to detail or the relationship itself.

The role of lawyers. While business leaders value legal expertise at the beginning of the relationship during contractual negotiations and at the end of the relationship to resolve renewal or termination, 33% of respondents fail to involve lawyers in the day-to-day management of the relationships and instead prefer to rely on department heads and business teams to find solutions during moments of friction. Although this approach is often motivated by the desire to pursue win-win outcomes, the Report paradoxically argues that excluding lawyers at early stages of friction undermines stable relationships by allowing misunderstandings to accumulate.

This critique was developed through the metaphor "the frog at the bottom of the well" vs "the turtle in the ocean". Businesses operating with departments can sometimes resemble the frog in the well, seeing only a small circle of the project. Whereas the inclusion of teams into multiple stages of the B2B journey allows them to be like a turtle in the ocean, able to see the vastness of the entire project and contribute accordingly.

The Report also explores how business leaders have different priorities and selection criteria when choosing external lawyers and experts when disputes arise. The data demonstrates that reputation, expertise, industry specialisation and prior relationships are the most influential factors. Diverse international experience and familiarity with diverse legal systems are valued, as opposed to cultural awareness and characteristics such as race, gender and age which are not given the same level of consideration, if at all.

Potential role of technology and AI in improving how businesses integrate expertise and mitigate unconscious bias. AI-enabled selection process tools may be able help businesses identify the most suitable external legal counsel to match the specific B2B stage the relationship is at for a better outcome. Furthermore, AI tools can help identify when and where specialists are needed most across different stages of the B2B journey to avoid frictions that end in disputes. However, it is important to remember that these tools may be built on data that reflects earlier biases and therefore understood within that context, rather than relied on for purely objective and neutral outputs.

3 See e.g. the ICC Report on Facilitating Settlement in International Arbitration (2023), for guidance on case management techniques; mediation windows and protocols; and preliminary views and settlement conferences.

Why it matters for international arbitration

By the time an arbitration has commenced, the underlying relationship in a B2B partnership has usually passed through multiple organisational silos or departments, each shaping the emotions and narrative of the relationship. It is because of this that the claims presented in the arbitration might not only reflect legal disagreements but also accumulated misalignment over time and perspectives. This highlights an opportunity for legal professionals to implicate themselves by guiding and safeguarding business interactions from inception to completion.

Part 5 also highlights that arbitration is frequently pursued at a late stage of conflict, at which point legal experts are often sidelined in day-to-day management, avoiding the possibility of renegotiation and interest-based solutions. Arbitration lawyers would be well served by being turtles in the ocean of their client's needs, understanding their business objectives and relationships so that they may respond and advise at the first signs of conflict.

Part 6: "One Size Does Not Fit All"

The sixth part of the Report series concludes by examining the fundamental tension between B2B relationships: the gap between the qualities that people admire in business leaders and the values prioritised in day-to-day business, highlighting how leaders must navigate between acting as figureheads for their organisations and creating meaningful engagement with colleagues, suppliers, and clients in everyday interactions.

Innovation emerged as the most admired leadership trait and one of the emotional highpoints in the B2B experience: the act of transforming a thought into reality through the process of identifying new opportunities is highly admired. Nonetheless, when respondents described how business is conducted in practice, responses indicated that business leaders are also valued for having leadership skills and technical expertise to guide ideas through competition.

Moreover, the Report challenges the persistent gender stereotypes in business leadership which tend to reflect assumptions about leadership style rather than actual behaviours or capabilities. Historically, female business leadership has been characterised as fundamentally different from male leadership. Although women are more frequently described using "supportive" adjectives such as care, service and inclusion, compared to the language used to describe male leaders, the behavioural data shows a different story. Across more than 161 different "micro-behaviours" examined, 90% showed no meaningful behavioural differences between genders. In fact, men and women have similar views about collaboration with proven performance as well as having a similar response to a supplier failing or not meeting expectations. Where small differences did appear, such as women taking a broader and more explanatory strategy to supplier selection while setting more conservative goals and realistic approaches to objectives, they were not indicative of different leadership styles.

Why it matters for international arbitration

With this, the Report demonstrates that the biggest gap is not one of behaviour, but of perception and stereotype; demonstrating that leadership behaviours are shaped more by context and experience than by gender. Organisations, including arbitration institutions, have an opportunity to shift how leadership potential is recognised, ensuring it is based on skills, experience, and strategic thinking rather than assumptions.

Conclusion

The strong emphasis placed by business leaders and businesspeople on trust, care,[4] and mutual success suggests that many disputes are experienced not as legal or financial problems, but instead as relational and emotional failures. When expectations based on trust are not met, the sense of breach and disappointment are more emotionally charged than the actual contractual breach. This helps explain why the narratives brought to arbitration frequently involve accusations of betrayal, unfairness or bad faith, even when the legal issues in dispute are quite narrow.

With these key insights in mind, and with the practical recommendations outlined, "The Truth about cross-Cultural B2B Relationships" Report provides the tools to remap the world according to business culture as it actually is, rather than how it is perceived, so that professionals can rethink the success formula and reimagine dispute outcomes.

4 Part 6 of the Report shows that only 5% of the language used to describe admired business heroes focused on trust and honesty, yet these emerged as the most important values when participants shared advice on how to be effective in business. Furthermore, the Report highlights that most businesspeople have a high level of trust towards their partners. Similarly paradoxical, when businesspeople described the characteristics of admired business heroes, the language of care appeared in only 8% of the language used. However, this characteristic emerged as the second most important value when participants described their daily business behaviours and as a value that is necessary to establish long-term relationships.

11th ICC Institute AustralAsian Chapter Connect

The Role of In-House Counsel in Arbitration: Strategies for Controlling Costs and Outcomes

Earl Rivera-Dolera
Arbitrator, Partner, TKI Singapore LLP; Member, ICC Institute of World Business Law

While arbitration has become the preferred method of resolving complex commercial disputes, especially in cross-border transactions, the rising costs and procedural complexities associated with arbitration continue to pose challenges for companies and governments alike. This report summarises the discussions and practical insights during the 11th Australasian Chapter Connect organised by ICC Institute of World Business Law ("ICC Institute") at the occasion of the 3rd ICC Philippines Arbitration Day in February 2025.[1] This report offers a roadmap for in-house lawyers navigating an arbitration procedure, covering issues from cost management to strategy, collaboration with external counsel, as well as future trends and tools that in-house counsel may employ in their arbitration strategy.

1. General overview: The strategic role of in-house counsel in arbitration

Together with an audience of experienced in-house counsel, private practitioners, and government officials, the panellists explored the critical topic of the strategic role of in-house counsel. They unanimously agreed that in-house counsel are the conductors of the arbitration orchestra. Their primary role is not to argue the case (that responsibility lies with external counsel) but to lead internal coordination, manage costs, select the right advisors, and align the dispute strategy with the company's broader commercial objectives, maximising the claims available arising from disputed matters, and balancing costs considerations. According to an attendee:

> "We are the bridge between legal strategy and business strategy. It's our job to make sure the arbitration serves the company, not the other way around."

In-house legal teams appreciate early candour from external counsel, particularly with regard to the strength or weakness of potential claims or counterclaims, as well as a realistic assessment of the viability of the supporting evidence. There have been cautionary tales of clients being advised to pursue claims or counterclaims that exceeded what the evidence could reasonably support, cases where the discussions or negotiations at the contracting stage between disputing parties are not well-documented resulting to reliance to "he said, she said" testimonial evidence. In arbitration, this often results in higher advance cost deposits due to the increased amount in dispute – only for the claims to ultimately be dismissed as unmeritorious in the award, with the added burden of adverse costs payable to the prevailing party.

2. Managing costs effectively

In-house legal teams can manage arbitration costs by way of three key strategies:

(i) Early scoping and budgeting.
(ii) Strategic use of resources.
(iii) Outside counsel offering reasonable fee arrangements.

Before commencing arbitration, the legal team, working closely with external counsel, should undertake a comprehensive case assessment that goes beyond evaluating the merits. This includes identifying potential jurisdictional issues, such as expired limitation periods or arbitration clauses that are vague, invalid, or inoperable. Early awareness of such issues can help companies avoid costly jurisdictional challenges.

In parallel, developing a realistic budget that reflects the expected phases of the dispute and engaging external counsel on flexible fee arrangements can enhance cost predictability and promote efficiency for both in-house and external teams.

1 The event, co-organised by ICC Institute members Earl Rivera-Dolera (Arbitrator, Partner, TKI Singapore LLP) and Dino delos Angeles (Partner, Romulo Mabanta Buenaventura Sayoc & De Los Angeles), featured the panellists Marie Amular-Bantog (Senior Vice-President, Head of Legal, ACEN Philippine operations), Jared Amoroso (Partner, Quisumbing Torres; President, Philippine Institute of Arbitrators) and Earl Rivera-Dolera.

Cost control support provided by external counsel. Collaboration and transparency are key. External counsel can offer tiered billing rates, fixed-fee estimates in stages (especially for pleadings or hearings), and more agile case management techniques such as leaner teams and document review protocols. In-house teams appreciate regular updates from external counsel as regards out-of-scope work to be undertaken that may result to increase of initial fee estimates. This is especially so for large conglomerates, government entities, multinational corporations where the approval process for additional costs may be prolonged and go beyond the ordered deadline(s) from the arbitrators.

Cost control in the public sector. In arbitration involving States, a careful budget oversight and inter-agency coordination are required. Governments often rely on competitive tenders to appoint counsel and enforce stricter budgeting policies. It was said:

> "For us, cost control is not only financial but political. We are accountable to the public."

Third-party funding is gaining traction. While still relatively new in Southeast Asia, panellists agreed that litigation/arbitration funding is becoming more common, especially in high-value or investor-State disputes. However, usage is often constrained by confidentiality concerns and unfamiliarity with funder terms and their enforceability in the Philippines. The consensus: in-house counsel should be open to exploring funding, but must weigh control, disclosure, and pricing risks carefully.

3. Optimising case strategy and process management

Early case assessment driven by in-house counsel. Early case assessment is crucial for both cost and outcome management. In-house counsel are uniquely positioned to gather internal facts quickly, identify key documents and witnesses, and pressure test arguments before external counsel are even engaged. One panellist said:

> "If you wait until counsel is on board to start figuring out your case, you're already behind."

However, it is also recognised that not all companies have the privilege of having in-house teams experienced or trained in litigations or arbitrations. It was also recognised that not all jurisdictions have in-house counsel who are qualified and trained lawyers. Another challenge relates to long-term contracts (e.g. 10 or 20-year purchase agreements) where disputes may arise at the tail-end of the contract, where key employee-witnesses may no longer be within the employ of the disputing companies.

In-house teams also emphasised their growing awareness of enforcement of arbitral awards as a vital strategy in the early case assessment. As much as possible, they prefer to avoid costly challenges to jurisdiction, setting aside of awards, and resisting enforcement, and they appreciate external counsel advice on enforcement challenges to be avoided early on.

Managing procedural efficiency. In-house counsel should play an active role in shaping the procedural strategy. This includes reviewing pleadings and submissions without delay to ensure alignment with internal positions, coordinating internal witnesses (including witnesses who may no longer be connected with the company) and document production efficiently.

How can external counsel support this effort? The importance of clear communication was stressed. Law firms should build procedural timelines jointly with in-house teams and avoid over-lawyering, i.e. where issues raised by in-house teams could be adequately addressed by bulletpoints via an email, then external counsel should not prepare a 10-page memorandum when not practical at all under the circumstances. It was also highlighted that not many (if at all) in-house teams require old school memorandum-length legal strategy or arguments. Outside pleadings and legal submissions, in-house teams stress they do not require a thorough analysis of case authorities unless clearly instructed for external counsel to do so.

> "Too many hands on one document adds cost but not always quality."

Joint document management systems, shared responsibility for first drafts, and streamlined review processes were all identified as practical ways to manage the arbitration efficiently.

State arbitration costs strategies. Matters involving States have several unique challenges including political considerations, multi-agency involvement, transparency and public scrutiny. Even a legal win can be a political loss if it creates public controversy or diplomatic strain. Government cases often (if not always) require input from multiple departments, which can slow down decision-making.

For arbitrators, this may require them to understand the broader policy context when arbitrating matters involving States, and the ensuing long bureaucratic process of approvals required.

Assessment of settlement options. In-house counsel must consistently assess the viability of settlement or mediation throughout the arbitration lifecycle. A strong case may still be worth settling if litigation risks outweigh potential gains. Litigation risks may include changes in the law or regulatory framework that may impact the legal strategy and legal arguments used in the arbitration, discovery of damaging evidence in the course of the arbitral proceedings, or loss of a critical witness if testimonial evidence is the sole source of evidentiary support. Decisions must reflect not just legal analysis, but business and reputational factors. It was noted:

> "Sometimes the best arbitration is the one you avoid altogether."

4. What lies ahead for in-house counsel in arbitration?

The panel predicted several key trends including increased use of technology in arbitration, and smarter budgeting tools. AI tools for document review, virtual hearings, and predictive analytics are becoming mainstream. Legal departments will adopt project management tools to monitor arbitration phases and spending in real-time.

Setting document review parameters early on can prevent massive cost overruns. One anonymised case involved a mid-sized company that underestimated the scope of document production. By failing to map out data sources early, they incurred expenses that amounted to two thirds of the costs of the whole arbitration.

The lesson? Invest upfront in planning and expert support for document review in document-intensive arbitrations. This is especially important in construction-related disputes where in-house teams may be required to engage damages assessment expert at the earliest opportunity.

For large corporations, best practices include designating dedicated dispute resolution specialists within the in-house team, creating internal knowledge banks from past arbitrations.

All panellists emphasised due diligence on arbitrator selection which should prioritise relevant experience, neutrality, and decision-making style. Counsel selection should focus on track record and pricing flexibility.

Red flags include overuse of certain arbitrators and firms not attuned to the Asian legal services pricing structure.

Third-party funding and litigation risk insurance, services not yet widely used in the Philippines, and how in-house counsel can leverage these tools in their arbitration strategy, were also discussed. It was highlighted how funding or insurance could protect shareholder value, preserve a company's cash flow, and less impact (if at all) to a company's share price.

The panel discussion offered a timely and practical exploration of the evolving role of in-house counsel in arbitration. Far from being passive observers, in-house lawyers are now central players in managing cost, controlling process, and driving dispute outcomes. As arbitration becomes more complex and expensive, the ability of in-house teams to act strategically, not just legally, will determine not only the success of individual cases but the long-term resilience of the organisations they serve.

For in-house counsel, the message is clear: arbitration is not just about winning, it is about managing risk, cost, and business impact. In this, their role is more crucial than ever.

The **ICC Institute of World Business Law** is a think-tank providing research, training and information to the legal profession concerned with the development of international business law. The Institute Chapters aim at promoting the work of the ICC Institute within their geographical area and, in the process, develop a network of people who have interest in participating in regular dialogues and academic activities on aspects of the practice and underlying principles of international arbitration, as well as relevant business law issues.

Following the establishment of the ICC Institute Latin American and Iberian Chapter in 2018, the Australasian Chapter[2] and the African Regional Chapter were established in 2021.

For more information on the ICC Institute, its activities, and on how to become a member, please visit www.iccwbo.org/icc-institute.

2 See A.J. Thambiayah, A. Pang, C. Thye Tan Australasian Chapter of the ICC Institute of World Business Law: First Meeting on Due Process Paranoia, *ICC Dispute Resolution Bulletin*, 2021-3.

12th ICC Institute AustralAsian Chapter Connect

Can you choose your own adventure or are there limitations on your substantive law choices?

Brian Millar FCIArb
Barrister & Arbitrator, Francis Burt Chambers (Australia)

Dr Winnie Jo-Mei Ma FCIArb
Arbitrator, The Arbitration Chambers (Singapore); Council Member, ICC Institute of World Business Law; Chair, ICC Institute Prize Jury

The AustralAsian Chapter of the ICC Institute of World Business Law ("ICC Institute") held its 12th "Chapter Connect" and first hybrid event in Perth, Australia, on 15 April 2025. Organised and presented by Brian Millar, the distinguished speakers the Honourable Wayne Martin AC KC,[1] the Honourable Ken Martin KC, and Winnie Jo-Mei Ma, discussed (i) the applicability of Australian states' proportionate liability laws in arbitrations and whether there are limits on the ability of parties to avoid the operation of such laws; (ii) the applicability of section 18 of the federal Australian Consumer Law in arbitrations and whether parties could limit or avoid its operation; and (iii) how arbitrators, courts and parties might deal with the issue of whether those laws apply in arbitration having regard to the substantive law chosen by the parties and the seat of the arbitration.

1. Prelude: *Tesseract* case of the Australian High Court

> "Unless legislation alters the law in some or all Australian States, the result of this appeal is that…the widespread consensus over the last decade no longer applies in Australia. Proportionate liability laws will usually (but not necessarily always) apply as part of the substantive law in Australian arbitrations".[2]

In the underlying arbitration considered by the High Court of Australia in the"*Tesseract*" case, Pascale (the claimant) claimed damages against Tesseract (the respondent) for breach of contract, negligence, and misleading or deceptive conduct. The arbitration was wholly domestic, as both parties were from the Australian State of South Australia, which was also the seat of the arbitration and the place of contract performance.

The sole question on appeal to the Australian High Court was whether the laws of South Australia, as the law governing the substance of the dispute (determined under section 28 of the *Commercial Arbitration Act 2011* (SA) that reflects Article 28 of the *UNCITRAL Model Law* on the "Rules applicable to substance of dispute"),[3] included proportionate liability legislation.[4]

The High Court majority (5:2) held that the proportionate liability legislations indeed form part of the South Australian governing law. The majority also acknowledged that the parties could have, but had not, excluded these laws. By contrast, the minority concluded that the proportionate liability laws do not form part of the arbitration's governing law because the potential inability to join third parties may affect the finality of arbitration and even result in multiple proceedings with inconsistent decisions.

1 The Honourable Wayne Martin AC KC was not able to take part in discussion in relation to the *Tesseract* case.

2 *Tesseract International Pty Ltd v. Pascale Construction Pty Ltd* [2024] HCA 24, [227] (dissenting Edelman J).

3 Art. 28, UNCITRAL Model Law on International Commercial Arbitration ("Model Law"): "(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. (3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction".

4 The proportionate liability legislation were the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) and the Competition and Consumer Act 2010 (Cth).

2. Hypothetical and context

There are several important implications of the *Tesseract* case for international arbitrations involving Australia, especially with respect to party autonomy in choice of substantive law by using the following hypothetical scenario:

- A project is being performed in Australia and arbitration is the parties' chosen dispute resolution mechanism.
- The parties have chosen the law of an Australian jurisdiction as the law governing their contract, and the arbitration is seated in an Australian jurisdiction.
- The proportionate liability legislations in Australia replace solidary liability (applicable under the common law).
- The Australian Consumer Law in Australia prohibits misleading and deceptive conduct in trade or commerce.[5]

The following questions were explored during this Chapter Connect: Will these Australian laws apply to the parties' arbitration, or can the parties agree on the applicable substantive law so as to avoid them? Does the parties' choice of the seat make a difference?

Issues relating to the parties' choice of substantive law may arise in at least three Model Law contexts:

(i) The arbitral tribunal's determination of the governing law in accordance with Article 28 (e.g. *Tesseract* case).[6]

(ii) The judicial decision on whether to refer the parties to arbitration pursuant to Article 8.[7]

(iii) The judicial decision on whether to set aside or enforce an arbitral award under Articles 34 and 36 respectively.

3. Limits on parties' choice of substantive law

According to the *Tesseract* majority, there are three potential limits on the parties' choice of substantive law in an arbitration.

First, the application of the chosen law must not render the parties' dispute incapable of being arbitrated or be contrary to the public policy of the seat of arbitration. This is because:

> "the arbitrability of the dispute and the public policy of [the place of arbitration] necessarily trump the choice of the parties as to the substantive rules to be applied in the arbitration".[8]

Second, the chosen law must be substantive (and not procedural) in nature. This is because:

> "rules of procedure prescribed to be followed in the conduct of proceedings between the parties are carved out of the substantive law determined under Article 28 [of the Model Law]".[9]

The High Court nevertheless acknowledged that the substance-procedure distinction may be elusive and even artificial, and illustrated the difficulty in that distinction through the High Court's separate judgements[10] – Gageler CJ characterised the legislative requirements of notification and joinder of concurrent wrongdoers as procedural whereas Gordon & Gleeson JJ characterised them as substantive.[11]

Third, the chosen substantive law must be adaptable to the arbitration without changing the effect of that law. This is because Article 28(2) of the Model Law limits the substantive law in two respects:

- the language of the law must be capable of translation or adaptation into the arbitration context; and
- once translated or adapted, the law must not be altered such that it can no longer be described as part of the substantive law identified by the relevant conflict of laws rules.[12]

5 See e.g. section 18, The Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cth)).
6 See also *Francis Travel Marketing Pty Ltd v. Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, [167] (Gleeson CJ; Meagher JA and Sheller JA agreeing).
7 See e.g. *Freedom Foods Pty Ltd v. Blue Diamond Growers* [2021] FCA 172, [137] (Moshinsky J).
8 *Tesseract*, at [290] (Jagot & Beech-Jones JJ).
9 Id. at [31] (Gageler CJ).
10 Id. at [102] (Gordon & Gleeson JJ); and [165] (dissenting Edelman J).
11 Id. at [61] (Gageler CJ); and [104] (Gordon & Gleeson JJ).
12 Id. at [100] (Gordon & Gleeson JJ).

4. Limits on parties' exclusion of substantive law

Although "parties to an arbitration agreement are free to exclude the application of otherwise relevant substantive laws", "the mere fact of an arbitration agreement" between the parties did not demonstrate that the parties contracted out of the application of the proportionate liability laws.[13] The dissenting Edelman J observed that such exclusion (or manifestation of intention to exclude) requires "sufficiently clear context, or sufficiently clear terms".[14]

In addition, some Australian proportionate liability laws expressly prohibit the parties from contracting out – for instance, the proportionate liability legislation of Queensland.[15] On the other hand, the proportionate liability legislation of Western Australia, New South Wales and Tasmania permit contracting out, while the comparable legislations of South Australia, Victoria and the Commonwealth are silent on whether contracting out is permissible.[16]

Furthermore, other mandatory laws may apply regardless of the parties' choice or exclusion of substantive law. To what extent do mandatory laws trump party autonomy? This issue did not arise in the *Tesseract* case but it warranted further discussion.

5. Applicability of other (mandatory) Australian laws

Assume an Australian jurisdiction is either the place of arbitration or the place of performance. Would the laws of that Australian jurisdiction still apply even if the parties have chosen a non-Australian law to govern their dispute?

Mandatory laws may be defined as:

> "laws that purport to apply [in arbitration] irrespective of a contract's proper law or the procedural regime selected by the parties [which] may or may not embody fundamental precepts of public policy of the place in which the arbitration is being conducted or the place in which an award is sought to be recognised and enforced".[17]

In the context of litigation, the Australian position is that the evasion of mandatory laws of the forum would be contrary to the public policy of that forum. However, the application of mandatory laws in international commercial arbitration is more complicated. One controversy is *whose* mandatory laws are relevant, as the 'forum' in international arbitration is not fixed. Depending on the stage or timing of the arbitral or judicial proceedings, the mandatory laws of three places are potentially applicable:

(i) the place of arbitration;
(ii) the place of contract performance; and
(iii) the probable place of award enforcement.

Another controversy is whether mere inconsistency with mandatory laws may also be contrary to public policy, since mandatory laws may or may not embody public policy.

Examples of mandatory laws of Australia include the *Carriage of Goods by Sea Act 1991* (Cth)[18] and the Insurance Contracts Act 1984 (Cth).[19] Discussion at the Chapter Connect focused on the *Competition and Consumer Act 2010* (Cth) and the Australian Consumer Law scheduled to that Act ("ACL").

13 Id. at [92], [134] (Gordon & Gleeson JJ).
14 Id. at [225] (dissenting Edelman J).
15 Civil Liability Act 2003 (Qld).
16 *Tesseract*, at [319] (Jagot & Beech-Jones JJ).
17 Id. at [342] (Jagot & Beech-Jones JJ) (with citations omitted), quoting A. Barraclough, J. Waincymer, "Mandatory Rules of Law in International Commercial Arbitration" (2005) 6 *Melbourne Journal of International Law*, at 205-206.
18 Section 11(1), *Carriage of Goods by Sea Act*: "All parties to … a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia … are taken to have intended to contract according to the laws in force at the place of shipment".
19 Section 8(2), *Insurance Contracts Act*: "where the proper law of a contract or proposed contract would, but for an express provision to the contrary, be the law of a State or Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory".

Part 3-2 Division 1 of the ACL contains certain consumer guarantees relating to the supply of goods and services, and applies:

> "[i]f the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia".[20]

Part 2-1 of the ACL contains section 18 of the ACL (formerly section 52 of the *Trade Practices Act 1974* (Cth)), which stipulates:

> "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

Contravention of this statutory prohibition against misleading and deceptive conduct may have far-reaching impact, giving rise to various remedies including the right to damages or other relief. As an example, one aspect of its application is the potential to outflank limitations of liability prescribed in a contract.

The **ICC Institute of World Business Law** is a think-tank providing research, training and information to the legal profession concerned with the development of international business law. The Institute Chapters aim at promoting the work of the ICC Institute within their geographical area and, in the process, develop a network of people who have interest in participating in regular dialogues and academic activities on aspects of the practice and underlying principles of international arbitration, as well as relevant business law issues.

Following the establishment of the ICC Institute Latin American and Iberian Chapter in 2018, the Australasian Chapter[21] and the African Regional Chapter were established in 2021.

For more information on the ICC Institute, its activities, and on how to become a member, please visit www.iccwbo.org/icc-institute.

20 See section 67 of the ACL.

21 See A.J. Thambiayah, A. Pang, C. Thye Tan Australasian Chapter of the ICC Institute of World Business Law: First Meeting on Due Process Paranoia, *ICC Dispute Resolution Bulletin*, 2021-3.

ICC Institute Training for Tribunal Secretaries

Role, Tasks and Skills of Arbitral Tribunal Secretaries to Excel in their Function

Han Lin Shun (Carina Shun)
Associate, Withers, Hong Kong

On 25 June 2025, during the 10th ICC Asia Pacific Conference on International Arbitration in Hong Kong, the ICC Institute of World Business Law held its Training for Tribunal Secretaries. The full-day programme examined the evolving role of arbitral tribunal secretaries, covering expectations, appointments, procedural organisation, technology, and post-award tasks, blending institutional guidance with practical insights.

1. Welcome and introductory remarks

The Training, chaired by **Delphine Ho** (Independent Arbitrator at the Arbitration Chambers; Member, ICC Institute of World Business Law), began with a candid acknowledgment of the arbitration tribunal's fundamental purpose: to adjudicate disputes and render decisions. In contrast, the arbitral tribunal secretary's role is supportive, primarily administrative, and designed to enhance efficiency rather than influence outcomes.

While the appointment of a tribunal secretary is not mandatory and remains subject to the parties' agreement, **Delphine Ho** highlighted the tangible benefits of such appointments in complex cases involving voluminous evidence and multiple parties. These benefits include improved efficiency in managing procedural steps and documentation, continuity of case management to ensure smooth progression even when proceedings span months or years, and disciplined record-keeping that safeguards transparency and procedural integrity.

Ms Ho did not shy away from addressing recurring controversies. Concerns persist about whether secretaries might inadvertently interfere with decision-making, blur drafting boundaries, or compromise the tribunal's independence. ICC's position remains clear: a secretary's contribution is invaluable when their role is clearly defined, disclosed to the parties, and closely supervised by the tribunal.

Transparency emerged as a recurring theme throughout the day. Experience shows that parties are generally supportive when the secretary's appointment, tasks, and limitations are articulated upfront. Increasingly, written matrices and procedural orders are used to codify these boundaries, reflecting a trend towards formalisation and predictability.

2. What is expected from a tribunal secretary?

The first substantive session, led by **Paul Sandosham** (Partner, Clifford Chance, Singapore) and **Yvonne Mak** (Counsel, ICC International Court of Arbitration, Singapore), explored expectations from arbitrators, parties, and the ICC.

The central question was how a secretary adds value beyond mere administrative assistance. The discussion emphasised that secretaries serve as the organisational backbone of arbitral proceedings.

Their responsibilities include:

- calendaring procedural steps;
- setting agendas;
- controlling the circulation of information;
- time-keeping; and
- minute-taking during hearings.

These tasks, though seemingly routine, are critical to maintaining procedural discipline and avoiding costly delays.

Under the tribunal's direction, secretaries assist in drafting the Terms of Reference (ToR) and Procedural Orders (POs) (usually Procedural Order No. 1 (PO1)), preparing case management conferences, and maintaining lists of issues and documents indices. These tasks demand precision and neutrality, as they form the backbone of procedural fairness.

While primarily administrative, the role can extend to legal support under strict tribunal supervision. Secretaries may:

- synthesise party positions;
- conduct targeted research;
- propose neutral timelines; and
- prepare templates for Redfern schedules and procedural orders.

Crucially, they must avoid any involvement in deliberative or decision-making functions. The discussion reinforced a cardinal principle: tribunal secretaries do *not* decide. They organise, inform, and draft within factual and procedural domains, operating under the tribunal's explicit instructions.

3. The appointment of tribunal secretaries

The next session, led by **Dino Ricardo T. de los Angeles** (Partner, Romulo Mabanta Buenaventura Sayoc & de los Angeles, Philippines), examined the mechanics of appointment – when and how to appoint, who qualifies, and how objections should be handled.

Appointments are most beneficial in complex, document-heavy cases but should not become routine. Ideal candidates are junior lawyers or trained paralegals familiar with international arbitration. Experienced practitioners, while competent, may risk encroaching on the tribunal's mandate and create perceptions of undue influence.

Key considerations include independence and impartiality, with secretaries required to declare independence before appointment, mirroring arbitrator protocols. Transparency is equally important. Tribunals should inform parties of the proposed appointment, providing CVs, declarations, and undertakings. Parties retain the right to object, and if they do – even without reason – the appointment cannot proceed. Timing is also critical, with early appointment recommended for cases anticipated to become complex and document-heavy. Remuneration must be handled carefully. For ICC arbitrators, secretary fees must not increase total costs, though reasonable expenses are allowed. Other institutions may adopt different models.

Modern protocols now incorporate data security undertakings, AI-use declarations, and confidentiality annexes, reflecting heightened privacy concerns and remote work realities post-pandemic.

4. Overview of the tribunal secretary's tasks and role in the organisation of the proceedings

Rahul Donde (Founder, Rahul Donde Dispute Resolution, Switzerland) led a granular review of administrative and non-administrative tasks.

At its core, the tribunal secretary's role is organisational. They manage version control, maintain service lists, and ensure accurate distribution logs. They draft agendas, prepare checklists, and coordinate procedural calendars to keep the case on track. These tasks, while administrative, are critical for maintaining order in complex arbitrations.

Beyond logistics, secretaries assist the tribunal in structuring the factual and procedural framework of the case. This includes preparing factual summaries, compiling neutral chronologies, and assembling bundles of legal authorities. They also format Redfern schedules and draft procedural documents such as the ToR and POs for the tribunal's review. These contributions help streamline the deliberations and ensure clarity for all parties.

That said, boundaries remain clear: secretaries must *not* engage in substantive drafting or decision-making. Their role is to support, not substitute, the tribunal's analysis. They should also avoid unsupervised communications with parties, maintaining neutrality and transparency at all times.

In short, the secretary is the custodian of process – organising, documenting, and facilitating without crossing into adjudication.

5. The support provided by tribunal secretaries

From the receipt of the case file until the signature of the Terms of Reference

The panel comprising **Erika Williams** (Independent Arbitrator, Australia) and **Yvonne Mak** explained that tribunal secretaries:

- Confirm communication channels, securing document repositories, and arranging hearing logistics – steps that prevent confusion later on in the proceedings.
- Assist in drafting the ToR and PO1. These documents define the scope of the case, procedural steps, and timelines. They must be precise and comprehensive, covering confidentiality, document production, and witness preparation.
- Prepare for the case management conference, coordinating schedules and consolidating issue lists.

Practical tips shared during the workshop stressed the importance of flexibility in the PO1 format while ensuring all critical aspects were addressed. A well-prepared ToR and PO1 streamline proceedings and reduce procedural disputes.

From the signature of the Terms of Reference until the evidentiary hearing

In a dual-track session, **Earl Rivera-Dolera** (Partner, TKI Singapore LLP/Tokyo International Law Office) and **Wang Hui** (Michael Wang, Senior Managing Associate and Registered Foreign Lawyer, Sidley Austin, Hong Kong) discussed the support provided by tribunal secretaries from procedural and technological aspects.

Tribunal secretaries manage:

- bifurcation requests;
- interim measures; and
- document production.

They:

- organise submissions;
- track deliberations; and
- prepare draft orders under tribunal supervision.

Pre-hearing tasks for the secretary include:

- finalising timetables;
- confirming logistics; and
- arranging interpretation and transcription services.

During hearings, secretaries:

- manage the smooth conduct of the hearing ; and
- maintain accurate records.

Technology is now central. Secretaries must handle electronic case files, enforce cybersecurity protocols, and manage e-disclosure. Role-based access control and audit trails are standard expectations. This phase highlights the secretary's dual responsibility: *procedural precision and technological competence*.

6. The award

The final stage of the arbitration, the award, was addressed by **Delphine Ho** and **Paul Sandosham**, who emphasised the secretary's limited yet essential role. While the tribunal deliberates and drafts the reasoning, the secretary remains a silent observer, assisting only with factual and procedural remarks. Their neutrality is paramount; they must *not* participate in internal discussions or influence the tribunal's decision-making.

Post award responsibilities, however, extend beyond the hearing room. Secretaries often prepare tables of corrections and interpretations, liaise with the ICC Secretariat, and handle notifications and administrative formalities. These tasks ensure compliance with institutional requirements and a smooth finalisation of the case.

The perennial debate over substantial drafting resurfaced during this session. While some institutions allow limited assistance under strict supervision, the consensus remains that the tribunal must own the reasoning and review every word. Functional boundaries matter more than labels: the secretary's role is organisational, not deliberative.

Ultimately, this phase reinforces the guiding principle of the training: support without interference. By maintaining neutrality and precision, tribunal secretaries help deliver awards efficiently while safeguarding the integrity of the arbitral process.

7. Practical takeaways for tribunal secretaries

The Institute Training underscored that tribunal secretaries should focus on organisation and procedural integrity while preserving the tribunal's exclusive authority over decisions. Their drafting must remain factual and neutral, supported by precise citations and consistent formatting. Standard templates for key documents such as the ToR, PO1 and hearing checklists help reduce risk and improve efficiency.

Communications must be deliberate and authorised, ensuring transparency and neutrality. Cybersecurity and data-handling protocols should be implemented early, with clear audit trails maintained throughout the case. Secretaries should also anticipate logistical needs – whether physical or virtual – by conducting technical checks and confirming interpretation and transcription arrangements to guarantee seamless hearings.

The Institute Training underscored a critical truth: arbitration is not static. As technology advances and privacy regimes tighten, the role of tribunal secretaries has expanded beyond clerical support to encompass sophisticated organisational and compliance functions.

Todays' secretaries must combine legal acumen with technological fluency, procedural discipline, and unwavering neutrality. For aspiring tribunal secretaries, this training offers more than technical know-how – it provides a roadmap for professional excellence in a field where precision, discretion, and adaptability are paramount.

This training was developed by the following members of the ICC Institute of World Business Law: Catherine Schroeder (Independent Arbitrator, Schroeder Arbitration, Paris) and Ana Paula Montans (Partner, Omnia, London). For more information on the ICC Institute of World Business Law, membership and activities, please visit www.iccwbo.org/icc-institute.

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国际商会仲裁庭秘书培训课程
仲裁庭秘书的角色、职责与技能：卓越履职之道

孙翰林（Carina Shun）
香港卫达仕律师事务所律师

2025年6月25日，在香港举行的国际商会亚太国际仲裁会议期间，国际商会世界商法研究所举办了仲裁庭秘书培训课程。全天议程探讨了仲裁庭秘书不断演变的角色，涵盖期望、任命、程序管理、科技应用及裁决作出后的相关工作，融合了机构的指引与实践的见解。

1. 欢迎致辞与引言

本次培训由**Delphine Ho**主持（独立仲裁员，Arbitration Chambers；国际商会世界商法研究院成员）。她在开场致辞中坦率地指出，仲裁庭的根本职责在于裁决争议并作出决定。相比之下，仲裁庭秘书的角色属于支持性角色，主要侧重于行政与程序层面的协助，其目的在于提升仲裁效率，而非影响裁决结果。

尽管任命仲裁庭秘书并非强制要求，且仍需经当事人同意，**何女士**强调，在涉及证据数量庞大、当事人众多的复杂案件中，任命仲裁庭秘书具有切实而显著的优势。这些优势包括：更高效地管理程序步骤与案件文件；在仲裁程序可能持续数月甚至数年的情况下，确保案件管理的连续性与程序推进的顺畅；以及通过规范、有序的记录保存，维护程序的透明性与程序正当性。

何女士亦直面实践中反复出现的争议问题。外界持续关注仲裁庭秘书是否可能在无意中干预裁决过程、模糊起草工作的界限，或削弱仲裁庭的独立性。对此，国际商会的立场始终明确：只要仲裁庭秘书的职责范围得到清晰界定、向当事人充分披露，并由仲裁庭进行密切监督，其贡献便是不可或缺且具有积极价值的。

透明性是全天讨论中反复出现的核心主题。实践经验表明，只要在初期明确说明仲裁庭秘书的任命、职责内容及其权限限制，当事人通常都会表示支持。近年来，越来越多的案件通过书面文件和程序命令对上述界限加以明确和固化，体现出仲裁实践日益走向规范化与可预期性的趋势。

2. 仲裁庭秘书的职责是什么？

第一场实质性讨论由 **Paul Sandosham**（Clifford Chance 新加坡办公室合伙人）与 **Yvonne Mak**（国际商会国际仲裁院新加坡办公室法律顾问）共同主持，重点探讨了仲裁员、当事人以及国际商会对仲裁庭秘书的期望。

讨论的核心问题在于：仲裁庭秘书如何在单纯的行政协助之外创造附加价值。与会者强调，仲裁庭秘书是仲裁程序的组织中枢。

其主要职责包括：

- 安排和管理程序时间表；
- 制定会议议程；
- 控制信息与文件流通；
- 进行时间管理；以及
- 准备聆讯纪要。

这些看似例行的工作，对于维护程序纪律、防止程序延误并避免高昂成本至关重要。

在仲裁庭的指导下，仲裁庭秘书还会协助起草审理范围书（Terms of Reference，ToR）和程序命令（通常为第 1 号程序命令（PO1）），筹备案件管理会议，并整理争议问题清单及文件索引。这些工作对准确性和中立性的要求极高，因为它们构成程序公正的基础。

尽管仲裁庭秘书的角色以行政支持为主，但在仲裁庭的严格监督下，其职能亦可延伸至有限的法律支持，包括：

- 归纳和整理当事人的立场；
- 进行针对性的法律或事实研究；
- 提出中立的程序时间安排建议；以及
- 准备Redfern表格和程序命令的模板。

尤为关键的是，仲裁庭秘书不得承担任何审议性或裁决性职能。讨论再次强调了一项基本原则：**仲裁庭秘书不作决定**。其职责在于组织、整理信息，并在事实和程序层面进行起草工作，且始终须在仲裁庭的明确指示之下履行职能。

3. 仲裁庭秘书的任命

下一场讨论由 **Dino Ricardo T. de los Angeles** 主持（菲律宾 Romulo Mabanta Buenaventura Sayoc & de los Angeles 律师事务所合伙人），重点探讨了仲裁庭秘书任命的具体机制，包括何时以及如何任命、任职资格，以及当事人提出异议时的处理方式。

仲裁庭秘书的任命在复杂且文件数量庞大的案件中最具价值，但不应流于惯例化。理想的候选人通常是熟悉国际仲裁的初级律师或受过专门培训的法律助理。相比之下，尽管资深从业者具备相应能力，但其参与可能存在越界介入仲裁庭职权范围的风险，并引发存在不当影响的观感。

任命过程中需重点考量独立性与公正性。与仲裁员的要求类似，仲裁庭秘书在任命前须作出独立性声明。透明性同样至关重要。仲裁庭应就拟任命仲裁庭秘书事宜通知当事人，并向其提供仲裁庭秘书的简历、独立性声明及相关承诺文件。当事人保留提出异议的权利；一旦当事人提出异议，即便未说明理由，该任命亦不得继续进行。 任命时机亦属关键考量因素。对于预计将发展为复杂、文件密集型的案件，建议尽早任命仲裁庭秘书。报酬安排需谨慎处理。就国际商会仲裁而言，仲裁庭秘书的报酬不得增加仲裁总成本，但合理的开支报销仍属允许范围。其他仲裁机构可能采用不同的费用模式。

随着实践的发展，现时的任命协议和相关指引已逐步纳入数据安全承诺、人工智能使用声明以及保密附件等内容，以回应疫情后远程办公常态化背景下日益提高的隐私保护和信息安全要求。

4. 仲裁庭秘书的职责概览及其在程序组织中的角色

Rahul Donde（瑞士 Rahul Donde Dispute Resolution 的创始人）对仲裁庭秘书所承担的行政性与非行政性工作进行了细致入微的梳理。

从根本上看，仲裁庭秘书的角色是组织性的。其职责包括管理文件版本、管理送达名单，并确保文件分发记录的准确性；起草会议议程、准备工作清单，并协调程序时间表，以确保案件有序推进。这些虽属行政性质的工作，却对于在复杂仲裁中维持程序秩序至关重要。

除后勤与程序安排外，仲裁庭秘书还协助仲裁庭搭建案件的事实与程序框架，包括编制事实摘要、整理中立的时间轴，以及汇编法律依据材料。他们还负责格式化 Redfern 表格，并为仲裁庭审阅起草诸如审理范围书（ToR）和程序命令（POs）等程序性文件。这些工作有助于提高审议效率，并确保所有当事人对案件程序具有清晰理解。

尽管如此，角色界限始终明确：仲裁庭秘书不得参与实质性起草或决策。其职责在于支持仲裁庭的分析，而非取而代之。同时，仲裁庭秘书亦应避免在缺乏监督的情况下与当事人直接沟通，并在任何情况下保持中立性与透明性。

简言之，仲裁庭秘书是程序的守护者 – 通过组织、记录与协调来促进仲裁程序的顺利进行，而不跨越裁判职能的边界。

5. 仲裁庭秘书所提供的支持

自案件材料接收至审理范围书（Terms of Reference）签署阶段

由 **Erika Williams**（澳大利亚独立仲裁员）与 **Yvonne Mak** 组成的讲者小组介绍了仲裁庭秘书在该阶段所提供的支持，主要包括：

- 确认沟通渠道、建立并保障文件存储系统的安全，以及安排聆讯相关的后勤事宜 – 这些前期工作有助于避免日后程序中的混乱。
- 协助起草ToR和PO1。上述文件用于界定案件范围、程序步骤及时间安排，须做到准确、全面，并涵盖保密安排、文件披露及证人准备等关键事项。
- 为案件管理会议作准备，包括协调各方时间安排并整合争议问题清单。

在培训中分享的实务建议强调，在确保涵盖所有关键事项的前提下，应保持 PO1 形式上的灵活性。一份准备充分的 ToR 与 PO1 有助于简化仲裁程序并减少程序性争议。

自审理范围书签署至证据聆讯阶段

在一场双轨讨论中，**Earl Rivera-Dolera**（TKI Singapore LLP/Tokyo International Law Office 合伙人）与 **Wang Hui**（Michael Wang）（Sidley Austin 香港办公室高级管理律师及注册外国律师）从程序与技术两个层面探讨了仲裁庭秘书在该阶段所提供的支持。

仲裁庭秘书负责管理：

- 分步审理请求；
- 临时措施；以及
- 文件披露程序。

同时，他们还：

- 组织和整理当事人提交的文件；
- 跟踪仲裁庭的程序进展；以及
- 在仲裁庭的监督下准备命令草稿。

在聆讯前，仲裁庭秘书的工作包括：

- 敲定程序时间表；
- 确认聆讯相关的后勤安排；以及
- 安排口译与聆讯记录服务。

在聆讯过程中，仲裁庭秘书：

- 确保聆讯顺利、有序进行；以及
- 维护准确、完整的记录。

科技已成为仲裁程序中的核心要素。仲裁庭秘书需负责管理电子案卷、落实网络安全系统，并处理电子证据披露事宜。基于角色的访问控制和审计追踪机制已成为标准要求。本阶段凸显了仲裁庭秘书的双重责任：程序上的精准性与技术层面的专业能力。

6. 裁决

仲裁程序的最后阶段 – 裁决，由 **Delphine Ho** 与 **Paul Sandosham** 共同讲解。他们强调，仲裁庭秘书在该阶段的角色虽受限，但至关重要。在仲裁庭进行审议并起草裁决理由时，仲裁庭秘书应保持“沉默的观察者”角色，仅在事实性和程序性事项上提供协助。中立性是首要原则：仲裁庭秘书不得参与内部讨论，也不得以任何方式影响仲裁庭的决策过程。

然而，裁决作出后的工作并不限于聆讯庭内。仲裁庭秘书通常需要编制更正与解释事项表，与国际商会秘书处进行沟通联络，并处理裁决送达及相关行政手续。这些工作有助于确保裁决符合机构要求，并推动案件的顺利结案。

在本节讨论中，围绕实质性起草的长期争议再次被提及。尽管部分仲裁机构在严格监督下允许秘书提供有限协助，但与会者普遍认为，裁决理由必须由仲裁庭自行掌控，且每一文字均应由仲裁庭亲自审阅。职能边界重于角色称谓：仲裁庭秘书的职责是组织性的，而非审议性的。

归根结底，本阶段再次强化了本次培训的核心原则：支持而不干预。通过保持中立与严谨，仲裁庭秘书**既能协助高效作出裁决，又能切实维护仲裁程序的公正性与完整性**。

7. 仲裁庭秘书的实务要点

本次培训强调，仲裁庭秘书应专注于组织管理与程序正当性，同时充分尊重并维护仲裁庭对裁决事项的专属决定权。秘书的起草工作必须保持事实性与中立性，并辅以准确的引注和一致的格式规范。针对审理范围书（ToR）、第 1 号程序命令（PO1）及聆讯工作清单等关键文件，使用标准化模板有助于降低风险并提升效率。

沟通应当审慎且经授权进行，以确保透明性与中立性。网络安全与数据处理规范应在案件初期即予以落实，并在整个仲裁过程中保留清晰、可追溯的记录。仲裁庭秘书亦应具备前瞻性，提前预判案件在实体或线上层面的后勤需求，通过进行技术测试并确认口译与庭审记录安排，确保聆讯顺畅无碍。

培训进一步强调了一个关键事实：仲裁并非一成不变。随着技术进步以及隐私与数据保护制度日益严格，仲裁庭秘书的角色已从单纯的文书性支持，拓展为涵盖高度专业化的组织管理与合规职能。

当今的仲裁庭秘书必须兼具法律专业能力与技术素养，恪守程序纪律，并始终保持坚定的中立立场。对于有志成为仲裁庭秘书的人而言，本次培训不仅提供了技术层面的知识，更勾勒出一条通往职业卓越的路线图 – 在这一领域，精准、审慎与适应能力至关重要。

本次培训由以下国际商会世界商法研究院成员共同制定：Catherine Schroeder（独立仲裁员，Schroeder Arbitration，巴黎）及 Ana Paula Montans（合伙人，Omnia，伦敦）。有关 国际商会世界商法研究院、会员资格及相关活动的更多信息，请访问www.iccwbo.org/icc-institute。

国际商会谨此感谢第十届国际商会亚太国际仲裁会议及 ICC 仲裁庭秘书培训的赞助机构：Omani Partners, A&O Shearman, BW ARBINTL LTD, Debevoise Plimpton, 汇仲律师事务所、金茂律师事务所、Jus Mundi, Opus2, Withers。 如欲了解赞助合作机会，请访问： https://iccwbo.org/become-a-member/partnership-and-sponsorship-opportunites/。

ICC Dispute Resolution Services / ICC Brasil

12th and 13th ICC Brazilian Arbitration Days: A Decade of Progress, Transformation, and Innovation

7 March 2024 and 13 March 2025, Sao Paulo

Mariana Brito and Mayara Nunes
Deputy Counsel, ICC International Court of Arbitration, Sao Paulo

Victoria Rodríguez Goyena
Deputy Director, ICC Arbitration & ADR LATAM, Argentina

Gabriela Schafler Villalobos
Arbitration Coordinator, Secretaría de Energía, Mexico

Each year, the ICC Brazilian Arbitration Day brings together over 20 speakers and 500 participants to discuss current arbitration and ADR trends in Brazil and Latin America as well as industry-specific topics, with sessions in Portuguese and English and simultaneous translation. This reports provides insights from both 2024 and 2025 editions co-organised by ICC Dispute Resolution Services ("ICC DRS") and the ICC Brasil national committee ("ICC Brasil"), which marked the celebration of the 10th anniversary of ICC Brasil in 2024 and the 15th anniversary of Brazil's arbitration law reform in 2025. The 14th ICC Brazilian Arbitration Day will take place in Sao Paulo on 12 March 2026.

1. Welcome remarks and opening speeches

The opening remarks at the 2024 and 2025 ICC Brazilian Arbitration Day were delivered by **Gabriel Costa** (Associate General Counsel Global Litigation, Shell Brasil Petróleo Ltda., President, Commission on Arbitration and ADR 2024/2025, ICC Brasil) and **Gabriella Dorlhiac** (Executive Director, ICC Brasil). They highlighted ICC Brasil's work over the past decade, focusing on three pillars: credibility, sustainability, and international projection. Arbitration was emphasised as a key driver for the development of Brazilian companies, with legal certainty seen as essential for unlocking Brazil's economic potential.

Speakers also reflected on current geopolitical challenges, noting that armed conflicts and climate change pose significant issues for ICC. Despite efforts to promote common regulatory standards, countries have diverged from internationally accepted norms, especially regarding climate change. Over the past ten years, around 4,000 extreme climate events have caused $2 trillion in losses, with $451 billion in damages in 2022 and 2023 alone. The lack of coordinated international action could result in a 5% drop in GDP for developing countries by 2030, according to ICC and Oxford Economics.[1]

Alexander G. Fessas (Secretary General, ICC International Court of Arbitration ("ICC Court"); Director, ICC DRS) and **Ana Serra e Moura** (Deputy Secretary General, ICC Court) discussed the ICC Court's century-long role in fostering and safeguarding arbitration, including its role in the drafting of the New York Convention,[2] and presented the ICC DRS two-year strategy, built on access to justice, integrity, and rule of law. This strategy includes expanding services, improving case management efficiency, and strengthening business development. In 2024, ICC opened a new hearing centre in Paris; in 2025,[3] a new case management platform was launched,[4] with arbitration rules' reform planned in 2026.

1 The impact on developing economies of WTO dissolution, a regional analysis and a country-level analysis (ICC, 2025).

2 See Centenary of the ICC Court (www.iccwbo.org). The ICC 1953 Preliminary Draft Convention served as the basis of the discussions that led to the adoption of the final text of the New York Convention in 1958; Enforcement of International Arbitral Awards : Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953, *ICC International Court of Arbitration Bulletin* Vol. 9 No. 1, 1998.

3 https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-hearing-facilities/.

4 ICC launches next-generation digital case management platform for dispute resolution services - ICC - International Chamber of Commerce (ICC, 1 Apr. 2025).

ICC continues to expand its global presence, with offices in Hong Kong, New York, São Paulo, Singapore, and Abu Dhabi to increase access to justice.[5] In 2024, Brazilian parties reached the second position globally in number of cases seated in different cities,[6] demonstrating the diversity and maturity of arbitration in Brazil, with the Brazilian Arbitration Committee (CBAr) playing a key role.[7]

2. Interviews – Claudia Salomon, President of the ICC Court, and Adriana Maia Venturini, Attorney General for Federal Agencies

In the 2024 edition of the ICC Brazilian Arbitration Day, **Eduardo Damião Gonçalves** (Partner, Mattos Filho, Sao Paulo; Vice President, ICC Court) interviewed **Claudia Salomon** (President, ICC Court). Ms Salomon emphasised the ICC's core mission: promoting access to justice and the rule of law. She shared her journey from being an ICC YAAF representative to becoming the first woman President of the ICC Court.[8]

As President of the ICC Court, her role involves three main responsibilities: (i) overseeing the Secretariat to ensure high-quality work, (ii) acting as an executive ambassador for ICC, and (iii) listening to stakeholders to prepare the ICC Court for future challenges. She also highlighted the importance of client service and diversity for the legitimacy of the institution.

Finally, Ms Salomon reflected on Brazil's leader position in the region for ICC Arbitration,[9] noting that being global does not prevent ICC from adapting to local jurisdictions.[10]

In the 2025 edition, **Alice Moreira Franco** (Partner, FCDG Advogados) and **Fabiano Robalinho** (Partner, Bermudes Advogados) interviewed **Adriana Maia Venturini** (Attorney General, Federal Prosecutor's Office, Brasilia). Ms Venturini mentioned that public entities in Brazil account for almost 40% of the caseload at the ICC Court Brazilian Office. She explained that arbitrations involving federal public entities are always commercial as there is no investment arbitration in Brazil. Arbitrations are typically domestic, meaning they are seated in Brazil and governed by Brazilian law. Ms Venturini also addressed the duration of such cases, stating that they last about three years on average, with 80% managed by ICC. The Brazilian public administration has its own conciliation mechanisms – COMPOR and SECEX-Consenso – which allow for settlement negotiations over periods of 80 to 120 days.[11] Ms Venturini emphasised that the ability to participate in forming the arbitral tribunal and the technical quality of decisions are the most important reasons public entities choose arbitration.

3. ADR and arbitration in evolution

In 2024, a panel moderated by **Marie-Isabelle Delleur** (Counsel, Clifford Chance, Sao Paulo) focused on the evolving landscape of arbitration and alternative dispute resolution (ADR) mechanisms. The discussion highlighted that while arbitration remains the most commonly used method, it is not always the best fit for every dispute. **Raphael Lang Silva** (Counsel, ICC Court, Sao Paulo) introduced the ICC "Effective Conflict Management" guide,[12] which helps practitioners choose the most suitable dispute resolution tool for each situation, and allows to choose 'the right tool in the toolbox'.

5 In 2025 – just over 100 years from its establishment in 1923 – the ICC Court administered cases that were seated in 123 cities across 70 countries. See the 2025 Preliminary ICC Dispute Resolution Statistics.

6 In 2024, 30 ICC arbitrations were seated in Brazil (15 cases were seated in Sao Paulo, 14 in Rio de Janeiro and one in Brasilia). See the 2024 ICC Dispute Resolution Statistics.

7 Comitê Brasileiro de Arbitragem, https://cbar.org.br/site/.

8 See the interview of C. Salomon "From YAAF Representative to the first female ICC Court President – The power in shaping your own future", 9th ICC Global YAAF Conference, *ICC Dispute Resolution Bulletin*, 2025-1.

9 In 2024, Brazil ranked second in party nationality ranking worldwide (and first within Latin America) with 156 parties; ranked 5th among arbitrator nationality ranking with 88 arbitrators confirmed or appointed; 30 ICC arbitrations were seated in Brazil; Brazilian law was the *lex contractus* in 44 ICC cases, ranking to the 4th most selected applicable law. The 29,000th case, which was registered at the Sao Paulo office in 2024, involved Brazilian parties from the power and energy sector, was governed by Brazilian law, with a tribunal to be seated in Rio de Janeiro, showcasing the impact of the ICC's case management office in Brazil, known as SCIAB, a registered institution in the State of Sao Paulo.

10 See the ICC Note on the Functioning of the Brazilian Office of the Secretariat of the Court, and the ICC Arbitration Cost Scales in Reals.

11 COMPOR is the Centre for Self-composition from the Public Prosecutor's Office in Minas Gerais and SECEX-Consenso is the Secretariat for External Control of Consensual Resolution and Conflict Prevention, from the Brazilian Federal Court of Accounts.

12 Effective Conflict Management (ICC Commission on Arbitration and ADR, 2023).

The panel also discussed ICC's recommendation to include "mediation windows" in arbitration timetables, allowing parties opportunities to negotiate settlements during key moments of the process.[13]

It was noted that European parties use ICC Mediation more frequently than Brazilian parties.[14] **Flávio Bianchi** (Federal Consultant in Economic Regulation at the Federal Attorney General's Office, Brasilia) mentioned that the use of settlement agreements or mediation in the public administration is minimal given the specific rules and regulatory barriers in this sector. However, some in-house counsel, such as **Fernanda Barjud** (Legal Director, AMBEV, Sao Paulo), see value in settlement and dispute avoidance, though others are cautious about mediation's risks. **Paula Linhares Karam** (Senior Litigation and Arbitration Lawyer, Petrobras, Rio de Janeiro) shared a positive experience with mediation, stressing the importance of a skilled mediator.

Overall, the panel emphasised the need for greater awareness and use of various ADR mechanisms in Brazil, especially mediation and negotiation, as there is significant potential for growth in these areas.

4. M&A disputes in evolution

Also in 2024, a panel moderated by **Cristiano de Sousa Zanetti** (Partner, Cristiano Zanetti Advogados, Sao Paulo) – comprised of **Stephan Adell** (Partner, Adell & Merizalde, Santo Domingo), **Carmen Martinez** (Partner, Three Crowns LLP, Madrid), **Juliana Krueger Pela** (Partner, Krueger Pela Advocacia e Arbitragem, Sao Paulo) and **Sheila Neder Cerezetti** (Partner, Neder Cerezetti Advocacia, Sao Paulo) – analysed scenarios in mergers and acquisitions (M&A) that can lead to disputes. The discussion covered all stages of the M&A process – from negotiations and contract clauses to signing, closing, and contract performance.

Key points included:

- **Frequent dispute triggers.** Clauses on exclusivity, confidentiality, pricing, and "material adverse changes" (MAC) are common sources of conflict during negotiations. However, not all disputes end the transaction; outcomes depend on the parties' expectations and willingness to resolve issues.
- **Interim period challenge.** The time between signing and closing is critical. Parties are advised to draft the contract with dispute resolution mechanisms suitable for addressing conflicts urgent issues. Interim relief is often considered but parties need to consider that interim decisions are not final. Expedited procedures may be more suitable for quick and binding decisions.
- **Price adjustment clauses**. Information asymmetry is a major cause of conflict. Earn-out clauses link price to performance but are still considered price-fixing rather than price-adjustment clauses. When asked how the earn-out clauses could be perfected to avoid conflicts, the panel reminded the audience that "it is people, not clauses, that can avoid conflicts".
- **Clauses in times of crisis.** Buy or sell clauses can help parties exit a contract when differences are irreconcilable. However, their enforceability under Brazilian law is uncertain, as they may be seen as unilateral conditions.

Overall, the panel highlighted the importance of well-drafted contracts and the human element in preventing and resolving M&A disputes.

5. Bare minimum: How compact can an award be?

During the 2025 edition, a panel explored what constitutes the essential content of an arbitral award for it to be valid and enforceable, referencing the study "The Bare Minimum: Cost-Efficient Awards for Disputes of Small– and Medium– Sized Enterprise" ("Bare minimum Study")[15] in general terms and in the context of Brazilian law and practice.

Andrés Jana (Founding Partner, Jana & Gil Dispute Resolution; Vice-president, ICC Court; Co-Chair of the Bare Minimum Study) expressed that the essential elements of an award constitute its minimum content for it to be valid and enforceable, according to the law of the seat, the applicable rules and parties' agreement. The Study, which includes an overview of 41 jurisdictions, suggests that the awards may reach

13 Facilitating Settlement in International Arbitration (ICC Commission on Arbitration and ADR, 2023), see "III. Mediation/settlement windows", p. 7. The ICC Arbitration Rules encourage arbitrators to promote settlement between parties. ICC Arbitration Rules, Appendix IV 'Case Management Techniques': 'h) Settlement of disputes: (i) encouraging the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules; (ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

14 For example, in 2024, while 48.5% of the parties filing a request under the ICC Mediation Rules came from Europe, 21.5% came from the Americas, see the 2024 ICC Dispute Resolution Statistics.

15 G.A. Bermann, A. Jana, A. Rigozzi, M. van Hooijdonk, N. Kamau, The Bare Minimum: Cost-Efficient Awards for Disputes of Small– and Medium– Sized Enterprises *ICC Dispute Resolution Bulletin*, 2024-3.

a bare minimum by (i) abridging and eliminating reasoning; (ii) abridging or eliminating the history of the dispute and the proceeding; (iii) curtailing the parties' statements of position; and (iv) eliminating the dissenting and concurrent opinions, among others.

Panellists **Maria Claudia Procopiak** (International Arbitrator, United Kingdom), **Guilherme de Paula Nascente Nunes** (Auxiliary Judge, State Court of Sao Paulo) and **Debora Lunardelli Djehdian** (Legal Superintendent, Consag Engenharia, Sao Paulo) emphasised that, under Brazilian law, a summary of the dispute and the reasoning behind the decision are essential elements of an award. While the length of an award does not necessarily reflect its quality, requirements such as self-sufficiency, a dispositive section, reasons, written form, seat, and date of signing are generally necessary, with specific requirements varying by jurisdiction. It was also noted that Brazilian courts usually do not review the merits of arbitral decisions, and arbitrators are not required to address every argument presented. For in-house counsel, a well-reasoned and detailed decision is crucial, as companies value the expertise of arbitrators. A lack of motivation in an award can lead to insecurity and dissatisfaction, especially for the losing party.[16]

6. Efficiency and expediency: Evidentiary process in evolution

In the 2025 edition, a panel moderated by **Adriana Braghetta** (Founding Partner, Adriana Braghetta Advogados, Sao Paulo) addressed efficiency and celerity during the evidentiary process.

Cecilia Azar (Partner, Galicia Abogados, Mexico City) first emphasised the important role of the arbitral tribunal in the efficiency of the proceedings and suggested three techniques to make it expeditious:

- Invite the parties to narrow and limit their claims by identifying disputed and undisputed issues before the establishment of the Terms of Reference.
- Limit the document production stage by focusing on what is extremely relevant to that case.
- Consider holding a preliminary hearing on the merits of the case at an early stage, before the Procedural Order N° 1. During the preliminary hearing, the arbitral tribunal has the opportunity to ask questions that will help the parties to properly present their case.

Eduardo Flores (Professor, Department of Accounting and Actuarial Sciences, FEA/USP, Sao Paulo) emphasised the value of involving experts from the start. Early expert engagement can help identify the most relevant documents and the corresponding arguments for their production, streamlining evidence production. He also noted that party-appointed experts can be used instead of tribunal-appointed experts, provided they deliver impartial reports.

Nilo Sérgio Gaião Santos (Federal Prosecutor and Coordinator of the National Arbitration Team, Federal Attorney General's Office, AGU, Chapeco) discussed public administration cases, observing that tribunal-appointed experts tend to prolong proceedings. He recommended that, in such cases, arbitral tribunals clearly define the scope of issues for experts to address.

Sofia Martins (Chairman, Board of the Portuguese Arbitration Association, Lisbon) proposed that written witness statements should clearly outline each witness's role. This allows the parties to know the exact role of a witness and help the arbitral tribunal to prepare for evidentiary hearings, avoids unnecessary questions, and reduces the number of irrelevant witnesses.

7. The transformation of arbitration in the energy industry: From oil & gas to renewables

In 2025, a panel moderated by **Julie Bedard** (Partner, Skadden, Arps, Slate, Meagher & Flom LLP, New York and Sao Paulo; Vice-President, ICC Court) explored the complexities of arbitration in the energy sector, highlighting the unique challenges posed by upstream, midstream, and downstream operations.

Fabricio Zalusk (Energy Sector Executive, Rio de Janeiro) discussed complex contracts in the industry and emphasised that the energy sector is highly capital-intensive, making project finance and the involvement of financing entities particularly important. In situations involving distressed assets, Mr Zalusk identified the duration of arbitration proceedings as a point of improvement, while he pointed out that the autonomy parties have in drafting arbitration agreements is a significant advantage, as it allows them to tailor procedures to their needs. Accordingly, he indicated that parties need to consider time and effectiveness when drafting the arbitration agreements, to avoid delaying the proceedings because of requirements that cannot be fulfilled.

16 For further reading on reasoning in arbitral awards, see A. Crivellaro, M. Hodgson (eds.), Explaining Why You Lost - Reasoning in Arbitration, *Dossier XVIII* (ICC Institute of World Business Law, 2020).

Marcela Veríssimo (Legal Manager, Total Energies, Rio de Janeiro) explained that arbitration is the preferred method for resolving disputes in both the oil and gas and renewable energy sectors. However, she noted that these sectors differ in their level of maturity and the public policies that apply to them. She emphasised that public policies play a crucial role in the development of the renewable energy sector and highlighted the potential for future disputes, including those related to ESG (Environmental, Social, and Governance) issues. Veríssimo also stressed the importance of in-house counsel in arbitration proceedings. Finally, Ms Veríssimo pointed out that early risk assessments and proactive gathering of evidence by in-house counsel can help avoid delays and improve the efficiency of dispute resolution.[17]

Lucas Barreto Ribeiro (Chief of Staff to the Presidency, Pré-Sal Petróleo S/A (PPSA), Rio de Janeiro) explained the company's role in Brazil's energy industry, particularly its participation in concession consortiums for the protection of public interest. Mr Barreto Ribeiro described the "*partilha*" (sharing) regime,[18] and commercialisation of oil & gas in the country. He also outlined the negotiation process for arbitration agreements in this context, including the importance of choosing the seat and language for arbitration.

Hannah Tung (Coordinator of the Legal and Audit Department, CGN Brazil Energy) explained that renewable energy is a relatively new sector in Brazil. She described the main phases and contracts involved, starting with feasibility studies by consultancy firms, followed by project installation – where both Brazilian and foreign companies participate, mainly through EPC (Engineering, Procurement, and Construction) contracts. She also mentioned the execution of power purchase agreements and land-related arrangements, such as the right of superficies. On procedural aspects, Ms Tung highlighted the importance of incorporating arbitration agreements into contracts, as well as carefully choosing the applicable law, seat, and language for arbitration. She emphasised three key factors for improving the efficiency of arbitration proceedings: conducting early risk assessments, preparing evidence in advance, and careful selection of arbitrators.

8. The company in the center: Unraveling the corporate disputes' puzzle

In 2025, a panel moderated by **Marcela Levy** (moderator) (Partner, Mannheimer, Perez e Lyra Advogados, Rio de Janeiro), comprised of **Marina Palma Copola de Carvalho** (Director, Comissão de Valores Mobiliários, Brazil); **Guilherme Nitschke** (Partner, Litigation and Arbitration, TozziniFreire, Sao Paulo); **Nelson Eizirik** (Founding Partner, Eizirik Advogados, Brazil), **Gabriela Alvarez-Avila** (Partner, DLA Piper, Mexico) addressed shareholders' liability in indemnity actions.

On corporate responsibility and indemnities, the panellists highlighted that, under Brazilian corporate law: (i) the company directors are liable for direct damages to the shareholders, (ii) the arbitration agreement in company by-laws bind the directors, and (iii) directors are bound by third-party contracts. However, indirect damages to shareholders – such as those resulting from corruption or illegal actions – cannot be indemnified by the company, and may fall outside the scope of arbitration clauses. Claims for fraud, for example, must be pursued in administrative or criminal forums, not against the company itself.

The discussion highlighted that some challenges in damages and indemnity actions could be resolved by properly applying Civil law. However, two 2019 decisions by the Superior Tribunal de Justiça (STJ) interpreted arbitration clauses narrowly,[19] excluding the State from their scope – contrary to what a literal and systematic reading of Civil law would suggest. The panel also noted that American legal concepts, like "fraud on the market" and collective arbitrations, do not easily translate to the Brazilian context, and broadening the concept of damages would not necessarily address impunity.

17 On the proactive involvement of in-house counsel, see also ICC Guide on Effective Conflict Management (ICC Commission on Arbitration and ADR, July 2023) and K. Hennessee, In-house Counsel: Why they should be more involved in the Arbitral process, in A. Mourre, B. Hanotiau (eds.), Players' Interaction in International Arbitration - Dossier IX (*ICC Institute of World Business Law*, 2012).

18 In the production sharing regime, the State takes part in exploration and production activities without investing or bearing risk, while also regulating and overseeing them. More information is available on the official website: https://www.gov.br/anp/pt-br/rodadas-anp/entenda-as-rodadas/os-regimes-de-concessao-e-de-partilha.

19 See REsp 1656643 and REsp 1598220/RN.

The speakers emphasised that the prevalence of corporate disputes in Brazilian arbitration is a result of the advancement of arbitration in the country's corporate laws. Many disputes that would typically be handled by the judiciary in other jurisdictions are now resolved through arbitration in Brazil. The panellists pointed out that Brazil has a more mature legal framework for corporate arbitrations compared to countries like Mexico, where shareholder rights and obligations are more restrictive and must be explicitly stated in certificates.

Finally, the speakers addressed the tension between the confidentiality of arbitration proceedings and the full disclosure required in capital markets. While arbitration's confidential nature can limit transparency for investors, the *Comissão de Valores Mobiliários* (CVM) now requires disclosure of judicial and arbitration disputes as relevant facts. Arbitration institutions have responded by compiling awards to echo this disclosure rule, aiming to balance confidentiality with the need for transparency in the interests of shareholders.

9. 2024 keynote speech – The duty of loyalty in international arbitration

João Bosco Lee (Partner, JBLEE Advogados, Curitiba) delivered the keynote speech on the duty of loyalty in arbitration. He began by defining the words "loyalty" and "loyal": while the first comes from the Latin word "*legalis*", which means "according to the law", the later finds its origin in chivalry, used to describe behaviour in accordance with morality where honour is paramount.

Mr Lee indicated that the duty of loyalty is present in most legal systems. In Brazil, it can be seen in multiple forms, such as prohibiting acts against procedural good faith and loyalty between the parties.[20]

Mr Lee emphasised that the duty of loyalty extends to arbitrators, parties and their counsel, and encompasses key responsibilities, including (i) presenting all related and known claims in the same arbitration; (ii) submitting all, and only relevant, documents during early submissions after the Terms of Reference are signed; and (iii) refraining from any unnecessary and frivolous challenges to arbitrators.

Mr Lee noted the ethical nature of the lawyers' duty of loyalty,[21] which leads them to honour their word, not to lie, and not to mislead others. Mr Lee described how a breach of the duty of loyalty may delay proceedings and affect the enforceability of an award.

On the parties' duty of loyalty, both Article 1466 of the French Code of civil procedure[22] and Article 40 of the ICC Arbitration Rules[23] highlight another aspect aimed at protecting the integrity of the arbitration: the obligation for a party to invoke any known irregularity within a reasonable time. One example of a party's breach of this duty is when a party retains counsel who has a direct conflict of interest with one of the arbitrators. To safeguard the integrity of the proceedings, the IBA Guidelines on Party Representation[24] and the ICC Arbitration Rules[25] give directions on how counsel and arbitrators may deal with such situations.

Mr Lee noted that, for arbitrators, loyalty is an essential virtue and a trait of character than a duty. Like integrity, loyalty is a quality inherent to the jurisdictional function. Arbitrators should demonstrate loyalty to both the parties and their fellow tribunal members, by being impartial, diligent, and by fulfilling their mission.

Mr Lee concluded that the duty of loyalty aims to preserve the proper conduct of the proceedings – especially in terms of efficiency and celerity – and that such duty must be observed in the arbitration practice around the world.

20 See Brazilian Code of Civil Procedure, chapter II, duty of parties and their representatives. https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm.

21 See e.g. M. de Boisséson, "A obrigação de lealdade dos advogados em relação ao árbitro", *Revista de Arbitragem e Mediação*, v. 11, n. 43, pp. 157-167, out./dez. 2014.

22 Art. 1466 (as translated): "A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity".

23 Art. 40, ICC Arbitration Rules: "A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object".

24 Guidelines 5 and 6 of the IBA Guidelines on Party Representation.

25 Art. 17(2), ICC Arbitration Rules: "The arbitral tribunal may, once constituted and after it has afforded an opportunity to the parties to comment in writing within a suitable period of time, take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings".

10. 2025 keynote speech – Artificial intelligence in international arbitration

Alexis Mourre (Founding Partner, Mourre Chessa Le Lay Arbitration, Paris) addressed a keynote speech on the risks and challenges artificial intelligence ("AI") poses from the perspective of arbitrators, counsel, and young practitioners. As law firms increasingly acquire software for drafting summaries, document production, and select potential arbitrators, among others, Mr Mourre questioned whether this shift will result in fewer skilled lawyers and a greater need for proficient programmers.

Mr Mourre reflected on the prospect of AI replacing arbitrators. He noted that AI decisions resemble those of a dispute board more than a judicial decision. Mr Mourre stated that justice involves values, moral judgment, and empathy – qualities unique to humans and absent in AI. He also pointed out that arbitrators have greater discretion than judges and are not strictly bound by precedent, while algorithms depend on past decisions.

Accordingly, AI operates using extractive and mechanical processes that introduce repetition bias. Referring to some of AI's known defects – including risks to information confidentiality; constant risks of errors in continuity and hallucination; significant energy consumption that may aggravate climate change – Mr Mourre concluded that an algorithm should not be able to replace an arbitrator and there should not and never be an entire AI decision making. AI needs to be trained. The more information fed into the algorithm, the better the outcome.[26]

AI is seen as essential for international arbitration, despite existing risks. Mr Mourre stated that the use of AI by counsel is acceptable without strict regulation, but its use by arbitrators is more sensitive. While AI can support tasks, which is today thought of as a job for tribunal secretaries – arbitrators must remain actively involved in the drafting of awards since it is part of the deliberative process. Therefore, he anticipates that arbitral institutions will adopt binding rules for the use of AI by arbitrators as soft law in the form of guidelines.[27] The use of AI by arbitrators needs to be regulated by institutions in a way that is at the same time flexible but also demanding.

Parties should consent to the use of AI by arbitrators but should also agree to an AI protocol, which would determine the nature of the use of AI by the arbitrators, such as summarising submissions or drafting portions of awards or orders. The protocol must outline the AI tools involved and the warranties offered in terms of performance, confidentiality, and protection of due process.

Patrícia de Figueiredo Ferraz (ICC Director of Arbitration and ADR, LATAM) delivered the closing remarks at the 12th and 13th Brazilian Arbitration Days, and encouraged professionals from the region to attend the 14th edition in 2026.

ICC thanks the sponsors of the 2024 and 2025 ICC Brazilian Arbitration Days: BMA; Cescon Barrieu; Clavio Valença Advogados; Cleary Gottlieb; Correia Fleury Advogados; Demarest; Dfexa Consultoria e Pericia; E Munhoz Advogados; Eliana Baraldi Advogados; Exxata; FCDG Advogados; FTI; Jus Mundi; KPMG; L.O. Baptista Advogados; Lefosse Advogados; Leste Financial Services; Lobo & de Rizzo Advogados; Machado Meyer Advogados; Mattos Filho (João Vicente Pereira de Assis); Nunes Ferreira Adv.; Padis Mattar; Ponto PPT; Sergio Bermudes Advogados; SOB Advogados: Tauil & Chequer Advogados; Tozzini Freire Advogados; Valença Arb; Wald, Antunes; Vita e Blattner Advogados.

26 The most advanced AI and machine learning (ML) models available today are extremely powerful, but this power comes at the price of lower interpretability, i.e. the black box problem. Black box AI models arrive at conclusions or decisions without providing any explanations as to how they were reached. See What Is Black Box AI and How Does It Work? (https://www.ibm.com, 29 Oct. 2024); What is Black Box AI? (https://www.techtarget.com, 16 Oct. 2024); What Is AI Interpretability? (8 Oct. 2024). A. Mourre referred to two solutions currently available to achieve explainable AI systems: Local Interpretable Model Agnostic Explanations (LIMAE) and Retrieval-Augmented Generation (RAG) systems. See e.g. What is retrieval-augmented generation (RAG)? (22 Aug. 2023); What is Explainable AI (XAI)? (https://www.ibm.com, 22 March 2023).

27 A. Mourre noted that the few regulations in existence take the wrong direction. For example, the SCC Guide to the use of artificial intelligence in cases administered under the SCC rules (Oct. 2024) have a very loose and vague disclosure requirement. Further, the Silicon Valley Arbitration & Mediation Center Guidelines on the Use of AI in Arbitration (Apr. 2024) determine that the disclosure of the use of AI tools is not necessary. Finally, the AAA and the SIAC "encourage" the use of AI, which according to Alexis Mourre, is the opposite of what arbitral institutions are supposed to do, 2025 AAA-ICDR® Guidance on Arbitrators' Use of AI Tools. In 2025, Ciarb launched its Guideline on the Use of AI in Arbitration and the ICC Commission on Arbitration and ADR has established a Task Force on Artificial Intelligence in Dispute Resolution.

ICC YAAF x ICC Australia:

In Conversation with ICC Secretary General John Denton

Melbourne, 1 September 2025

Held every two years in a different region of the world, the World Chambers Congress co-organised by the ICC World Chambers Federation unites more than 1,000 business, chamber and government leaders from 100 countries. On the eve of its 14th edition in Melbourne, the ICC Young Arbitration and ADR Forum (ICC YAAF) and ICC Australia hosted a panel discussion on "Navigating Trade in the Asia-Pacific region", opening with a fireside chat with John W.H. Denton AO, Secretary General of ICC, interviewed by ICC YAAF Representatives for South Asia, Mariia Artemenko and Nivvy Venkatraman.

John W.H. Denton AO is the Secretary General of the International Chamber of Commerce (ICC). He is a global business leader and international advisor on policy and a legal expert on international trade and investment.

In 2022, Mr Denton was appointed by United Nations Secretary General to represent the global private sector on the newly formed Steering Committee of the UN Global Crisis Response Group on Food, Energy and Finance.

He currently serves on the WHO Foundation Strategic Advisory Group and the Global Task Force on Refugee Labour Mobility and is currently chair of the UN Business and Human Security Initiative of the London School of Economics and Political Science's foreign policy think tank LSE IDEAS.

Mr Denton is a Board member of the UN Global Compact and Co-chair of the B20 finance and infrastructure taskforce, as well as a founding member of the Business 20 (B20), Co-founder of the Australia–China CEO Roundtable and Patron of UNHCR in Australia. He serves on the Board of IFM Global Investors, a leading institutional investment manager, and is Chair of the Moeller Institute Advisory Board at the University of Cambridge. He additionally serves on the Boards of the UN Development Programme's Impact Investing Steering Group and UNICEF's global education initiative, GenU, and he is a member of the Advisory Board of the African Green Infrastructure Investment Bank (AfGIIB) and the G7 Working Group on Impact Investment.

A former diplomat, Mr Denton co-led the Australian Government's 2012 White Paper on "Australia in the Asian Century" and previously chaired the APEC Finance and Economics Working Group.[1]

Mariia Artemenko – Thank you very much John for being here with us today. As ICC YAAF regional representatives, we are always keen to hear and share about career journeys of leading figures in law, in particular. But, John, when it comes to you, it is not just about law, you wear many "hats": in the legal industry, international affairs, as well as trade and business. We would like to know more about your career journey.

Nivvy Venkatraman – Let's start with your early beginnings. Back when you were a bright-eyed high school student trying to work out what you wanted to do in life, what was it that inspired you to pursue a career in law? And if you had not become a lawyer, what do you think you would have become?

John Denton – To be candid, I was actually never inspired to become a lawyer. What I was inspired by was the opportunity to go to university. I particularly wanted to go to the University of Melbourne because it had a fantastic campus and I was very interested in the range of life changing opportunities that I believed would come to me from spending time at university. The best avenue for getting into university was to choose a course. Like a lot of people – maybe not all the driven lawyers here – I got the results and got into law, and I was also doing Arts. I studied classics Latin and Greek and then I did quite a deep investigation of Italian Renaissance History. So I was able to combine lots of different things at the same time, and was incredibly involved with lots of different activities at university.

1 https://iccwbo.org/governance/chairmanship-and-secretary-general/. The following transcript of the interview by Mariia Artemenko (Senior Advisor, Disputes, Governance & Special Situations, Paris) and Nivvy Venkatraman (Senior Associate, HWF, Sidney) has been edited for readability.

My choice then, having got through the law degree, was: What do I do next? By complete chance, I was shown an advertisement for the Department of Foreign Affairs, as it then was, and I thought I would have a go. I discovered that there are a whole cadre of people whose life's ambition is to get into foreign affairs. I thought it might be quite interesting and I propelled along the journey. When I look back and discern the unifying features of my career, it is always having the willingness to have a go – which is actually incredibly Australian, I must say. But also in a way, not to actually believe there are any barriers in my way of having a go, and almost my inexperience was my strength and I thought "why not". I had no connections in foreign affairs. When I actually got into foreign affairs, I discovered that there were a whole lot of people there whose family were in foreign affairs.

I discovered the same thing in law – a lot of it is predetermined connectivity. That became quite interesting in my later life when I started being asked to mentor people. It led me to some clear decisions about who I would mentor, and I do mentor a lot of people. I never mentor anyone whose parents I know, because if I know them, they are already connected. I generally do not mentor anyone who went to a private school because that generally means that they are pretty well connected - their parents have paid a lot of money to get them those connections. Generally, I prefer to mentor people who come from the country, not from the city, because I realised the value that I could create was being a bridge into the connectivity that I saw was missing from so many people's lives.

The other piece that came through for me – and something I also say to people I mentor – don't be passive in your career. I was never passive. You are an active participant. Stop complaining – let's create some space for you.

N.V. – If you hadn't gone into law, do you think you would have done something with your Arts degree?

John Denton – As many of you will know, I'm intimately connected with the arts sector. My wife is a very well-known Australian icon, so the idea of me competing with her in that space is just too ridiculous to even think about. Interestingly, my second son, Nicholas, has become an actor in his own right. They always laugh at me and say that lawyers are businessman, but I think they fail to understand the importance of creativity in business. That is one thing generally the teams with which I work and with whom I work discover – there is actually a process that helps create opportunities and that process is a creative one. Maybe I do link up my liberal arts background to that kind of forward visioning and creative thinking.

N.V. – Thank you for that John, and that shows how our early motivations and experiences end up shaping most of the choices we end up making.

John Denton – But don't you think that, in a way, you build on what you have? As a senior partner for almost 20 years, a long time for a national firm, there were a lot of things I learnt. First of all, when you don't have something, you have to create it, or you can just give up. And the process of creation actually requires a level of ill-discipline, which a lot of lawyers are not comfortable with.

At ICC, I have been gifted the opportunity to recast the organisation. One thing I learnt is that if I have strengths as a leader, its actually my ability to transform an organisation from what it is to what it needs to be, thinking forward and ensuring that what it needs to have is cast out not for the next year, but for the next five/ten years and then building towards that.

Trying things all the time is a very creative process, and a lot of people do not like the risk of that. If you are a leading, it is really important to build around you a high-performance team that is really trust based. You have got to have people in your circle who are your team, who know that you have got their back, but also who are prepared to take risks and try new experiences. You can only do that when you trust each other. This enables to delegate, which means more things can happen. I always say to my team "be careful what you wish for", because when you have a high-performance team, it enables to do more and, of course, creates more opportunities. It is a lived experience, but it is extraordinary what you can build and what you can actually achieve from that. There is a creative element that runs through it all and I suppose that's something I learnt along the way – the skills and the leadership style to enable that to happen.

M.A. – Picking up on the leadership style – what key decisions and defining experiences shaped your approach to global leadership?

John Denton – Matching the leadership style to the context in which you operate is incredibly important. For example, in a crisis, one of the things people forget about leadership is that there is a unifying moment - you actually do not have to explain much because everyone understands things must change. This is called the "command-and-control" moment. The challenge, of course, is not to allow that to go on too long. At what point, once you are though the crisis, do you change the leadership style to match the next iteration of what's necessary? Getting that timing right is not easy; that is again thinking about the context. The context of a crisis gives the leader and the leadership group enormous political capital which they can deploy effectively or ineffectively depending on what style of people you've got in those roles.

The next challenge comes once you have moved through turnaround and you are actually in a situation where your revenue is growing faster than your costs, and you can move into profit again. At what stage do you start shifting what kind of leadership model do you need for that? That is when the external environment becomes extremely important because you then have to argue the case for change whereas previously the case for change is so clear if you act on it, you can get things done. That is when you start learning about changing leadership styles.

What I did not realise at the time was that I had the capacity to deploy different leadership styles and that is something that I developed over the years. Of course, once the firm is successful – that is never good enough. You need to keep on going. That is the whole idea of the "world class" model. How do you then argue to a room full of millionaires that they need to continue to change? And how do you stop people becoming content and, therefore, inertial led which also leads to an erosion?

One of the challenges for law firms that are coming through and for those firms that are capable or interested in being in the leadership group is not just leadership in terms of revenue per partner or profit per partner, but actually changing things for the way in which clients experience services and advancing the course of justice. How do you continue to motivate, inspire and elicit that kind of support? That is a different leadership style as well. The interesting thing for me is that there are different leadership styles you need to deploy, but if you get the sequence wrong, if you are suddenly doing consensus-based leadership in a crisis – you have got a problem. If you are trying to deploy command control when you are on a rise, that can also be a problem because you will get resistance. That is my experience. Others may have a completely different one.

N.V. – You mentioned your early years were rooted here in Australia. What aspects of your early legal training and practice do you believe have proven valuable in international settings and how did your mindset evolve as you transitioned onto the global stage?

John Denton – One thing that I learnt at *Corrs*, but really developed from incredibly skilful training at Foreign Affairs, was drafting skills. You can see this a little bit in the context of current trade arrangements where we are doing what is called "napkin arrangements" between economies and the Unites States. The lack of ability to draft clearly is a huge problem in terms of contract formation and disputes – you see it all the time. One of the challenges is that a lot of young lawyers and emerging lawyers do not value clarity and precision in drafting. I think that is something that I learnt from the best.

People will often say: "Oh, you learned negotiating skills". Lawyers are not good negotiators as they are not very good at ranking risk. They tend to apply a same level of risk to everything rather than prioritising. That is partly because they do not have a broad enough experiential base to understand real business risk. If they are a tax lawyer, everything is a tax problem. If they are a litigation lawyer, everything has to be seen through a litigation lens. I would never say that negotiation is something I learnt. In fact, to be honest, most people would say my negotiating skills and effectiveness comes from my broader life experience rather than from my legal training. But clarity of thinking, clarity of drafting, is something that I think the best law firms deliver time and time again.

Another thing I find very strong – the best law firms and the best lawyers are very good relationship people. Trying to really understand the relationship that they are forming. And in the end, that is about trust. How do you create trust? Frankly, I think that it is probably a diminishing art within the legal profession. But the outstanding practitioners I deal with on a constant basis are characterised by their high trust, the value they bring to relationships, the clarity of their thinking, and broader experience that allows them to prioritise and understand risk. In negotiation, therefore, what do you give away? Why do you keep moving forward? I do not know how well that is instilled these days in the practice of law.

M.A. – Building on the "napkin arrangements" and global perspective, let us turn to the present moment. We are living in an era of geopolitical tensions and economic fragmentation. From your perspective, what do you think ICC could do, and what role should ICC play, in re-establishing trust in global commerce and strengthening multilateral cooperation?

John Denton – I think the first observation I would make is that we have probably shifted now to a world that is framed in geoeconomic terms rather than the dominance of geopolitics. Geoeconomic terms are very important because of the trade-offs that come with that.

Flipping it back to ICC, an amazing organisation that has been around for 100 years that needed to redefine itself to remain relevant for the twenty first century. I did some work on helping understand the opportunities. In Paris alone, we have about 350 staff members who are enormously proud to be working for ICC – this is a significant institution – but who could not align what they did with the purpose of the organisation. What we had to do was reposition the organisation with a clear purpose and then align the organisation to that purpose. The purpose we worked on was enabling business worldwide to secure peace, prosperity and opportunity for all. The reason this becomes relevant is that it gave people an above-the-day-to-day focus. We have been able to realign the whole of the organisation. We have direct employees in Paris, more in Singapore, more in Brazil. Then we have the network and we are now in 170 countries, with 70% being in the global south.[2]

The other thing I wanted to do was to recreate the value preposition. So not only are we the largest business organisation in the world, we are the most inclusive business organisation in the world and that is relevant because what I was trying to do and what I am hopefully achieving doing with my term is positioning ICC as the voice of business in multilateral engagement. Think about global challenges like climate change. Name one global problem that can be solved without the private sector. If the private sector is not directly engaged, it is outside the room and the reason for that is it does not have the legitimacy of a state.

What I have been trying to do is reposition ICC – a not for profit, for purpose institution. We actually enable through the ICC rules and standards 17.5 trillion dollars' worth of economic activity every year,[3] which is larger than the GDP of China. We are not an observer, we are an actor. The reason I say this is that we are not waiting for anyone to invite us to participate in a process to ensure that the multilateral trading system continues. We are doing it because it is good for business and it is what, for example, is really important for developing and emerging economy businesses. The system that has enabled the fastest movement of people from poverty into improved positions has been built to a functioning cross-border trade with rules and certainty to actually engage in commerce. That is the trading system, it is not the WTO. The trading system involves customs and finance. That is what we are trying to preserve at the moment.

Let's not forget that the US only accounts for 13% of global trade – 87% of the rest of the world is very happy to continue to operate under a system. The issue is that the system is not fit for purpose. So we are trying to use this opportunity to revitalise that system. We have a programme, which has three elements:[4]

1. **Stop escalation** – Protectionism is self-harm. We've been pleased to provide political capital to prevent retaliation. Effectively the government is not to retaliate.
2. **Stabilise the system** – There is enormous value in it.
3. **Revitalise the system** – Parts of the existing system do not function properly.

2 ICC National Committees and members of the ICC World Chambers Federation.

3 We are your ICC (2025).

4 Download the full report ICC Compact for Trade, Growth and Jobs (ICC, Dec. 2025).

The WTO was formed at a time just as the internet went into the public domain. Its rules were established before the internet went into public domain and before payment systems were connected online. The world of e-commerce is not covered by the rules. How can we operate in the 21st century economy and yet have the WTO with a playbook that does not include e-commerce. To not be deficient, an operational model requires unanimity.

N.V. – After this fireside chat, we are going to have a panel discussion on navigating trade disputes in the Asia-Pacific region. Given your role as ICC Secretary General, we thought we would get some insights from you on this particular topic. The Asia-Pacific is increasingly seen as an engine of global economic transformation, yet it is also a region marked and influenced by geopolitical currents. How do you envisage the future of commercial co-operation and dispute resolution of evolving across this dynamic region?

John Denton – You might be interested to know that one of the biggest net loses out of an erosion of the multilateral trading system is actually in the Association of South-East Asian Nations (ASEAN) in particular. If you think about the economic success of ASEAN – it has been built on what is called the Supply Chain Resolution,[5] which came about through the process of establishing standards that enable goods and supply chains to operate across the system. If the system erodes, it will lead to a 12% drop in GDP for ASEAN economies. ASEAN collectively understands the existential nature of the threat they are facing, and we are focusing a lot of our attention on supporting the ASEAN economies because ASEAN is not the whole of APEC but ASEAN is the convening force that the centrality of ASEAN should never be underestimate. Its convening power is extraordinary. As you know ASEAN also has the Regional Comprehensive Economic Partnership (RCEP), which brings together importantly China, Japan, Korea, Indonesia and Australia. There is a lot of value to be brought from RCEP, especially given the confusion over rules of origin.[6]

The other element we are looking at – going into the question about rule of law – is what the inhibitors to investment in this region are. One of the big inhibitors is when we have no confidence in the legal system. It is really important they therefore to look at alternates and, of course, arbitration is an alternate and an arbitration led by the ICC Rules gives people the confidence that they can invest. I have been four times in Ukraine, and one of the issues for Ukraine of course is that the only people that invest in Ukraine are people who are already there. There is no fresh investment because people are uncomfortable and this is to do with risk between the East and the West and the Central, but fundamentally one of the inhibitors is actually lack of confidence in the legal system. What we have been encouraging the Ukrainians to do is to incorporate arbitration in their next iteration of Ukrainian recovery and we are making a lot of progress. In fact, we are lowering the cost of access to the ICC International Court of Arbitration to enable that to happen.[7] We see arbitration as potentially enabling more investment in developing and merging economies. We just launched a project to create access to justice for SMEs because the inability to resolve disputes for small/medium enterprises globally is costing 1 trillion dollars' worth of lost economic activity.[8]

M.A. – Given all the changes that are happening in the world and everything you have mentioned, what skills should young practitioners be investing in now to ensure they are future ready?

John Denton – I think drafting is very important. I gave a commencement address at the University of Melbourne a couple of years ago and the point I made is that a lot of people would say that the challenge you have is your lack of experience. I see this as your strength, particularly with what we are confronted at the moment. Your inexperience is your strength because you should not see any barriers – the question you have to ask is: "Why not?" If you are going to make sense of things, you cannot apply to those contexts – you actually have to be imagining the *next* context. We are not talking about AI specifically here and it is not just AI, it is technological advancement in the way I think energy transformation will take place and the way that politics will be operating. We are not going back to what was, using those constructs would be a mistake. Therefore, you actually have got to create a new construct; your strength is your ability to actually enable to be pushed against the standard inertia of the world to actually move forward. Your inexperience is actually

5 https://asean.org/.

6 More information about Certificates of Origin is available at https://iccwbo.org/business-solutions/certificates-of-origin/.

7 ICC announces dispute resolution initiative on Ukraine reconstruction (www.iccwbo.org, 7 Nov 2024).

8 The economic impact of unresolved low value commercial disputes (ICC, 2025), at p. 8.

your strength. I hope the cultures and leaders of the organisations in which you work understand that. If they do not, you need to be enabling that culture, you need to be pushing back because their interest may not be your interest. Often the interest of people in leadership positions is to preserve what they have got. I think it is creating something new that is actually really important, it is where you create value. A good leader creates space for others and hopefully you will feel that space.

N.V. – What advice would you give to young professionals who want to develop a meaningful career in international business diplomacy and commerce?

John Denton – Do not hang around thinking about it. I remember when some lawyers come to see me here who wanted to get involved in human rights, which I said that is great, but I don't think you should be looking for middle class welfare here. If you want to get involved and work in human rights go and do it. I mean go in work in Guatemala, work for a not for profit – and a few of them took my advice, they have done it and they actually built incredible careers.

There is a bit of a risk that people are so busy minimising their risks that they will end up with a nice little bit of engagement when they will go workshop here and there. That is not building a career. You do need to through yourself into it in a full-blooded way and take a risk and may not get paid as much money but if you really want to work in that kind of aspect of global diplomacy which is Human Rights Development Systems, which can be extremely rewarding, you actually just have to go and do it and take risk and don't expect to be subsidised by organisation for which you work. If they can, that is great; but most of them put so many restrictions on you that you can never be full blooded in it anyway.

But the other thing is say "yes". The reason I said that is that I remember that I know a number of partners who are always shocked by the range of activities that I was involved with – but don't forget I was trying to take a firm from a position that it was in to create new space for it. Part of that is simply saying "yes". And what about work/life balance? That is work/life balance. I mean you are creating a life for yourself outside the corridor in which you are in. Often, lawyers are disappointed because they cannot find new opportunities – it is because they have almost limited themselves by saying "no" when they should have been saying "yes", broadening their experience, which will actually bring better value in terms of the relationship with their clients. If nothing else, they have a greater world view and they can participate in the very discussions which might drive organisations further forward or even their staff further forward. As I said, you need to be an active participant in your own career and saying "I will get involved in it", "it will take up for time", is actually quite a helpful way of doing it.

M.A. – John, thank you so much for finding the time to be with us today. We really appreciate you sharing your insights, reflections and wisdom, and I am sure that most people here will take away not just ideas, but a lot of inspiration from this conversation.

ICC Young Arbitration and ADR Forum (ICC YAAF)

Reshaping Tomorrow's Legal Leaders

Athens, 24 November 2025

Eleni Serifi
International Lawyer, Zurich/Athens; ICC YAAF Representative (Europe and Central Asia)

When innovation meets justice, lawyers become leaders of a new era in legal services. And this new era demands more than legal expertise – it requires new business, technical, and marketing skills to position oneself as a lawyer of the future. Above all, it calls for curiosity and a drive for growth. At an event organised by ICC YAAF which opened the Athens Arbitration Days 2025, experienced in-house counsel and arbitration practitioners from around the globe gathered in a uniquely diverse setting to discuss the emerging non-legal skills of future lawyers. They shared practical tips with an audience full of young professionals, eager to become the next generation of legal leaders.[1]

1. Opening speech: Build your brand

Pirita Virtanen (Founding Partner, Private Mediator Ltd, Helsinki) addressed a timely question in today's social-media-driven world:

> Is building a brand necessary in the legal and dispute resolution sectors?

Her answer was unequivocal: yes - but your brand must reflect exactly the kind of lawyer you aspire to become. Buying legal services is based on trust and perception. Future lawyers should not only be excellent practitioners, but also be able to communicate their true skills to the market or even create a market for their skills.

Ms Virtanen emphasised that lawyers should be visible not just by advertising their successes online but by substantially connecting with the market. Looking back on how she built such connections, she shared with the audience that she began by creating an excel-sheet of relevant contacts, scheduling meetings with people across industries, organising events and webinars to discuss their needs, and finding ways to meet those needs. Ultimately, trust was built by delivering precisely the legal service she promoted – in her case "mediating disputes in one day".

2. Work AI-smarter

The event then shifted focus from lawyers' marketing skills to the technical competencies required in the AI-era.

A distinguished panel featuring **Sandy Tsakiridi** (Senior Director – Legal Counsel, Global Legal, The Coca-Cola Company, Athens), **Afroditi Milidou** (Senior Counsel, Kaizen Gaming, Athens), **Melina Angelides** (Senior Legal Counsel, Fraport Greece, Athens), **Dr Matthew Dacoronias-Marina** (Lawyer, PhD on Arbitration and New Technologies, Dacoronia Law Offices, Athens), **Margarita Chatzi** (Deputy Counsel, ICC International Court of Arbitration) and moderated by the author of this report, explored the ways of working "smarter" with AI from an in-house, private practice and institutional perspective. The word "smarter" was used not only to connote "faster", but also a responsible and ethical manner of working and was deliberately chosen to reflect the panel's consensus on the importance of this point.

The discussion started with the in-house panelists sharing their experience with use of AI tools in their legal teams. While these tools are routinely used for translation of documents, transcription of meetings, search of emails, summaries, drafting of basic clauses etc., in substantive legal work, the panelists highlighted accuracy-based limitations. This is particularly so for jurisdictions like Greece where legal sources are not readily available online, thus limiting the functions, results and reliability of international AI tools.

1 This article reflects the author's personal recollection and understanding of the discussions held during the event and is provided for general informational purposes only. It is intended solely as a general summary of selected topics addressed and does not purport to be a verbatim or comprehensive record of the discussions. The views and opinions attributed to the speakers represent the author's interpretation of their contributions and have not been reviewed, approved, or endorsed by the speakers. Any views expressed by the speakers during the event were shared as their own and do not represent the views of their respective employers, organisations, or clients.

AI liability

The panelists shared that since confidentiality of company information and accuracy remain their primary concerns with AI, they now openly discuss the use of AI with their external consultants and other service providers and require disclosure of such use. Based on their experience, AI-related clauses increasingly appear in commercial agreements, often in the form of disclosure or liability-allocation provisions, with instances of total liability exemption clauses for AI-related errors even becoming a deal-breaker during negotiations.

As regards AI liability, the panel observed that recent fines imposed on consultancy firms and lawyers for AI-related mistakes confirm that:

> "the person who presses the button is still responsible for the outcome".

While this is currently the fail-safe approach of global legal systems, the panel predicted that as AI becomes more autonomous, the existing legal toolbox will prove insufficient. Law will need to catch-up and take into account:

(i) the more complicated supply chains behind AI development (from data preparers to model developers, fine-tuners, software integrators, and end-users); and

(ii) the black box issue of the unknown regarding the internal workings of machine learning.

The panelists flagged that if the cause of harm cannot legally be traced back through the black box and the supply chain, individuals may be left without protection. Addressing these liability gaps in cases of AI outputs without human input will be a central challenge for future lawyers and regulators.

AI governance

As law tries to catch-up with AI, companies and users are trying to catch-up with the law. On a company level, this is known as "AI governance". With the EU AI Act and existing privacy laws like GDPR, AI ethics have been transformed from voluntary principles to mandatory and enforceable rules which must be followed across the entire AI lifecycle. A new legal field is emerging, opening new career paths for lawyers. Future AI governance lawyers will not just draft internal AI policies and risk statements but will have to evaluate AI vendors and tools, monitor AI compliance, maintain specific systems and documentation, train management and employees, and rise to the level of a "core strategic leader in technology adoption", as stressed by the panel.

AI in case management

AI literacy won't be necessary only for the specialised AI lawyers, but also for all lawyers navigating this business transformation and the new, cross-functional way legal teams will work and deliver value within a company.

In private practice, AI literacy can offer lawyers a significant comparative advantage, especially regarding voluminous case files. When asked about the most useful applications of AI for dispute lawyers, the panel highlighted:

- summarisation of documents and chronologies;
- factual and legal research;
- inconsistency file-checks;
- document review and data analytics; and
- transcript generation.

However, private practitioners should also be AI-ethics literate by adopting strong cyber security systems, respecting confidentiality, privacy and GDPR requirements, complying with client AI policies and their professional standards, disclosing AI use to their clients and always cross-checking their AI-assisted work.

In the field of arbitration, strict confidentiality requirements regarding cases and awards pose even greater challenges for the use of AI. The ICC panelist noted that while there could be significant efficiency and cost benefits by using AI in case management and administrative tasks of an arbitral institution (e.g. on arbitrator selection processes, drafting routine correspondence), any generative AI tool trained on a database of arbitral awards (e.g. for decision-making or cost predictions) would face significant confidentiality obstacles.

The current lack of AI regulation in international arbitration paired with the fact that this form of private justice is a creature of consent between the participating parties, has led to disparate approaches in arbitration practice to date. According to the ICC panelist, three approaches have arisen in practice:

(i) parties allowed any kind of AI use in the process and in decision-making;

(ii) parties prohibited all kinds of AI use in the process and even in assisting the decision-making; and

(iii) cases where parties permitted AI use provided that the tribunal did not delegate its decision-making authority to AI, and/or provided that the tribunal and the parties disclosed such AI use to all participants.

The third balanced approach has been adopted by recent soft law such as the "Silicon Valley Arbitration and Mediation Center Guidelines on the Use of Artificial Intelligence in Arbitration"[2] and the "Chartered Institute of Arbitrators Guideline on the Use of AI in Arbitration",[3] although the major arbitral institutions remain silent on the issue. That said, the EU AI Act classifies AI systems used in alternative dispute resolution to assist a judicial authority as "high-risk".[4] According to the panel, any such regulation should strive to strike the right balance between innovation, protection of rights and due process.[5]

3. Pitch effectively

The event continued with a second panel discussion on the necessary business skills of future lawyers and most importantly on how to pitch effectively to clients. The panel discussed the elements of a "winning pitch", shared practical tips for younger professionals, and even showcased the required skills using a mock pitch.

The panel featured arbitration practitioners from around the globe: **Stavros Michalopoulos** (Senior Associate, DLA Piper Middle East, Doha), **Dimitra Tsakiri** (Senior Associate, Ghaffari Fussell LLP, London), **Panagiotis Chalkias** (Associate, White & Case, Geneva), **Maria Paschou** (Associate, Queritius, Athens), **Dimitrios Papageorgiou** (Associate, Eversheds Sutherland, Paris).

Live pitching

The moderator **Christos Paraskevopoulos** (Deputy Director, Group Legal M&As & Strategic Projects, Helleniq Energy, Athens) opened with a mock pitching situation, requesting that the panelists pitch their respective jurisdictions to him on the spot, acting as in-house counsel of a hypothetical international energy company that plans to proceed with a cross-border acquisition deal, and negotiate with the counterparty the dispute resolution clause. The audience had the rare opportunity to witness a live pitching exercise and learn from the way each panelist pitched the comparative strengths of their jurisdiction. The mock pitch session was followed by a discussion on the crucial practical aspects of preparing an effective pitch for a client.

Structuring the right team

The panel focused first on structuring a pitching team with diverse backgrounds (legal system, jurisdiction, language, gender), diverse experience (different seniority levels) and diverse expertise (e.g. industry, institutional, in-house) to multiply the angles of approaching the matter, anticipate blind spots, and increase the likelihood of success. Every team member should be present in the pitching room and should have a clear role to play.

The ideal team should have:

- the big-picture partner;
- the strategist (experienced senior lawyer);
- the industry expert;
- the jurisdiction/law expert;
- the language expert; and
- the detail-picker (junior lawyer).

In international arbitration disputes, the role of the jurisdiction/law expert is usually fulfilled by an additional local counsel in the respective jurisdiction. Such local counsel should ideally be pre-selected by the pitching party and participate in the pitch to demonstrate to the client the close and smooth cooperative relationship as well as the clear and structured allocation of tasks and responsibilities between the international and local counsel.

The team that is able to showcase such depth and diversity will likely win the race. Drawing on his in-house experience, the moderator noted that clients value team chemistry above all and choose the team they genuinely want to work with.

2 SVAMC Guidelines, 30 Apr. 2024; see e.g. Guideline 6: "An arbitrator shall not delegate any part of their personal mandate to any AI tool. This principle shall particularly apply to the arbitrator's decision-making process. The use of AI tools by arbitrators shall not replace their independent analysis of the facts, the law, and the evidence."

3 Ciarb Guideline on the use of AI in arbitration (updated in Sep. 2025); see e.g. Art. 8: "8.1. Arbitrators may consider using AI Tools in the context of their mandate to enhance the arbitral process including its efficiency and the quality of the arbitrators' decision-making. 8.2. Arbitrators should not relinquish their decision-making powers to AI but may use AI to support more accurate and efficient processing of submitted information, always ensuring independent judgement".

4 See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), Art. 6 and Annex III, 8(a).

5 The recent US case of *LaPaglia v. Valve Corp.*, No. 3:25-cv-00833 (S.D. Cal. 8 Apr. 2025) where the claimant sought to set aside an arbitral award on the grounds that the arbitrator outsourced his adjudicative authority by allegedly relying on AI, also indicates that closer AI regulation in arbitration and in the legal field in general is imminent. The case was dismissed for lack of jurisdiction.

Offering the right price

The panel stressed that pricing clarity and sticking to budget is of outmost importance to clients and will become even more critical with the increasing use of AI. To offer the right price, one needs to first understand the specific details of the subject matter of the dispute, the client's needs, pricing culture and budget constraints (if any). Clarity can be achieved by providing fee estimates for each step in the process, describing the proposed approach (e.g. hourly rate) and recording the underlying assumptions (e.g. volume of case-file, list of anticipated submissions) in the fee proposal. In case of AI use, the fee proposal should explain how the specific technology reduces cost and accelerates work.

Depending on the client and the competition, alternative pricing structures may be worth exploring, provided they do not undermine the quality of legal services offered. It is important to remember that clients are open to discuss and co-shape fee proposals, so lawyers should proactively seek feedback and counter-suggestions as well as discuss with clients their approach and assumptions.

Showing the right engagement

The panel highlighted that clients appreciate engagement throughout the pitching process. Lawyers should not hesitate to ask targeted, non-intrusive questions (e.g. underlying or interconnected contract(s), counterparty identity etc.) in case the client has shared only limited details about the matter but should also try to leverage public sources (e.g. on past disputes) in order to ask better-informed questions and appear prepared.

Lawyers should also be confident in managing client's expectations by offering scenario-based strategies and outcomes, data-driven examples (e.g. average timelines, cost ranges), and transparent assessments of success prospects and other risk percentages. While the review process is on-going, lawyers should keep the communication channel with the client open for questions and clarifications, follow-up with interesting developments, insights or case law updates (if any) and, thus, prove their commitment, responsiveness, and strategic thinking beyond their initial pitch presentation.

Even if rejected for the specific matter, such lawyers will likely leave a lasting impression on the prospective client and build a relationship that would allow the client's team to provide them with unique feedback on what did not work so as to enable the team to succeed in the next pitch.

Landing your first pitch-invitation

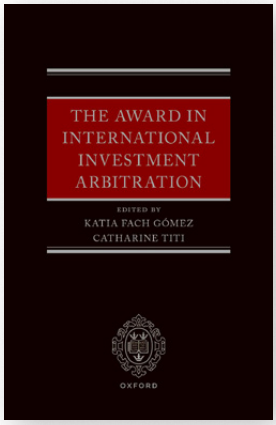
The panel concluded with the most essential question for the younger practitioners in the audience: how to stand out and secure a first pitch-invitation and how to pitch as a young lawyer. Young lawyers should be proactive in building their network early on and actively engage in relevant forums by participating in conferences, assuming organizational and leadership roles, and building credible visibility through speaking engagements and publications.

With visibility and network, small matters will come and if handled well, they will inevitably lead to larger ones. A young lawyer's pitch is being faster, cheaper, directly involved, and more accessible. Substance and reliability can cut through seniority bias (even in markets with gerontocratic tendencies), if the young lawyer can demonstrate unique knowledge of all the legal and factual details of the matter, and lead with out-of-the-box solutions for the client's needs.

Finally, young lawyers should leverage their generational strengths such as technological fluency and adaptability, and consider building their expertise in modern era disputes (e.g. data centres, digital platforms, smart contracts, ESG, new technologies, AI, space) where their deeper understanding and more advanced skillset provide them with a natural edge compared to older generations.

"The Award in International Investment Arbitration"
A Multi-Dimensional Study in International Investment Arbitration

Cyprien Mathié
Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP (Paris)



The Award in International Investment Arbitration

By Katia Fach Gómez; Catharine Titi (eds.)
Oxford University Press, 2024
580 pages
ISBN:9780192872968

In international investment disputes, the arbitral award is often treated as a purely procedural endpoint, rather than as an object of sustained legal scrutiny. "The Award in International Investment Arbitration", edited by Katia Fach Gómez and Catharine Titi, challenges this narrow view by placing the arbitral award, in all its facets, at the centre of analysis, providing a comprehensive examination of an investment award's multiple, and often evolving, dimensions, combining theoretical depth with practical insight.

The work's strength lies in its holistic approach. Rather than treating the award as an isolated artifact, the volume places it within a broader constellation of theoretical, procedural, and policy considerations.

- Academically inclined chapters probe foundational questions – the legal nature of treaty-based consent, the epistemology of burden and standard of proof and the integration of human rights norms.
- Practice-oriented contributions provide more concrete guidance on the relevance of factual findings, the architecture of legal reasoning, and the craft of drafting awards resilient to challenge.

The book is divided into six parts, comprising of 31 chapters. Drawing on leading authorities, it explores the award's historical development, social implications, empirical patterns, and procedural intricacies. The study also discusses subjects of undeniable contemporary relevance. As the investment arbitration regime navigates questions of systemic reform, appellate mechanisms, artificial intelligence, and gender diversity, this comprehensive guide equips practitioners and scholars alike with both a conceptual framework and concrete tools to address the field's evolving challenges.

Part 1 "Key Aspects and Types of Investment Awards"

This part, which presents the principal features and types of investment awards opens with a contribution by "**What is an Award? Concept, Content, Drafting, Effects**",[1] placing a particular emphasis on the distinction between arbitral awards and decisions rendered under the ICSID Convention. The author subsequently turns to the minimum content requirements and structural features of investment awards in both ICSID and non-ICSID arbitrations, providing a practical checklist of the formal and substantive requirements governing ICSID Convention awards.[2]

1 By Catharine Titi.
2 See Table 1.1, at p. 8.

The following chapter, "**The Award on Jurisdiction and Merits**",[3] examines awards on jurisdiction and merits in international investment disputes, also highlighting the distinction between ICSID and non-ICSID arbitrations. It begins with a presentation of bifurcation as a key procedural tool to ensure the fairness and efficiency of arbitral proceedings.[4] In this respect, the authors note the increasing recourse to bifurcation by arbitral tribunals in recent years, particularly to prioritise, albeit temporarily, their jurisdictional decisions concerning the intra-EU objection (*Achmea* issue).[5] They further explain the established practice regarding the non-finality of ICSID jurisdictional decisions, emphasising that this is a distinctive feature of the ICSID system, an important consideration for both States party to international investment treaties and claimant investors.[6] Subsequent chapters of this initial section of the book then consider related topics: "**Compensation**",[7] "**The Cost Awards**",[8] "**Consent Awards**",[9] and "**Draft Awards: Twirling Curls on a Bald Head**".[10]

Part 2 "Procedural Principles"

Chapter 7 "**The Legal Nature of the Treaty-Based Consent to Investment Arbitration**"[11] examines the legal nature of a state's consent to arbitration under investment treaties. The authors revisit existing scholarly views on the conceptualisation of the nature of consent through the lens of private law, public international law, and, finally, the dual nature approach.[12] They argue for moving beyond the private-public dichotomy and propose instead determining the legal nature of the State consent by reference to the law applicable to the arbitration agreement, identified through a conflict of law analysis based on the closest connection test.[13]

In the following chapter "**Burden and Standard of Proof on Jurisdiction**",[14] discusses the burden and standard of proof for jurisdiction. Following a brief explanation of the traditional allocation of the burden of proof, the author explains why this evidentiary tool is ill-suited to the jurisdictional analysis.[15] The section then shows how both the ICJ and a growing number of investment tribunals have therefore moved towards a more holistic "preponderance of arguments" approach, which assesses all evidence and legal submissions together rather than mechanically applying legal burdens of proof.[16]

A rigorous analysis "**On the Adjudicative Discretion of Investment Arbitrators: Between ne ultra petita, ne infra petita, and jura novit curia**",[17] of the adjudicative discretion of investment arbitral tribunals, examining these procedural principles and the interplay between them. Part 2 concludes with a discussion on the "**Equality of Arms**",[18] another fundamental adjudicative principle.

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3 By Giorgio Sacerdoti and Carlo de Stefano.

4 At pp. 21-23.

5 See e.g. *Eskosol SpA in liquidazione v. Italy*, ICSID Case No ARB/15/50, Decision on Termination Request and Intra-EU Objection (7 May 2019). See p. 21, footnote 26.

6 At. pp. 29-30.

7 By Kaj Hobér.

8 By Susan Franck and Bailey Roe.

9 By Gabriel Bottini.

10 By Friedl Weiss.

11 By Martin Gronemann and Markus Krajewski.

12 The authors meticulously critique these approaches, in particular the private law approach for failing to account for the independent legal nature of investment treaties, and public law theories for overlooking the inconsistent legal outcomes that may result from forum selection, as well as the requirement that arbitral jurisdiction be grounded in the actual agreements between the disputing parties. The "dual nature" theory is no more persuasive, as it misconceives both the source of arbitral jurisdiction and the role of sovereign immunity in international proceedings. See pp. 114-121.

13 At pp. 123-127.

14 By Christoph Schreuer.

15 At p. 136.

16 At pp. 136-140, see e.g. Fisheries Jurisdiction (*Spain v. Canada*) (Jurisdiction of the Court, Judgment) [1998] *ICJ Rep* 432, paras. 36-38 ; *Çap v. Turkmenistan*, Decision on Jurisdiction (13 Feb. 2015), paras. 119-120; *WNC v. Czech Republic*, Award (22 Feb. 2017), para. 293; *Itisaluna v. Iraq*, Award (3 Apr. 2020), para. 151; *Addiko v. Croatia*, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis (12 June 2020), para. 200.

17 By Attila M. Tanzi.

18 By Lukas Vanhonnaeker.

Part 3 "The Content of Investment Awards"

Chapter 11 "**The Relevance of the Facts in Complex Investor-State Arbitration Proceedings: Reflections on the Drafting of Arbitral Awards**"[19] examines how arbitral tribunals address factual complexity in investor-State arbitration.[20] With reference to investment decisions, and drawing on examples from the waves of cases involving Argentina and Spain, the chapter analyses the manner in which tribunals present the facts and demonstrates how different approaches to fact-finding and evidentiary evaluation may affect an award's exposure to annulment.[21]

The following chapter "The Applicable Law in Investor-State Dispute Settlement"[22] provides a comprehensive analysis of the applicable law in investor-State dispute settlement. The chapter effectively shows that applicable law in ISDS is a layered and evolving system in which treaties, international law, host and home country laws, and regional legal systems interact in complicated ways to influence decisions on jurisdiction, merits, and enforcement.

Part 3 then turns to evolving issues in investment arbitration, such as the rise of exception clauses as a means of protecting a States' right to regulate ("regulatory chill"), the integration of human rights into investment disputes, and counterclaims by States. "**The Role of Human Rights in Investment Awards**"[23] identifies the recurring ways in which international human rights feature in investor-State arbitral jurisprudence, primarily as interpretative guidance, evidentiary support for substantive arguments, or through non-disputing party submissions, while noting that tribunals generally refrain from applying human rights directly as substantive law.

The following Chapter "**Counterclaims: Trends and Perspectives**"[24] underscores a growing trend towards ensuring procedural fairness, particularly through the recognition in recent IIA reforms and arbitral practice of the host State's right to invoke claims against investor. The section then includes contributions discussing "**Investment Tribunals' Search for the Truth and Its Impact on the Arbitral Award**",[25] i.e. fact-finding powers to seek the material of the case beyond the parties submissions, and an effective case study "**The Impact of Expert Legal Opinions: A NAFTA Chapter Case Study**".[26] '

Part 4 "Award Drafting"

This Part opens with a candid Chapter 18 "**Tribunal Dynamics and Arbitral Deliberations**",[27] which offers an insight into how three-member investment tribunals actually deliberate behind closed doors. After outlining how deliberations should look like in an ideal setting, the author contrasts this with the stark reality of arbitral practice. He identifies the key factors affecting the deliberation process, namely the arbitrators' partiality/impartiality and level of preparation.[28] The next chapter "**The Role of Tribunal Secretaries in the Drafting of Investment Awards**",[29] offers a particularly valuable examination of tribunal secretaries' growing involvement in drafting awards, addressing concerns about delegation, consent, legitimacy, and transparency.

In "**The Reasoned Award**",[30] the authors set out a comprehensive overview of what issuing a reasoned award entails and emphasise the importance of this in investment arbitration. They highlight how this requirement is reinforced by annulment and enforcement mechanisms under Article 52 (1)(e) of the ICSID Convention, as well as through public policy considerations reflected in the UNCITRAL Model Law and the New York Convention.[31]

19 By Crina Baltag.

20 See e.g. *Pantechniki SA Contractors and Engineers v Albania*, ICSID Case No ARB/07/21, Award (30 July 2009); Emilio Agustín Maffezini v Spain, ICSID Case No ARB/97/7, Award (13 Nov. 2000), as cited by the author as an example of effectively presenting a complex factual background in only 27 pages. See p.180.

21 At pp. 181-183.

22 By George Bermann.

23 By Diane A Desierto.

24 By Mohamed S Abdel Wahab.

25 By Nigel Blackaby and Maria Julia Milesi.

26 By Céline Lévesque and Christian Schmid.

27 By Yves Derains.

28 At pp. 330-331.

29 By Claudia Frutos-Peterson, Marat Umerov, and Marija Ozolins

30 By Bruno Simma and Jan Ortgies.

31 To avoid challenges or enforcement issues, the authors offer a series of suggestions, including limiting summaries and citations to essentials, addressing issues earlier, and prioritising case-specific analysis over broad legal debates. See pp. 371-372.

Chapters 21 and 22 then turn to two closely related themes. "**To Err Is Human, to Dissent Divine**"[32] is dedicated to the significant phenomenon of dissenting opinions in investment arbitration. "**An Empirical Analysis of Legal Reasoning: Comparing Investment Arbitration and International Commercial Arbitration**"[33] offers an empirical comparison of legal reasoning contained in international investment and commercial arbitral awards.

Part 5 "Review and Enforcement"

This Part explores the post-award landscape in international investment arbitration. Chapter 23 "**Annulment and Set-Aside**"[34] starts with an examination of annulment and setting aside proceedings, comparing the narrow procedural review under Article 52 of the ICSID Convention with the non-ICSID domestic court oversight. An extended in Chapter 24 "Review beyond Annulment: Correction, Additional Awards, Clarification, and Revision"[35] addresses other post-award remedies, including correction, additional awards, interpretation, and revision. "The Appeal in International Investment Arbitration"[36] situates these remedies within the broader debates on reforming appellate mechanisms, analysing models from domestic law, WTO and other international dispute settlement mechanisms,[37] as well as proposed multilateral investment courts. He further highlights the potential advantages of a meticulously designed appellate system in promoting consistency and, consequently, enhancing the legitimacy of ISDS.[38] In the Chapters "**Recognition and Enforcement of ICSID Convention Awards**" and "**Recognition and Enforcement of Non-ICSID Convention Awards**", the enforcement of ICSID and non-ICSID awards. The traditional assumption of voluntary compliance is criticised, noting increasing resistance by domestic courts, particularly those in the EU.[39]

Part 6 "Cross-Cutting Issues"

The final part provides a wide-ranging evaluation of international investment arbitration, commencing with a historical analysis of investment awards in "**The Investment Award in a Historical Perspective**",[40] tracing arbitration from ancient Greece and Rome to the contemporary ISDS system. The historical narrative is followed by an empirical analysis in "**Empirical Dimensions of Investment Awards**",[41] where over 550 investment awards are examined and emerging trends are highlighted through statistics on both the internal and external elements of an award.[42] The following chapter "**Gender and Investment Awards**"[43] adopts a critical approach to the social aspect of investment arbitration, emphasising the importance of gender diversity for both the legitimacy and quality of investment awards.

The last chapter of the book "**The Visible and Invisible Footprint of New Technologies in Investment Awards**"[44] examines the generative function of technology as utilitarian tools that promote efficiency, while noting that the use of AI-enabled systems provokes inquiry regarding authorship, responsibility, and overall transparency of investment arbitrations.

This volume represents a significant contribution to investment arbitration scholarship. It offers readers concrete guidance on jurisdictional complexities, legal reasoning, and enforcement challenges, seamlessly integrated with sophisticated analyses of foundational questions and empirical insights into emerging trends. It is essential reading for anyone seeking the distilled insights of preeminent practitioners and scholars on the field's most pressing and multifaceted challenges.

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32 By Charles N. Brower and Ahmed Mazlom.

33 By S.I. Strong.

34 By Steffen Hindelang and Julia Nassl.

35 By Karsten Nowrot and Emily Sipiorski.

36 By Julien Chaisse.

37 See e.g. the discussion on the 2013 JAMS Optional Arbitration Appeal Procedure, at pp. 453-454.

38 At pp. 463-464.

39 At pp. 473-474.

40 By Valentine Vadi.

41 By Rodrigo Polanco.

42 The author provides robust statistics on internal elements, such as the number of arbitrators, applicable arbitral rules and treaties, language, and length. The Chapter also examines external elements, including the types of claimants and respondents, their geographical distribution, and the economic sector of investors.

43 By Patricia Nacimiento and Andrés E. Alvarado-Garzón.

44 By Katia Fach Gómez.

Modern International Arbitration in the Making
35 Awards from the ICC Archives (1925-1968)

Emmanuel Jolivet
General Counsel, International Chamber of Commerce (ICC) and ICC International Court of Arbitration; PhD in Law; Qualification to supervise doctoral research (HDR)

Mikaël Schinazi
Senior Associate, Jones Day; Admitted to the New York and Paris Bars; PhD in Law; Visiting Lecturer at Sciences Po Law School, France

Stephanie Torkomyan
Publications Manager, ICC Dispute Resolution Services; Editor, ICC Dispute Resolution Bulletin

Valeria Costantino
PhD Candidate admitted to the Italian Bar; Former Intern, ICC International Court of Arbitration

The authors wish to thank Sylvie Picard Renaut for her meticulous archival preservation and referencing, as well as for her essential role in collecting the original awards and historical publications. They also take this opportunity to express their gratitude to Virginia Hamilton, Publications Manager with the ICC Court between 2000 and 2017, for her assiduous work on the ICC Bulletin and the dissemination of ICC awards.

The views expressed in this article are solely those of the authors and should not be understood as reflecting the views of ICC or Jones Day.

With over 30,000 cases registered since its founding in 1923 and an average of 500 awards issued annually over the past decade, the ICC International Court of Arbitration ("ICC Court") serves as the leading institution for resolving a broad range of disputes, involving a diversity of nationalities, jurisdictions, economic sectors, contracts, legal issues, and monetary amounts. The ICC Court has, since its earliest years, considered the question of the publication of awards to support the development of arbitral and international jurisprudence. Since 1990, its Bulletin has played a key role in the publication and commentary of awards.

To mark ICC Bulletin's 35th anniversary, the authors present a selection of 35 awards rendered between 1925 and 1968, for which the extracts are reproduced in their original language – in English or French. These awards are more than archival curiosities. They offer a vivid glimpse into the arbitral craft of a formative era, and show how arbitrators then balanced national legal orders, transnational commercial realities and contractual pragmatism. While ICC was founded on the belief that the facilitation of international exchanges could promote peace, progress, and cordial relations among countries, early awards show that the ICC Court has acted as a distinct form of justice – faster, expert-driven, and inherently international, fostering the emergence of transnational *lex mercatoria* aimed at ensuring predictability in cross-border transactions.

Introduction

On the occasion of the ICC Bulletin's 35th anniversary, the authors present a selection of 35 arbitral awards from the ICC's archives. Most of these awards are published here for the first time,[1] and predate modern arbitration statutes and international instruments, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965). Preserved for decades in the ICC archives[2] – on ageing paper, their ink fading but their significance undiminished – these past awards reveal how arbitrators of the time navigated a more fluid legal landscape, balancing national legal orders, transnational commercial realities, and contractual pragmatism with remarkable sensitivity.

Their methodological flexibility, close attention to commercial detail, and often intuitive reasoning prefigure many of today's international arbitration debates. At the same time, these awards reflect an evolving institutional framework – already transnational in ambition, commercially attuned, and inventive in terms of procedure and substance. Approached in the spirit of Foucault's "archaeology",[3] these awards invite readers to excavate the layers of discourse, practice, and institutional imagination through which modern arbitral authority gradually emerged.[4]

This article proceeds in two parts. The first provides a succinct historical overview of early ICC Arbitration, situating these awards in their institutional and legal context (**1.**). The second offers a brief analysis of these 35 awards, highlighting some of their key features and enduring relevance to contemporary arbitral practice (**2.**).

1. Early ICC Arbitration: Institutional optimism and global context

One cannot understand the origins of ICC Arbitration without first considering the broader origins of the International Chamber of Commerce itself. The roots of ICC lay in a 1919 business conference in Atlantic City, New Jersey, where business leaders, industrialists, and representatives of chambers of commerce from Allied countries gathered to envision a new framework for post-war economic cooperation.[5]

One participant aptly described the meeting as "a corollary to the Peace Conference":[6] it was the seedbed of ICC and of the idea that international trade, properly organised, could serve as a foundation for lasting peace.

The following year, that idea took institutional form with the creation of ICC in Paris in 1920. Its founders sought to promote economic reconstruction and international cooperation through trade, convinced that commerce could be a stabilising force in a fragile post-war world. In its by-laws, ICC defined its mission as:

1 Of the 35 awards published in this edition of the *Bulletin*, seven awards were originally published in the former ICC journal *World Trade/L'Économie internationale*: Award in **ICC Case 143** published in English (translated from the original French text) in *World Trade*, vol. IV, no. 10 (Nov. 1932), p. 11; **ICC Case 304** "An Agent's Claim to Commission on Business Effected outside His Area", *World Trade*, 5, no. 6 (June 1933), pp. 7-8; **ICC Case 513**, "Arbitration Awards Concerning Sterling Contracts", *World Trade*, Oct. 1932, pp. 10-11; **Affaire CCI 519**: "Une sentence récente sur un contrat en livres sterling", *World Trade*, Dec. 1932, p. 11; **ICC Case 536**, "A Recent Decision in a Sterling Contract Dispute", *World Trade*, May 1933, p. 11; **ICC Case 543** "The Validity of Tacit Acceptance", *World Trade*, 6, no. 10 (Dec. 1934), pp. 7-8; **ICC Case 568** "A Dispute Arising Out of a Contract between a Principal and His Agent", *World Trade*, 6, no. 8 (Oct. 1934), pp. 6–7. The following introductive paragraph usually preceded the text reproduced: "The awards selected for publication by the Executive Committee of the Court of Arbitration cannot be considered as expressing the opinion of the International Chamber of Commerce on the questions of principle involved, nor as a constituting precedent binding the arbitrators of the International Chamber of Commerce in future".

2 The authors thank Colin Moriniaux, Jose-Ronan Montull, Elise Roussel, and Cordélia Genzel who, as Sciences Po students, transcribed with Mikaël Schinazi more than 130 arbitral awards over the course of several months in 2017.

3 See M. Foucault, The Archaeology of Knowledge (transl. from the French by A.M. Sheridan Smith, Pantheon Books, 1971). "Archeology" is here understood as a "metaphor presenting knowledge as something that lies beneath a surface and needs to be uncovered before it can be understood". L. Lawlor, J. Nale, *The Cambridge Foucault Lexicon* (Cambridge University Press, 2014).

4 A limited number of researchers have already had access to these awards and made use of them in their respective works. See in particular (in chronological order), F. Grisel, "Droit et non-droit dans les sentences arbitrales CCI: Une perspective historique", *ICC International Court of Arbitration Bulletin,* 25, no. 2 (2014), pp. 13-20; C. Lemercier, J. Sgard, Arbitrage privé international et globalisation(s): Rapport final (Rapport de recherche 11.11, Mission de Recherche Droit et Justice; CNRS; Sciences Po, 2015); E. Silva Romero, E. Jolivet, F. Grisel, "Aux origines de l'arbitrage commercial contemporain: L'émergence de l'arbitrage CCI (1920-1958)", *Revue de l'arbitrage*, 2016, pp. 403-444; A. Stone Sweet, F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017); E. Jolivet, "La création de la Chambre de commerce internationale : dans les coulisses d'une négociation internationale originale", *Liber Amicorum in honor of Professor Didier Ferrier* (Dalloz, 2021), p. 331; M. Schinazi, The Three Ages of International Commercial Arbitration (Cambridge University Press, 2021; repr. 2024).

5 They included the French steel magnate Eugène Schneider, the Belgian industrialist Louis Canon-Legrand, the American philanthropist Edward A. Filene, and the businessman John H. Fahey. On the history of ICC and its International Court of Arbitration, see M. Schinazi, supra note 4, part II.

6 *International Trade Conference* (Chamber of Commerce of the United States of America, 1919), p. 10. These were the words of Alfred Bedford, who chaired the executive committee for the conference and was the vice-president of the US Chamber of Commerce. Étienne Clémentel, ICC's first president, was part of the French government during the Paris Peace Conference in 1919–1920.

> "to facilitate the commercial intercourse of nations, to secure harmony of action on all international questions affecting commerce and industry, and to promote peace, progress, and cordial relations among countries and their citizens by the cooperation of business men and their organizations devoted to the development of commerce and industry".[7]

ICC's motto "peace through commerce" was therefore more than a slogan: it expressed a belief in the potential of transnational economic exchange in an era of shattered empires, war debt, and geopolitical realignment. This institutional idealism provides the backdrop against which the early ICC Court jurisprudence must be read.

a) Paris, Clémentel, and the French imprint on ICC internationalism

This belief found its most forceful advocate in ICC's founding president, Étienne Clémentel (1864–1936), a former French minister of commerce and passionate proponent of liberal internationalism.[8] Deeply involved in the organisation's genesis, Clémentel played a decisive role in articulating and giving coherence to ICC's internationalist project.

When delegates at the Atlantic City conference decided to establish a permanent international body, they were confronted with a question that was at once practical and symbolic: where should its headquarters be located? Several cities were proposed, including London, The Hague, Brussels, and Geneva, each embodying a different vision of internationalism.[9] London stood for financial power; Belgium recalled the origins of the movement, having hosted the first International Congress of Chambers of Commerce (in Liège); and Geneva, newly associated with the League of Nations, represented political idealism. Yet none of these options ultimately prevailed.

Paris emerged as the natural choice – not only because France had borne immense human and material losses during the First World War, but also because the city had become a hub of post-war reconstruction and diplomacy. The decision thus carried both moral and pragmatic significance. Clémentel's personal influence proved decisive: a respected statesman with close ties to industrial and commercial circles, he was able to mobilise both governmental and private actors around his conviction that trade and arbitration could serve as instruments of peace.

With hindsight, the choice of Paris proved to have far-reaching impact. By bringing together business leaders, lawyers, and scholars within a single institutional centre, it contributed decisively to shaping modern international commercial arbitration, particularly within the French legal tradition.[10] The establishment of ICC in Paris not only generated direct and indirect economic benefits for the city but also fostered a distinctive symbiosis between arbitral practice and French legal thought. Over time, this interaction facilitated the emergence of doctrines that would come to define international arbitration, including the autonomy of the arbitration clause (as reflected, inter alia, in **ICC Cases 762, 768, 974, 1007 and 1024**) and the theory of the "delocalisation" of the arbitral award.[11] It also firmly established the reputation of Paris as "the home of international arbitration" – a status it continues to enjoy today.[12]

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7 *Proceedings: Organization Meeting of the International Chamber of Commerce. Paris, France, June 23 to 30, 1920* (ICC International Headquarters, 1920), p. 35

8 On Clémentel generally, see M.-Ch. Kessler, G. Rousseau (eds.), *Étienne Clémentel: Politique et action publique sous la Troisième République* (Peter Lang, 2018); M. Schinazi, supra note 4, pp. 106–109.

9 On the selection of Paris as the location of the ICC headquarters, see e.g. C. Druelle-Korn, "The Great War: Matrix of the International Chamber of Commerce, a Fortunate Business League of Nations". in A. Smith, K. Tennent, S. Mollan (eds), *The Impact of the First World War on International Business* (Routledge, 2016).

10 On the modern history of arbitration in France, see e.g. C. Becharef Jallamion, "La jurisprudence française et l'arbitrage de 1843 à 1958 : De la défaveur à la faveur jusqu'à l'avènement de l'arbitrage international", *Revue de l'arbitrage*, 2015, pp. 739–780 (part 1) and pp. 1037–1101 (part 2); C. Becharef Jallamion, T. Clay, "Arbitrage et justice étatique, hier et aujourd'hui", *Itinéraires d'Histoire de la procédure civile*, vol. I, Regards français, L. Cadiet, S. Dauchy, J.-L. Halpérin (eds.), Bibliothèque de l'Institut de Recherche juridique de la Sorbonne – André Tunc, Vol. 51 (IRJS, 2014), pp. 177-221; M. Schinazi, supra note 4, pp. 67–86; J. Sgard, "A Tale of Three Cities: The Construction of International Commercial Arbitration," in J. Sgard, G. Mallard (eds.), *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* (Cambridge University Press, 2016), pp. 153–184.

11 In **ICC Case 927** (award rendered in 1955), the arbitrator highlights the principle of "freedom of contract" to confirm its jurisdiction over the dispute: "The parties have expressly by contract agreed to Arbitration in accordance with the Rules of Conciliation and Arbitration of ICC. The arbitrator cannot imagine that the law of [U.S. State] forbids American businessmen to enter such an international agreement and still less allow them to disregard a signed agreement to arbitrate abroad. Such a stand would be utterly inconsistent with the fundamental principle of the freedom of contract …".

12 See the website Paris Home of International Arbitration; and "Arbitration: a French Model" in France's Legal Attractiveness (Ministry of Justice, Ministry for Europe and Foreign Affairs, 2026), p. 22.

Moreover, ICC's presence in the French capital helped position French law as one of the most frequently selected applicable laws worldwide, as concerns both substantive obligations and procedural frameworks. This trend is illustrated, for example, by **ICC Case 983**. That legacy remains visible in the ongoing reform of French arbitration law, which seeks to reaffirm France's historic leadership in the field by modernising its framework while preserving the core principles first nurtured under ICC's influence a century ago.[13]

Clémentel's vision for ICC was nothing short of ambitious. As he declared at the organisation's founding meeting at the Sorbonne in June 1920, business leaders were called upon to extend into economic life the same ideals that the League of Nations sought to realise in political life.[14] Under his presidency, this vision took concrete institutional form with the creation of the "ICC Court of Arbitration" in 1923[15] – a veritable "businessmen's League of Nations" dedicated to the peaceful settlement of commercial disputes.[16] That ambition found practical expression in early ICC jurisprudence, which repeatedly emphasised the role of arbitrators as *amiables compositeurs*, entrusted with reconciling legal norms and commercial equity.[17]

b) Defining the ICC Court's function: Administration, scrutiny, and legitimacy

The inauguration of the ICC Court on 19 January 1923 was itself an act of institutional optimism. Held in the grand hearing chamber of the Tribunal de Commerce de la Seine, the ceremony was attended by more than 500 personalities, including government ministers, ambassadors, senior judges, and business leaders. In his inaugural address, Clémentel paid tribute to the judiciary, while pointedly contrasting the lengthiness and cost of ordinary court proceedings with the efficiency, expertise, and adaptability that arbitration could offer. International disputes, he observed:

> "usually bear on questions of a technical nature, which can only be settled by a technical expert".[18]

Arbitration was thus presented not merely as an alternative to justice, but as a distinct form of justice – faster, expert-driven, and inherently international in outlook.

This vision positioned the ICC Court at the intersection between the public and private sectors. Although conceived as a private institution, it was consciously modelled on judicial ideals of rigour, impartiality, and legitimacy. From the outset, its role was clearly delineated.[19] The ICC Court was not itself an arbitral tribunal, but rather an administrative body entrusted with supervising the arbitral process conducted under the ICC Rules.

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13 See Groupe de travail sur la réforme du droit français de l'arbitrage (under the presidency of F. Ancel and T. Clay), Rapport et Propositions de réforme (March 2025). See also more information about the ICC Court Centenary.

14 It should be noted that Clémentel was close to Léon Bourgeois, the first president of the League of Nations, and both men belonged to the same party, the Gauche radicale. On Clémentel's relationship with the League of Nations, see C. Lemercier, J. Sgard, "Arbitrage privé international et globalisation(s): Rapport final" (March 2015), p. 103; C. Druelle-Korn, "The Great War: Matrix of the International Chamber of Commerce, a Fortunate Business League of Nations," in A. Smith, K. Tennent, S. Mollan (eds.), *The Impact of the First World War on International Business* (Routledge, 2016), p. 109; M. Schinazi, supra note 4, p. 107.

15 The "Court of Arbitration" was renamed the "International Court of Arbitration" on 14 June 1989, at the 157th ICC World Council Meeting. This terminology was incorporated in the second edition of the 1988 Arbitration Rules. See also W.L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications and ICC Publishing, 2nd. ed, 1990), at xix: "A more cosmetic change was the modification on 15 June 1989 of the name of the Court of Arbitration of the ICC to become the International Court of Arbitration of the ICC, a modification designed to reflect the multinational composition … but not to change it mission or jurisdiction".

16 The expression is from George Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce, 1919–1938* (Columbia University Press, 1938), p. 15.

17 See specifically Section 2(c) of this article.

18 "Inauguration of the Court of Commercial Arbitration: January 19th, 1923", *ICC Brochure* no. 22 (Paris: ICC International Headquarters, 1923), p. 16.

19 An outlier in this respect is the unpublished ICC Case 848 (award rendered in 1953), where the respondent wrote that "[The Court] is not a pre-constituted third party to whom the parties may only entrust the task of appointing or selecting an arbitrator. The Court is an adjudicative body; it has rules which vest it with powers wholly incompatible with the status of a pre-constituted third party. It behaves as a true tribunal: it entertains issues that must be resolved before any arbitrator can be appointed; its decisions are subject to judicial review; and, once again, no arbitrator may be appointed until the appeal brought before such courts has been disposed of". (Original in French: "[La Cour] à l'évidence, n'est pas un tiers préconstitué auquel les parties ne peuvent donner que la mission de désigner, de choisir un arbitre. La Cour est un organisme contentieux, elle a un règlement qui lui confère des pouvoirs absolument incompatibles avec la qualité de tiers préconstitué. Elle se comporte comme un véritable tribunal : elle connaît de questions qui doivent être résolues avant toute nomination d'arbitre, ses décisions doivent être soumises au contrôle des tribunaux et là encore l'arbitre ne devra pas être désigné avant que ne soit vidé le recours soumis à ces tribunaux".)

As an early award rendered in 1932, **ICC Case 889** explained:

> "La Cour d'arbitrage n'arbitre pas elle-même les différends qui lui sont soumis. Elle n'intervient que sur le plan administratif pour examiner s'il existe, *prima facie*, une clause d'arbitrage en vertu de laquelle la partie demanderesse peut exiger la constitution d'un tribunal arbitral appelé à connaître de ses prétentions".[20]

Yet, from its earliest years, the ICC Court's responsibilities went beyond the mere appointment of arbitrators. The Court was involved in constituting tribunals, granting extensions of time, and – most importantly – reviewing draft awards.

Although the 1922 ICC Rules did not expressly provide for such scrutiny,[21] that practice emerged almost immediately as a cornerstone of the ICC system. The 1923 Explanatory Commentary made this clear, specifying that:

> "before signing the award, the arbitrators must submit the draft of their award to the Court of Arbitration for examination from the point of view of form. No award can be pronounced without having been submitted to the approval of the Court of Arbitration".[22]

This language was subsequently codified in the 1927 ICC Rules, which read:

> "Before completing the award the arbitrators or arbitrator shall submit the same to the Court of Arbitration for examination as to its form. No award shall under any circumstances be issued until approved as to its form by the Court of Arbitration".[23]

With this provision, ICC introduced a defining feature of its arbitral framework: the idea that institutional oversight enhances both the technical quality and the legitimacy of arbitral decisions. At the time, scrutiny was widely perceived as one of ICC's most distinctive contributions to international arbitration.

Clémentel himself emphasised the importance of this mechanism at ICC congresses, explaining that members of the ICC Court's Executive Committee:

> "study with minute care the cases submitted to the Court and see to it that the awards rendered are in due legal form and in case of necessity can be enforced. The parties have but little idea of the large amount of work done with striking impartiality by merchants and manufacturers, traders and bankers, who give their time, out of pure devotion, to the great cause of commercial justice".[24]

Since the adoption of the first Rules in 1922,[25] the ICC framework has evolved continuously in response to practice and feedback, with successive revisions reflecting a pragmatic effort to reconcile procedural flexibility with institutional discipline. From an early stage, ICC thus cultivated an ethos of continuous procedural adaptation. A century later, scrutiny of awards remains a defining feature of the ICC Court's mission and a central element of its contribution to the legitimacy and effectiveness of international arbitration.[26]

Beyond dispute resolution, ICC Arbitration also contributed to the development of mechanisms for the recognition and enforcement of arbitral awards across jurisdictions. By ensuring predictability in an environment characterised by fragmented legal systems, the ICC Court's supervisory role helped stabilise international trade and fostered the gradual emergence of a transnational *lex mercatoria* during a historical period marked by resurgent nationalism (see **ICC Cases 143, 301 and 927**).

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20 As translated: "The Court of Arbitration does not itself arbitrate the disputes submitted to it. It intervenes only at the administrative level to examine whether there exists, *prima facie*, an arbitration clause under which the claimant may demand that an arbitral tribunal be constituted to hear its claims".

21 Art. XIV/XXXV(b), 1922 ICC Rules of Conciliation and Arbitration provided that a copy of the arbitrators' decision should be sent to ICC and that the parties would receive a certified copy of the decision once the requirements relating to fees and charges had been complied with.

22 Art. XIV/XXXV, 1923 Explanatory Commentary of the Rules of Conciliation (Good Offices) and Arbitration, originally published in the Appendix to *ICC Brochure* No. 21 (1922).

23 1927 ICC Rules of Conciliation and Arbitration, Art. 21, originally published in *ICC Brochure* No. 50 (1927).

24 "Solemn Session of the Court of Arbitration", proceedings of the Stockholm Congress, June 27–July 2, 1927, *Journal of the International Chamber of Commerce*, no. 15 (Sept.–Oct. 1927), p. 38.

25 They were promulgated in 1922, recast in 1927, and amended several times thereafter (1931, 1933, 1935, 1939, and 1947). New versions then appeared in 1955, 1975, 1988, 1998, 2012, 2017, and, most recently, 2021. A detailed analysis of these Rules over time has been carried out by A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP, 2017), pp. 84–107; and M. Schinazi, supra note 4, pp. 159–172. The previous versions of the ICC Rules are available in the ICC Dispute Resolution Library.

26 For further reading on scrutiny by the ICC Court, see Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process, *ICC Dispute Resolution Bulletin,* 2022-2; A. Carlevaris, "A Century of Awards Scrutiny: An Appraisal", *Liber Amicorum pour Y. Derains: Arbitration and beyond … Une forme de vie?* (A. Pedone, 2021).

In this institutional context, several cases underscored the importance of defining the scope of the arbitrator's mandate in order to determine the extent of arbitral authority, including the powers conferred and the limits imposed by the parties' agreement. Such clarification reinforced the legitimacy of arbitral awards and reflected the ICC Court's broader concern with procedural discipline and effective oversight (notably in **ICC Cases 927 and 1007**).

c) From interwar treaties to systemic crises: Economic shocks, geopolitics, and arbitral practice

The establishment of the ICC Court coincided with the first concerted efforts to build an international legal framework for arbitration. In the very year of the ICC Court's inauguration, the League of Nations adopted the "Geneva Protocol on Arbitration Clauses" (1923), followed a few years later by the "Geneva Convention on the Execution of Foreign Awards" (1927), in which ICC played an active role in the negotiation.[27] These texts represented early attempts to harmonise the cross-border recognition of arbitration clauses and awards. At the same time, however, they revealed the structural limits of interwar internationalism.

The Geneva regime remained firmly anchored in state consent and reciprocity. The 1927 Convention was open only to states that had previously ratified the 1923 Protocol and applied only if an entire set of nine stringent conditions were satisfied.[28] The proliferation of formal requirements reflected governments' enduring reservations: states were still reluctant to accept that arbitral authority might operate outside domestic judicial control. International arbitration, in this framework, remained subordinate to national legal orders.

Against this background, ICC's institutional model offered something genuinely novel. Whereas the Geneva instruments relied on interstate obligations and diplomatic coordination, the ICC Court embodied a transnational legal order driven by private initiative. It provided traders and enterprises with a dispute resolution mechanism capable of functioning independently of political relations between states – a form of economic internationalism that complemented, and in some respects compensated for, the fragility of political internationalism under the League of Nations.

The ICC Court's very existence suggested that an international legal order could emerge not only through treaties but also through the routine practices of commerce and adjudication.

Throughout the interwar years, ICC Arbitration became an anchor of legal stability amid profound economic and political upheaval. The late 1920s and the 1930s were marked by currency collapses, protectionist measures, and the fragmentation of global trade networks. The awards of the period mirror these shocks with particular clarity, revealing how international arbitration responded to systemic economic disruption. One recurring cause of disputes was the sharp depreciation of national currencies and its impact on international contracts and payment obligations, as illustrated by **ICC Cases 513, 519 and 536**.

The Great Depression provides a striking illustration. Numerous disputes arose following the devaluation of the pound sterling, which destabilised contractual equilibria and triggered claims for price adjustments. As stated in **ICC Case 536**:

> "Whereas, subsequently to the contract, the value of the £ fell considerably on the foreign exchange market and whereas the seller uses that fact as an argument for claiming that the price should be paid to him on the basis of the old gold parity; … Whereas, in addition, the disastrous depreciation of the £ has, in the case of a large number of contracts, resulted in unexpected profit or loss; whereas the same persons have often gained and lost at the same time, on the one hand by settling debts in £ and on the other hand by being paid in £; whereas it would be inadmissible in law to modify business transactions on the ground that it was necessary to maintain a balance".[29]

This reasoning typifies the refusal to allow macroeconomic disruption, however severe,

27 Available at https://treaties.un.org/. See also M. Schinazi, supra note 4, pp. 121-124; C. Lemercier, J. Sgard, supra note 4, pp. 107-108.

28 Formulated as they were in restrictive terms, the conditions led to serious difficulties. The most problematic requirement was that to be enforceable an award had to have become "final" in the country of the seat. In practice, this necessitated "double exequatur" proceedings, which could significantly lengthen the duration of the arbitral process.

29 On the devaluation of the pound sterling, see also **ICC Cases 513 and 519** (both rendered in 1932) and also published in *World Trade*, supra note 1. In **ICC Case 519**, the arbitrator considered: "En ce qui concerne les frais, il faut considérer que les deux parties sont de bonne foi et, d'autre part, que la demanderesse encourt incontestablement une perte de change, dont toutefois la défenderesse n'est nullement responsable, en sorte qu'il y a lieu de faire supporter à la demanderesse les 4/5 des frais et dépens déjà exposés à la date de la présente sentence et de mettre le surplus a la charge de la défenderesse". (As translated: "With regard to costs, it must be considered that both parties are acting in good faith and, furthermore, that the claimant is undoubtedly incurring a foreign exchange loss, for which the respondent is in no way responsible, so that the claimant should bear 4/5 of the costs and expenses already incurred at the date of this award and the remainder should be borne by the respondent".) See also "To Avoid Foreign Lawsuits", *World Trade* 4, no. 2 (Jan. 1932), p. 6.

to undermine contractual stability demonstrated by ICC tribunals at the time. Rather than redistributing losses ex post, arbitrators emphasised risk allocation and commercial foreseeability, thereby preserving legal certainty at a time of extreme financial volatility. Faced with the growing number of such disputes – more frequently submitted to arbitration than to ICC conciliation – the ICC Court gradually contributed to the emergence of standardised approaches to currency valuation and contractual interpretation. These awards illustrate how arbitrators exercised discretion to fill contractual lacunae and mitigate risk,[30] an approach that continues to inform contemporary debates on interpretative autonomy in international arbitration.

In many instances, arbitrators adopted an overtly pragmatic and business-oriented approach. Thus, in **ICC Case 519** the arbitrator observed that it was regrettable that merchants engaging in transactions denominated in foreign currencies often failed to take adequate precautions against exchange-rate risk, explaining that:

> "On peut dire d'une manière générale, ici, qu'il est regrettable de constater que dans beaucoup de cas, des commerçants traitant des affaires en d'autres monnaies que la monnaie nationale ne se préoccupent pas suffisamment de la question du change, ou ne savent pas suffisamment qu'on peut assurer le change à terme. Un bon commerçant doit toujours prendre ses précautions dans ce sens, car son activité est de faire du commerce et non pas de spéculer sur le change".[31]

This reasoning shows that from early on arbitrators expected commercial actors to display business acumen in their conduct and would take account of commercial norms and practices when rendering their decisions.

A second series of cases illustrates how geopolitical transformations shaped arbitral reasoning. For instance, the special legal regime of the Saar Basin Territory following the Treaty of Versailles – under which the region was placed under the French customs regime and governed by the League of Nations – generated complex legal consequences for private contracts. In the aftermath of the First World War, newly established norms of international public law governing territorial realignments in Western Europe had a direct impact on arbitration agreements and commercial obligations, including non-competition clauses.

ICC arbitrators adapted their reasoning to ensure continuity and fairness in cross-border commerce, thereby illustrating the horizontal effect public international law could have on private contractual relationships. **ICC Case 546–549** (award rendered in 1933) is particularly instructive in this respect:

> "Avant d'aborder l'interprétation des Conventions conclues entre les parties, il convient de considérer le statut juridique du Bassin de la Sarre pour autant qu'il soit pertinent pour le présent litige … La situation juridique du Bassin de la Sarre est unique … Il s'agit de savoir si le territoire du Bassin de la Sarre est compris dans les termes « marché français »."[32]

The tribunal concluded that the parties were operating within an economic rather than a political framework, and that the Saarland was included in the "French market" in the meaning of the convention to be interpreted.[33] This approach integrated public-law constraints into the private-law analysis while maintaining coherence. These cases demonstrate how ICC Arbitration accommodated shifting sovereignties without sacrificing contractual predictability.

A further illustration of ICC's stabilising role in times of geopolitical tension is provided by **ICC Case 998**. In that dispute, a sovereign state voluntarily waived its jurisdictional immunity and consented to arbitration against a private company under the auspices of ICC. This choice reflected a deliberate commitment to peaceful dispute resolution and procedural neutrality. By submitting to arbitration, the state not only ensured procedural fairness in that particular case but also reinforced confidence in international legal mechanisms, demonstrating that even sovereign actors could accept neutral adjudication in pursuit of amicable solutions.

Remarkably, even during periods of acute geopolitical disruption, the ICC Court continued to function. From its headquarters in Paris – and later, during the Second World War, from Stockholm, where the

30 See Section 2(d) of this article providing past examples of interpretation of contract by arbitrators.

31 As translated: "Generally speaking, it is regrettable that in many cases, traders dealing in currencies other than the national currency do not pay sufficient attention to the issue of exchange rates, or are not sufficiently aware that forward exchange rates can be secured. A good trader should always take precautions in this regard, as their business is to trade and not to speculate on exchange rates".

32 As translated: "Before addressing the interpretation of the agreements concluded between the parties, it is necessary to consider the legal status of the Saar Basin insofar as it is relevant to the present dispute … The legal situation of the Saar Basin is unique … The question is whether the territory of the Saar Basin is included within the term 'French market'."

33 **ICC Case 546-549**: "les parties se placent, pour fixer l'étendue géographique de leurs engagements, sur le terrain économique et non politique. C'est donc un critère économique qui doit être à la base de la distinction entre le marché français et tout autre marché". (As translated: "the parties are operating within an economic rather than a political framework. It is therefore an economic criterion that must form the basis for distinguishing between the French market and any other market".)

institution temporarily relocated[34] – ICC administered disputes involving parties from all continents. This continuity was exceptional. At a time when diplomatic channels were fractured and international cooperation severely constrained, ICC preserved a functioning forum for the peaceful settlement of international commercial disputes.

For the business community, the ICC Court represented a rare zone of predictability and neutrality. Its early case files – including the 35 awards published in this issue – reveal the initial contours of a genuinely international arbitral practice: arbitrators drawn from diverse legal traditions, proceedings conducted in multiple languages, and reasoning attentive to transnational commercial realities. In this way, ICC helped shape not only the technical mechanics of international arbitration but also its professional culture – one grounded in expertise, procedural fairness, and cross-border cooperation.

Beyond its administrative role, the ICC Court – and ICC more broadly – performed a stabilising function within the international economic order. It embodied a broader conviction that, when properly institutionalised, commerce and law could mitigate conflict and promote prosperity.

2. Early ICC jurisprudence: 35 awards as a laboratory of transnational arbitral practice

The excerpts from 35 awards published in this issue of the Bulletin were selected for their relevance and representativeness and have been anonymised. Considered together, they offer a rare window onto the formative decades of ICC Arbitration. They depict an institution – and body of practice – still in its infancy, yet developing at a striking pace as ICC transformed from an essentially European forum into a genuinely global dispute resolution mechanism.

Several aspects of this early jurisprudence warrant closer examination, not least because the awards reflect the gradual consolidation of institutional habits (who arbitrated, what kinds of disputes were brought, and how proceedings were conducted) and the progressive refinement of legal reasoning. The sections that follow treat, in turn, the actors and disputes involved (**a.**), the format of awards (**b.**), the gradual shift from equitable to legal reasoning (**c.**), the legal concepts recurrent in the awards (**d.**), and jurisdiction and procedure (**e.**).

a) Actors and disputes in early ICC Arbitration

Parties and geographical reach

In the 1920s, most cases were brought by parties from France and neighbouring European countries such as Belgium, England, Germany, Italy, and Spain. This European core nevertheless expanded quickly. The awards published in this issue include disputes involving parties from the Americas (**ICC Case 983**), Oceania (**ICC Cases 787 and 1073**), Africa (**ICC Cases 477 and 974**), Asia (**ICC Cases 163, 998 and 1315**), and the Middle East (**ICC Case 1158**). In **ICC Case 998**, one party was a state from Asia, showing that ICC's reach spanned different continents and categories of actors, as a corollary to ICC's expanding international reputation.[35] At the time, ICC Arbitration was already used to resolve disputes between parties located within the same jurisdiction.[36]

Arbitrators and professionalisation

A similar pattern can be observed among arbitrators. French nationals predominated in the 1920s and 1930s, alongside Belgian, Swiss, Austrian, British, Dutch, German, and Italian arbitrators.

In the very early years, many arbitrators were not jurists but instead came from chambers of commerce or commercial professions.[37] Some conducted proceedings informally, including from their homes. By way of illustration, in **ICC Case 225:**

> "L'arbitre a été chargé d'examiner les documents relatifs à l'affaire et de rendre sa sentence sur pièces à sa résidence à Bâle".[38]

34 On this episode, see S. Jarvin, "La Cour d'arbitrage de la Chambre de Commerce internationale pendant la seconde guerre mondiale", in L. Lévy, Y. Derains (eds.), *Liber amicorum en l'honneur de Serge Lazareff* (Pedone, 2011), pp. 331–347; S. Jarvin, "The Move to Stockholm of the Court of Arbitration of the International Chamber of Commerce (ICC) during the Second World War", *Scandinavian Studies in Law*, 63 (2017), pp. 115–138; and M. Schinazi, supra note 4, pp. 124–127.

35 See e.g. "Proceedings of the Twelfth Council Meeting," ICC Doc. No. 1214, Paris, July 20, 1923, 27; "Proceedings of the Thirteenth Meeting of the Council", Paris, 9 Nov. 1923, at 48; "Publishing Arbitration Awards", *World Trade*, 4, no. 3 (Feb. 1932), p. 10.

36 See e.g. **ICC Case 163**: "On behalf of the Court of Arbitration, the undersigned, ... [Japan], renders the following award in a dispute between [X] [Japan] and [Y] (French firm) [Japan] ...".

37 Other cases, not published here, provide additional examples: engineers, a merchant, a company director, a member of a tobacco journal, and an industrialist.

38 As translated: "The arbitrator was tasked with examining the documents relating to the case and rendering his award on the basis of those documents at his residence in Basel". In one case, **ICC Case 787**, the arbitrator stated in the award that he had waived its fees ("L'arbitre déclare renoncer à ses honoraires").

By the late 1920s, however, legally trained professionals increasingly served as arbitrators, particularly as disputes grew more complex. The arbitrator in **ICC Case 143**, concerning letters of credit, was a Belgian lawyer, "avocat à la Cour de cassation de Belgique". Similarly, the arbitrator in **ICC Case 477** was an "avocat à la Cour d'appel, Bruxelles". This development was explicitly anticipated within ICC itself. As René Arnaud (1893–1981), a leading figure in the ICC Court,[39] observed:

> "The Court of Arbitration does not wish to confine its activity to purely technical disputes over the quality of goods or the customs of a particular trade. It feels competent to decide purely legal cases and for these will, of course, seek the collaboration of legal experts".[40]

Evolving disputes and changing subject matters of arbitration

Some of the goods in dispute may seem unremarkable to modern readers: food products (**ICC Case 477**), textile materials (**ICC Cases 88 and 762**), clothing items (**ICC Cases 1007 and 1315**), and chemical and metallurgical items (**ICC Cases 927 and 519**). These cases reflect the commercial realities of the 1920s, when many ICC arbitrations resembled those handled by trade associations in England, France, and elsewhere – particularly those involving quality control, conformity, and trade usage.

Arbitrators were often tasked with physically inspecting goods. In **ICC Case 88**, the arbitrator reported:

> "J'avais pour mission : 1. de dire si la marchandise livrée par la maison [Y] était bien conforme à l'échantillon remis par cette maison avant que la commande ne lui eût été passée. 2. en cas de non-conformité de ladite marchandise avec les échantillons, de déclarer si [X] était fondé à réclamer une réfaction sur la livraison". [41]

Likewise, in **ICC Case 163**:

> "The arbitrator was to examine the documentary evidence in the case submitted by the two parties and, in particular, samples of the goods as well as the certificates obtained …".

A number of awards (see e.g. **ICC Cases 88, 143, 301 and 1383**) also concern documentary payment mechanisms, especially letters of credit. Taken together, these cases illustrate both the continuity of recurring commercial techniques and the increasing judicialisation of the disputes they generated.

From the 1930s onwards, however, ICC Arbitration increasingly dealt with complex legal and factual issues, and the cases published here illustrate that shift. **ICC Case 477** addresses the definition of a "buying agent". **ICC Case 546–549** interprets a legal instrument in light of principles elaborated by the Permanent Court of International Justice. Questions of applicable law also feature prominently (**ICC Cases 225, 756 and 986**), sometimes discussed at length,[42] whether in terms of multi-law governance (**ICC Case 1073**) or conflict of laws (**ICC Case 1281**).[43]

Other recurrent themes include licensing agreements, including (but not limited to) exclusive territorial or manufacturing licences, distributor designations, and reserved clientele (**ICC Cases 88, 1158, 907 and 1448**). Patents were also the subject matter of disputes in **ICC Cases 974, 1007 and 1024**, with jurisdictional objections ("exception d'incompétence") raised in all three cases.

Finally, certain awards, such as **ICC Case 1383**, highlight the persistence of commercial concerns that remain salient today, including economic dependence and

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39 On René Arnaud more broadly, see Comité national français de la Chambre de commerce internationale, *Un demi-siècle au service de la Chambre de commerce internationale: Brochure publiée à l'occasion du départ en retraite de René Arnaud*, Directeur Général du Comité (ICC, 1969).

40 R. Arnaud, "Arbitration in the International Chamber of Commerce", *World Trade*, 1, no. 1 (Jan. 1929), p. 123.

41 As translated: "My mission was: (1) to determine whether the merchandise delivered by the company … corresponded to the sample provided by that company before the order was placed; (2) in the event of non-conformity with the sample, to determine whether [X] was entitled to claim a price reduction on the delivery". Likewise, in **ICC Case 225** : "l'arbitre a été chargé d'examiner les documents relatifs à l'affaire et de rendre sa sentence sur pièces à sa résidence à Bâle". (As translated: "the arbitrator was tasked with examining the documents relating to the case and issuing his ruling based on the documents at his residence in Basel".)

42 See also **ICC Cases 983 and 1073**.

43 In unpublished ICC Case 893, the arbitral tribunal undertook significant reflections on determining the applicable law when the parties had not indicated the governing provisions and took an approach demonstrating the non-application of the principle *iura novit curia* in arbitration: "Le juge-arbitre constate d'abord que les parties qui sont d'accord d'appliquer le droit yougoslave à leurs relations n'ont, les deux, pas indiqué les dispositions de compensation du droit yougoslave. Dans ces circonstances, le juge-arbitre ne peut qu'appliquer le droit suisse qui est le droit de son domicile – et qui lui est connu. Il substitue son droit au droit yougoslave et doit supposer que les dispositions légales du droit yougoslave ne sont pas différentes de celles du droit suisse". (As translated: "The arbitrator first notes that the parties, while agreeing to apply Yugoslav law to their relations, have neither specified the provisions of Yugoslav law that would allow for compensation. In these circumstances, the arbitrator can only apply Swiss law, which is the law of his domicile and with which he is familiar. He substitutes his own law for Yugoslav law and must assume that the legal provisions of Yugoslav law are no different from those of Swiss law".)

asymmetric bargaining dynamics, themes that have since become central to modern European debates on market power and contractual imbalance.

b) The length, structure, and style of arbitral awards

Over time, ICC awards became significantly longer, more structured, and more analytically developed. Some of the earliest awards consist of only a few pages, whereas those rendered in the 1930s onwards display increasing sophistication in both form and reasoning.[44] This change is evident when comparing, for example, **ICC Case 225** (award rendered in 1925) with later awards such as **ICC Case 889** (award rendered in 1954), which includes a detailed subdivision of issues, or **ICC Case 1007** (award rendered in 1959), which structures its reasoning into clearly defined "Chapters".

Awards quickly came to follow a recognisable structure. Many reproduce the Terms of Reference (see e.g. **ICC Cases 88, 225, 762 and 983**).[45] This practice underscores the importance attached, from an early stage, to defining the arbitrator's mandate and situating the award within a clearly articulated procedural framework. Awards then separated the parties' arguments from the tribunal's reasoning and the dispositive section, anticipating the characteristics commonly associated with judicial decisions.

The progressive refinement of this structure illustrates the early "judicialisation" of ICC Arbitration – that is, the gradual adoption of techniques, formats, and stylistic conventions traditionally associated with court judgments. Rather than serving merely as pragmatic settlements between merchants, arbitral awards increasingly came to be conceived, drafted, and received as authoritative legal decisions grounded in structured reasoning and formal adjudication.

This shift was not limited to layout and organisation. Early awards display a personal, almost narrative, tone, with the arbitrator speaking in the first person (e.g. "je devais rendre ma sentence …" in **ICC Case 88**).

By contrast, later awards tend to adopt an institutional and impersonal voice ("the tribunal holds …"), signalling a shift from individual decision-making to a more collective and judicial posture. In parallel, arbitral reasoning evolved from a predominantly pragmatic and fact-centred evaluation – frequently framed in equitable or commercial terms – towards legal argumentation anchored in principles, authorities, and structured logic.

This stylistic and linguistic transformation mirrors the ICC Court's own evolution as an arbitration institution: from a merchants' forum designed to resolve trade disputes efficiently to an arbitral court rendering decisions with quasi-judicial authority and international resonance.

Finally, the composition of arbitral tribunals also sheds light on the developing nature of early ICC Arbitration. Of the 35 awards published here, only seven were rendered by a three-member tribunal, indicating that sole arbitrators predominated in the early days. Where three arbitrators were appointed, deliberations appear to have been more complex and, in some instances, confrontational. This is illustrated by the existence of majority awards in **ICC Cases 889 and 1453**, the latter concluding with the following statement:

> "… the majority of the arbitrators … certified that the other arbitrator … declined to sign".

Such instances foreshadow the later normalisation of multi-member tribunals and majority decision-making, further aligning ICC Arbitration with judicial models of collective adjudication.

c) From equity to law: The recalibration of arbitral authority

From its inception, ICC Arbitration was shaped by a strong idealistic commitment to flexibility, equity, and commercial pragmatism. At the very first ICC Congress held in London from 27 June to 1 July 1921, a proposal for regulations on conciliation and arbitration was presented and debated, before being formally approved by the ICC Council on 10 July 1922. These early discussions reflected a vision of arbitration as an instrument not merely of dispute resolution but of international cooperation and moral reconstruction in the aftermath of the First World War.

This ambition was articulated with particular eloquence by ICC's first president, Étienne Clémentel, who described ICC as:

> "not merely an institution of practical scope which aims at rendering easier the course of commercial transactions, but also a new manifestation of that international conscience which asserts itself in spite of the keenness of competition, and the good fellowship of economic interests of all the nations and the union of noble sentiments of human brotherhood.

44 In fact, the average length of awards in the 1920s was seven pages, whereas the 1930s saw the figure rise to nine pages (using the texts retyped in a standardised format with uniform fonts and margins).

45 In **ICC Case 983**, quotes from the terms of reference are in French while the award is drafted in English.

> The International Chamber, by grouping together the greatest elements of activity in the world and by creating among its members a vast network of friendships, will take its place in the community of international institutions which in every sphere, in the ideal as well as the material sphere, will help men to free themselves from all thoughts of national selfishness and prepare the future destiny of mankind."[46]

Consistent with this outlook, ICC arbitrators in the early years frequently favoured equity over strict legal reasoning. It was widely accepted that "in the domain of private law, and especially in that of commercial law, the parties may, by mutual agreement, derogate from the strict application of the law".[47] Early ICC Arbitration was thus conceived less as a substitute for courts than as a consensual and flexible mechanism that allowed commercial actors to resolve disputes *ex aequo et bono*.

Several of the awards published in this issue reflect this approach. In **ICC Case 88** (award rendered in 1925), noting that the parties sought to resolve their dispute amicably and had thus agreed to submit it to ICC Arbitration, the arbitrator specified that:

> "Aux termes du compromis, il était entendu qu'en qualité d'arbitre *amiable compositeur*, je ne serais pas tenu de suivre les règles de la procédure et du droit".[48]

Similarly, in **ICC Case 143**, the arbitrator rendered his decision "as *amiable compositeur*, exempted from compliance with rules of procedure and of law".

In **ICC Case 163**, the arbitrator again emphasised that, pursuant to the parties' submission agreement under the ICC Rules, he was entitled to decide "in equity without observing the legal rules of the procedure".

A significant shift nevertheless occurred in the late 1920s and the 1930s:

> "as arbitration gradually increased its influence and acquired a stronger foothold in law, ICC conciliation shed something of its original inspiration and yielded to legal considerations".[49]

The ICC Rules were progressively amended to reflect this change. Article 16(3) of the 1927 Rules provided that arbitrators were empowered to act as *amiables compositeurs*, unless one of the parties objected, and provided that such powers would not interfere with the legal enforcement of the award. This provision marked an intermediate stage, maintaining equitable discretion while introducing safeguards for legal validity.[50]

By the early 1930s, however, awards increasingly emphasised the limits of equitable adjudication. In **ICC Case 536** (award rendered in 1933), the tribunal explicitly stated that the arbitrators had not been authorised to act as *amiables compositeurs*, signalling a clearer distinction between equity-based and law-based arbitration. Even where parties experimented with procedural flexibility – as in **ICC Case 301** where they waived adversarial proceedings and agreed not to submit legal pleadings – the arbitral mandate remained carefully circumscribed by the terms of their agreement.

The post-war reforms consolidated this trend. The 1947 amendments to the ICC Rules revised Article 16 to provide that arbitrators were not to act as *amiables compositeurs* unless the parties expressly agreed and that such empowerment would not interfere with the enforceability of the award. These changes were designed to ensure that parties were fully aware of the scope of arbitral authority and that awards would meet the requirements of national courts.

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46 Message from E. Clémentel, The Record of the International Chamber of Commerce, No. 1, 1 March 1921, quoted in S. Hamilton, ICC Conciliation: A Glimpse into History in *ADR: International Applications, Special Supplement, ICC International Court of Arbitration Bulletin* (2001). The author observed that "Early ICC conciliation is imbued with this belief in the power of international friendship to overcome differences"; "It may be described as a scheme designed to achieve an informal settlement of a dispute or a difference through a recommendation made by an ICC authority. The parties did not choose their conciliator(s), but, by referring their case to ICC, automatically gave ICC a mandate freely to seek a solution to their problem. This blend of informality and authority is in many ways a reflection of the spirit in which ICC was established and undertook its objectives in the early 1920s".

47 R. Pozzi, "Conciliation and Arbitration between Merchants of Different Countries. Memorandum Submitted by M. Roberto Pozzi", in Commercial Arbitration, *ICC Brochure* No. 13, 1921, p. 12. E. Silva Romero, E. Jolivet, F. Grisel, supra note 4, also noted: "The informal nature of the early requests submitted to the ICC undoubtedly explains the influence of consensualism on the first dispute resolution model it explored. This model was largely dominated by the use of conciliation rather than arbitration. The small portion left to arbitration was also largely influenced by equity". (Original in French: "Le caractère informel des premières demandes adressées à la CCI explique sans doute l'influence du consensualisme sur le premier modèle de règlement des différends qu'elle a exploré. Ce modèle était dominé très largement par le recours à la conciliation plutôt qu'à l'arbitrage. La portion congrue laissé à l'arbitrage était par ailleurs largement influencée par l'équité".) See also G. Ridgeway, supra note 16, pp. 325–326: "The first case heard by the newly created ICC Court [was] successfully settled according to the rules for conciliation".

48 As translated: "As under the terms of the submission agreement, it was understood that, as *amiable compositeur*, I would not be bound to follow rules of procedure or of law".

49 S. Hamilton, supra note 46. More broadly on this issue, see e.g. F. Grisel, Droit et non-droit dans les sentences arbitrales CCI: Une perspective historique, *ICC International Court of Arbitration Bulletin*, 25, no. 2 (2014); M. Schinazi, supra note 4, pp. 182-186.

50 1933 amendments, Art. VI (relating to Art. 16(3) of the 1927 Rules).

Subsequent awards illustrate the practical effect of this doctrinal clarification. In **ICC Case 889** (award rendered in 1955) the tribunal stated unequivocally:

> "Le Tribunal arbitral ne prétend en aucune manière s'arroger le pouvoir de juger en *amiable compositeur*, pouvoir qu'il ne saurait recevoir, conformément au Règlement de Conciliation et d'Arbitrage de la CCI, qu'en vertu d'un accord des parties".[51]

Similarly, in **ICC Case 1453** (award rendered in 1968) the tribunal considered whether a decision *ex aequo et bono* might be appropriate, but concluded that it lacked the requisite authority under the Rules and was therefore obliged to confine its reasoning to the applicable law.[52]

Notably, traces of the earlier equitable ethos did not disappear entirely. In **ICC Case 225** (award rendered in 1929) the arbitrator – acting within the scope of his mandate as *amiable compositeur* – explicitly framed his reasoning in terms of preserving the parties' ongoing business relationship, seeking a solution that would allow the contract to continue while awarding damages:

> "il y a tout lieu de croire que le contrat pourra continuer à être exécuté sans difficultés pour autant que la défenderesse applique à l'avenir strictement le texte du contrat. En raison de ses fonctions d'*amiable compositeur*, l'arbitre doit chercher à ne pas séparer les parties plus que cela n'est nécessaire, mais doit au contraire choisir la solution qui permette de continuer utilement les relations d'affaires. L'arbitre soussigné arrive donc à la conclusion que le contrat doit être maintenu en vigueur, conformément à la demande de la défenderesse, mais que cette dernière doit cependant, comme déjà dit, payer des dommages-intérêts".[53]

Such cases illustrate that the transition from equity to law was gradual rather than abrupt, and that equitable considerations remained influential where expressly authorised.

This trajectory – from broad reliance on *amiable composition* to a predominantly law-based model of adjudication – marks one of the most significant transformations in ICC arbitral practice. It reflects not only the professionalisation of the arbitrator's role but also ICC's deliberate effort to align arbitral decision-making with enforceable, legally grounded reasoning capable of recognition and execution within national legal systems.[54]

At the same time, ICC continued to encourage consensual resolution alongside adjudication. In **ICC Case 998**, involving a state party, an amicable settlement was reached and embodied in an award rendered by consent of the parties.[55] Conversely, **ICC Cases 1124 and 1453** record the arbitrators' unsuccessful attempt to facilitate a voluntary settlement, under the 1955 ICC Arbitration Rules, demonstrating that even as legal reasoning was becoming more prominent, conciliation and settlement remained integral to the ICC procedural culture.

d) Applications of recurring legal concepts

The awards published in this issue trace the gradual transformation of arbitral reasoning from predominantly commercial fact-finding towards more articulated legal analysis – a transformation that foreshadows the later emergence of *lex mercatoria* and introduction of "transnational principles" in ICC practice. Even before such concepts were formalised, early ICC arbitrators frequently relied on legal notions common to multiple legal systems, thereby anticipating concepts and notions that now form the backbone of international commercial law.

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51 As translated: "The Arbitral Tribunal does not in any way claim the power to act as an *amiable compositeur*, a power which, in accordance with the ICC Rules of Conciliation and Arbitration, it can only receive by agreement of the parties".

52 **ICC Case 1453**, para. 16: "Although our interpretation of German law as applied to the material before us has required us to reject the Counterclaim, we have considered whether there could be any decision '*ex aequo et bono*'. We have noted that before any such decision could be contemplated we should need to be specifically empowered in accordance with Article 19(3) of the Chamber's Rules involving the agreement of the parties. We have not been so empowered. … We are thus obliged to confine our decision to the appropriate law as applied to the facts of the case".

53 As translated: "there is every reason to believe that the contract can continue to be performed without difficulty, provided that the respondent strictly complies with the terms of the contract in future. In view of his role as an *amiable compositeur*, the arbitrator must seek not to separate the parties more than is necessary, but must instead choose the solution that allows the business relationship to continue in a meaningful way. The undersigned arbitrator therefore concludes that the contract must remain in force, in accordance with the defendant's request, but that the defendant must, as already stated, pay damages".

54 For later published awards on *amiable composition*, see Amiable Composition and ICC Arbitration, *ICC Int. Court. Arb. Bulletin*, 2007, Vol. 18-1.

55 **ICC Case 998**: "The parties are bound to conform to the terms of the above recorded amicable settlement which constitutes the award directed by the arbitrators. The expenses and fees of the Arbitration as defined in the terms of reference of the arbitrators, i.e. dealing only with the fees and expenses of the Chairman of the Arbitral Tribunal and the administrative charges, amounting to … Frs, will be borne equally by each party".

Several cases provide paradigmatic illustrations of this tendency. Arbitrators drew on shared legal concepts such as *force majeure* and mitigation of damages (**ICC Case 543**),[56] good faith (**ICC Cases 88, 225, 519 and 1007**), abuse of right or "good faith and business morals" (**ICC Case 1158**), bad faith (*mala fide*) (**ICC Case 1448**),[57] and conduct *contra bonos mores* (**ICC Case 1453**).[58] The recurrent invocation of these notions reflects an effort to resolve disputes by reference to broadly accepted standards of commercial behaviour rather than to any single national legal system.

Older awards also provide valuable insights into the hermeneutic methods adopted by arbitrators. Several decisions shed light on gap-filling powers (**ICC Case 1124**), contract interpretation (**ICC Case 304**),[59] and the interpretation of substantive law (see e.g. **ICC Case 1448** on German law). In these cases, arbitrators did not confine themselves to literal readings of contractual provisions but engaged in purposive interpretation attentive to commercial context and underlying party intent. For example, in **ICC Case 1383**, the tribunal relied on the legal expert's opinion that:

> "under German law, intention is determinative when making a contract and that it governs even if the parties neglect to use customary technical expressions used in credit transactions".

This approach is particularly evident in **ICC Case 225**, where the arbitrator acknowledged the absence of a clearly expressed common intention and emphasised the need to move beyond the four corners rule when interpreting the contract. Referring expressly to Articles 1134 and 1135 of the French Civil Code, the arbitrator stressed that contracts must be performed in good faith and bind the parties not only to what is expressly stated but also to the consequences that flow from the nature of an obligation according to equity, usage, or the law.[60]

In the same award, the arbitrator explicitly relied on comparative commercial practice, noting that he had consulted a company external to the dispute that was experienced in international affairs to ascertain what was business usage in similar representation agreements.[61] This reference illustrates how arbitrators sought to anchor their legal reasoning in transnational commercial reality, thereby reinforcing the legitimacy of their conclusions.

e) Jurisdiction, procedure, and enforceability

From a procedural perspective, the early awards provide insight into the ICC Court's handling of issues that remain central to contemporary arbitration.

Several cases involve non- or partial participation of parties (**ICC Cases 768, 787, 927, 1010 and 1383**), illustrating how arbitrators addressed default scenarios while safeguarding fundamental requirements of due process. These cases demonstrate that concerns regarding party participation and procedural fairness were already salient in the formative years of ICC Arbitration.

In some instances, parties explicitly waived adversarial proceedings and agreed to simplified procedures focused on documentary evidence. The award in **ICC Case 301** records that the arbitrator was appointed as sole arbitrator to examine the documents submitted by the parties, who had waived the right to be heard face-to-face and had agreed that the procedure would be limited to fact-finding. **ICC Case 889** also addresses, upon party request, the question of whether a separate

56 The award in **ICC Case 543** reads: "Furthermore it is to be observed that anybody who is temporarily prevented by *force majeure* from fulfilling his obligations, is nevertheless compelled to make every effort to reduce as far as possible any loss the other party may suffer therefrom". For more recent ICC awards addressing mitigation of damages, see J. F. Merizalde, Mitigation of Damages: A Selection of Recent ICC Awards, *ICC Dispute Resolution Bulletin*, 2018-1.

57 See **ICC Case 1448**: "Therefore, after [the sale] in the proper contractual territory, whether [products] were installed or not, transportation or resale thereof to any country did not come under the jurisdiction of the License Agreement and consequently cannot be considered a *mala fide* indirect export to unauthorised territory". **ICC Case 1453**: "We are convinced that neither the agreement to accept the Conditions nor the Conditions themselves can be regarded as *contra bonos mores* (*Guten Sitten*), §138 BGB. Moreover by relying on this Conditions the Claimants did not offend against §242 (*Treu and Glauben*) and the Respondents did not object on that score at the time". In **ICC Case 1024**, the arbitrator referred to the French civil law concept of "bon père de famille" (*bonus pater familias*).

58 For recent ICC awards on good faith, see J. Martinez, S. Weber, Good Faith in International Arbitration: Comparative Approaches in ICC Awards, *ICC Dispute Resolution Bulletin*, 2020-2.

59 More recent ICC awards on the interpretation of contract have been published in ICC Arbitral Awards on the Interpretation of Contracts, *ICC Int. Court Arb. Bulletin*, 25-1 (2014).

60 **ICC Case 225**: "Comme on ne peut pas trouver l'expression d'une volonté claire des parties, il faut s'en tenir au texte du contrat. Les dispositions du contrat interdisent expressément et sans aucun doute à la demanderesse de se mettre en rapport direct avec des clients espagnols, mais il ne serait pas juste, et certainement contraire à la volonté des parties, d'interpréter le contrat d'une manière étroitement grammaticale. Il faut au contraire appliquer les articles 1134 et 1135 du Code civil qui disent que les conventions doivent être exécutées de bonne foi, qu'elles n'obligent non seulement à ce qui y est imprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donne à l'obligation d'après sa nature".

61 **ICC Case 225**: "[La Société] en Suisse que l'arbitre soussigné a consultée et qui ont des relations internationales et des contrats de représentation semblables, déclarent tous que, dans la pratique, le chiffre d'affaires est calculé sur les montants facturés"). (As translated: "[The Company] in Switzerland, which the undersigned arbitrator consulted and which have similar international relations and representation contracts, all state that, in practice, turnover is calculated on the basis of invoiced amounts".)

and reasoned judgment on jurisdiction is required, a concept known today as "bifurcation of proceedings". Such arrangements underscore the procedural flexibility characteristic of early ICC Arbitration, while also highlighting the importance attached to party autonomy.

Another recurring theme concerns jurisdictional objections and the principle of competence-competence.[62] These cases illustrate early reflections on the arbitrator's authority to rule on jurisdictional issues, a matter that would later become a cornerstone of modern arbitration law. In **ICC Case 974**, for example, the arbitrator confirmed the principle of competence-competence:

> "Mais attendu que l'arbitre est juge de sa propre compétence ; et que, jugeant dans le cadre du Règlement de Conciliation et d'Arbitrage de la CCI dont les parties ont stipulé l'application en l'occurrence, l'arbitre est même appelé, à l'exclusion des tribunaux ordinaires bien que sous réserve du contrôle judiciaire de sa décision de ce chef, à connaître du déclinatoire de compétence …"[63]

In **ICC Case 787**, the arbitrator declined jurisdiction, deciding that the case could not be referred to arbitration. Although the parties had engaged in negotiations with a view to concluding a collaboration agreement, the respondent had not signed the final contract containing the arbitration clause.

In terms of arbitration costs,[64] it appears to be standard practice that the loser pays and that each party bears its own costs and expenses (see e.g. **ICC Cases 304, 983, 1010 and 1281**), but some arbitrators decided to award costs in proportion to the relative success of the claims, as illustrated in **ICC Case 536**:

> "whereas in these circumstances it seems fair, in accordance with the legal precedent of the defendant's country, to divide the costs and expenses between the parties in the proportions given below; … the board of arbitration awards and directs the defendant to pay one sixth of the costs and the plaintiff to pay the remaining five-sixths".

Furthermore, arbitrators often complied with any agreement between the parties regarding the allocation of costs, as illustrated by **ICC Case 513,** in which the arbitral tribunal decided to:

> "confirm the arrangement agreed between the parties and according to which half the expenses and costs of the arbitration, including the arbitrator's fees, shall be paid by each one of the two parties".

This included agreements relating to legal representation costs, such as in **ICC Case 1124**:

> "The costs of the arbitration amounting to … as well as the costs of legal representation are to be borne by the respondents at two thirds and by the applicant at one third. The additional costs that have arisen by the fact that a second hearing took place shall be borne by the respondents at two thirds and by the applicant at one third. The additional costs that have arisen by the fact that a second hearing took place shall be borne by the applicant."

A few awards also shed light on the interaction between arbitration and court proceedings. In **ICC Case 983**, extracts from the terms of reference reveal that, when signing the arbitration agreement, the respondents had made express reservations referring to a prior settlement agreement and ongoing national court litigation.[65] In **ICC Case 768**, the respondent initiated parallel proceedings before a national court to declare the contracts unlawful on the basis of fraudulent conduct, and claimant applied for "stay of suit" in light of the ongoing arbitration. These cases illustrates how arbitrators navigated situations involving concurrent jurisdictional claims, heeding party reservations while remaining aware of the need to proceed with the arbitral mandate entrusted to them.

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62 See e.g. **ICC Cases 762, 974 and 889**.

63 As translated: "However, given that the arbitrator is the judge of his own jurisdiction; and that, ruling under the ICC Rules of Conciliation and Arbitration, the application of which the parties have agreed to in this case, the arbitrator is himself called upon, to the exclusion of the ordinary courts though subject to judicial review of his decision in this regard, to rule on the allegation of lack of jurisdiction …". **ICC Cases 762 and 889** specifically address jurisdiction *ratione materiae* and *ratione personae*, respectively.

64 The ICC Arbitration and ADR Commission Report on Decisions on Costs in International Arbitration (2015) provides considerations intended to inform users of arbitration of how tribunals may allocate costs in accordance with the parties' agreement and/or any applicable rules or law, and how to encourage efficient and costs-effective procedural conduct.

65 **ICC Case 983**: "Les défendeurs signent le compromis ci-dessous, sous les réserves qui y sont exprimées et, en outre, sous la réserve suivante : Le 9 mars 1957 un accord est intervenu qui a mis fin à toutes les difficultés existant entre les parties. Les demandeurs ont refusé d'exécuter ledit accord Les défendeurs les ont, en conséquence, assignés devant le Tribunal [national] pour les voir condamner à la dite exécution. C'est sous toutes réserves

Finally, several awards demonstrate the early use of waivers of recourse against arbitral decisions. In **ICC Cases 88, 477 and 762**, the parties expressly waived their right to appeal and instead undertook to accept and enforce the award as final and binding.[66] Such clauses highlight an early awareness of the importance of finality and enforceability in international arbitration, reinforcing ICC's broader objective of providing a reliable and effective dispute resolution mechanism.

Conclusion

The 35 awards published in this issue do more than throw light on a relatively neglected chapter of ICC history. Taken together, they chart the gradual transformation of international arbitration from a pragmatic instrument of commercial conciliation into a distinct legal regime grounded in professional standards, procedural discipline, and increasingly transnational modes of reasoning. They show how, from the 1920s onwards, the ICC Court functioned as a genuine laboratory for modern arbitral practice – experimenting with procedures, defining the contours of *amiable composition*, and progressively forging principles that would later be consolidated in modern arbitral rules.

These awards also capture the evolution of arbitral reasoning itself: the shift from commercial equity to legal analysis, from predominantly national reference points to a genuinely international outlook, and from private dispute settlement to a form of adjudication carrying public legitimacy. By revealing these developments, the awards offer invaluable insight into how arbitral authority was constructed at a formative moment – before the discipline acquired its modern vocabulary and conceptual framework.

Today, access to arbitral reasoning has expanded significantly through ICC publications and other platforms. The publication of awards takes on particular significance at a time when transparency is increasingly regarded as an indicator of legitimacy and equal access to legal knowledge. Arbitral precedents are now frequently invoked as expressions of international principles, rules, or soft law, underscoring the enduring relevance of the early reasoning patterns identified in these cases.[67]

Ultimately, these early awards remind us that international arbitration – like ICC itself – emerged from a belief in the law's capacity to work for commerce and peace. Its enduring strength relies on that same combination of idealism and pragmatism: the conviction that disputes between parties from different nations can be resolved not through power or politics but through shared rules, fair process, and reasoned judgments.

Although much more could be said about these early cases, the intention is rather to let readers explore the decisions for themselves – whether out of legal, institutional, or historical interest, or simply for the pleasure, in this celebratory year of the ICC Bulletin, of revisiting the recent history of a field that continues to evolve.

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de cette dernière instance et en raison uniquement du fait que la Cour d'Arbitrage a cru devoir ordonner que Monsieur l'Arbitre passerait à l'exécution de sa mission, que les défendeurs acceptent de signer et de comparaître à l'arbitrage". (As translated: "The defendants sign the agreement below subject to the reservations expressed therein and, in addition, subject to the following reservation: On 9 March 1957, an agreement was reached that put an end to all difficulties between the parties. The plaintiffs refused to implement the said agreement. The defendants therefore brought proceedings against them before the [national] court to have them ordered to perform the said agreement. It is with all reservations regarding this latter instance and solely because the Court of Arbitration deemed it necessary to order the Arbitrator to proceed with his mission that the defendants agree to sign and appear at the arbitration".)

66 **ICC Case 88**: "Les parties avaient pris l'engagement de renoncer à attaquer la sentence à intervenir par les voies de recours quelles qu'elles puissent être s'obligeant à l'accepter et à l'exécuter". (As translated: The parties had undertaken to refrain from challenging the award to be made by any means whatsoever, undertaking to accept and enforce it".) **ICC Case 477**: "Les parties prennent l'engagement de renoncer à attaquer la sentence à intervenir par les voies de recours quelles qu'elles puissent être, s'obligeant dès maintenant à l'accepter et à l'exécuter comme définitive et sans appel". (As translated: "The parties undertake to refrain from challenging the award to be made by any means whatsoever, and hereby undertake to accept and enforce it as final and binding".) **ICC Case 762** : "Elles déclarent en outre qu'elles considèrent la sentence à intervenir comme définitive et renoncent à l'attaquer par les voies de recours auxquelles elles peuvent valablement renoncer et qu'elles l'exécuteront". (As translated: "They further declare that they consider the judgment to be final and waive their right to appeal through any legal channels that they can validly waive, and that they will comply with the award".)

67 S. Adell, ICC x Jus Mundi Partnership: An Effective Tool on the Study of the Latest ICC Awards, *ICC Dispute Resolution Bulletin,* 2023-2; M. E. Ramirez, D. Tagtachian, The Precedential Effect of Increasing Transparency, *ICC Dispute Resolution Bulletin*, 2017-2. See also G. Kaufmann-Kohler's article "Is Consistency a Myth?: "rules cannot emerge without consistency"; "we need consistency for the sake of the development of the rule of law", in E. Gaillard, Y. Banifatemi (eds), Precedent in International Arbitration, *International Arbitration Institute (IAI) Series No. 5* (2008).

35 ICC Awards 1925-1968

The extracts published below are reproduced in their original language. The successive applicable versions of the ICC Arbitration Rules are available in the ICC Dispute Resolution Library.

> **1. Affaire CCI n° 88 (Paris, 1925)** 168
Nationalité des parties : Etats-Unis, France
Contrat d'achat sur échantillons/ textile/ demande de remboursement de la lettre de crédit et frais de douane/ non-conformité des produits/ seuil de tolérance de différence entre la qualité de l'échantillon et la qualité de la marchandise livrée/ réfaction du prix de vente/ prise en compte de l'évaluation du taux de change/ *amiable compositeur*.

> **2. Affaire CCI n° 143 (Bruxelles, 1927)**
Published in World Trade, Nov. 1932 170
Nationality of parties: Countries in Europe
Legal nature and operation of letters of credit/ forged letters of credit/ no mention on the letters of previous payment/ paying bank's right to maintain this debit/ custom/ *amiable compositeur*.

> **3. ICC Case no. 163 (1927)** 176
Nationality of parties: Japan
Sales contract/ inferior quality of goods compared to the sample and significant variation in quality and size/ impossibility to survey or return the goods delivered/ goods resold/ claims not justified/ buyers' lack of knowledge of the business/ decision in equity.

> **4. Affaire CCI n° 225 (Bâle, 1929)** 178
Nationalité des parties : France, Espagne
Contrat de représentation exclusive/ vente directe et rabais accordé au client local/ proposition initiale de résolution du différend à l'amiable par le demandeur (représentant local)/ compétence/ « Protocole relatif aux clauses d'arbitrage (1923) »/ détermination du droit applicable/ interprétation du contrat/ bonne foi contractuelle/ demande de résiliation du contrat/ maintien du contrat en vigueur par l'arbitre/ interprétation du « chiffre net » selon la pratique commerciale internationale/ *amiable compositeur*.

> **5. Affaire CCI n° 301 (Paris, 1929)** 186
Nationalité des parties : France, Espagne
Lettre de crédit/ banque redevable de l'impôt municipal/ somme de l'impôt portée au débit sans autorisation du donneur d'ordre/ renonciation des parties à être entendues contradictoirement/ *amiable compositeur*.

> **6. ICC Case no. 304 (Brussels, 1929)**
Published in World Trade, June 1933. 188
Exclusive agency contract/ payment of commission/ interpretation of contract/ scope of the sales subject to a commission/ inclusion or exclusion of contracts signed abroad for the sale of supplies intended for use in the country covered by the contract.

> **7. Affaire CCI n° 477 (Bruxelles, 1932)** 189
Nationalité des parties : Pays d'Europe, Pays d'Afrique
Contrat de représentation/ conventions verbales/ évolution de la relation entre les parties/ "buying agent"/ acheteur/ commissionnaire mandataire commercial/ placement de marchandises/ marchandises invendues/ allégation de mauvaise qualité des marchandises/ conservation délicate des marchandises/ marchandises consignées avariées/ *damnum emergens*/ *lucrum cessans*/ usages commerciaux/ *amiable compositeur*.

> **8. Affaire CCI n° 513 (Paris, 1932)**
Published in World Trade, Oct. 1932. 193
Nationality of parties: Belgium, Italy
Currency depreciation/ claim for payment of sterling pounds in gold value/ interpretation of contract/ price not stipulated in "gold pounds" in the contract/ possible reference to a third party currency as a stable currency to safeguard dealings from the risks of exchange/ dismissal of claim on the basis of factual circumstances.

> **9. Affaire CCI n° 519 (Bâle, 1932)**
Publiée à l'Economie Internationale, Déc. 1932. 194
Nationalité des parties : Allemagne, Pays-Bas
Indexation sur une devise tierce/ dépréciation de la monnaie de paiement/ contrat sans réserve de change/ intention des parties/ prise en compte de la perte de change du demandeur dans la répartition des frais et dépens/ bonne foi des parties.

> **10. Affaire CCI n° 536 (Paris, 1933)**
Published in World Trade, May 1933. 195
Depreciation of the sterling pound/ no exchange rate reservations in the contract/ claim for payment on the basis of the old gold parity/ arbitrators not authorised to act as *amiable compositeur*/ "fair", in accordance with the legal precedent of the defendant's country (European country), to divide the costs and expenses between the parties.

> **11. ICC Case no. 543 (1934)**
Published in World Trade, Dec. 1934. 196
Nationality of parties: France, Belgium
Claim for losses caused by the non-delivery to a third party/ communications and letters between the paties/ intention of the parties/ dispute as to the date of the "authorization of sale"/ conditions required to bind one party in a foreign sale/ non objection and tacit acceptance of arrangements with a third party/ trade usage/ *force majeure*/ mitigation of damages/ *amiable compositeur*.

> **12. Affaire CCI n° 546-549 (Zurich, 1933)** 198
Nationalité des parties : France, Belgique
Statut juridique du Bassin de la Sarre/ Traité de Versailles/ contrat de partage de marché/ interprétation du contrat/ valeur effective du contrat/ définition du « marché français »/ critère économique et non politique retenu/ unité du régime douanier/ interprétation du compromis « de faire droit à tout ou partie de la demande d'indemnité »/ sentence déclaratoire/ importations et ventes sur le territoire de la Sarre non fondées/ indemnité de principe rejetée/ bonne foi/ absence de dommage.

> **13. ICC Case no. 568 (1934)**
Published in World Trade, Oct. 1924. 201
Nationalité des parties : Etats-Unis, Pays d'Europe
Conditions for the termination of a contract of representation/ transfer of business/ payment in instalments/ mistakes in the inventory/ deduction of sums allegedly previously collected by the representative/ *amiable compositeur*.

> **14. Affaire no. 756 (Paris, 1949)** 203
Nationalité des parties : Suisse, France
Procédés et licence de brevets/ détermination du droit applicable/ critère du rattachement/ interprétation contractuelle quant à la durée du contrat/ option de reconduction tacite/ faculté de dénonciation/ allégation d'application des procédés, en violation du contrat, après résiliation de celui-ci/ déclaration de résiliation et de non-violation de contrat.

> **15. Affaire CCI n° 762 (Paris, 1955)** **205**
Nationalité des parties : Suisse, France
Textile/ contrat de transformation, confection et vente/ exception d'incompétence/ expiration du compromis selon le droit français/ prolongation des délais par la Cour de la CCI/ arbitrabilité/ compétence *ratione materiae*/ matière non liée à la règlementation des changes et à l'ordre public/ accommodements consentis n'emportant pas novation du contrat/ circonstances économiques défavorables/ prolongation de la durée d'exécution du contrat/ fixation de modalités spéciales de règlement/ obligation solidaire entre co-débiteurs.

> **16. Affaire CCI n° 768 (Paris, 1954)** 211
Nationalité des parties : France, Pays d'Asie
Contrat d'agence exclusive/ tacite reconduction/ compétence/ interprétation du terme « litigation »/ non-participation du défendeur (agent exclusif)/ procédure parallèle pour déclarer l'illégalité des contrats conclus par suite de manœuvres frauduleuses/ demande de suspension de la procédure devant un tribunal national « stay of suit »/ obligation d'achat d'une quantité minimale/ restriction gouvernementale à l'importation de produits étrangers/ inexécution et résiliation du contrat.

> **17. ICC Case no. 787 (Stockholm, 1951)** 216
Nationality of parties: France, Australia
Exclusive licence/ royalties/ binding letter until the conclusion of final contract providing for arbitration/ contractual performance and financial counter-proposals during the negotiations/ reference to the arbitral institution (ICC) in the draft final contract/ lack of signature/ respondent's partial participation and non-appearance/ lack of jurisdiction.

> **18. Affaire CCI n° 889 (Paris, 1954)** 217
Nationalité des parties : Pays d'Europe de l'Est, Etats-Unis
Contrat de fourniture de matériel/ contrats successifs et contrat « additionnel »/ clause compromissoire figurant au premier contrat/ dispositions « restant entièrement applicables à l'ensemble de la livraison entière »/ compétence *ratione personae*/ capacité juridique/ succession/ défaut de signature du compromis/ *force majeure*/ refus de licence d'exportation par la chambre de commerce de la juridiction du défendeur/ sentence rendue à la majorité.

> **19. Affaire CCI n° 907 (Amsterdam, 1956)** 223
Nationalité des parties : Pays d'Amérique Latine, Allemagne
Contrat d'agent commerciale/ résiliation du contrat de représentation/ demande de paiement de commission pour vente à la clientèle locale par l'intermédiaire d'exportateurs étrangers/ interprétation du terme « ordre indirect »/ charge de la preuve/ prétendue impossibilité de fournir des copies de factures ou déclarations.

> **20. ICC Case No. 927 (Oslo, 1955)** 224
Nationality of parties: European Country, USA
Non-participation of Respondent/ alleged non-enforceability of an award in Respondent's jurisdiction/ competence/ agreement to arbitrate/ "freedom of contract"/ inspection of the quality of the goods/ inferior quality of goods.

> **21. Affaire CCI n° 974 (Paris, 1958)** 227
Nationalité des parties : Suède, Pays d'Afrique
Allégation de nullité du contrat/ demande de nullité du brevet devant un tribunal national/ exception d'incompétence/ demande subsidiaire de sursoir à statuer/ obligation de restitution de la marque/ validité du contrat et de la clause d'arbitrage/ déclaration de résiliation du contrat.

> **22. ICC Case No. 983 (London, 1958)** 231
Nationality of parties: USA, France
Validity of the arbitration agreement/ determination of the applicable law/ qualification of the contract/ "partnership" or "service contract", "international" or "national".

> **23. Affaire CCI n° 986 (Paris, 1957)** 234
Nationalité des parties : Pays européens
Vente d'actions/ détermination du droit applicable/ lieu d'exécution du contrat/ charge de la preuve/ information incomplète de la part du vendeur/ Etat actionnaire majoritaire/ vente subordonnée à l'accord du gouvernement/ fait du prince/ réduction de la clause pénale au contrat selon droit applicable/ partie non-commerçante.

> **24. ICC Case no. 998 (Paris, 1957)** 236
Nationality of parties: France, Pays d'Asie
State party/ amicable settlement reached by the parties/ explicit waiver of sovereign immunity from jurisdiction/ settlement recorded in an award/ "award made by consent".

> **25. Affaire CCI n° 1007 (Paris, 1959)** 237
Nationalité des parties : France, Allemagne
Licence exclusive/ « know-how »/ priorité nationale/ objection de compétence/ validité et autonomie de la clause compromissoire/ « indivisibilité du contrat »/ impossibilité d'exécuter le contrat/ défaut d'autorisation/ commencement d'exécution/ inexécution partielle.

> **26. ICC Case no. 1010 (Oslo, 1958)** 246
Nationality of parties : France, Etats-Unis
Licence to manufacture and sell/ non-signature of the final contract/ inexecution of the contract/ annulment of contract/ unilateral termination request/ date of termination/ party non-participation.

> **27. Affaire CCI n° 1024 (Paris, 1959)** 248
Nationalité des parties : Allemagne, Français
Demande de nullité du contrat pour vice de consentement/ langue de rédaction du contrat étrangère au demandeur/ prix fictif/ validité et autonomie de la clause compromissoire/ compétence-compétence/ propriété des brevets/ condition suspensive de ratification par les autorités/ obligation d'exploitation de l'invention "en bon père de famille"

> **28. ICC Case no. 1073 (St. Gallen, 1961)** 255
Nationality of parties: Australia, Belgium
International commercial contracts/ determination of the applicable law/ Swiss rules of conflict of laws/ Hague Convention 15 June 1955 relating to the purchase of movable goods/ defective goods/ evident and hidden defects.

> **29. ICC Case no. 1124 (Frankfurt/Main, 1961)** 257
Nationality of parties: France, United Kingdom
Interpretation of the contract/ meaning of the clauses read together/ arbitrator's unsuccessful appeal to the parties to seek a compromise/ interpretation of "renewable" and "automatic tacit consent"/ dominant object of the contract.

> **30. ICC Case No. 1158 (Athens, 1962)** 261
Nationality of parties: Country in the Middle East, Germany
Distribution agreement/ exclusive distributor/ territorial exclusivity/ abusive exercise of the right of termination under Greek Law/ notice of termination/ third party exports to contract area/ loss of profit/ non-delivery/ breach of contract.

> **31. ICC Case no. 1281 (Frankfurt am Main, 1964)** 266
Nationality of parties: Belgium, United Kingdom
Invalidity or non-existence of the contract or contractual relationship/ chain of contracts/ lack of authorisation to act on behalf/ appearance as not sufficient/ lex fori/ conflict of laws/ limitation act/ claim as statute-barred.

> **32. ICC Case no. 1315 (Cologne, 1965)** 268
Nationality of parties: Country in Europe, Country in Asia
Manufacturing contract/ manufacture of products subject to sample approval/ possible requests for alterations of the product under the contract/ breach of contract.

> **33. ICC Case no. 1383 (Munich, 1966)** 269
Nationality of parties: Austria, USA
Economic dependence/ abuse of dominant position/ abuse of economic dependence/ imbalanced bargaining power/ coerced acceptance of contractual terms/ financial distress/ economic hardship/ interpretation of contract/ intent as determinative in German law/ letter of credit/ financial difficulties/ contractual adjustments/ installments/ legal expert/ language of contract/ prevailing language/ oral undertaking during negotiations/ non-participation at the hearing.

> **34. ICC Case no. 1448 (Paris, 1966)** 272
Nationality of parties: Germany, USA
Exclusive license to manufacture and sell/ territorial restrictions/ US anti-trust laws/ resale of products to other countries/ no *mala fide* conduct/ scope of license agreement/ creation of a joint venture with a third party/ transfer of know-how/ parties' request to terminate the license agreement.

> **35. ICC Case no. 1453 (Paris, 1968)** 275
Nationality of parties: Germany, France
Delays in the delivery of machines/ failure to provide adequate evidence/ exclusion of liability clause/ no *contra bonos mores* arrangement/ voluntary settlement suggested by arbitrators declined by the parties/ Art. 22 of the 1955 ICC Arbitration Rules/ burden of proof/ no evidence of damages/ simple interest/ customary banking rate/ award rendered by majority.

1. SENTENCE ARBITRALE Affaire CCI n° 88 (Paris, 1925)

Au nom de la Cour d'Arbitrage de la CCI, je soussigné … [France], nommé arbitre unique par le Comité Exécutif de la Cour d'Arbitrage de la CCI pour procéder à un arbitrage entre [X] [Etats-Unis d'Amérique], et [Y] [France] au siège du Secrétariat Général de la CCI, 33 rue Jean-Goujon, Paris, le 10 décembre 1925, ayant entendu contradictoirement les deux représentants des parties …

L'arbitrage portait sur un litige défini par un acte de compromis signé … par les deux Parties et enregistré à Paris …

Point de fait

Le 5 novembre 1924, [Y] envoyait … six caisses de [produits textiles] à [X]. Cet envoi comprenait :

[Quantité de produits textiles] qui, selon [Y], étaient conformes à l'échantillon … qui avait été envoyé le 15 août 1924 à [A], représentant de [X], par [B], laquelle a agi comme commissionnaire pour le compte du demandeur vis-à-vis du défendeur.

La facture totale de [Y] s'élevait donc à … Frs. et elle se trouvait payée par une ouverture de crédit faite au préalable par [X] et qui s'élevait à … Frs. Les 26 et 28 novembre, [X] envoyait des marchandises à ses clients qui lui avaient fait leurs commandes au vu des échantillons envoyés au mois d'août précédent par l'intermédiaire [de son représentant et du commissionnaire pour le compte de X vis-à-vis de Y, respectivement B et A].

Ces clients déclarèrent que la qualité des marchandises était de beaucoup inférieure à la qualité des échantillons sur lesquels ils avaient passé leurs ordres. Ils déclarèrent notamment que les [produits textiles] étaient beaucoup trop faibles, qu'ils n'étaient pas recouverts d'une manière suffisante (« *covered enough* »). En conséquence, ils retournèrent les marchandises à [X].

[X] déclare de son côté que les [produits textiles] doivent être assez forts pour pouvoir être employés sur les machines à coudre ou à broder. Il avait passé la commande sur le vu des échantillons qui lui avaient été soumis : si les [produits textiles] qui lui ont été expédiés avaient été conformes aux échantillons, il les aurait acceptés. Mais ces [produits textiles] n'ont aucune force … Cette marchandise était destinée à des manufactures. Or, il est impossible de la monter sur machines en raison de son peu de résistance et les fabricants de broderie ne peuvent s'en servir.

[X] ajoute d'autre part qu'il a subi un préjudice moral pour avoir offert à ses clients des marchandises qui n'étaient pas conformes aux échantillons qu'il leur avait d'abord montrés.

Pour toutes ces raisons, [X] déclare avoir subi un dommage auquel s'ajoutent les frais de douane payés à l'arrivée qui s'élevaient à $ … et que la douane refuse de rembourser. Il demande en conséquence :

Que [Y] lui rembourse sa lettre de crédit dont le montant total s'élevait à $ … ainsi que les droits de douane payés, soit $ … c'est-à-dire au total $ … moyennant quoi [X] se déclare prêt à livrer les marchandises à n'importe quel autre correspondant de [Y] [aux Etats-Unis].

A défaut de ce correspondant, [X] se déclare prêt à accepter les marchandises avec un rabais de 50% sur le total de ce qu'il a payé. Il demande donc que [Y] lui rembourse la somme de $ …

A cela [Y] répond en déclarant que les réclamations de [X] ne lui paraissent pas fondées et en affirmant que la marchandise envoyée correspond exactement aux échantillons. La résistance [du produit textile] livré n'est pas inférieure à la résistance [du produit textile] des échantillons. Si l'on désirait un article de résistance spéciale, il ne fallait pas passer l'ordre sur ces échantillons mais indiquer que [le produit textile] était destiné à tel ou tel travail et devait comporter une résistance déterminée. Or, aucune résistance spéciale n'avait été demandée de même qu'aucune indication de l'emploi auquel étaient destinées les marchandises n'avait jamais été donnée.

Dans ces conditions, en raison du désaccord qui divise les parties, celles-ci désirant régler amiablement le différend qui les partage ont décidé de saisir la Cour d'Arbitrage de la CCI à l'effet de nommer un arbitre pour trancher les difficultés nées entre elles conformément au Règlement d'arbitrage de la CCI [de 1922], Section C.

En conséquence, pour statuer sur la contestation qui vient d'être exposée, la Cour d'Arbitrage de la CCI m'a désigné comme arbitre unique.

Aux termes du compromis, il était entendu qu'en qualité d'arbitre *amiable compositeur*, je ne serais pas tenu de suivre les règles de la procédure et du droit … [C]onformément au compromis, j'ai entendu contradictoirement les représentants des parties en cause et leurs explications et examiné en leur présence les documents relatifs à l'affaire produits par les deux parties ainsi que les échantillons …

J'avais pour mission :

1. de dire si la marchandise livrée par [Y] était bien conforme à l'échantillon remis par [Y] avant que la commande ne lui eût été passée.
2. en cas de non-conformité de ladite marchandise avec les échantillons, de déclarer si [X] était fondé à réclamer une réfaction sur la livraison de [quantités de matières premières] qui lui avait été faite en novembre 1924 par [Y], et de fixer s'il y avait lieu l'importance de cette réfaction.
3. d'ordonner éventuellement tous remboursements nécessaires par [Y] à [X].
4. de déclarer à laquelle des deux parties incombent en totalité les frais et dépens ou en quelle proportion les dits frais et dépens seraient partagés entre elles. …

Les parties avaient pris l'engagement de renoncer à attaquer la sentence à intervenir par les voies de recours quelles qu'elles puissent être, s'obligeant à l'accepter et à l'exécuter.

Motifs du jugement

La marchandise livrée n'était pas échantillonnée. Il est d'usage de tolérer une différence de 5% entre la qualité de l'échantillon et la qualité de la marchandise livrée, mais la différence a ici excédé 5% sans néanmoins justifier la demande présentée par [X]. Il n'est pas possible de rechercher si cette différence s'explique par la différence des locaux où ont été conservés les échantillons d'une part et les marchandises livrées d'autre part …

Par ailleurs, je dois observer que le demandeur, qui semble avoir été acheteur occasionnel de cette marchandise, aurait dû s'adresser directement au défendeur pour lui indiquer à quel emploi il destinait ces marchandises. Il faut observer que lorsque [B] a offert les échantillons à [A], représentant de [X], il n'a pas reproduit exactement à propos des [produits textiles] l'indication … qui se trouvait sur les offres de [Y] …
Or, cette indication avait une grosse importance …

Enfin, il y a lieu d'observer que si [X] est fondé à réclamer une réfaction, cette réfaction doit être calculée sur le prix effectif de la marchandise livrée sans tenir compte des frais de transport, de connaissement, d'emballage et d'assurance, des frais de visa consulaire ni des frais de douane qui auraient été en tout cas les mêmes quelle que fût la qualité de la marchandise livrée.

Une autre considération doit entrer équitablement en ligne de compte ; c'est le montant en francs français au taux du jour de la somme en dollars que réclame [X], somme qui pourrait, si l'on faisait droit aux demandes de [X], dépasser la valeur même de la marchandise. D'un autre côté, il y a lieu de tenir compte de la hausse actuelle évaluée à 25% de la marchandise qui est en ce moment dans les mains de [X] et qu'il peut, semble-t-il, vendre pour d'autres usages puisqu'elle lui paraît utilisable et qu'il offre de la payer 50% de sa valeur.

En somme, les deux parties sont également de bonne foi mais l'une se place du point de vue de l'application industrielle et l'autre uniquement du point de vue commercial. On peut admettre avec [Y] que [X], acheteur, aurait dû savoir exactement la qualité qu'il achetait. Mais il faut d'autre part reconnaître avec [X] que la marchandise livrée par [Y] n'était pas conforme aux échantillons.

Dispositif

Par ces motifs :

1. Je déclare que la marchandise livrée par [Y] n'est pas conforme à l'échantillon remis par cette maison avant que la commande ne lui ait été passée.
2. En conséquence, je déclare que [X] est fondé à réclamer sur la livraison de [quantité de produits textiles] qui lui avait été faite en novembre 1924 par [Y] une réfaction que j'évalue et fixe à 15%. Je déclare [X] mal fondé pour le surplus de sa demande et l'en déboute.
3. Je condamne en conséquence [Y] à rembourser à [X] par chèque, dès réception de l'expédition de la présente sentence, la somme de Frs. … représentant les 15% de celle [du] prix réel de la marchandise livrée à [X] et par lui reçue. A défaut par [Y] d'avoir exécuté ce paiement à la date du 31 janvier 1926 et celle-ci passée, [Y] sera sujette à y être contrainte par toutes les voies de droit.
4. Et vu les circonstances de la cause, je condamne chacune des parties par les voies de droit à la moitié des dépens … représentent les frais papier timbré et d'enregistrement du compromis, et ce, non compris les droits d'enregistrement de la sentence. En conséquence, [X] et [Y] devront verser au Secrétariat Général de la CCI, avant le 31 Janvier 1926, chacune la somme de …

En vertu du compromis, j'ai été dispensé de l'obligation de déposer dans les trois jours du jugement la minute de la sentence au greffe du tribunal. Les parties m'ont, de par le compromis, donné décharge de cette obligation et ont déclaré qu'elles s'en chargeraient éventuellement elles-mêmes.

J'ordonne l'exécution du présent jugement selon sa forme et teneur.

2. ARBITRAL AWARD
Affaire CCI n° 143 (Bruxelles, 1927)

Published in English (translated from the original French award) in *World Trade*, Nov. 1932, p. 11: "A Case of Forged Letters".

"The following award selected for publication this month by the Executive Committee of the Court of Arbitration will be read with equal interest by bankers and all interested in commercial law. The case arises out of a major fraud perpetrated by means of forged letters of credit prepared by the forgers from two genuine letters of credit issued to them in the ordinary course of business. Who was liable for the consequent losses involved, the bank that issued the letters of credit or the bank that made payments on presentation ? In answering this question, the arbitrator proceeds to give an exhaustive analysis of the nature of a letter of credit and of the legal relations which it established between the issuing bank, the paying bank and the holder of the letter."

Award made on February 19th, 1927, by Mr. Maurice Hermans, Avocat à la Cour de Cassation of Belgium

1. On June 25th 1926 the X ... branch of the defendant bank delivered to an individual calling himself A.P. a letter of credit, No. 6232 for £3,250 payable at a number of European banking houses among which the defendant bank figured.

   On June 28th 1926 the same branch delivered to an individual calling himself [S] a letter of credit No. 6241 for £1,000 payable at various European banking houses among which the defendant bank figured.

2. According to custom the said branch immediately sent to the various banking houses indicated in the letters of credit, notices informing them of the issue of the aid letters of credit and specifying their serial number, their amount, the period of validity and the names of the payees; attached to these letters were specimen signatures of the payees.

3. On August 5th 1926 two individuals presented themselves at Bank No. I which payed to one of them the sum of £3,200 and to the other the sum of £975 on presentation, the said bank states, of letters of credit bearing the Nos. 6232 and 6241 respectively. Bank No. I also asserts that the letters bore no mention of previous payment having been made and that it entered on them the payments made by it. It is to be noted that letter of credit No. 6241 delivered to the so-called [S] did not mention Bank No. I among the paying banks, and that Bank No. I could not in consequence have been advised of having a payment to make to the so-called [S].

4. On August 6th 1926 the plaintiff (Bank No. 2) paid to the so-called A.P. the sum of £3,200 and to the so-called [S] the sum of £950 on presentation, it states, of letters of credit similar to those which, according to the letters of advice, had been issued by the branch of the defendant. It states also that on the letters thus presented there appeared no mention of a previous payment having been made and that it entered on them, in ink and by means of a perforating machine, the sums withdrawn from it.

5. On August 7th 1926 two individuals presented themselves at Bank No. 3 whose name appeared among the paying banks on the genuine letters of credit; they were the bearers, this bank states, of letters bearing the same numbers and having the same import as those which had been issued by the X... branch of the defendant and caused themselves to be paid £3.150 on presentation of letter No. 6232 and £950 on presentation of No. 6241. The said bank states also that the letters bore no mention of any previous payment having been made and that it entered on them the amount of the payments made by it.

6. On August 9th 1926 two individuals presented themselves at Bank No. 4 whose name appeared among the paying banks in the genuine letters; they were bearers of letters of credit bearing the numbers specified; one of them obtained payment of £950 on letter No. 6241, but when the other presented letter No. 6232, the cashier took it saying that he was going to consult the manager; when he returned the individual had disappeared.

7. Letter No. 6232 thus surrendered to Bank No. 4 is a forgery which at first sight resembles the original letter No. 6232 if a comparison is made with the specimen produced by the defendant; nevertheless a close comparison of the forged letter with the specimen reveals certain differences.

8. The original letters of credit were not returned and have not therefore been presented to the arbitrator.
9. It was certainly to the payees of the original letters of credit Nos. 6232 and 6241, that is to say to the individuals who presented themselves at X... as A.P. and [S]. and to whom the genuine letters had been delivered, that the plaintiff paid £3,200 and £950 respectively, and it was they who signed the receipts in duplicate in accordance with custom.
10. According to the letters of advice, the plaintiff had the right to reimburse itself from Bank No. 5 for the advances made on letters od credit Nos. 6232 and 5241; consequently, it caused two cheques to be presented at the said bank, but the latter refused payment of them on the grounds of insufficient funds, having already reimbursed to Bank No. I the sums that it had advanced on the letters of credit which had been presented to it.
11. It was only on August 11th that the defendant warned the plaintiff and other interested banks by telegram and letter, that no further payment could be made on the letters of credit.
12. The plaintiff advised the defendant on August 16th 1926 that it was debiting the account of the latter's branch at X ... with Pesetas 121,762.50, value August 10th, to offset the payments which it had made on the two letters of credit. The defendant's branch and the defendant itself refused to accept this debit.

Whereas the plaintiff claims that the payments made by it to the payees of the letters of credit No. 6232 and No. 6241 are valid and that it has consequence the right to maintain this debit;

Whereas the defendant disputes this claim;

Whereas, as the defendant rightly points out, the burden of the proof falls on the plaintiff in order to substantiate its claim; But whereas the question is to determine of that the proof should consist; Whereas, in order to settle this question, it is necessary to show the legal aspect and the operation of the letter of credit;

Whereas a letter of credit is a document by which a person – generally a bank – gives to one or several other persons – generally one or several other banks – power of attorney to pay to a third party whom the letter names and within the periods that it stipulates, sums of money of which the maximum amount is generally fixed; whereas this letter is handed to the payee who is free to make use of it or not as he wishes; whereas when he makes use of it he presents it as a bank, or at one or more of the banks which the letter names; whereas the bank which makes a payment causes the payee to furnish it with a receipt, generally in duplicate, and enters the amount of the payment on the letter of credit itself in such a way that the sums which may be advanced later on the same letter are reduced by that amount; whereas the bank making the payment of necessity returns the letter to the payee when the latter has not drawn the total of the sums which he has a right to draw;

Whereas the bank which issues the letter of credit advises immediately and directly the bank or banks whose name or names it enters on the letter, and informs them of the essential points of that letter (name of payee, amount of the total sum which may be paid, duration of validity, serial number) at the same time as it sends to these banks a specimen of the signature of the payee;

Whereas at first sight it appears that the bank which has made the payment must, in order to be reimbursed by the bank which issued the letter of credit, prove not only that it made the payment to the payee of the letter of credit himself but that it made the payment on presentation of the letter, that the letter was the genuine letter of credit and not a forged one, that the letter bore no mention of any previous withdrawal greater than the difference between the total amount of the letter of credit and the payment which it made and that the payment was made during the period of validity of the letter;

Whereas the defendant claims that such is the proof which the plaintiffs must furnish;

Whereas this claim is founded neither in law nor in equity; Whereas, in fact, as is recognised by all authorities when speaking of letters of credit, the relations established between the bank issuing the letter of credit and the banks appointed to make the payments, are the relations of principal and attorney-in-fact;

Whereas, the bank appointed by the letter of credit to make payments to the payee as required, and which, within the period of validity of the letter, made a payment to the payee of that letter within the limits of the total originally indicated in it, has no need to procedure the letter in order to prove that it had the right to make a payment on it; whereas that power is sufficiently established by the letter of advice which it received from the bank issuing the letter of credit at the time of issue; whereas the bank has consequently in its possession written proof of the power of attorney that was given to it;

Whereas if the production of the latter by the payee, at the bank from which he demands a payment, constitutes nevertheless an essential formality for the operation of the letter of credit, this is not for the purpose of proving the existence of a power of attorney of which the bank entrusted with the payment is already aware and which it is in a position to prove by another written document which is and remains in its possessions, but it is to enable the bank making the payment to ascertain whether any previous payment has been made and to enter on the letter the amount of the payment it has made; the payment bank must in fact enter on the letter the payment it makes, l order that the other interested banks may be advised that from them onwards they can only make payments on the letter of credit up to the difference between the maximum amount of the letter and the amount of payments already made;

Whereas if these operations are examined from the legal standpoint it appears that the payment made by a bank on a letter of credit constitutes, in respect of the amount of that payment, a revocation of the power of attorney given to the banks designated by that letter; whereas the entry of the payment on the letter and the presentation of the letter bearing that entry constitute the notification to the banks concerned of that revocation; whereas it is actually the only means of notification possible in the normal operation of the letter of credit;

Whereas every bank appointed by the letter of credit has in principle the right to pay to the payee the total amount for which the letter is issued; whereas it retains that right, as long as the power of attorney given to it by the issuing bank and of which the latter has directly notified it has not been revoked and that it has not been notified of that revocation; whereas it appears from the foregoing that it is indeed the payee himself who is made responsible by the agreement which exists between himself and the issuing bank for giving this notification in the case of partial revocations arising from the fact that partial payments have been made on the letter of credit;

Whereas if the payee instead of giving this notification to the bank at which he is going to demand a payment by presenting to it the genuine letter in which the payments already made are entered, presents either a forged letter of the genuine letter from which he has been able skilfully to erase the mention of the previous payment or payments, it must be admitted that in acting thus he is not presenting a document which apparently establishes a right but a document which being forged or falsified does not establish any right; he fails to make known the partial revocation of a right whose existence has been brought by other and more certain means to the knowledge of the bank making the payment; whereas in consequence the payment made by the bank appears to be the act of an attorney-in-fact within the limits of the power of attorney which has been notified to him, made, it is true, after revocation of the power of attorney but of which revocation the attorney was ignorant;

Whereas the attorney-in-fact, in order to justify his acts, need only prove the existence of his power of attorney and that his act comes within the terms of this power of attorney; whereas if the principal claims that the power of attorney has been revoked wholly or partially, it is for him not only to prove it but also to prove that this revocation was duly notified to the attorney-in-fact;

Whereas in fact it is possible that the letter presented to the attorney-in-fact may be a forged letter of the genuine letter which has been falsified and that thus the revocation is not notified to him; Whereas the normal operation of a letter of credit demands that the bank making a partial payment hands back the letter to the payee;

Whereas therefore the normal operation of the letter of credit necessarily assumes that the bank making the partial payment does not retain in its possession the one document whereby it could be shown that it received notification of the revocation of its power of attorney in respect of a determined amount;

Whereas in consequence it is not possible to oblige it to furnish written or verbal evidence that it received the notification, since it has to give up the only piece of written matter that is the instrument of such evidence and since the only available witness is normally the official of the bank making the payment, i.e. the bank itself in a certain measure; and further also because, even on the supposition that such evidence would be declared admissible without reservation, it is unreasonable to expect a man before whose eyes numerous documents pass daily, to have his attention attracted by details of which he cannot take notice, to implant them in his memory in regard to each and every one of these documents, in view of a possible dispute which may arise at the end of a more or less lengthy period; because this man may disappear, because the issue of what is frequently an important lawsuit cannot be allowed to depend upon such frail and perishable evidence;

Whereas the defendant objects that if its point of view is not admitted the banks responsible for making payments will pay without taking any precautions as they are running no risk; Whereas it is desirable to point out first that when a bank appoints certain other banks to make payments on a letter of credit, it is because it apparently considers them to be reliable and that there are reasons to believe that they are reliable; whereas it cannot be presumed that a reliable bank which is professionally scrupulous in its dealings and hesitates to accept responsibilities, will make either dishonest of careless payments, particularly when it has no interest to do so; whereas the bank making the payment must bear in mind that if it commits a negligent or dishonest act, it will almost certainly be discovered which means that to protect its own interests it will take the same precautions as if it would later have to furnish the unprocurable proofs demanded by the plaintiff;

Whereas it could be alleged against the defendant that in its system the bank issuing a letter of credit against payment by the payee of the total amount of the letter would really run no risk; whereas banks could thus deliver, without verification and to anybody, credit documents which normally would give rise to unquestionable risks which would fall on the banks appointed to make the payments, thus increasing those risks without any responsibility to itself;

Whereas when the only risk for the banks appointed by a letter of credit would be that they were liable to make a payment to somebody who is not the real payee of the letter of credit (in case of loss or theft of the letter and of presentation by a third party imitating more or less skilfully the signature of the payee), this risk must not be underestimated; whereas it is of sufficient importance and whereas it must not be increased by the risk which the defendant's argument would place upon these banks;

Whereas if the position must be worse for one bank than for the other, in the event of abuse committed by the payee which in the case in the present instance – a very rare occurrence nevertheless since it does not seem to have any known precedent – and since no legal decision appears to have been given in this connection, it is equitable that the position should be worse for the bank which issued the letter of credit; whereas it is not the bank which pays which has chosen the payee; whereas it must accept him and has, in principle and a priori, no information regarding him;

Whereas it cannot seriously contemplate procuring information regarding him since usage decrees that it pays to this payee, on the spot, the sum he demands as soon as it has satisfied itself as to his identity and the regularity of the letter of credit; whereas in making verifications at the time of the payment which would give the payee the impression that it distrusts him, the bank responsible for making the payment would do more harm to the prestige of the bank issuing the letter of credit than to itself; whereas conversely the bank issuing the letter is free to accept or refuse the demand made to it;

Whereas if the payee of the letter of credit misuses it, it is not with the bank appointed to make the payments that he defaults but with the bank which issued the letter; whereas in fact, whatever contract there may be between the payee of the letter and the bank which delivered it to him (the delivery of the letter may or may not be the execution of an opening of credit, or it may be the consequence of a payment made by the payee to the bank), that contract of necessity includes, without its being expressly stipulated, the obligation of the payee to make use of the letter of credit for its proper purpose, as a prudent owner; whereas when he makes a withdrawal he must in consequence present the genuine letter to the bank and not a forged letter or the genuine letter which has been falsified in one or other of its parts; whereas if he does not fulfil this obligation e violated the contract existing between himself and the issuing bank;

Whereas it as to the latter that he causes damage; whereas there exists, between the payee of the letter and the bank appointed to make the payment, no legal relation to the extent that the payee cannot bring any action to oblige the latter to make a payment to him, as the authorities are unanimous in admitting; whereas being instructed by the issuing bank to present to each ban the genuine letter with the mentions of the withdrawals of sums made previously, he appears in this part of the operation of the letter as the attorney-in-fact of the issuing bank and instructed by the latter thus to notify the partial revocations of the power of attorney given by the issuing bank so the banks appointed to make the payments; whereas if the does not carry out his duties or if he carries them out badly it is naturally on his principal, and not on the bank to which he should have made the position known, that the consequences of his actions must fall;

Whereas it is therefore unimportant to discover whether the plaintiff paid on the production of the genuine letter, falsified or not, or on production of the genuine letter, falsified or not, or on production of a forged letter since it is the duty of the defendant to prove that the plaintiff knew of the partial revocation of the power which had been given to it to make payments to the payees of the letters.

Whereas the defendant wrongly compares the present case with the case of the bearer of a forged bank-note or of a forged cheque who cannot demand payment of them even if the note or cheque is perfectly imitated; whereas the bank-note or the cheque constitutes the instrument itself and the only instrument giving right to payment; whereas if the note or the cheque is forged it does not give any rights against the bank, from which it does not emanate; just as a forged letter o credit which has not been notified would not give the right to the bank named in that letter to make a payment validly to the person named in that letter; for since the only instrument in virtue of which the bank would in that case be making payment would be the letter of credit itself, and that instrument a forgery, it would be making payment in virtue of a power of attorney which did not exist to a pseudo-payee; while in the present case it has paid in virtue of a power of attorney which exists and to the person for whose benefit the power was given, the irregularities committed by the payee resulting, not in establishing a right to his benefit, but in concealing from the person to whom the power of attorney was given that such power had been partially or wholly revoked;

Whereas the defendant claims that the plaintiff has defaulted in the performance of its duties and that in this respect the onus of proof falls upon the defendant;

Whereas its claim rests entirely on the supposition that the plaintiff has made a payment on production of forged letters of credits; whereas there is no sufficiently convincing proof in this connection; whereas it is in the realm of possibilities that the plaintiff might have made payment on presentation of the genuine letters; whereas in a case as extraordinary as the present one, it is not permissible to say that this possibility is in the realm of pure theory and constitutes an improbability; whereas if the individual who caused the letters of credit to be delivered to them had decided – as events proved they had done – to commit forgeries in order to withdraw from successive banks and in some degree day by day, sums amounting each time almost to the maximum of… the sums which they could cause to be paid to them only once, it does not follow that they must have presented the genuine letter the first day rather than another day; it is even open to question whether they presented the genuine letters the first date since it is certain that one of the genuine letters did not bear the name of the Bank No. I where two letters were presented the first day and the hypothesis can thus be put forward that in making two forged letters the payees inscribed on both the forged letters, by error or knowingly, the name of a bank which only appeared on one of the genuine letters; whereas if it is conceivable that a bank named in a letter of credit may make a payment on that letter, although it has not been notified, it is more difficult to conceive a bank, which has not been notified, it is more difficult to conceive a bank, which has not been notified, making a payment on a letter in which its name does not appear; whereas it is therefore permissible to suppose that letter No. 6241 presented at the Bank No. I mentioned its name, that it was therefore forged and that the plaintiff (Bank No. 2) could thus have made a payment, at least in respect of letter No. 6241, on the genuine letter bearing no mention of a previous payment having been made;

Whereas supposing the plaintiff made a payment on presentation of false letters similar to the one which was left on the hands of the Bank no. 4, it does not appear that it would have committed an error; whereas that letter is perfectly imitated and that only a close comparison between that letter and a genuine letter enables certain differences – of a secondary nature also – to be observed;

Whereas it must be pointed out in this connection that it is not customary, as the parties agree in recognizing, when warning the banks appointed by the letter of credit to make payments for the issuing bank, to send them a specimen of the letter which it has delivered; whereas the issuing bank restricts itself to making known the creation of the letter, to giving the essential points of it and to furnishing a specimen of the payee's signature; whereas this fact in itself shows that, in practice, issuing banks like the banks entrusted with payment set on one seethe supposition of the presentation of a forged letter of credit by the payee and only consider the question of ascertaining whether the person representing the letter is actually the person for whose benefit it was issued; letter is actually the person for whose benefit it was issued; whereas if the verification of the authenticity of the letter had to be made absolutely minutely, it would include one first essential element which is the comparison of the type of the letter used by the issuing bank and the letter presented and it would be the duty of the issuing bank to communicate a specimen of the genuine letter to the banks appointed;

Whereas if it is customary to refrain from making such communication the defendant appears to say that it is by reason of the fact that the banks appointed are already made previous payments on letters of credit and that they thus possess the elements of comparison; but whereas it does not appear that there was any communication of the specimen of the genuine letter of credit on a previous occasion; whereas it results on the contrary from the letter written by the defendant on September 6th 1926 to the plaintiff that at a certain moment it had modified its forms of letters of credit; whereas especially the new forms differed from the old ones n that they were made on watermarked paper, and that it had not warned the plaintiff before September 6th 1926.

Whereas no serious reproach can be levelled ad that plaintiff for having paid without mistrust almost the total amount of each letter to each one of the bearers; whereas it cannot further be reproached, as soon as it was certain that it was dealing with the genuine payees of the letters (and it is not disputed that it made the payment to the genuine payees, that in consequence it was not mistaken and did not commit any error in that connection), with not having enquired at what hotel they were staying; whereas the defendant has even less the right to make a life reproach that its branch delivered the letters of credit to unknown persons on simple presentation of papers of identity without verifying the authenticity of those papers;

Whereas it is shown by statements furnished by first class banks that it is the custom with them only to deliver letters of credit to their customers regarding whose respectability they have sufficient assurance or to third parties personally known to the management or high officials; whereas if is cannot be said with certainty that a departure from this usage constitutes *ipso facto* a wrongful act towards the banks appointed to make payment, and especially if it cannot be said from what moment and to what extent that wrongful act would engage the responsibility in civil law of the bank which delivers a letter of credit to unknown persons, it is shown by the considerations explained earlier regarding the legal aspect and operation of a letter of credit that the delivery if such letter can only be made to persons in whom the bank has sufficiently justified confidence since those persons are required by the normal working of the letter of credit to occupy a position of trust on behalf of the issuing bank; whereas the plaintiff is justified both in law and in equity to claim from the defendant the reimbursement of the sums which it paid to the payees of the two letters of credit and that no wrongful act has been established against it, it appears from no circumstance of the case that this right to reimbursement can be restricted in any measures which it would furthermore be impossible to determine;

Whereas there is no decisive reason in the elements which have been submitted to depart from the rule by virtue of which the party who fails to establish his claim must pay the expenses;

For these reasons, I the undersigned, Maurice Hermans, Avocat à la Cour de Cassation de Belgique, deciding in accordance with the terms of reference of the submission to arbitration as *amiable compositeur*, exempt from following the rules of procedure and of the law,

1. Award and find that the payments of £3,200 and £950 made on August 6th 1926 by the plaintiff on two letters of credit Nos. 6232 and 6241 emanating or appearing to emanate from the X... branch of the defendant must be declared valid;
2. Award and direct in consequence that the defendant must enter in total the sum of ... (Pesetas 131,762,50) to the debit of its X ... branch to the credit of the plaintiff, August 10th 1926 value:
3. Award and direct that the costs and expenses of the arbitration which amount to 15,000 Belgian francs and 1,000 French francs including the fees allowed to the arbitrator, and also all the taxes, legal dues or fines which might be payable in connection with the present award if it were necessary to have it enforced in law, must be borne by the defendant.

3. ARBITRAL AWARD ICC Case no. 163 (1927)

On behalf of the Court of Arbitration, the undersigned, … [Japan], renders the following award in a dispute between [X] [Japan] and [Y] (French firm) [Japan] …

Statement of facts

Whereas on the 27th of October 1926, the following submission to arbitration has been signed by Mr. … representing [X] and Mr. … representing [Y].

> "In transaction between [X], Kyoto, represented by … herein after called the Buyers and [Y], Kobe, duly represented by … herein after called the Sellers, there exist between the Sellers and the Buyers a difference of view regarding the quality of Orders Nos 13, 17 and 19. They have decided to submit the question to the International Chamber of Commerce, Tokyo, for arbitration, the Sellers having deposited with the [Z] Bank, Kobe, the amount of yen … on the 18th September 1926 as a guarantee to pay the full indemnity to which the arbitre [sic] may eventually condemn the Sellers.

But Buyers pretended that the goods of Orders 21, 22 and 23 which afterward arrived at Kobe were also very inferior to sample in quality, they decided to refuse the payment of the cost of goods until the previous question: namely the claims regarding the orders 13, 17 and 19 were settled by both parties.

Sellers asked urgently to pay the cost, accepting that goods of Orders 13, 17, 19, 21, 22 and 23 should be submitted to arbitration of ICC and they should accept the decision of the Chamber of Commerce as absolutely binding with responsibility.

So the Buyers completed the payment of cost of Orders 21, 22 and 23 for the matter of convenience and between both parties the following agreement has been made with a view to settle immediately all questions pending now.

- Goods of Orders 13, 17, 19, 21, 22 and 23 to be submitted to the arbitration of ICC, Tokyo, and to submit for their appreciation and judgment the certificates obtained from … re goods already tested.
- Buyers must have made formal application to ICC on or before November 30th, 1926.
- Buyers and Sellers accept the decision of above arbitration as absolutely binding and promise not to appeal to any other Court.
- No claim either direct or through ICC regarding above goods can be accepted after November 30th, 1926.
- Both parties should complete all obligations to which ICC may eventually condemn within three weeks after date of decision of Chamber of Commerce.
- Both parties request arbitration by the Tokyo International Chamber of Commerce, because this trouble occurred in Japan and all goods in question are in Kyoto and Kobe.

Now, under these circumstances, and on account of the dispute which has arisen between the parties and their desire to arrive at an amicable settlement thereof, they have decided, in accordance with the arbitration clause of the contract, to submit the matter to the Court of Arbitration of ICC for the purpose of having an arbitrator named to decide upon the questions in dispute between them in accordance with Section C of the Rules of Arbitration of ICC.

Therefore, in order to decide upon the difference above stated, the Court of Arbitration of ICC has named me as sole arbitrator at its session of the 6th April 1927. Minute of submission was signed by the parties …

According to this submission, the arbitrator was entitled to decide in equity. The arbitrator was to examine the documentary evidence in the case submitted by the two parties and, in particular, samples of the goods as well as the certificates obtained from …; the arbitrator was also to hear the two parties or their duly accredited proxies in Kobe in the presence of each other.

Duty of the arbitrator

I was to:

- decide whether the Buyers should return to the Sellers the following deliveries and the Sellers should refund the Buyers the whole account paid for the same … However, out of these 55 cases of Order 19, 50 cases were placed on the market and disposed off by the Buyers at a reduction as inferior quality of Yen: … per case. This having been done at the request of the Sellers, the arbitrator will decide if the Sellers should refund the Buyers a sum of … being the difference arising from such degradation.
- decide whether the Sellers should refund the Buyers a sum of … paid by the Buyers as import duties upon 25 cases, part of the 55 cases of Order 19.

- decide whether allowances claimed by the Buyers … should be refunded to the Buyers by the Sellers totally or in part.
- decide which of the two parties shall pay the costs, expenses and fees that the Court of Arbitration may allot to the arbitrator or in what proportion the said costs, expenses and fees shall be divided between them, including stamp duties as well as all dues, double dues, stamp and registration fines which may be collected in connection with the award, should it have to be enforced by legal means.

The arbitrator was to render his decision within four months of the signing of the submission to arbitration, the four months beginning to run on the date on which the last signature was given. This period of delay has been extended …

The arbitrator was to publish the grounds upon which he would render his award. The parties undertook neither to attack the decision nor to appeal from it in any manner whatsoever and they solemnly undertook to accept and comply with the decision. I examined the documentary evidence and the samples as well as the certificates and I heard the parties.

Award

- The goods cannot be returned by the buyers to the sellers because all the goods have already been sold. Regarding the request for an allowance of Yen … per case on part of the goods sold previous to the request for arbitration, same should not be paid for reasons set out later.
- The duty paid by the buyers should not be returned because as already mentioned, the goods have already been sold.
- The allowance claimed should not be made because the goods have already been sold at a loss stated by the buyers to be Yen … but estimated by the arbitrator to be approximately Yen …
- The arbitrator is of the opinion that the expenses incurred in interviewing the two parties interested, and for the time spent over such interviews justify his asking for the sum of … as a recompense for the service rendered plus French francs … (cable and clerical expenses of the Court of Arbitration), and is of opinion that the amount in question should be paid by [Y] for reasons set forth below.

Grounds for the Award

The prices at which the [product] was eventually sold by [X] showed a loss which only represented the actual decline which had taken place in the maker's cost prices, whereas the selling prices in Japan declined a further twenty or thirty percent owing [the product] having been imported into Japan in far greater quantities than the country was able to consume at the time. In the opinion of the arbitrator, the fact that the goods were eventually sold at the current makers prices altogether disproves the buyers' justification for making a claim based on the quality delivered. The arbitrator considers also that the fact that orders 21, 22 and 23 were placed by the buyers at a considerable time after orders 13 and 17 were delivered and paid for, proves that the claims as regards the quality of the goods were not justified.

As regards the quality of the actual goods delivered, it is difficult for the arbitrator to render a definite decision owing the following reasons:

The orders were not placed from samples but for … "Seconds" and "Thirds". The buyers claim that there was too great a variation in both quality and size but the sellers contend, and their views are supported by all [European sellers] that such variations may inevitably occur when "Seconds" or "Thirds" are bought, and that for these goods buyers must take the goods as they are without admitting any controversy about the classification of a given quality.

The arbitrator's opinion is that the buyers have ignored the fact that certain lots of goods are produced and sold … as "Seconds" and "Thirds" owing to irregularities in the "titre" on account of the wrong working of the machines.

The goods having already been sold, makes it impossible for the same to be surveyed. From the goods delivered, certain samples were drawn by the sellers in the presence of the buyers' representative and were submitted for testing purposes … The results of the test varied considerably but it is the opinion of the arbitrator that no useful purpose could be served in arguments regarding these tests on one side or the other, owing to the fact that the variations in quality and "titre" are characteristics of "Second" and "Third" qualities.

The buyers lay stress in their "Statement of Facts" in support of their claims on letters which they purport to have received from the sellers in Kobe. These letters mentioned are all translations … and have not been signed by the firm's representative and cannot be admitted as evidence in support of the claim by the seller. On the other hand, the buyers have entirely ignored the official correspondence written by the sellers in English, copies of which have been submitted by the sellers. This is mentioned in view of the variation which is to be found when comparing the various letters mentioned by the buyers, with the copies of the letters of the same date submitted by the sellers.

With regard to the cost of this arbitration, the arbitrator is of the opinion that same should be paid by the sellers for the following reasons:

The sellers' representative in Kobe had made certain allowances on goods delivered previous to the present dispute which led the buyers to believe that they were justified in making a claim on later deliveries. These allowances were based on a question of policy but were undoubtedly partly accountable for the present allowances put forward. Further, neither the said representative in Kobe or … who negotiated the sale of the goods had any knowledge of the [product] business and it is the arbitrator's opinion that this lack of knowledge of the business led them into the acceptance of certain business which, firms in Japan with a knowledge of the trade would have hesitated to accept without fully knowing what class of goods would be likely to be delivered.

4. SENTENCE ARBITRALE Affaire CCI n° 225 (Bâle, 1929)

[E]n la cause liée entre [X] [Espagne] (demandeur et défendeur reconventionnel) et [Y] [France] (défenderesse et demanderesse reconventionnelle). Nous juge arbitral, Invité par la CCI à statuer sur la demande introduite par [X] contre [Y] et sur la demande reconventionnelle de cette dernière contre [X].

Considérant en fait

I. Au début de mai 1926, les parties ont signé à Paris un contrat daté du … d'après lequel [Y] confiait (art. 1) à [X] la représentation exclusive pour l'Espagne et ses colonies de tous les appareils de ses constructions …

[X] s'engageait de ne s'intéresser ni directement, ni indirectement, à la vente des produits concurrents. Mais il reçut l'autorisation de faire construire quelques appareils et accessoires en Espagne, et de les livrer à sa clientèle sous sa propre responsabilité (art. 2), [Y] se réservant toutefois le droit de présenter elle-même à sa clientèle un devis comprenant tout ou partie de ces articles et accessoires … [Y] prit l'engagement de transmettre intégralement à [X] toutes les demandes venant d'Espagne ou de ses colonies afin qu'il puisse s'en occuper et faire le nécessaire dans le délai le plus court, et de lui consentir les remises maxima sur les tarifs de détail et qui étaient fixées, pour les spécialités de l'article [a] à 20% plus 10% ; la différence entre le prix de vente et celui obtenu, déduction faite de la remise sur le prix du tarif, représentait la commission de [X] … (art. 3) ; toutefois, dans les cas exceptionnels où il y aurait un intérêt réel à traiter une affaire à un prix tel qu'il absorbe la commission de [X], [Y] se déclarait prête à se mettre d'accord pour fixer la somme qui formerait la commission (art. 4).

[Y] promit ensuite qu'en janvier 1926 elle ferait une première avance de Fr… à [X] et la renouvellerait ensuite chaque fois que [X] aurait traité Fr. … d'affaires, chiffre net obtenu après déduction des emballages, transports, montages, impôt, taxe sur chiffre d'affaires et impôt nouveaux qui pourraient être votés, à titre de frais de bureau et de représentation, et ce pendant les années 1926 et 1927 ; il était prévu que cette avance serait réduite successivement à Fr. …payables dans les mêmes conditions durant les années 1928 et 1929, et à Fr. … pour les années 1930 et 1931 art. 7). Le contrat était fait pour une durée de 6 ans … Les parties s'engageait à recourir, en cas de désaccord, à un arbitrage rendu conformément au Règlement d'arbitrage de la CCI pour le règlement de tous litiges

à l'interprétation ou à l'exécution du contrat. En cas de contestation, les parties prorogeaient à la compétence des tribunaux [nationaux].

II. Peu de temps après l'entrée en vigueur du contrat, une contestation paraît s'être élevée entre les parties sur l'interprétation de l'art. 3. Par lettre du 23 mars 1926, [X] écrivait à [Y] :

> « Dorénavant, nous vous prions de ne pas transmettre une offre directement à un client de l'Espagne sous aucun motif. Sans nous efforcer vous comprendrez tout parfaitement que ce ne serait pas la peine d'avoir une convention entre nous sous laquelle nous avons un bureau ouvert avec un respectable chiffre comme des frais généraux ; veuillez nous aider à l'égard de nos intérêts réciproques mais toujours dans le souci de ne pas envahir notre terrain .... »

[Y] répondit, en date du 26 mars :

> « Nous nous conformerons donc pour l'avenir strictement à vos indications.
>
> Nous devrons toutefois attirer votre attention sur ce fait qu'il pourrait arriver qu'un [client] Espagnol de passage à Paris vienne nous consulter, et nous demander un prix ; vous admettrez que dans ces conditions, il nous est bien difficile de ne pas lui donner ce prix.
>
> Veuillez donc nous dire sur quelle base dans ces conditions nous pourrions faire des prix à un client espagnol. »

Il n'est pas possible de voir, d'après les actes déposés par les parties, si et de quelle manière [X] a répondu à cette question.

En date du 22 avril 1927, [Z] [Espagne] se rendit au bureau de [Y] [en France] accompagné d'une autre personne qui semble avoir été son artisan … comme [X] l'écrivit plus tard. [Z] s'informa sur les conditions de livraison du matériel … qui était mentionné sur la liste et qu'il désirait acquérir. [Y] assure avoir renvoyé [Z] à son représentant en Espagne. Mais [Z] doit avoir déclaré qu'il était venu [en France] voir des constructeurs d'appareils, qu'il tenait à conclure *avant* de retourner en Espagne et que, s'il ne recevait pas les renseignements désirés auprès de [Y] entrevoir qu'il était déjà en rapport avec des maisons concurrentes. [Z] doit en outre avoir ajouté qu'il n'était pas en relations avec [X] pour cette affaire et qu'il n'avait jamais reçu de celui-ci aucun droit ou proposition. [Y] s'est mise alors en négociations directes avec [Z], lequel, après deux jours de discussion, se déclara d'accord, en date du 24 avril, de traiter sur la base de Fr. … [Z] ajouta [qu'une société tierce] lui avait soumis un devis sensiblement inférieur, mais qu'il voulait tout de même donner l'avantage à [Y], à cause de la meilleure qualité de ses produits. [Y] accepta cette proposition de [Z], malgré que le prix de Fr. … fût de 28% moins élevé que le prix du tarif, de sorte que la remise revenant à [X] était entièrement absorbée (prix du tarif Fr. … moins 28%, plus emballage et transport gare). Elle confirma par lettre du 26 avril à [Z] qu'elle acceptait son offre. [Z] revint ensuite sur sa commande et demanda différentes modifications. A la suite d'un échange de lettres, les parties s'entendirent sur une commande conforme au … devis que [Y] confirma à [Z] par lettre du 6 mai :

Le prix du tarif de Fr. … était donc de nouveau réduit de 28%, ce qui donnait, en chiffre rond, Fr. … porté à Fr. … par l'addition des frais d'emballage et de transport en gare … Entre-temps, [X] apprit, au cours d'une visite chez [Z], la conclusion directe de cette affaire et se plaignit auprès de [Y], en invoquant [le contrat], de ce que cette dernière avait traité et conclu avec [Z] sans passer par son entremise et sans même lui en donner connaissance. Il ajoutait qu'il avait déjà été en rapport avec [Z], que sa situation de représentant était rendue plus difficile par suite de ces réductions de prix accordées directement, que [Z], encouragé par son premier succès, allait tenter d'obtenir de lui ([X])) également une réduction de prix pour la livraison des accessoires et pour le montage du moulin, et qu'enfin un autre client, qui s'était intéressé pour un appareil, avait obtenu de son ami [Z] l'assurance qu'il le soutiendrait pour obtenir, comme lui, une réduction de prix à Paris.

[Y] répondit que c'était parce que les commandes devaient subir encore quelques modifications et qu'elles n'étaient du reste pas encore définitives. Elle ajoutait que [Z] avait déclaré n'avoir eu aucun rapport quelconque avec [X] et que si ce dernier remettait, comme les représentants des autres pays, des rapports périodiques sur l'état de ses affaires ainsi que la liste de ses clients, elle aurait été orientée sur ses relations avec [Z] et n'aurait pas traité directement avec lui. Dans le cas particulier, elle avait dû traiter et conclure directement parce que, sans cela, l'affaire aurait été à la concurrence, ce qui aurait été contraire aux intérêts de [X] lui-même. Elle offrit à [X] d'ajouter à son chiffre d'affaires le montant de cette affaire, s'élevant à Fr. … pour le calcul de son avance de Fr… par Fr. … mais refusa de lui accorder une remise.

A l'occasion d'une visite à Paris, en date du 12 mai, [Z] fit faire encore quelques petites modifications à sa commande et s'entendit avec [Y] sur un nouveau devis définitif … comportant un prix de tarif de Fr. … réduit de 28%, ce qui faisait … à quoi s'ajoutaient Fr. … pour frais d'emballage et de transport … donnant un total de Fr. …

[Y] donna connaissance de ce qui précède à [X], par lettre du 16 mai. Dans l'échange de correspondance qui suivit, les parties maintinrent chacune leur point de vue. [Y] déclarait devoir réserver sa liberté pour les cas où des clients espagnols venaient la voir à son siège de Paris, tandis que [X] soutenait l'avis qu'elle pouvait bien montrer ses fabriques aux visiteurs dans des cas semblables et les mettre au courant des perfectionnements apportés dans la construction de ces machines, mais qu'elle devait en tous les cas s'entendre avec lui pour fixer les prix …

La Cour arbitrale demanda à [X] d'indiquer le montant de sa demande de dommages-intérêts, sur quoi ce dernier écrivit … à [Y], qu'il désirait liquider le différend à l'amiable, à la condition qu'il reçoive la promesse formelle que, pendant la durée du contrat, elle ne s'occuperait jamais de fournir les des prix soit directement, soit indirectement, pour les demandes qui pourraient lui arriver au sujet de matériel à importer en Espagne ou à ses colonies, et à la condition qu'elle lui offre des compensations satisfaisantes pour le dommage causé par sa manière d'agir dans l'affaire [Z]. [Y] répondit, en date du 8 novembre 1927, qu'elle était d'accord de ne rien faire directement et de transmettre à [X] toutes les demandes qu'elle recevrait, mais qu'elle se réservait de servir directement des clients qui venaient la voir à son bureau de Paris et qui tenaient essentiellement à avoir des renseignements. Elle ne voulut pas accorder une autre compensation que l'allocation de Fr. … sur un chiffre d'affaires de Fr. …

En date du 9 novembre 1927, [Y] transmit à [X] une copie des propositions qu'elle avait faites, à la suite d'un échange de correspondance, à [A] à Barcelone pour la livraison [d'un produit] ; le devis indiquait un prix de tarif de Fr. … sur lequel [Y] accordait un rabais de Fr. … [X] protesta, par lettre du … en ajoutant qu'il avait été envoyé un expert [en Espagne] en date du 4 novembre pour s'entendre avec [A] au sujet de la fourniture de ce dont il avait besoin, et qu'il était maintenant forcé d'attendre pour faire des propositions au sujet des appareils, car il ne voulait pas se mettre en contradiction avec les offres transmises directement par le siège central.

En date du 23 décembre 1927, [Y] envoya à [X] copie d'une lettre du 22 décembre, par laquelle elle avait adressé à [B] … un catalogue pour … selon un devis de Fr. … au total, sur lequel elle assurait la rétrocession d'une commission de 5%.

Par lettre du 11 janvier 1928, [X] demanda à la CCI qu'à la suite des cas mentionnés ci-dessus d'affaires traitées directement, le contrat du … fût résilié. Il demandait en outre des dommages-intérêts pour un montant de Fr. … [Y] répondit … qu'elle ne désirait pas résilier le contrat, mais demandait seulement que les dispositions contestées du contrat soient interprétées par un arbitre …

III. L'art. 7 du contrat … a la teneur suivante :

> « En janvier 1926, [Y] fera une première avance de … francs à [X] et la renouvelleront ensuite chaque fois que [X] aura traité … francs d'affaires, chiffre net obtenu après déduction des emballages, transports, montages, impôts, taxe sur chiffre d'affaires et impôts nouveau qui pourraient être votés, à titre de frais de bureau et de représentation, et ce pendant les années de 1926 et 1927.
>
> Cette avance sera réduite successivement à … francs payables dans les mêmes conditions durant les années 1928 et 1929 et à … francs pour les années 1930 et 1931. »

Comme cela ressort de la correspondance, ce texte avait été précédé de ce qui suit :

En date du 27 août 1925, [X] soumit un projet de contrat qu'il avait rédigé sur la base de conversations antérieures et dont l'art. 7 était ainsi conçu ;

> « En janvier 1926, [Y] fera une première avance de … Frs. à [X] et la renouvelleront ensuite chaque fois que [X] aura traité … Frs. d'affaires (chiffre brut déduction faite des transports) à titre de frais de bureau et de représentation, et e pendant les années 1926 et 1927. Cette avance sera réduite successivement à … Frs. payables dans les mêmes conditions durant les années 1928 et 1929, et à … Frs. pour les années 1930 et 1931. »

… Quelques mois après la signature du contrat, une contestation s'éleva entre les parties sur le sens de l'expression « chiffre net obtenu… » … Comme, d'après son décompte, la somme de Fr. … n'était pas atteinte, [Y] redébita [X] de la somme de Fr. … [X] n'ayant rien répondu au sujet de cette modification … protesta contre l'attitude de [Y] et exprima énergiquement le point de vue que le chiffre d'affaires devait se calculer sur le montant *brut* des affaires. Il s'ensuivit une longue correspondance, dans laquelle chacune des parties maintenait son point de vue.

[Y] écrivit, en date du 4 août 1927, au Président de la CCI pour lui demander de faire approuver, par un arbitrage, son point de vue. Elle faisait particulièrement ressortir que son point de vue correspondait à la pratique suivie jusqu'à ce jour, pratique qui avait été appliquée sans exception pour ses … agences, ainsi qu'à l'égard de [X] jusqu'au 31 décembre 1925. Ce n'était que par la suite d'une erreur dactylographique qu'il avait été question de montant brut dans les projets de contrat, expression qui avait été modifiée dans le texte définitif en « chiffre net ». La manière d compter de [X] l'aurait obligée à modifier ses prix de revient.

[X] déclara par contre s'en tenir au texte du contrat qui justifiait son point de vue. L'expression « chiffre brut » n'avait pas été inscrite à la machine, mais rajoutée à la main dans le contrat par [Y]. Pendant les pourparlers, [Y] n'avait jamais dit qu'elle désirait fixer les prix après déduction de la commission.

IV. Le Comité exécutif de la Cour d'arbitrage de la Chambre de Commerce Internationale nomma, en date du 28 septembre 1927, le soussigné en qualité d'arbitre, avec pouvoirs d'amiable compositeur. L'acte de compromis a été signé en date du 29 octobre 1928 par les parties et remis à l'arbitrage soussigné par lettre du 21 novembre 1928. Aux termes de cet acte, l'arbitre soussigné a pour mission :

1. de dire et juger si [X] est fondé à réclamer la résiliation de son contrat et à demander en conséquence de [Y] une indemnité de Frs. … – ou une fraction de ladite somme à titre de dommages-intérêts pour la vente directe effectuée par [Y] à [Z] et pour la résiliation du contrat.
2. en cas de réponse affirmative à la question n°1, de condamner [Y] à payer à [X] ladite somme ou fraction de somme et à fixer dans quel délai ce paiement devra être effectué.
3. en cas de réponse négative à la question n°1, de débouter [X] de sa demande.
4. de dire et juger si [Y] est fondée à considérer que le chiffre net doit s'entendre déduction faite des remises et, par conséquent, sont justifiés à réclamer à [X] la somme de Fr. …
5. en cas de réponse affirmative à cette quatrième question, de condamner [X] à payer ladite somme [Y] et à fixer le délai dans lequel ce paiement devra être effectué.
6. en cas de réponse négative à la quatrième question, de débouter [Y] de leur demande.
7. de déclarer à laquelle des deux parties incomberont en totalité les frais et dépens de l'arbitrage y compris les honoraires que la Cour d'arbitrage pourra allouer à l'arbitre ou en quelle proportion les dits frais et dépens seront partagés entre elles et de procéder en conséquence à toutes condamnations nécessaires.

En droit

I. Le protocole relatif aux clauses d'arbitrage a été signé et ratifié par la France comme par l'Espagne avec la limitation de leur adhésion aux contrats qui sont considérés comme commerciaux par leurs droits nationaux. Les deux pays reconnaissent donc la validité de la clause d'arbitrage en matière commerciale, de sorte que la validité de la clause d'arbitrage contenue dans le contrat intervenu entre les parties du présent litige en date du … ne laisse aucun doute. Cette clause prévoit que tous les différends seront réglés conformément au Règlement de la Cour d'arbitrage de la CCI [de 1927] et les parties se sont soumises expressément au Règlement révisé qui est entré en vigueur … Les dispositions formelles de ce Règlement ont été observées.

L'acte de compromis, établi conformément à l'article 14 du Règlement ayant été signé par les deux parties, le délai de deux mois imparti à l'arbitre pour rendre sa sentence, a commencé à courir à cette date. Toutefois, l'arbitre n'ayant reçu l'acte de compromis que le 23 novembre 1928, il a dû demander une prolongation de ce délai jusqu'au commencement de janvier 1929. Le Comité Exécutif de la Cour d'arbitrage a, dans sa séance du 19 décembre 1928, prolongé d'un mois ce délai et également d'un mois dans sa séance du 30 janvier 1929.

La compétence de l'arbitre étant ainsi établie, la cause elle-même est recevable. Aucune des parties n'a du reste soulevé de question préjudicielle à ce sujet ; toutefois, l'arbitre a examiné d'office la question de compétence.

II. Les parties ont produit la correspondance échangée. L'arbitre a été chargé d'examiner les documents relatifs à l'affaire et de rendre sa sentence sur pièces à sa résidence à Bâle. Les parties ont convenu qu'elles ne comparaîtront pas devant l'arbitre et celui-ci n'a pas jugé opportun d'ordonner d'office une audition personnelle des parties. L'administration des preuves peut dont être considérée comme close.

III. Le demandeur et défendeur reconventionnel est domicilié en Espagne ; la défenderesse et demanderesse reconventionnelle est française ; le procès est jugé en Suisse. La question se pose de savoir quel est le droit qui doit être appliqué dans le cas présent.

Le droit suisse, loi du for, ne peut entrer en ligne de compte, car le for désigné par le Comité exécutif de la Cour d'arbitrage est un for exceptionnel et ne peut avoir aucune influence sur le droit applicable. Il est plus difficile de trancher la question de savoir si c'est le droit français ou le droit espagnol qui doit être appliqué. Pour répondre à cette question, il y a lieu d'examiner en première ligne la volonté des parties. Le contrat ne contient pas une manifestation de volonté claire ; toutefois, il faut retenir la disposition de l'art. 12 du contrat, selon lequel en cas de contestation de l'arbitrage la CCI, les tribunaux [nationaux] seront seuls compétents, le siège social [Y] étant fixé à Paris. Cette disposition ne donne pas une réponse directe à la question du droit matériel applicable. Si toutefois les parties, en voulant éviter la juridiction naturelle, ont fixé le for, d'après la pratique constante, cela implique la conséquence qu'elles ont voulu se soumettre ou être soumises au droit matériel de ce for. Ce serait donc le droit français qui serait applicable.

La doctrine, en matière de droit international privé, a établi certaines règles qui sont applicables comme la volonté présumée des parties, lorsque cette volonté n'a pas été exprimée clairement. La jurisprudence des pays latins met en première ligne, pour les contrats, le droit du lieu de la conclusion. Les tribunaux des autres pays ont donné la préférence au droit du lieu d'exécution. L'application du droit du lieu d'exécution donne cependant lieu, en général, à des difficultés [en matiere d'exécution]. Il en résulterait donc que ce serait en partie le droit français et en partie le droit espagnol qui devraient être applicables. Dans le cas présent, cela paraît plus juste et correspondre mieux à la volonté des parties de se conformer à la jurisprudence des pays latins et appliquer le droit du lieu de la conclusion du contrat. Ce lieu, auquel, en sa qualité de centre des rapports juridiques nés du contrat, la doctrine la plus récente donne de plus en plus la préférence, est, sans contestation possible, Paris, et l'on peut donc appliquer le droit français, d'autant plus que, comme déjà mentionné, les parties ont manifestement pensé à l'application du droit français en indiquant que les tribunaux français seraient compétents en cas de contestation.

IV. Le défendeur a-t-il violé [le contrat] en se mettant en rapport et en concluant des affaires directement avec [Z] et ensuite avec d'autres clients espagnols ?

L'article 3 contient la disposition très claire que la défenderesse est tenue de transmettre intégralement au demandeur toutes les demandes venant d'Espagne ou de ses colonies, afin qu'il puisse s'en occuper et faire le nécessaire dans le délai le plus court. L'article 5 dit que le demandeur sera amené à présenter à sa clientèle des devis comprenant du matériel de la défenderesse et du matériel pris en Espagne, et l'article 6 que la défenderesse peut être amenée à présenter elle-même un devis comprenant tout ou partie des articles et accessoires dont [X] se réserve habituellement la fourniture. Mais, dans ce cas aussi, il est expressément prescrit que la défenderesse devra soumettre son devis par l'entremise du demandeur. Le contrat ne contient donc aucune disposition permettant à la défenderesse de se mettre directement en rapport avec des clients espagnols. La défenderesse a toutefois déclaré, par lettre du 26 mars 1926, qu'il pourrait arriver qu'un [client] espagnol, de passage à Paris, vienne la consulter et lui demander un prix, et que, dans ces conditions, il lui était bien difficile de ne pas donner ce prix au minotier en question.

Ce point de vue de la défenderesse n'a jamais été expressément contesté par le demandeur, mais n'a également jamais été approuvé expressément. Le silence du demandeur sur ce point ne peut pas être interprété sans autre comme une acceptation. D'après la doctrine actuelle dominant également en France, le précepte « qui ne dit mot consent » n'est admis que lorsqu'une acceptation expresse d'une proposition ne doit pas être attendue en raison de la nature spéciale de l'affaire ou des circonstances. Dans sa lettre déjà mentionnée du 26 mars 1926, la défenderesse déclarait cependant :

> « Veuillez donc nous dire sur quelle base, dans ces conditions, nous pourrions faire des prix à un client espagnol ».

La défenderesse devait donc attendre une réponse expresse du demandeur sur sa proposition et ne devait pas admettre sans autre que le demandeur fût d'accord avec son point de vue.

Comme on ne peut pas trouver l'expression d'une volonté claire des parties, il faut s'en tenir au texte du contrat. Les dispositions du contrat interdisent expressément et sans aucun doute à la demanderesse de se mettre en rapport direct avec des clients espagnols, mais il ne serait pas juste, et certainement contraire à la volonté des parties, d'interpréter le contrat d'une manière étroitement grammaticale. Il faut au contraire appliquer les articles 1134 et 1135 du Code civil qui disent que les conventions doivent être exécutées de bonne foi, qu'elles n'obligent non seulement à ce qui y est imprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donne à l'obligation d'après sa nature.

La défenderesse ne fait pas remarquer tout à fait à tort que, dans le cas contesté, elle a agi dans l'intérêt des deux parties, et donc conformément à la volonté présumée de celles-ci, lorsqu'elle a reçu [Z] à Paris et l'a informé, sur sa demande expresse, des conditions de livraison du matériel .... D'après l'exposé non contesté de la défenderesse, [Z] lui laissa entendre qu'il ne connaissait pas le demandeur et n'avait eu aucun rapport d'affaires avec lui. Elle devait également supposer que l'affaire lui échapperait si elle ne soumettait pas immédiatement une proposition à [Z], proposition l'engageant à ne pas faire sa commande auprès de la maison concurrente. On doit donc lui accorder ici à la défenderesse le droit exceptionnel d'entrer en rapport direct avec [Z]. Elle va par contre trop loin en concluant directement l'affaire avec [Z] et en lui accordant un rabais de 28%, mettant ainsi en jeu toute la provision revenant au demandeur d'après le contrat. La défenderesse n'était certainement pas en droit d'agir ainsi. Elle aurait dû demander l'assentiment du demandeur, ce qui aurait été certes possible par télégramme ou même par lettre. On ne peut comprendre pour quel motif la défenderesse n'a pas donné immédiatement connaissance au demandeur de la proposition qu'elle avait faite.

Cette proposition fût soumise à [Z] en date du 24 avril et c'est seulement en date du 10 mai que la défenderesse donna connaissance de son marché au demandeur, et cela seulement après la réclamation de celui-ci. Le fait que la défenderesse n'a pas orienté le demandeur sur ses négociations directes peut faire supposer qu'elle n'a pas agi en parfaite bonne foi et qu'elle savait pertinemment qu'elle violait les dispositions du contrat, et qu'elle avait donc l'intention de ne pas informer le demandeur de l'affaire qu'elle avait conclue.

La déclaration postérieure de la défenderesse qu'elle avait toujours eu l'intention de tenir le demandeur au courant et qu'elle avait, dans ce but, fait une copie de ces lettres, mais qu'elle n'avait voulu l'en informer qu'après la conclusion définitive de l'affaire, ne suffit pas pour sa justification. Car même si cette déclaration était parfaitement confirme à la vérité, elle n'excuse pas la défenderesse qui précisément ne devait pas attendre jusqu'à la conclusion de l'affaire pour tenir le demandeur au courant.

En raison des considérations ci-dessus, l'arbitre soussigné arrive à la conclusion que la défenderesse a violé le contrat et que l'inexécution du contrat doit lui être imputée. La défenderesse est donc tenue en principe au paiement de dommages-intérêts pour inexécution du contrat.

Les autres cas de violation du contrat ([A] et [B]) qui sont mentionnés par le demandeur et non contestés par la défenderesse doivent être jugés avec moins de rigueur que le cas [Z], parce que la défenderesse a, dans ces deux cas, donne chaque fois connaissance au demandeur des propositions qu'elle avait faites. Il n'en reste pas moins, dans ces deux cas, que la défenderesse a, contrairement au contrat, conclu des affaires directement sans en avoir reçu l'assentiment au demandeur. En outre, il ne ressort pas des actes déposés qu'elle ait eu des motifs spéciaux d'agir de la sorte, comme dans le cas de [Z]. Ces cas s'étant cependant produits après l'introduction de la demande d'arbitrage et n'étant pas mentionnées dans le compromis, ne forment pas précisément des objets de litige. Toutefois, le demandeur les a invoqués, pour résilier le contrat, en faisant ressortir que la défenderesse commettait des infractions d'une manière permanente.

Il y a lieu d'examiner maintenant la question soumise à l'arbitre de savoir si la violation du contrat de la défenderesse autorise le demandeur à résilier prématurément le contrat. Cette question doit être tranchée par la négative. La loi prévoit, en cas d'inexécution d'une obligation, le paiement de dommages-intérêts, sans que la partie soit déliée de ses obligations contractuelles. L'art. 1184 du Code civil dit toutefois que la condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement et que, dans ce cas, la partie envers laquelle l'engagement n'a point été exécuté a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts.

On ne peut cependant pas dire, dans le cas présent, que la défenderesse n'ait point satisfait à ses engagements contractuels. Elle a seulement fait défaut en tant qu'elle a interprété faussement une disposition contractuelle et, qu'ensuite de cette fausse interprétation, elle a agi contrairement au contrat dans quelques cas sur un grand nombre d'affaires. Il n'y a pas de motifs de mettre en doute la bonne foi de la défenderesse. Le demandeur lui-même ne l'a pas mise en doute, c'est pourquoi il a cherché un arrangement à l'amiable en vue de continuer les relations contractuelles. Il n'a demandé la résiliation du contrat que lorsque la défenderesse a de nouveau agi contrairement au contrat dans les cas de [A] et [B], qui sont du reste d'un intérêt matériel relativement faible. Mais la défenderesse a également agi de bonne foi dans ces deux cas en tant qu'elle interprétait faussement les dispositions du même article 3. Elle a déclaré expressément … qu'elle désirait qu'un arbitre détermine l'interprétation de la disposition ayant donné lieu au différend et qu'elle s'en tiendrait à l'interprétation qui serait donnée sans la sentence d'arbitrage. On ne peut donc pas dire qu'elle n'ait point satisfait à ses engagements. L'art. 1184 du Code civil ne s'applique qu'aux cas où les relations contractuelles des parties ont été si compromises par la faute de l'une d'elles qu'en toute bonne foi on ne peut pas imposer à l'autre partie la continuation du contrat.

Mais les faits ne se présentent pas de cette manière dans le cas présent. Au contraire, il y a tout lieu de croire que le contrat pourra continuer à être exécuté sans difficultés pour autant que la défenderesse applique à l'avenir strictement le texte du contrat. En raison de ses fonctions d'*amiable compositeur*, l'arbitre doit chercher à ne pas séparer les parties plus que cela n'est nécessaire, mais doit au contraire choisir la solution qui permette de continuer utilement les relations d'affaires. L'arbitre soussigné arrive donc à la conclusion que le contrat doit être maintenu en vigueur, conformément à la demande de la défenderesse, mais que cette dernière doit cependant, comme déjà dit, payer des dommages-intérêts.

A combien s'élèvent ces dommages-intérêts ? Le demandeur n'a fixé un chiffre que pour le cas de la résiliation du contrat. Par contre, en cas de maintien du contrat, le demandeur n'a exposé son dommage qu'en termes vagues et d'une manière peu précise. Il a déclaré que son activité future serait rendue très difficile par le fait que la défenderesse avait fait des offres à prix réduits en Espagne, déclaration qui paraît exacte mais qu'il n'a appuyée par aucun document, no accompagnée d'aucune indication relative au montant du bénéfice qui lui a échappé par la faute de la demanderesse.

L'arbitre s'est demandé tout d'abord s'il devait s'adresser au demandeur pour lui faire préciser le montant de ses dommages. Il croit cependant qu'il ressort des actes que le demandeur ne pourra pas spécifier en chiffre son dommage, de sorte qu'il estime devoir évaluer le manque à gagner probable du demandeur et l'en faire dédommager. Il peut être admis comme certain que, dans le cas de [Z], le demandeur n'aurait pas effectué la vente au prix du tarif, mais qu'en raison de la concurrence, il aurait accordé une réduction de prix sensible.

D'autre part, il faut admettre que le demandeur n'aurait pas conclu l'affaire avec [Z] si le prix fixé ne lui eût laissé aucun bénéfice. L'arbitre soussigné fixe, selon les principes de l'équité, les dommages-intérêts à la charge de la demanderesse à la moitié de la remise qui aurait dû revenir au demandeur si la vente s'était effectuée au prix du tarif. Ce prix du tarif s'élevait à Fr. … Si donc le demandeur avait vendu à ce prix, il lui serait revenu, d'après le contrat, une remise de Fr. … dont la moitié correspond donc à Fr. … En attribuant cette somme au demandeur, l'arbitre soussigné tient compte également des dommages non évalués qu'a causés au demandeur l'attitude de la défenderesse, car il est très possible que le demandeur aurait accordé à [Z] une réduction de prix encore supérieure à la moitié de sa remise. Le surplus que doit verse, dans ce cas, la défenderesse, comme dommages-intérêts, contient donc une compensation équitable pour le dommage qu'elle a causé au demandeur en lui rendant plus difficile la continuation de ses affaires. L'arbitre considère en raison de ces motifs que la somme de Fr. … comme dommages-intérêts est équitable. A cette somme doivent s'ajouter des dommages intérêts-moratoires à 5% l'an comptés à partir de la date où le dommage a été causé, c'est-à-dire depuis le 13 mai 1927, jour où l'affaire avec [Z] a été conclue.

Pour être complet, il y a lieu de remarquer que, sur l'affaire [Z], l'avance de Fr. … au sens de l'art. 7 du contrat, revient encore au demandeur, ainsi que l'a accepté la défenderesse.

V. Au sujet de la demande reconventionnelle de fixer si, d'après l'art. 7 du contrat, l'avance de Fr. .. par Fr. … de chiffre d'affaires, doit être calculée sur la base du chiffre d'affaires net, l'arbitre est amené à exposer ce qui suit :

L'avance de Fr. … stipulée à l'article 7 était destinée à la couverture des frais de bureau et de représentation de [X]. Il ressort de l'échange de correspondance que les parties ont longuement discuté la question de savoir si, pour le chiffre d'affaires devant servir de base au calcul, les emballages, transports et montages (à quoi se sont ajoutés ensuite les « impôts, taxes sur chiffre d'affaires et impôts nouveaux qui pourraient être votés ») devaient être déduits ou si, au contraire, les transports devaient être compris comme le demandait le défendeur reconventionnel. Le point de vue de la demanderesse reconventionnelle a finalement triomphé. Au cours de l'échange de correspondance, l'expression « chiffre brut, déduction faite » a été remplacée par « chiffre net obtenu après déduction ». Une divergence d'opinions s'éleva sur cette modification au cours de laquelle la demanderesse reconventionnelle insista seulement sur la nécessité de déduire les transports, emballages et montages, et le défendeur reconventionnel déclara expressément qu'il trouvait l'ancienne rédaction plus claire, mais qu'il estimait qu'il ne s'agissait que d'une question de nature purement rédactionnelle.

On ne peut donc pas éclaircir, d'après l'échange de correspondance, si les parties ont eu l'intention d'entendre, sous « chiffre net obtenu après … » le prix du tarif de la demanderesse reconventionnelle, ou le prix net à payer après déduction de la remise de 20% plus 10%, au total 28% revenant au demandeur reconventionnel.

En l'absence d'une expression de volonté claire, il y a lieu de s'en tenir au texte du contrat et il faut examiner tout d'abord ce qu'il veut signifier. Un examen approfondi ne donne cependant aucun résultat positif. On serait peut-être enclin à comprendre, d'après la tournure du contrat, que, selon la volonté des parties, le chiffre net doit s'entendre après la seule déduction des emballages, etc. expressément mentionnée …

Toutefois, cette conclusion ne peut pas être considérée comme indubitable, car sous « chiffre d'affaires obtenu après déduction » on pourrait bien entendre le chiffre net obtenu après déduction de la remise du défendeur reconventionnel. Une semblable solution devrait être même considérée comme correspondant à la volonté présumée des parties, s'il est de coutume, dans les affaires, de déduire la remise des agents pour fixer le chiffre d'affaires.

L'arbitre soussigné a cherché en conséquence à déterminer quelle était, d'une manière générale, la pratique en vigueur dans les affaires à l'égard de cette question. Un certain indice existe en faveur de la demanderesse reconventionnelle en ce sens qu'elle déclare (déclaration qui n'est pas contestée) que c'était la première fois, depuis sa carrière industrielle, qu'elle voyait un différend surgir sur la façon de calculer le chiffre d'affaires … et que, jusqu'à présent, elle n'avait jamais eu la moindre contestation avec aucun des 60 agents qu'elle avait à l'étranger en dehors du cas soulevé par le défendeur reconventionnel … Toutefois, cette déclaration de la demanderesse reconventionnelle n'étant pas prouvée, elle ne suffit pas pour établir l'inexactitude de son point de vue.

[La Société …] en Suisse que l'arbitre soussigné a consultée et qui ont des relations internationales et des contrats de représentation semblables, déclarent tous que, dans la pratique, le chiffre d'affaires est calculé sur les *montants facturés*. C'est donc la somme que la demanderesse reconventionnelle a portée au compte du défendeur reconventionnel qui est déterminante. Il ressort de la correspondance déposée que la demanderesse reconventionnelle a porté au compte du défendeur reconventionnel le *montant net*, c'est-à-dire qu'elle a déduit dans ses factures les remises de 28% sur le prix du tarif et qu'elle a ajouté ensuite les frais de transports, emballage et montage. Si l'on s'en tient donc aux factures, il faut établir le chiffre d'affaires après déduction de la remise …

Ces considérations amènent l'arbitre soussigné à déclarer que le point de vue de la demanderesse reconventionnelle est fondé. Cette conclusion, comme les experts consultés par l'arbitre l'ont aussi fait remarquer à juste titre, correspond également à l'équité dans le cas présent, cas les remises stipulées dans le contrat au défendeur reconventionnel doivent être considérées comme relativement hautes.

Les décomptes du défendeur reconventionnel doivent dont être corrigés dans le sens que, pour le calcul de l'avance de Fr. … par Fr. … de chiffre d'affaires, il faut chaque fois prendre en considération le prix du tarif après déduction de la remise de 28%.

L'arbitre répond donc affirmativement à la quatrième question qui lui a été soumise par les parties et condamne le défendeur reconventionnel au paiement de Fr. … à la demanderesse reconventionnelle, avec 5% d'intérêts moratoires à partir du 9 septembre 1926, jour où il a avisé la demanderesse reconventionnelle qu'il la débitait de cette somme.

VI. Pour ce qui concerne les frais de procédure, il y a lieu de considérer d'une part que la demande n'a pas été acceptée formellement, mais que le demandeur obtient cependant gain de cause en ce sens qu'il est établi que la défenderesse a violé le contrat et qu'elle est tenue à des dommages-intérêts et que, d'autre part, la demande reconventionnelle a été entièrement retenue. S'il n'avait été jugé que sur la demande, il faudrait donc condamner la défenderesse à la plus grande partie des frais. Par contre, si l'arbitrage n'avait porté que sur la demande reconventionnelle, c'est le défendeur reconventionnel qui aurait dû supporter entièrement les frais …

Par ces motifs, déclarons

1. Le demandeur n'est pas fondé à réclamer la résiliation de son contrat ; les parties sont donc tenues de continuer à exécuter les dispositions du contrat jusqu'à l'expiration de la date du 1er janvier 1932 au plus tôt.
2. La défenderesse n'est pas fondée à vendre directement et sans consulter le demandeur des machines … à des clients domiciliés en Espagne ou dans ces colonies. En vendant directement des machines à [Z] [Espagne] elle a violé le contrat et par conséquent l'arbitre la condamne à payer au demandeur, à titre de dommages-intérêts, la somme de Fr. … plus intérêts moratoires au taux de 5% l'an à partir du 13 mai 1927, dans un délai de 30 jours dès la notification de la présente sentence.
3. La demanderesse reconventionnelle est fondée à considérer que le chiffre net doit s'entendre déduction faite des remises et par conséquent est justifiée à réclamer au défendeur reconventionnel la somme de Fr. … Par conséquent, l'arbitre condamne le défendeur reconventionnel à payer la somme de Fr. … plus intérêt au taux de 5% l'an à partir du 9 septembre 1926, dans un délai de 30 jours dès la notification de la présente sentence.
4. Chacune des parties est condamnée à payer la moitié des frais et dépens de la présente instance, à savoir pour chacune Frs. français : … soit au total … y compris … Frs. d'honoraires alloués par le Comité Exécutif de la Cour d'Arbitrage dans sa séance du 30 janvier 1929.

5. SENTENCE ARBITRALE Affaire CCI n° 301 (Paris, 1929)

Nous soussignés … Dottore in Diritto, Avvocato alla Corte di Roma, nommé d'arbitre unique par le Comité Exécutif de la Cour d'Arbitrage de la CCI dans sa séance du 27 février dernier sur la proposition du Comité National Italien, pour procéder à un arbitrage entre : **1.** [Banque "X"] [France] d'une part ; **2.** [Banque "Y"] [Espagne] d'autre part. ….

Points de fait

D'ordre et pour compte de [W] [France], [X], a ouvert le 30 avril 1927 auprès de [Y] [Espagne] un accréditif en faveur de [Z], accréditif utilisable contre apport de marchandises … Cet accréditif de … pesetas était utilisable dans des conditions déterminées par [Z] pour des achats de [marchandises]

Or [Y] recevant ainsi ces [marchandises] en magasin à son nom, sur les instructions de [X], était redevable vis-à-vis de la municipalité de [ville en Espagne] d'un impôt de pesetas … frappant la marchandise. Le litige porte sur cette somme (augmentée des intérêts depuis le 21 avril 1928). [Y] veut débiter [X] du montant de cette taxe et celle-ci s'oppose à ce que cette somme soit passée à son débit.

[X] fait observer qu'un simple accréditif a été ouvert auprès [de Y] en faveur de [Z], accréditif utilisable seulement contre apport de [marchandises] à raison de … pesetas par kilo de [marchandises] et que d'autres sommes n'auraient pu être prélevées en faveur de [Z] pour frais et débours qu'en cas d'autorisation expresse donnée chaque fois pour [X]. Puisque [X] n'a jamais autorisé à payer pour son compte la taxe municipale, qui suivant les accords passés avec [Z] était comprise dans le prix établi à forfait … il en résulte qu'il était illégitime de la part de [Y] de débiter [X] du montant de cette taxe.

[Y] répond qu'il ne s'agit pas là de débours facultatifs mais obligatoires dont [Y] devait être responsable du fait qu'il recevait les [marchandises] en magasin et que faute de payer cette taxe, la municipalité aurait saisi lesdits [marchandises] ; elle en conclut que [X], pour le compte de laquelle elle a reçu les [marchandises], doit répondre du paiement de la taxe et ceci indépendamment de toute autorisation spéciale.

D'un commun accord, les deux parties sont convenues de soumettre le différend à l'arbitrage de la CCI, conformément aux dispositions du Règlement de Conciliation et d'Arbitrage de la CCI. La Cour nous a désigné comme arbitre unique pour examiner les documents relatifs à l'affaire et produits par les deux parties celles-ci ayant renoncé à être entendues contradictoirement par l'arbitre et étant convenues que la procédure porterait uniquement sur l'examen des faits.

L'arbitre a les pouvoirs d'*amiable compositeur* et devra rendre sa sentence dans le délai de deux mois, délai qui ne commencera à courir que du jour de la date de la signature de la partie qui aura singé la dernière, c'est-à-dire le 13 avril 1929.

L'arbitre aura pour mission de :

1. Dire et juger si [Y] est ou non fondé à débiter [X] du montant de … pesetas à partir du 21 avril 1928.
2. Déclarer à laquelle des deux parties incomberont en totalité les frais et dépens de l'arbitrage, y compris les honoraires que la Cour d'arbitrage pourra allouer à l'arbitre ou en quelle proportion lesdits frais et dépens seront partagés entre elles, et de procéder en conséquence à toutes condamnation nécessaires ; les frais et dépens comprendront notamment les frais de timbre et d'enregistrement du compromis, ainsi que tous droits, doubles droits, amendes de timbre et d'enregistrement qui pourraient être perçus sur ou à l'occasion de la présente sentence, au cas où son exécution devrait avoir lieu par les voies judiciaires.

Attendu qu'en effet il s'agit de l'ouverture d'un accréditif utilisable dans les conditions fixées par la lettre du 30 avril 1927 et que ladite lettre il est expressément déclaré ce qui suit :

> « En dehors de ces avances sur [les marchandises], il pourra être prélevé avec l'autorisation de [W] certaines sommes sur ce crédit pour le règlement à [Z] ou à son délégué, des frais et débours. Cette autorisation devra être donnée *chaque fois*, soit par [W] ou par leur délégué … »

Attendu qu'il appert en fait que [Y] a payé la taxe à la municipalité sans demander aucune autorisation et sans avertir du paiement et n'a demandé que le 16 avril 1928, le remboursement de [X] ;

Qu'en outre il appert en fait que les rapports entre les deux … se sont poursuivis au sujet de la même opération pendant de nombreuses années et que [Y] n'a jamais réclamé à [X] le remboursement des taxes, que [Z] lui payait ; Qu'il résulte de la correspondance que [Z] était client de [Y] et que ceci explique comment on pouvait débiter [Z] du montant des taxes sans en avoir jamais fait la demande à [X] ;

Que de l'ensemble de la lettre du 30 avril 1927, il ressort clairement que [X] autorisait à utiliser les crédits exclusivement pour l'achat des [marchandises] et non pour d'autre dépenses quelles qu'elles fussent (sauf avis et autorisation expresse), de sorte que [Y] était prévenu que si d'autres dépenses devaient être portées en compte, celles-ci devaient rester à la chargé de [Z] ; ceci est confirmé par le fait que par le passé le remboursement de ces taxes municipales avait toujours été réclamé [à Z] et ne l'avait jamais été à [X].

Que si la taxe représente – comme le soutient [Y] – un débours fait en vertu du mandat conféré par [X] et indépendant de l'ouverture de crédit, [Y] devait donner immédiatement avis du paiement au mandant sans attendre le mois d'avril 1928, mettant ainsi le mandant dans l'impossibilité d'être remboursé par [Z] suivant les accords passés entre eux.

Conclusions

Nous, arbitre international soussigné, statuant sans recours après avoir pris connaissance des documents et des mémoires présentés par les parties :

Décidons :

1. Que [Y] n'a pas le droit de débiter [X] du montant de … pesetas.
2. Et vu les circonstances de la cause, que les frais de la cause ainsi que les frais de timbre et d'enregistrement du compromis et les frais de timbre de la sentence qui s'élèvent à Frs français … seront partagés entre les deux parties.

L'arbitre déclare renoncer à ses honoraires.

Ordonnons l'exécution du présent jugement selon sa forme et sa teneur.

6. ARBITRAL AWARD
ICC Case no. 304 (Brussels, 1929)

Published in *World Trade*, June 1933, pp. 7-8: "An Agent's Claim to Commission on Business Effected Outside His Area".

"Dispute concerning the payment of commission for the sale in country A of five electric locomotives destined for country B, to a company acting as agent in country B for a group of companies in country A. the arbitrator ordered the said companies to pay their agent the commission claimed, mainly on the ground that they were aware of the real destination of the locomotives."

Extract from the award rendered in Brussels on December 9th, 1929, by Mr. Paul Lagasse, Counsel at the Brussels Court of Appeal.

Whereas the facts may be summarized as follows: A contract was concluded between a group of companies of country A (hereinafter referred to as Group A) and a company of country B (hereinafter referred to as Company B), by which Group A made Company B their exclusive agent for all sales, whether direct or indirect, to governments, railway companies or agents in country B, of rolling stock – particularly electric locomotives – built by the members of Group A, and which the Group was responsible for selling abroad. Group A was to pay a commission to Company B for its services in connection with each transaction concluded with the administrations, companies or agent in country B.

On the basis of this contract, Company B claimed from Group A a commission of Fr. frs 59,500 for the sale of five electric locomotives (of a total value of 3,450,000 frs, according to Company B) effected in 1926 to a firm in country A by a company belonging to Group A.

Group A refused to pay the commission on the ground that the said sale was not covered by the contract.

Whereas the dispute is concerned with the interpretation of the agreement concluded between Group A and Company B, particularly of the paragraph (accepted by Company B) stipulating that Group A made Company B their exclusive agent for all sales, whether direct or indirect, to governments, railway companies or agents in country B, of rolling stock constating mainly of electric locomotives;

Whereas Company B interprets this provision as including sales of material destined for governments, railway companies, or agents in country B, even if the contract is signed abroad; Whereas on the other hand, Group A interprets it as only referring to sales carried out in country B, to the exclusion of contracts signed abroad even for the sale of material destined for country B;

Whereas it is not contested that a company belonging to Group A sold five electric locomotives to the firm of country A which was handling the electrification of the line X to Y in country B; Whereas, on the other hand, it is objected that the sale in question was outside the scope of the agreement on the ground that the transaction was concluded in country A where the buyer had his main establishment;

Whereas it cannot be seriously maintained that contracts signed outside country B for supplies intended for use in that country are not covered by the terms of the agreement, as that would make it too easy for Group A to escape its obligations, and whereas, in default of an express reservation in the agreement itself, there is no ground for presuming that such was the intention of the contracting parties;

Whereas there is likewise no justification for alleging that the company belonging to Group A could have been unaware, as Group A asserts, that the locomotives were to be used in country B by the firm in question, since Company B had informed Group A that the railway lines were being electrified by that firm;

Whereas there is no reason to attach any weight to the argument of Group A that the particulars previously furnished by Company B on this transaction only referred to an electrification plan constituting a contract for work not covered by the agreement, this agreement being exclusively a sales agreement;

Whereas it is well known that the electrification of a line also involves supplying material and whereas its function as agent obliged Company B to lose no opportunity of securing orders for its principals (see particularly article ... of the said agreement);

Whereas even if Company B had not itself taken any part in negotiating the sale in question, this would not make the agreement inapplicable, as the agreement even gave Company B the benefit of commissions on indirect sales;

Whereas arguments based on the agreements binding the members of Group A *inter se*, as well as arguments concerning the extent of the other amounts earned by Company B under the said agreement, are irrelevant;

Whereas, in respect of the amount of the claim, Company B entered a claim as early as [date] for the commissions in dispute in connection with a transaction which was, it alleged, worth 3,450,000 frs and which according to the scale adopted by the parties, corresponded to a commission of 59,500 frs;

Whereas neither the figure claimed nor the amount of the transaction on which the commission was based has been contested either in the correspondence produced by Group A or in its memoranda or rejoinders; Whereas, if the amount of the commissions in dispute were less than that claimed by Company B, it is not likely that Group A would have refrained from contesting it, if only as a secondary point;

Whereas the award given below excludes the payment of any other compensation; Whereas, as regards the date from which interest payments should run, some account should be taken of the possibility that the defendant was mistaken as to the scope of his rights;

For these reasons, I, the arbitrator, award and decide:

- That the claim of Company B for payment by Group A of a commission for the sale of five electric locomotives by one of the latter's members is justified;
- Consequently, award and direct Group A to pay the plaintiff, Company B, the amount of 59,500 frs within a maximum period of three months from the day on which the present award is duly notified to Group A;
- Fix the interest at 6% to run from the date on which the above-mentioned period expires;

Also award and direct Group A to pay the costs and expenses of arbitration amounting to 1,197.45 Frs. including the fees allowed to the arbitrator by the Executive Committee of the Court of Arbitration, the stamp and registration fees of the submission to arbitration as well as all taxes, legal dues or fines which might be payable on or in connection with the present award, should it be necessary to have it enforced in law.

7. SENTENCE ARBITRALE
Affaire CCI n° 477 (Bruxelles, 1932)

Compromis entre les soussignés

[X] [Pays d'Europe], ci-dessous désignés par l'expression « demandeur », d'une part ; et [Y] [Pays d'Afrique], ci-dessous désigné par l'expression « défendeur » d'autre part.

Il a été exposé, fait et convenu ce qui suit

Par contrat du 29 mai 1929, le demandeur a concédé au défendeur la représentation de sa maison [dans un pays d'Afrique] pour la vente [de produits alimentaires]. Le demandeur accordait au défendeur une commission de 4% sur toutes les ventes effectuées par le défendeur sous condition que ce dernier garantît le paiement total des transactions. Cette garantie toutefois ne se référait pas à des sommes non perçues du fait de réclamations sur la marchandise livrée. Le compte des commissions et frais de correspondance devait être fixé et liquidé chaque trimestre. La marchandise devait être facturée à 6 jours de la date d'expédition … et livrée [dans un pays d'Afrique].

Par lettre du 11 octobre 1929, le défendeur passait au demandeur l'ordre suivant : 10 fardeaux de 5 caissettes [d'aliment A] et 10 fardeaux [d'aliment B]. Cet ordre fut exécuté le 24 octobre 1929 par le demandeur. Par lettre du 8 novembre 1929, le défendeur passait un deuxième ordre identique à l'ordre du 11 octobre. Il fut exécuté le 22 novembre par le demandeur.

Invoquant une erreur de son client, le défendeur faisait savoir le 6 mars 1930 au demandeur que seule une partie [d'aliment A] était placée. Après avoir, à plusieurs reprises, assuré le demandeur que [l'aliment A] serait vendu sans perte pour lui, le défendeur écrivait le 27 juin au demandeur pour l'informer que la mauvaise qualité de la marchandise l'empêchait de trouver preneur. Il offrait de le réexpédier. Ne pouvant accepter les motifs invoqués, le demandeur refusa cette proposition en alléguant notamment qu'il ne pouvait garantir la qualité des marchandises après plus de 7 mois de livraison et il demanda au demandeur de lui en payer le montant intégral.

Le défendeur répondit alors qu'il ne pouvait être tenu pour responsable de la défection d'un client.

Un arrangement amiable n'ayant pu intervenir, le demandeur a demandé l'arbitrage de la CCI en vertu de la clause suivante insérée dans le contrat de représentation :

> « Tous différends découlant du présent contrat seront tranchés suivant le Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale par un ou plusieurs arbitres nommés conformément à ce Règlement ».

En ce qui concerne [l'aliment A], le demandeur demande à la Cour d'Arbitrage de la CCI de condamner le défendeur à lui payer … Le défendeur conteste le bien-fondé des prétentions du demandeur et déclare qu'il ne lui doit rien. Il affirme notamment que les envois lui ont été adressés par le demandeur en compte-consignation, qu'il ne s'est jamais agi de vente ferme et il invoque à l'appui de ses dires les stipulations du contrat limitant sa garantie, ainsi qu'une correspondance échangée avec le demandeur. Ce dernier invoque à son tour la correspondance échangée et les circonstances qui ont entouré les opérations litigieuses pour maintenir que le défendeur a passé des ordres fermes et qu'il a agi en qualité de « *buying agent* ».

D'autre part, le demandeur a expédié au défendeur 5 caisses [d'aliment B] le 1er avril 1930, en exécution d'un ordre. Le 2 avril, le défendeur annulait cette commande en invoquant la mauvaise qualité d'une livraison antérieure de cette marchandise. Mais l'annulation ne parvenait au demandeur que le 6 avril, soit après l'expédition des 5 caisses.

Le défendeur vendit 2 caisses au prix normal mais ne put placer le solde malgré un rabais de 10 à 15% que le demandeur l'avait autorisé à accorder au preneur éventuel. Le défendeur déclare qu'il a fait toute diligence pour tenter d'écouler ces trois caisses à tout prix. Ne pouvant y parvenir étant donné, dit-il, la mauvaise qualité de la marchandise, il offrit de les retourner. La proposition ayant été rejetée, il se refuse à payer quoi que ce soit de ce chef au demandeur.

Ce dernier demande à la Cour d'Arbitrage de la CCI de condamner le défendeur à lui payer, en ce qui concerne [l'aliment B], Frs. … selon le décompte suivant : …

Le Comité Exécutif de la Cour d'Arbitrage, en sa session du 24 novembre 1931, a désigné comme arbitre unique … avocat à la Cour d'Appel de Bruxelles. L'arbitre se conformera aux dispositions du Règlement de Conciliation et d'Arbitrage de la CCI en vigueur au 1er janvier 1928, Règlement dont les deux parties déclarent, par la présente, avoir pris connaissance.

L'arbitre examinera les documents qui auront été produits par les parties et rendra sa sentence sur pièces à son domicile à Bruxelles. Les parties conviennent qu'elles ne comparaîtront pas devant lui mais l'arbitre aura toutefois le droit de les citer s'il est nécessaire.

L'arbitre aura pour mission :

- étant donné le contrat de représentation du 29 mai 1929, la correspondance échangée entre les parties, les circonstances qui ont entouré les envois des ordres litigieux par le défendeur au demandeur, et les usages commerciaux, de dire et juger si le demandeur est fondé à réclamer au défendeur le paiement de tout ou partie des 40 fardeaux [d'aliment A] expédiés le 24 octobre et le 22 novembre 1929 et les 3 caisses [d'aliment B] expédiées le 1er avril 1930.
- dans l'affirmative, de faire droit à tout ou partie des demandes formulées par le demandeur… du présent compromis ; en conséquence, de condamner le défendeur à payer au demandeur dans le délai d'un mois à partir du prononcé de la sentence, tout ou partie de la somme totale demandée par le demandeur et qui se monte à Frs. … ;
- dans la négative, de débouter le demandeur ;
- de déclarer à laquelle des deux parties incomberont en totalité les frais et dépens de l'arbitrage y compris les honoraires que la Cour d'Arbitrage pourra allouer à l'arbitre ou en quelle proportion les dits frais et dépens seront partagés entre les parties, et de procéder en conséquence à toutes condamnations nécessaires : les frais et dépens comprendront les frais de timbre et d'enregistrement du compromis ainsi que tous droits, doubles droits, amendes de timbre et d'enregistrement qui pourraient être perçus sur ou à l'occasion de la sentence au cas où son exécution devrait avoir lieu par les voies judiciaires.

L'arbitre devra rendre sa sentence dans le délai de deux mois après la signature du présent compromis, délai fixé par la Cour d'Arbitrage dans sa séance du 28 octobre 1931 et qui commencera à courir quinze jours après la date de la signature par la partie qui aura signé la première.

Les parties prennent l'engagement de renoncer à attaquer la sentence à intervenir par les voies de recours quelles qu'elles puissent être, s'obligeant dès maintenant à l'accepter et à l'exécuter comme définitive et sans appel.

Les parties dispensent l'arbitre de déposer la sentence au greffe du tribunal, sauf réquisition de l'une d'entre elles. En cas de refus ou d'empêchement de l'arbitre nommé, ou pour quelque cause que ce soit, celui-ci pourra être remplacé par la Cour d'Arbitrage sur simple lettre adressée à Monsieur le Président de la CCI par la partie la plus diligente.

Sentence

Attendu qu'il est constant que le défendeur entra en relations avec le demandeur en qualité de représentant ; Qu'en effet, les conventions verbales avenues entre parties le … mai 1929 ont été qualifiées par elles « contrat de représentation », que la situation juridique faite au défendeur répondait d'ailleurs pleinement à cette qualification ; que notamment le fait qu'il garantissait le paiement des transactions intervenues (ducroire) indique clairement qu'il n'était pas lui-même acheteur ;

Attendu, il est vrai, que le caractère des relations entre parties a évolué de telle sorte qu'en fait, le défendeur a cessé de se comporter en simple représentant ; que notamment, comme le signale le demandeur, les ordres qu'il transmettait ne faisaient pas mention du nom des clients auxquels ils étaient destinés ;

Attendu que c'est à tort cependant que le demandeur prétend déduire de là que le défendeur aurait dès ce moment agi en qualité de « *buying agent* » ; Qu'en effet, il est constant que le demandeur ne réglait les marchandises reçues qu'après écoulement et adressait régulièrement au demandeur des « comptes de vente » ; Qu'il apparaît donc que l'activité du défendeur a été bien plutôt celle d'un commissionnaire traitant en son nom avec les tiers, mais pour compte d'un commettant ;

Attendu qu'il résulte de plus des communications verbales échangées entre parties et notamment de celle du demandeur en date du 8 juin 1929 que celui-ci accepta – d'assez mauvaise grâce d'ailleurs - d'envoyer au défendeur des marchandises en consignation ; Que s'il exprima dans la suite sa préférence pour le système des ordres directs, rien n'indique par contre qu'il ait jamais manifesté au défendeur l'intention de le considérer lui-même comme acheteur ;

Attendu que cette thèse serait d'ailleurs inconciliable avec l'attitude adoptée par le demandeur dans les échanges de vue relatifs aux envois litigieux et notamment avec sa communication verbale du … juillet 1930, inexplicable si elle s'adressait à un acheteur ;

Qu'il ne se concevrait pas mieux dans cette hypothèse qu'il ait accueilli sans formuler de réserves les communications par lesquelles le défendeur lui déclarait :

> « vos intérêts sont en bonnes mains… » ; « je compte sous peu vous envoyer un compte de vente satisfaisant… » ; « je continuerai à liquider sans perte pour vous » ;

Attendu dès lors que le défendeur a incontestablement agi non comme acheteur mais comme commissionnaire ; que le demandeur est donc mal fondé à lui réclamer le prix des marchandises litigieuses ;

Attendu que c'est sans plus de raison qu'il invoquerait la clause par laquelle le défendeur a garanti le paiement des transactions intervenues ; qu'en l'espèce il n'est intervenu presque aucune transaction ; que selon les usages commerciaux le ducroire se limite d'ailleurs à la solvabilité du client ; que par application de ce principe les conventions verbales avenues entre parties spécifiaient que la garantie ne s'appliquait pas aux sommes non perçues pour réclamation sur les marchandises livrées ; qu'à fortiori elle ne joue pas lorsque, comme c'est le cas en l'espèce, le client a refusé de prendre livraison ;

Attendu que de ce qui précède il ne résulte cependant que le défendeur n'ait encouru en l'espèce aucune responsabilité ; Attendu en effet que le commissionnaire, mandataire commercial, est comme tel responsable de toute faute commise dans l'exécution de son mandat ;

Attendu que, s'agissant en l'espèce de marchandise d'une conservation délicate, le défendeur avait l'obligation de proportionner, dans la mesure du possible, les quantités qu'il se faisait envoyer en consignation à la capacité d'absorption du marché ;

Qu'il y avait lieu pour lui d'être d'autant plus prudent à cet égard que le demandeur n'avait admis le principe des envois en consignation qu'en attirant son attention sur la nécessité, pour éviter les avaries résultant d'un trop long séjour en magasin, de placer la marchandise autant que possible pendant qu'elle flottait encore ;

Quant aux 40 fardeaux [d'aliment A] …

Attendu qu'en fait le défendeur n'a rien ou presque rien vendu de cet article ; que les quantités commandées étaient donc sans aucune proportion avec les possibilités d'écoulement ;

Attendu que vainement le défendeur allèguerait pour se justifier à cet égard l'importante commande reçue d'un client et la mauvaise foi de ce dernier qui refusa d'en prendre livraison ;

Qu'il ne peut en effet, échapper au dilemme suivant :

- ou bien il avait un recours contre ce client et par la suite, en renonçant à l'exercer, il a assumé la responsabilité du préjudice qui pourrait s'ensuivre pour son commettant ;
- ou bien il n'avait pas de recours, auquel cas il ne peut que s'en prendre à lui-même de ne pas s'être ménagé l'instrument de preuve nécessaire pour contraindre son client au respect de ses obligations ;

Attendu qu'en toute hypothèse sa responsabilité se trouve donc engagée et qu'il est dès lors tenu de réparer le préjudice résultant de son manque de prévoyance ; Attendu cependant qu'il y a lieu d'observer que l'attitude du demandeur a dans une certaine mesure contribué à consommer la perte subie ;

Qu'en effet, alors que le 17 octobre 1931 il déclarait incompréhensible que le défendeur ait pu croire qu'un article comme [l'aliment A] pourrait se conserver 6 mois, il n'apparaît pas cependant qu'il ait, au moment des faits, attiré son attention sur le moment critique à cet égard ; que bien au contraire, le 10 novembre 1930, soit un an après l'expédition, il se déclarait

> « très surpris de ce que les [aliments A] ne valussent alors absolument plus rien » ;

Qu'on peut admettre que si, en réponse à ses communications verbales de mars et d'avril, le défendeur avait été sérieusement mis en garde contre le risque *imminent* de perte qui menaçait dès lors la marchandise, il eût mis plus de hâte à s'en débarrasser, fût-ce à bas prix ;

Que vainement le demandeur objecterait qu'il n'avait pas d'instructions à donner à un « *buying agent* », celui-ci supportant tous les risques, que cette thèse, ainsi qu'il a été montré plus haut, est démentie par les frais de la cause ; Qu'il y a lieu dès lors d'attribuer au demandeur dans la perte qu'il a subi une part de responsabilité qui peut être raisonnablement estimée à un quart.

Quant aux 3 caisses [d'aliment B]

Attendu que le défendeur a vendu 2 caisses sur 5 de cet article ; Attendu de plus que « *tempore non suspecto* » il avait attiré l'attention du demandeur sur la qualité défectueuse du dernier envoi qui lui en avait été fait ; qu'on ne pourrait lui reprocher d'avoir été avisé de ce fait trop tard pour arrêter l'expédition de l'envoi litigieux ;

Attendu que, à défaut de tout grief précis du demandeur, rien ne permet donc d'imputer à la négligence du défendeur la mévente de cet article qu'il a y a lieu d'attribuer plutôt à une défaillance de la qualité ;

Quant au montant du préjudice

Attendu que le consignataire par la faute duquel les marchandises consignées ont péri est tenu de rembourser au déposant non seulement la valeur que la marchandise avait pour lui au jour de la perte (*damnum emergens*) mais aussi le bénéfice qu'il pouvait légitimement espérer retirer de sa vente (*lucrum cessans*) ;

Attendu que ce dernier élément du préjudice doit être déterminé par le cours moyen de la marchandise au jour de la perte ; Attendu qu'en l'espèce, le défendeur n'eût pas manqué, si le prix facturé par le demandeur avait été exagéré, de s'en prévaloir pour expliquer la mévente de l'article, comme il l'a fait notamment le 27 juin pour [un produit tiers] ;

Qu'on peut donc tenir que le prix facturé par le demandeur était normal par rapport à ceux pratiqués à ce moment sur le marché et le prendre comme base du préjudice subi, sous déduction de la commission ;

Par ces motifs :

… Statuant en qualité d'*amiable compositeur*, définitivement et sans appel,

Condamnons le défendeur à payer au demandeur dans le mois du prononcé de la présente sentence la somme de …

Déboutons le demandeur du surplus de ses prétentions ;

Condamnons le défendeur aux deux tiers et le demandeur à un tiers des frais et dépens de l'arbitrage qui s'élèvent à Francs français …

8. SENTENCE ARBITRALE
Affaire CCI n° 513 (Paris, 1932)

Published in *World Trade*, Oct. 1932, pp. 10-11 : "Arbitration Awards Concerning Sterling Contracts"

"Dispute between a Belgian merchant and an Italian merchant regarding the payment of goods of chinese origin, sold in pounds before the suspension of the gold standard by Great Britain. On the 21st September, 1931, the plaintiff had sent two invoices amounting in all to …. On October 8th the plaintiff demanded payment of these pounds in gold value. The defendant refused."

Extract of the award made on April 11th, 1932, by the arbitrator Mr. A. Daudet, former "Auditeur à la Cour des Comptes'', Director of the Association Nationale d'Expansion Economique, Paris :

… Whereas, while in the initial exchange of correspondence establishing the essential conditions of the contract, the price was not expressly stipulated in "gold pounds", the absence of this latter mention is not sufficient to invalidate the claim ;

Whereas conversely, the fact that two traders that are not British and who are of different nationalities negotiated in pounds sterling, cannot in itself be regarded as a certain indication of the desire of the two parties to deal in a stable currency ;

Whereas in fact, if the stipulation of pounds or dollars between traders of different nationality has been frequently and even generally due to the mutual desire of the interested parties to avoid currency fluctuations by dealing in a currency considered as stable, the choice of the currency of a third country may equally be governed by other considerations particularly the trading facilities enjoyed by drafts made in that currency ;

Whereas, it is true, these latter considerations arise particularly in the case of contracts made between countries having an inadequate economic and banking organisation or where their reciprocal dealings are infrequent ; Whereas, such is not the case as far as Belgium and Italy are concerned ;

Whereas by reason of the importance of each one of these two countries, their proximity to one another, and the frequence of their relations and by reason of the facilities which existed even then for the plaintiff and the defendant to deal either in Belgian francs or in lire, the choice of the pound sterling could, in the absence of other indications, be regarded as being prompted by the mutual desire of the parties to safeguard their commercial dealings from the risks of exchange ;

But whereas the value of this interpretation is sensibly diminished by the fact that in the case in question the goods were sent from China, i.e. from a country where the quotation of prices is generally if not exclusively made in sterling or dollars ; Whereas, consequently, it may be considered that it was for convenience sake that the plaintiff made his prices in sterling to the defendant ;

Whereas, also, the invoices were made out by the plaintiff on September 21st, 1931, i.e. at a time when the pound was showing obvious signs of weakening, without the said Company having thought of stating that it had "gold pounds" in mind ;

Whereas, too, the first claims of the plaintiff were only formulated on October 5th, and it is permissible to think that the idea of an allowance being made only occurred to him later on and following the discussions of the question which were started in various economic circles ;

For these reasons and especially on account of the last mentioned fact, I, the said arbitrator ;

1. Award and find that the plaintiff is not justified in claiming, in respect of the sum involved of … the difference between the gold value of this amount before September 21st, 1931, and the gold value of this same amount on the date of the award ;
2. In consequence, dismiss the claim of the plaintiff ;
3. Confirm the arrangement agreed between the parties and according to which half the expenses and costs of the arbitration, including the arbitrator's fees, shall be paid by each one of the two parties ;
4. Decide in consequence that each party shall pay to Headquarters the sum of … French francs.

9. SENTENCE ARBITRALE Affaire CCI n° 519 (Bâle, 1932)

Publiée à l'Economie Internationale, Déc. 1932, p. 11 : « Une sentence récente sur un contrat en livres sterling »

« Litige entre un fabricant allemand et un négociant hollandais à propos du paiement de produits métallurgiques vendus en £ avant la suspension de l'étalon-or en Grande-Bretagne. Le fabricant demandait le paiement de la marchandise en valeur-or. Le défendeur avait refusé et avait payé le montant des livres sterling stipule sur la facture. Le fabricant réclamait RM. 1.473,87, différence entre le montant qu'il avait effectivement encaissé et le montant qu'il aurait touché s'il avait pu convertir, au cours de RM. 20,40 pour la livre, les livres payées par le défendeur. »

Extrait de la sentence rendue le 18 octobre 1932 par l'arbitre, M. Maurice Golay, Directeur General de la Société de Banque Suisse, à Bâle :

... Considérant que la demanderesse a vendu à la défenderesse, par contrat du 24 juillet 1931, 1.000 douzaines de ... (produits métallurgiques) au prix moyen de sh. 6/6, il y a lieu d'observer ce qui suit :

Il ressort des documents soumis que le contrat a été conclu sans aucune réserve de change et sans clause or quelconque.

Il faut examiner quelle était l'intention des parties. Or, la demanderesse a toujours coté ses ventes en £ stg. pour des raisons d'elle seule connues. Elle a donc pris le risque du change anglais, risque qui du reste avait été accepté implicitement par la défenderesse à la signature du contrat. Il va sans dire que si la £ stg. avait monté par rapport au florin, la défenderesse aurait du tout de même s'acquitter en £ stg.

Toutefois, il y a lieu de remarquer que la défenderesse achetant et vendant en £ stg. n'avait pas à se préoccuper du change. On peut dire d'une manière générale, ici, qu'il est regrettable de constater que dans beaucoup de cas, des commerçants traitant des affaires en d'autres monnaies que la monnaie nationale ne se préoccupent pas suffisamment de la question du change, ou ne savent pas suffisamment qu'on peut assurer le change à terme. Un bon commerçant doit toujours prendre ses précautions dans ce sens, car son activité est de faire du commerce et non pas de spéculer sur le change.

On ne peut pas dire, ainsi que le prétend la demanderesse, qu'en choisissant la £ stg., l'intention des parties était de traiter en valeur-or contre valeur-or ; au surplus, peut-on dire, comme le prétend la demanderesse, que des (produits métallurgiques) soient des valeurs or ? Il est évident que non, puisqu'ils sont soumis à d'énormes fluctuations de prix, ainsi que les dernières semaines l'ont démontré.

Il reste à déterminer quelle est la responsabilité de la défenderesse par suite des retards apparents de paiement si l'on veut s'en tenir strictement aux termes du contrat. Celui-ci prévoyait paiement avec 2% d'escompte dix jours après l'arrivée des marchandises à Bremen.

Le premier lot facturé le 22 aout 1931 a été payé le 5 septembre et n'entre pas en discussion. Le deuxième lot facturé le 9 septembre a été paye le 5 octobre. Il résulte de l'exposé que ce lot est arrivé à Bremen le 14 septembre, chose reconnue le 30 octobre par la demanderesse. Ce lot aurait donc dû être payé le 24 septembre au lieu du 5 octobre. La défenderesse doit donc à la demanderesse la différence entre le cours du change le 24 septembre (cours officiel à Londres : RM. 17.24) et celui du 5 octobre (cours officiel à Londres RM. 16.62 1/2) sur £39.16.3, soit RM. 24.49.

Les livraisons subséquentes, bien qu'ayant été effectuées après la dévalorisation de la £ stg., n'en ont pas moins été faites conformément au contrat. Ayant été apparemment payées dans les délais règlementaires, elles ne peuvent donner lieu à réclamation.

En ce qui concerne les frais, il faut considérer que les deux parties sont de bonne foi et, d'autre part, que la demanderesse encourt incontestablement une perte de change, dont toutefois la défenderesse n'est nullement responsable, en sorte qu'il y a lieu de faire supporter à la demanderesse les 4/5 des frais et dépens déjà exposés à la date de la présente sentence et de mettre le surplus a la charge de la défenderesse.

Statuant sur ces faits l'arbitre prononce :

1. La demanderesse ne peut réclamer à la défenderesse que la somme de RM. 24.49 pour différence de change sur la deuxième livraison ;
2. en conséquence, condamnons la défenderesse à verser à la demanderesse, dans le délai d'un mois à partir de la présente sentence, la somme de RM. 24.49 ;
3. condamnons la demanderesse à accepter ladite somme pour solde de tous comptes ;
4. condamnons la demanderesse aux 4/5 des frais et dépens déjà exposés à la date de la présente sentence ; condamnons la défenderesse au surplus. Mettons à la charge de la partie qui les nécessiterait les frais et dépens de dépôt de la sentence ainsi que tous droits d'enregistrement, timbres, doubles timbres, amendes, qui pourraient être perçus à cette occasion.

Le total des frais et dépens du Secrétariat General s'élève à Frs. français 1.089,60. En conséquence, condamnons la demanderesse à payer la somme de Frs. fr. 871,70 au Secrétariat General de la CCI avant qu'elle puisse recevoir copie de la présente sentence, et condamnons la défenderesse à payer au Secrétariat General de la CCI la somme de Frs. fr. 217,90 avant qu'elle puisse recevoir copie de la présente sentence ; au cas où elle refuserait de payer ladite somme, la demanderesse (conformément à l'article 24 du Règlement de Conciliation et d'Arbitrage de la CCI) versera elle-même ladite somme au Secrétariat General avant de recevoir copie de la présente sentence, sauf son recours contre la défenderesse conformément au même article du Règlement.

10. SENTENCE ARBITRALE Affaire CCI n° 536 (Paris, 1933)

Published in *World Trade*, May 1933, p. 11. "A Recent Decision in a Sterling Contract Dispute"

"Dispute between two companies of two countries of the European continent concerning payment for goods sold in pounds sterling before the suspension of the gold standard in Great Britain. The seller demanded payment in gold pounds. The defendant claimed that he need only pay the numerical amount of £ sterling stipulated in the contract and legal tender in England at the time of payment."

Extract from the award rendered in Paris on February 11th, 1933 by a board of arbitration consisting of three arbitrators.

Whereas the price of the goods was fixed in shillings ;

Whereas the choice of the £ sterling is sufficiently explained by the fact that the international market for the goods in question is London where it is quoted on the exchange and that such contracts are usually based upon £ sterling, without it being possible to deduce from that fact that it is not the £ sterling as legal tender, but the gold £ which is to be the currency of the contract ;

Whereas, subsequently to the contract, the value of the £ fell considerably on the foreign exchange market and whereas the seller uses that fact as an argument for claiming that the price should be paid to him on the basis of the old gold parity ;

Whereas the contract was clearly concluded without any reservations as to the rate of exchange and without any gold clause ;

Whereas such reservations cannot be considered as having been implied, and whereas the plaintiff is not justified in using as an argument his intentions or his conviction that to conclude the contract in £ sterling offered as much security as to conclude it in gold ;

Whereas the plaintiff has no one to blame but himself if he was deceived therein and if his perspicacity was at fault ;

Whereas it would be useless to claim that since an arbitration court judges in equity rather than purely according to law the plaintiff should therefore be allowed partial damages in respect of his "disappointment" ;

Whereas, further, the arbitrators have not been authorised to act as "*amiables compositeurs*" ;

Whereas the contract in dispute provides for payment in shillings without any exchange guarantee, and whereas no arbitrator may in any way add to the clear and explicit intention of the parties ;

Whereas, in addition, the disastrous depreciation of the £ has, in the case of a large number of contracts, resulted in unexpected profit or loss ; whereas the same persons have often gained and lost at the same time, on the one hand by settling debts in £ and on the other hand by being paid in £ ; whereas it would be inadmissible in law to modify business transactions on the ground that it was necessary to maintain a balance ;

Whereas the contract in dispute is subject to the law of the buyer's country, the delivery of the goods being fixed to take place in that country, and the domicile of the defendant and the place of payment being also in that country ;

Whereas, nevertheless, even if the plaintiff's case is unfounded, it cannot be said that he was imprudent in submitting his point of view to arbitration ; whereas in fact the defendant himself upheld the same point of view in another case ; whereas there was therefore legitimate doubt ; whereas in these circumstances it seems fair, in accordance with the legal precedent of the defendant's country, to divide the costs and expenses between the parties in the proportions given below ;

For these reasons, the board of arbitration,

- Awards and finds that the plaintiff's claim for an additional payment bringing the price up to the par rate of $4.86 per £ sterling is unfounded ;
- Awards and finds that the defendant has fully and entirely paid the price that was due ;
- Awards and finds that there is no ground for compensation owing to the depreciation of the £ sterling ;
- Consequently dismisses the plaintiff's claim.

However, for the reasons given above, the board of arbitration awards and directs the defendant to pay one sixth of the costs and the plaintiff to pay the remaining five-sixths, and further gives notice to the parties that they have undertaken to carry out the present award without further proceedings or formalities of any kind.

11. ARBITRAL AWARD ICC Case no. 543 (1934)

Published in *World Trade*, Dec. 1934, pp. 7-8: "The Validity of Tacit Acceptance"

"Dispute concerning the payment of compensation amounting to 50,000 Belgian francs claimed by a French manufacturer from a Belgian company for losses sustained through the non-delivery of a certain chemical product which the plaintiff, on the strength of the undertakings contracted by the defendant, had resold to other customers."

Excerpt of award made on 10th March 1934 by the arbitrator Mr. W. NOLEN, Barrister, Rotterdam (Netherlands), acting as *amiable compositeur*:

According to the submission to arbitration the plaintiff states that he was authorised in 1930 by the defendant company to sell their output for 1931 of a certain chemical product. The defendant company declares, on the other hand, that although no signed contract existed, they fully intended to grant a sales monopoly to the plaintiff, but only after their factory had started operation and manufacture of the product in question had begun.

The arbitrator agrees with the point of view of the plaintiff, except as to the moment when the authorisation of sale may be considered as having been granted. The authorization did not result, as the plaintiff asserts, either from his letter of 8th October 1930 or from his letter of 20th November 1930, the facts showing that the defendant company replied to the first letter that they were compelled to withhold their approval until the next meeting of their board, and that, further, the plaintiff himself wrote on November 20th follows:

> "... if I do not hear from you, I cannot sell firm."

But on 10th December 1930 the plaintiff wrote to the defendant company, after discussion with his general manager on 9th December, that he was making arrangements to sell 100 tons of their production monthly for delivery as from, February 1931. The defendant company raised no objection this communication, although they wrote to the plaintiff on the tenth, 16th and 20th December. If in business parties carry on a correspondence concerning their mutual relations and the progress of their business, the one who receives a letter from the other containing important communications and makes no protest against them, must be considered as being in agreement with those communications. This essential principle is generally recognized in commerce and must also be admitted in law.

The defendant company base their argument on a letter dated 19th September 1930 in which they informed the plaintiff that they would certainly be able to guarantee him deliveries of their product in the early part of the next spring, but that they preferred not to enter into any specific arrangement before manufacture had actually started. But negotiations between the parties took place after that date, at the end of October and beginning of December, and a large number of letters were exchanged. As the plaintiff subsequently informed the defendant company on 10th December that he was making arrangements to sell 100 tons (maximum) monthly of their products, they ought if they still wished to adhere to their reservation of September 19th, to have notified the plaintiff to that effect by protesting against his proposed sale.

Furthermore, the plaintiff informed the defendant company, on 29th January and 4th and 16th February 1931, that he had sold for their account large quantities of the product in dispute, and no objection to these communications was raised by the defendant company. According to the principle set forth above, they therefore approved these sales, thus confirming the authorization already tacitly granted to the plaintiff.

Consequently, from 10th December onwards the plaintiff was justified in considering himself authorized to sell 100 tons (maximum) monthly for delivery as from February 1931. In so far as the plaintiff has proved that he exercised that right and suffered losses through failure to deliver on the part of the defendant company, he is justified in claiming damages, unless the arguments put forward by the defendant company appear reasonable. These arguments are dealt with successively below.

First, the defendant company claims that the plaintiff never placed an order giving an indication of prices, dates and places of delivery, and specifications as to packing.

But in the three letters mentioned above, the plaintiff actually notified the defendant company of the sale of definite quantities with indications as to delivery dates. It had not been specified that the plaintiff was also to furnish prices and names of buyers, nor did the defendant company ask him for this information after receipt of the letters in question. Furthermore, it was the intention of the parties – as shown by a certain draft contract, on the contents of which they had agreed – that, in the case of export sales, the plaintiff would send the invoices direct to the customers and pay the defendant company by cheque. As foreign sales were involved in this instance, the indication of prices and names of buyers was not a condition required to bind the defendant company, still less so in view of the fact that they did not ask for this information. Nevertheless, these data are essential for purposes of calculating damages.

Secondly, the defendant company asserts that the plaintiff never called upon them to effect the deliveries in question.

The plaintiff repeatedly requested the defendant company in writing for information regarding the starting of manufacture and called their attention to the prejudicial consequences which would result from non-delivery, pointing out that he would either have to cover himself elsewhere at a higher price or compensate his customers. From the silence of the defendant company and the infrequency of their letters it, was evident that manufacture had not yet begun, and that it was therefore impossible for them to effect delivery. The situation being obvious, it would have been quite useless to call upon the defendant company to deliver the goods.

Thirdly, the defendant company pleads *force majeure* on the grounds that there was an explosion in their factory on 8th February 1931.

That this explosion had to be considered as a case of *force majeure* was clearly admitted by the plaintiff in the submission to arbitration, since he subscribed to the following sentence:

> "... it having been impossible for the defendant company to supply this product ... owing to an explosion."

It is likewise shown by the numerous letters of the plaintiff that he accepted the explosion as a case of *force majeure*. Nevertheless the defendant company wrongly claim that the explosion absolves them from their obligation. *Force majeure* suspends the carrying out of obligations, but does not cancel them.

Moreover, the defendant company indicated for a long time that even so they would effect the deliveries. As late as 30th May 1931 they wrote that they anticipated being able to resume manufacture within a few days. There is nothing to indicate why manufacture was not finally resumed, nor to did the defendant company claim, still less prove that it had become definitely impossible. The attitude of the defendant company cannot therefore be admitted, and in not fulfilling their obligations, even at a later date, they put themselves in the wrong.

Furthermore it is to be observed that anybody who is temporarily prevented by *force majeure* from fulfilling his obligations, is nevertheless compelled to make every effort to reduce as far as possible any loss the other party may suffer therefrom. The defendant company took no action in the matter. Needlessly, they made the plaintiff wait for eleven weeks before sending him a certificate in respect of the explosion, although he had repeatedly asked them for it, calling particular attention to the prejudice caused to him through his inability to produce this document and so relieve himself of his responsibility towards his customers.

For the reasons set forth above, the defendant company must be considered bound to compensate the plaintiff for the prejudice suffered by him. This obligation only applies, however to the damages arising out of the engagements contracted by the plaintiff between 10th December 1930 and 25th March 1931, on which date the plaintiff confirmed to the defendant company their discussion on 24th March, by stating that he would accept no further orders.

Once this principle has been established, the burden of proof in substantiating the alleged loss falls on the plaintiff. Having examined the 75 documents produced for the purpose by the plaintiff, the arbitrator is of the opinion that they prove that between 10th December 1930 and 25 March 1931, the plaintiff undertook to deliver 1,000 tons to a third party and that the third party himself sold those 1,000 tons to other purchasers.

The plaintiff was therefore obliged to compensate the said third party in respect of the loss caused by the non-delivery of the goods, the amount of the loss being calculated on the difference of prices and freight occasioned to the third party through being obliged to buy from another supplier. In this connection, the documents produced by the plaintiff show incontestably that the amount of the said loss was far in excess of the sum of 50,000 Belgian francs claimed by the plaintiff as compensation from the defendant company.

For these reasons, the arbitrator, deciding in accordance with the terms of reference of the submission to arbitration as *amiable compositeur*,

- directs the defendant company to pay to the plaintiff the sum of … Belgian francs;
- directs that the costs and expenses of the arbitration shall be borne by the defendant company. These costs and expenses, which amount to … French francs, include the costs of International Headquarters and the fees of the arbitrator.

12. SENTENCE ARBITRALE Affaire CCI n° 546-549 (Zurich, 1933)

Au nom de la Cour d'Arbitrage de la CCI, l'arbitre soussigné … [Suisse], nommé arbitre par le Comité Exécutif de la Cour d'Arbitrage de la CCI le 27 juillet 1932 pour trancher le différend entre **1.** [A] [France], d'une part, et **2.** [X] [Belgique], **3.** [Y] [Belgique], et **4.** [Z] [Belgique] représenté par [Z'] d'autre part.

… A rendu la sentence suivante :

1. La compétence de l'arbitre de juger la présente affaire est fondée sur le compromis. C'est par la signature de celui-ci que les parties ont pris l'engagement de soumettre le différend à l'arbitrage …

2. Avant d'aborder l'interprétation des Conventions conclues entre les parties, il convient de considérer le statut juridique du Bassin de la Sarre pour autant qu'il soit pertinent pour le présent litige.

Le Traité de Versailles a institué un régime spécial pour le Bassin de la Sarre. D'après l'article 49 dudit traité, l'Allemagne a renoncé au gouvernement du Territoire de la Sarre

> « en faveur de la Société des Nations considérée ici comme fidéicommissaire ».

Le gouvernement est confié à une commission représentant la Société des Nations et nommé par le Conseil de la Société des Nations (§§16 et 17 de l'annexe à la section IV de la partie III du Traité de Versailles). Le Territoire du Bassin de la Sarre ne fait donc pas partie du territoire français.

D'autre part, il est stipulé au §31 de ladite annexe que le Territoire du Bassin de la Sarre

> « sera soumis au régime douanier français ».

Pour les cinq premières années après la mise en vigueur du Traité de Versailles un régime transitoire était établi, mais il a pris fin en 1925 et le premier octobre 1925, le cordon douanier à la frontière entre la Sarre et la France fut définitivement aboli. Depuis cette date, la France et la Sarre ne forment plus qu'un territoire douanier unique …

La situation juridique du Bassin de la Sarre est unique. En particulier, elle n'a rien à faire avec le régime juridique des Mandats, établi par l'article 22 du Pacte de la Société des Nations.

3. Par la Convention dite N°1, les défenderesses se sont engagées à

> « se retirer du marché français et à ne plus vendre, ni directement, ni indirectement [le produit] à destination de la France ».

Il s'agit de savoir si le territoire du Bassin de la Sarre est compris dans les termes « marché français ».

Pour l'intermédiaire de cette Convention, il importe de retenir qu'il s'agit d'une convention destinée à effectuer un partage du marché [du produit] entre les parties contractantes. Pendant la durée de la Convention, les parties contractantes ne se font concurrence ni en France ni aux pays hors de France. En effet, [A] de son côté s'engage à ne vendre [le produit] hors de France que par l'intermédiaire de [Z'].

Il s'ensuit que le marché sarrois est, comme tout autre marché, réservé exclusivement à l'une ou l'autre des parties contractantes et qu'il serait contraire au but de la Convention d'admettre que le marché sarrois soit ouvert à toutes deux.

4. Il en découle que l'argument, invoqué par les défenderesses, et d'après lequel la clause restrictive figurant dans la Convention sous le N°8 devrait être interprétée restrictivement, porte à faux. En fait les obligations sont réciproques et toute restriction de l'obligation de l'une des parties impliquerait une extension correspondante de l'obligation de l'autre. La nature de la Convention ne permet pas l'application du principe que tout ce qui n'est pas expressément interdit aux parties leur est permis. Même s'il en était autrement, ce principe ne pourrait être appliqué que subsidiairement. De l'avis de la Cour permanente de Justice internationale:

> « les règles, quant à l'interprétation restrictive ou extensive des dispositions d'un traité, ne peuvent être appliquées que dans le cas où les méthodes ordinaires d'interprétation ont échoué ».

Or, pour la présente affaire, les méthodes ordinaires d'interprétation sont suffisantes.

5. Il vient d'être démontré que le marché sarrois est réservé exclusivement à l'une des parties contractantes. Comme les parties n'ont rien stipulé expressément à ce sujet, il incombe à l'arbitre de décider pour laquelle des deux parties le territoire de la Sarre est ouvert. En d'autres mots, l'arbitre doit rechercher quelle solution est la plus conforme au texte et au but de la Convention. Or, aussi bien le texte que le but de la Convention militent en faveur de la solution préconisée par [A].

La Convention emploie l'expression « marché français » pour circonscrire le champ d'action de la demanderesse, et pour limiter le champ d'action des défenderesses. L'expression « marché français » est empruntée au vocabulaire économique ; les parties se placent, pour fixer l'étendue géographique de leurs engagements, sur le terrain économique et non politique.

C'est donc un critère économique qui doit être à la base de la distinction entre le marché français et tout autre marché. Le marché français doit, de ce point de vue, former une unité économique vis-à-vis des marchés étrangers. Or, cette unité ne peut être constituée que par un seul et même cordon douanier et non pas par les frontières politiques de la France. Comme la France et la Sarre ne forment qu'un territoire douanier unique, la Sarre est comprise dans le « marché français » dans le sens de la Convention qu'il s'agit d'interpréter.

A cela s'ajoute un argument d'ordre pratique. Si les défenderesses étaient autorisées à vendre [le produit] dans le Bassin de la Sarre – et cela à l'exclusion de [A] – ce [produit] pourrait entrer en France sans être soumis, entre la Sarre et la France, à aucun droit de douane. Cette possibilité ne permettrait pas à la Convention de déployer les effets pratiques que les parties avaient certainement en vue lors de sa conclusion, ou, tout au moins, elle rendrait l'application de la Convention extrêmement difficile. On ne peut pas admettre que les parties aient voulu créer un régime si imparfait ; tout au contraire, seule une interprétation de la Convention paraît raisonnable, qui, en la rendant praticable, lui donne une valeur effective. Cette interprétation ne peut être que celle qui vient d'être donnée.

Les défenderesses n'ont pas seulement pris l'engagement de « se retirer du marché français » mais aussi l'engagement complémentaire de ne

> « plus vendre, ni directement, ni indirectement [le produit] à destination de la France ».

Pour des raisons qui viennent d'être mentionnées cette clause serait illusoire s'il était permis aux défenderesses d'importer [le produit] dans la Sarre. Cela démontre de nouveau que la Sarre fait partie du « marché français » dont les défenderesses sont obligées de se retirer.

Cette interprétation du chiffre 8 de la Convention N°1 est corroborée par la Convention N°2. Par cette Convention, la demanderesse s'est engagée à faire participer les autres sociétés signataires de la Convention, à raison de 10% dans l'excédent du droit d'entrée au-dessus de Fr... aux ... kgs. applicable en France à l'entrée [produit], ce pourcentage étant calculé sur la quantité totale du [produit fabriqué] en France par la demanderesse ainsi que par une autre société. Le point principal est, ici de nouveau, la protection douanière ; la Convention N°2 démontre que ce qui était décisif pour les parties était l'unité du régime douanier. Il en découle que quand elles ont parlé du marché français, elles ont eu en vue le marché douanier français lequel comprend le Territoire du Bassin de la Sarre.

6. Les défenderesses ont versé au dossier plusieurs pièces d'où il ressort que la demanderesse a transmis [en] 1929 des demandes de prix provenant du Territoire du Bassin de la Sarre à [Z']. D'autre part, la demanderesse a démontré qu'elle a elle-même répondu à des demandes de prix, provenant du Territoire du Bassin de la Sarre, par des lettres ... Il importe de constater que c'est le ... 1930 que la demanderesse a fait pour la première fois une réclamation au sujet de l'importation du [produit] dans la Sarre ...

Ces faits ne sauraient suffire à faire écarter les conclusions qui ont été déduites du texte et du but des Conventions intervenues. Mais ils suffisent pour établir la bonne foi des ... défenderesses. En effet, celles-ci étaient fondées à croire que la demanderesse donnait aux Conventions la même interprétation que celle qui, dans le présent litige, est soutenue par les défenderesses. Si la demanderesse a subi un préjudice, par suite de l'importation du [produit] dans la Sarre, c'est elle-même qui en est en partie responsable. Pour cette raison, en en considération du fait que la demanderesse n'a pas démontré qu'elle ait réellement subi un dommage (elle s'est contentée de demander une indemnité de principe), il n'y a pas lieu d'allouer des dommages-intérêts.

Si l'arbitre répond par la négative à la première question qui lui est posé et écarte en même temps la demande d'indemnité, il se trouve en harmonie avec le compromis. Certes, le compromis stipule ... que l'arbitre aura pour mission, dans la négative, de faire droit « à tout ou partie » de la demande d'indemnité formulée par la demanderesse. Mais les mots « tout ou partie » ne signifient pas que l'arbitre soit obligé de condamner les défenderesses à un paiement quelconque, si minime qu'il soit. La locution « tout ou partie » signifie, de l'avis de l'arbitre, qu'il n'est pas lié par la demande d'indemnité de la demanderesse, mais qu'il reste libre de fixer le montant des dommages-intérêts. Cette liberté implique nécessairement le pouvoir de n'allouer aucune indemnité.

7. Quant aux frais de l'arbitrage, il y a lieu de les partager entre les parties. Mais il paraît juste que les défenderesses supportent une part plus considérable que la demanderesse. Un partage des frais dans la relation de deux à un paraît le plus approprié.

Par ces motifs, l'arbitre prononce la sentence suivante :

- Les défenderesses ne sont pas fondées à importer et à vendre [le produit] dans le Territoire de la Sarre.

  a) Une indemnité n'est pas due.
  b) Les défenderesses ont à supporter deux tiers, la demanderesse un tiers des frais et dépens de l'arbitrage.

- Les frais et dépens de l'arbitrage, y compris les honoraires de l'arbitre, sont mis pour un tiers à la charge de la demanderesse et pour deux tiers à la charge des défenderesses. Ces frais s'élèvent à la somme de Francs français ...

En conséquence, la demanderesse est condamnée à payer la somme de Fr.... au Secrétariat Général de la CCI avant qu'elle puisse recevoir copie de la présente sentence ; les défenderesses sont condamnées à payer la somme de Fr. ... au Secrétariat Général de la CCI avant qu'elles puissent recevoir copie de la présente sentence.

13. ARBITRAL AWARD ICC Case no. 568 (1934)

Published in *World Trade*, Oct. 1924, pp. 6-7: "A Dispute Arising out of a Contract between a Principal and his agent".

Dispute relating to the performance of a dated November 1st, 1924, defining the conditions in which an American firm dealing in calculating machines would take over for its own account the general agency of its European representative whenever the parties terminated their business relations.

It was agreed that the representative – the plaintiff in the case – should receive, in accordance with an inventory to be drawn up, the price of the physical property of the agency as well as five annual instalments of $50,000. After lengthy negotiations, the price of the transfer was fixed at $1,452,737 for the 15 branches of the agency. On this sum, the American firm – the defendants – paid $1,361,619, differences of opinion having arisen in regard to the balance of $91,118.

Finally the defendants completed their obligation by paying $76,118 according to an agreement of May 18th, 1929. Later, however, and after having paid the first instalment of $50,000, the defendants deducted in 1932 the sum of $17,770 from the second instalment, invoking the fact that a certain number of motors had been entered twice on the inventory and that certain sums appearing under debts had already been collected by their agent. The plaintiff disputed the justice of this deduction, arguing that the sacrifice he had made in accepting $76,118 as final payment, instead of $91,118, viz. a difference of $15,000, had been agreed to precisely for the purpose of covering any mistakes which might transpire.

The defendants maintained, however, that this sum of $15,000 constituted merely a reserve for the purpose of guaranteeing the recovery of doubtful debts and was not a concession offered by the plaintiff. The defendants, moreover, had subsequently paid $12,000 to the plaintiff and considered, therefore, that the mistakes in the inventory were not covered, and that they were justified in deducting $17,770 from the second instalment of $50,000.

The arbitrator, acting as "*amiable compositeur*" decided in favour of the defendants and rejected the claim of the plaintiff basing his decision on the fact that the claims regarding the rectification of mistakes had not been unduly delayed, when taking into consideration the complexity of the interests at stake and the elements composing the inventory."

Excerpt from the award passed on February 20th, 1934 by the arbitrator Prof. Chs. Sindballe (Denmark):

1. The award to be made in the present dispute depends in the first place on the importance which is attached to the contract of May 18th, 1929. In the principal contract of November 1st, 1924, it is specified that the defendants should take over the plaintiff's business for their account, "except bills and accounts receivable".

It was later agreed that the defendants should also take over for their account the outstanding debts to be collected. This is confirmed in the following letter addressed by the plaintiff to the defendants on May 7th, 1929:

> "As soon as the correct total of these accounts has been determined, you agree to pay us 90% of such total, the remaining 10 % to be held as a reserve against which will be charged any and all deductions, cancellations, bad debts, taxes and other expenses paid by you for our account. The amount of reserve remaining will be remitted to us when all our accounts have been disposed of. When the total outstanding is less than the reserve, the excess reserve will be remitted to us. If the deductions and other items mentioned above exceed the reserve, the excess will be remitted to you by us."

The above is the letter referred to in the contract of May 18th, 1929. This contract took the form of a letter addressed by the defendants to the plaintiff and accepted by the latter. The letter reads as follows:

> "We beg to confirm our agreement of today as follows: You acknowledge that after the receipt of $1,452,737 as per schedule attached which has been satisfied to the extent of $l,361,619, all our obligation arising under the agreement of November 1st, 1924, as amended August 19th, 1925, and February 29th, 1928, and out of all oral or written agreements or understandings between us referring to the subject matter of said agreements will have been satisfied, except that this is without prejudice to pay you the amount of customers' accounts receivable in the manner and under the conditions set forth in your letter of May 7th, 1929. If you will agree to the foregoing, we will pay you the balance of $76,118 within ten days of the date of this letter."

In the schedule enclosed in this letter and referred to in the contract, there appears among others the following entry:

''Outstanding accounts. $150,459

Less reserve . . . . . –$ 15,000

$135,459''

It appears from this schedule as well as from the above-mentioned letter of May 7th, 1929, that the deduction of $15,000 by way of reserve was made with a view to covering the collection of outstanding debts. Of this amount, incidentally, $12,000 were subsequently paid to the plaintiff when it became evident that of the outstanding amounts only $3,000 proved uncollectable.

In view of the above, it cannot be admitted that the deduction of $15,000 was made or rather agreed to by the plaintiff (as stated by him) solely because it was the intention of the parties to settle finally all differences which might subsequently arise between them.

Neither can it be admitted that the contract of May 18th, 1929, can be considered – as asserted by the plaintiff – as a definite agreement, because in order to reach such an agreement, the plaintiff would have been obliged to renounce certain claims which he had put forward in the course of the negotiations preceding the agreement. In the first place, the said contract contains nothing on the subject; secondly it must be considered as proved by the defendants that the said claims (assuming that they really existed) had already been satisfied by the defendants at the moment of passing the contract.

2. The next question that arises is whether the deduction made in 1932 and forming the subject of this dispute is, as affirmed by the plaintiff, unjustified on the grounds that it was unduly delayed or because the defendants in paying unconditionally the payment of $50, 000, due for the year 1931, implied by doing so that they renounced the claims in question which dated back to October 7th, 1930.

It appears from the documents in the case that the business taken over for their account by the defendants possessed 50 branches in 7 different countries. In these circumstances, the inventory was bound to the very complicated and could easily give rise to mistakes. The transfer of the business took place on January 1st, 1929. The inventory which was made out to a great extent after the transfer, was drawn up by the plaintiff's employee who had been taken into the service of the defendants. When the contract of May 18th, 1929, was passed, the inventory was completely established, as confirmed by the schedule attached to the said contract. This fact, however, did not exclude the possibility of claims regarding the rectification of eventual mistakes, and in these conditions the claims presented on October 7th, 1930, by the control department of one of the defendants' branch establishments, cannot be considered as unduly delayed.

The payment of the instalment due of $50,000 was effected unconditionally on January 2nd, 1931. It appears from the dossier that in a letter dated October 20th, 1930, the plaintiff rejected the claims and the director of the control department of the defendants tried subsequently in vain to get in touch with the plaintiff. In the light of these facts, it cannot be assumed that the unconditional payment was equivalent to renunciation of the claims in question.

3. To the claims of October 7th, 1930, were attached particulars regarding the mistakes made. In view of the fact that the plaintiff disputed the accuracy of these particulars without supplying any further explanations, it must be accepted as a fact that the alleged mistakes were really existent. On the other hand, it cannot be admitted that there had been any fault on the part of the defendants which could exclude the possibility of their advancing claims.

4. For the reasons afore-mentioned, the following arbitral award is made:

- The plaintiff is not justified in claiming from the defendants all or part of the sum of $17,770 or interest on that sum at the rate of 6 % per annum. His demand is consequently rejected.
- The costs and expenses incurred by the arbitration, including the fees of the undersigned arbitrator amounting to Frs. 7,555.40 are payable by the plaintiff, who must remit this sum to Headquarters before being entitled to receive a copy of the present award, in accordance with article 25 of the Rules of Conciliation and Arbitration.

14. SENTENCE ARBITRALE Affaire no. 756 (Paris, 1949)

Au nom de la Cour d'Arbitrage de la CCI, l'arbitre soussigné … domicilié à [Pays-Bas], nommé arbitre unique par la Cour d'Arbitrage de la CCI pour trancher le différend entre : [X] [Suisse] et [Y] [France] rend la sentence dont la teneur suit :

I. Procédure

Le texte de l'acte de compromis signé les 15 et 20 juillet 1949 par les parties, ainsi que celui des documents échangés entre elles, à savoir l'exposé des prétentions de la demanderesse et l'opposition à ces prétentions de la défenderesse, doivent être considérés comme insérés ici.

Après la remise des pièces mentionnées, les parties ont plaidé le 14 octobre 1949 … A l'occasion des plaidoiries et ultérieurement les parties ont produit quelques documents supplémentaires. L'arbitre a constaté, avec l'assentiment des parties, que celles-ci avaient produit tous les arguments qu'elles désiraient faire valoir et n'avaient rien à ajouter.

II. Droit à appliquer

En traitant le litige la demanderesse s'est prévalue d'une disposition du droit suisse, tandis que la défenderesse a invoqué le droit français.

Quoique ce point litigieux soit d'importance secondaire, il y a lieu d'établir en principe que le contrat, conclu entre les parties le 1er juin 1946 qui régit les modalités d'exploitation uniquement en France d'un procédé déterminé et d'une licence de brevets … à laquelle fait suite un placement éventuel à un représentant en France … se rattache en majeure partie au territoire français et doit donc être considéré comme tombant dans le ressort du droit français. L'interprétation du contrat et la détermination de ses conséquences devront donc se faire en observation du droit français.

III. Durée du contrat

Les parties sont d'opinion différente quant à l'interprétation … du contrat précité. La demanderesse estime qu'aux termes de cette disposition le contrat a été conclu ferme pour trois ans à compter du 1er juillet 1945 avec, après cela, option de tacite reconduction et faculté de dénonciation d'année en année. La défenderesse prétend au contraire que l'option de reconduction tacite d'année en année a valu déjà endéans la première période de trois ans et qu'il en est par conséquent de même de la faculté de dénonciation.

Il est impossible d'admettre l'interprétation de la défenderesse. Si, en effet, le droit d'option de reconduction tacite avec faculté de dénonciation était censé valoir déjà pour les trois premières années, cette dernière période n'aurait ou bien aucun sens (dans le cas notamment où le droit d'option avec la faculté de dénonciation continuerait aussi, après expiration de ladite période, à demeurer valable), ou bien le sens d'un terme définitif au-delà duquel il n'est prévu aucun renouvellement du contrat par le fait des parties. L'une des deux branches de l'alternative est aussi peu admissible que l'autre : la première ne l'est pas du moment qu'on a bel et bien inséré au contrat cette période de trois ans, la seconde ne l'est pas davantage parce que la nature du contrat, qui envisage une coopération de longue durée … exclut la notion d'un terme impératif de trois années seulement.

L'interprétation du contrat telle que la donne la demanderesse est donc jugée correcte.

IV. Correspondance des parties

La défenderesse a toutefois soutenu que, quoiqu'il en soit de la durée du contrat fixée dans le contrat lui-même, les parties peuvent s'être écartées par la suite de cette clause de durée par le moyen d'un accord ultérieur et qu'elles s'en sont écartées en effet puisque, aux termes de la correspondance échangée, la demanderesse aurait consenti à la résiliation du contrat en date du 30 juin 1947. Le droit français permet, en effet, une telle conclusion, aussi faut-il vérifier la teneur de la correspondance échangée.

Par lettre recommandée du 31 mars 1947, la défenderesse a dénoncé le contrat pour le 30 juin 1947, c'est-à-dire pour une date antérieure à celle que permettait le contrat lui-même. Après avoir exposé les motifs de cette dénonciation, [Y] termine par ces mots :

> « Si toutefois vous pouvez avant le 30 juin prochain nous justifier etc. … nous serions disposés à reconsidérer la question ».

[X] répondit par lettre recommandée du 11 avril 1947, réponse au sujet de laquelle [X] a concédé elle-même dans la suite (lettre du 12 octobre 1948) qu'elle avait, en la faisant « enregistré la dénonciation du contrat ». En tout cas, [X] n'a pas, dans sa réponse susdite du 11 avril 1947, contesté la faculté de dénonciation du contrat puisqu'elle a, au contraire, terminé sa lettre par ces mots :

> « Vous êtes maintenant renseignés sur la situation exacte et nous croyons qu'il y aurait lieu pour vous de reconsidérer la question d'une dénonciation de votre contrat ».

Par contre, la faculté de dénoncer le contrat pour le 30 juin 1947 a bien été contestée dans une lettre du 5 mai 1947 non-recommandée et personnelle du directeur de [X] à celui de la défenderesse, mais la réception de cette lettre a été niée et elle n'a pas été prouvée (pas non plus par les lettres de [Y] du 6 et du 19 octobre 1948, celles-ci ayant aussi pu être écrites telles qu'elles le sont en cas de non-réception de la lettre du 5 mai 1947). Il ne peut donc être tenu compte de la lettre du 5 mai 1947. Quoiqu'il soit bien compréhensible que [X] ait tâché de corriger par une courte lettre personnelle et non officielle l'erreur [que X] avait commise quant à la durée du contrat, ce mode de procédé qui s'écarte de la normale et qui n'a pas abouti au résultat désiré demeure à ses propres risques et périls.

Après l'échange de correspondance des mois de mars et d'avril 1947, les parties se sont tues toutes deux durant un temps inconcevablement long. D'une part, en effet, [Y] eut raisonnablement dû faire savoir à sa contrepartie, après avoir reçu la lettre du 11 avril 1947, que les arguments y avancés ne l'avaient pas convaincue et [que Y] maintenait sa dénonciation anticipée ; [X], d'autre part, ne recevant point de réponse à sa lettre du 11 avril 1947 (ni à la lettre personnelle du 5 mai 1947) eut dû annoncer officiellement et en temps utile avant le 30 juin 1947 que [X] comptait sur la continuation du contrat après cette date.

Quelles étaient, dans ces circonstances, les conclusions que chacune des deux parties pouvait tirer de l'attitude de l'autre ?

[X] détenait une dénonciation anticipée du contrat par [Y], dénonciation que [X] avait combattue – en partie de façon irrégulière – après quoi [X] n'avait plus reçu de réponse. [X] était donc dans l'incertitude alors qu'il eut été tout d'abord à [X] de s'assurer, n'en pouvant évidemment rien savoir, si [Y] continuerait à se tenir de fait au contrat après le 30 juin 1947.

A sa dénonciation anticipée, [Y] avait reçu par contre une réponse qui n'opposait pas d'objection de principe à cette dénonciation et qui l'avait seulement sollicitée de reconsidérer la chose, alors que, aucune suite n'ayant été donnée à cette demande, un mutisme complet avait suivi jusqu'aux 6 juillet et 28 septembre 1948 respectivement.

Dans ces circonstances il faut admettre que [X] a suscité chez [Y] la conviction [que X], n'opposait aucune objection de principe et définitive à la dénonciation anticipée du contrat et [que X] était, par conséquent, d'accord là-dessus. En conséquence de quoi le contrat du premier juin 1946 est résilié en date du 30 juin 1947, ce en conformité de la volonté des parties.

V. Application du contrat après sa résiliation

Puis la question a été posée de savoir si, après la résiliation du contrat (au 30 juin 1947), la défenderesse a continué de se servir des procédés faisant l'objet du contrat … contrevenant ainsi [le] contrat. …

En regard de cela, [Y] a exposé par le menu les modifications [que Y] a apportées à sa fabrication depuis la résiliation du contrat en date du 30 juin 1947, et [X] a déclaré ne pas vouloir, à l'encontre de ces explications opposer de preuve selon laquelle [Y] aurait poursuivi l'application des procédés objets du contrat après le 30 juin 1947.

La violation … du contrat n'est donc pas prouvée, de sorte qu'une demande fondée là-dessus ne saurait être reçue.

VI. Demande préparatoire

A l'encontre de la demande préparatoire de [X], [Y] a avancé que cette demande n'a trait a aucun point litigieux réel attendu qu'elle a présenté ses relevés de comptes d'exploitation jusqu'à la date de la résiliation du contrat, le 30 juin 1947, alors que l'examen prévu [au] contrat n'avait été ni demandé ni refusé.

La preuve de la présentation des relevés de comptes a été fournie par la production de copies de ces relevés. …

VII. Pour ces motifs il est statué comme suit :

- le contrat du premier juin 1946 est résilié à partir du 30 juin 1947 ;
- [Y] n'a pas continué, en violation du contrat, à appliquer, après la résiliation de celui-ci, les procédés qui font l'objet du contrat ;
- en conséquence, [X] est déboutée de ses demandes ;
- le total des frais et dépens de l'arbitrage, soit … francs français incombe à [X]

15. SENTENCE ARBITRALE Affaire CCI n° 762 (Paris, 1955)

Au nom de la Cour d'Arbitrage de la CCI, l'arbitre soussigné … Docteur en Droit, Référendaire suppléant au Tribunal de Commerce de Bruxelles, nommé arbitre unique par la Cour d'Arbitrage … pour procéder à un arbitrage entre :

[X] [Suisse] ci-après désignée [aussi] demanderesse … d'une part, et [Y] [France] ci-après désignée [aussi] première défenderesse, représentée par … et [Z] [France] ci-après désignée [aussi] seconde défenderesse … d'autre part, avons procédé à cet arbitrage conformément au compromis ci-après reproduit, dressé par la Cour d'Arbitrage le 18 mars 1954.

L'acte de compromis dit et stipule ce qui suit (Art. 15 du Règlement de Conciliation et d'Arbitrage de la CCI).

I. Il a été exposé et convenu ce qui suit :

Demande de [X]

[X] expose que les 17 et 26 décembre 1946, les trois [Sociétés] désignées ci-dessus ont convenu que [Y] et [Z] assureraient la transformation, la confection et la vente auprès de leur clientèle extérieure de [matières textiles] achetées par [X], que la marchandise devait rester la propriété exclusive de [X] jusqu'à la réalisation et le produit en être affecté à l'apurement du compte n° … ouvert auprès de [la Banque] pour l'achat [de matières textiles] par [X] ainsi qu'aux comptes commission de [X].

[X] affirme que bien qu'ayant accepté l'entière responsabilité de la fabrication et de la vente dans un délai de neuf mois, [Y] et [Z] n'ont pas tenu leurs engagements financiers à son égard. [X] réclame le paiement de la somme due augmentée des intérêts ainsi que les commissions selon le contrat et réserve tous dommages intérêts et autres dus.

Réponse de [Y] et [Z]

[Y] expose qu'en raison de l'impossibilité d'exécuter les contrats, un rapprochement a eu lieu avec [X] et qu'en août 1950 est intervenue une novation quant aux modalités de règlement de la marchandise. Ceci rend irrecevable la demande introduite par [X] …

[Z] soutient que la demande de [X] est irrecevable comme contraire à la réglementation de l'Office des Changes français, d'ordre public, et contraire aux stipulations du Code de Procédure Civile français. Il demande qu'il lui soit donné acte de son offre de restituer, sous réserve de tout justement ou remboursement de frais à débattre, et notamment de toute novation, soit les [matières textiles] litigieuses soit leur contre-valeur en francs français, suivant les stipulations réglementaires de l'Office des Changes.

Réplique de [X]

… [X] nie la prétendue novation invoquée par [Y] et s'élève contre l'affirmation de [Y] que cette dernière … se trouverait dans une situation particulière, pour souligner qu'elle est tenue conjointement et solidairement avec [Z] de l'exécution du contrat.

[X] affirme que l'irrecevabilité fondée sur le moyen tiré de l'ordre public ayant été examinée et rejetée par les sentences du 4 juillet 1951 et l'arrêt de la Cour d'Appel de Paris du 13 avril 1953, [Z] ne saurait s'en prévaloir. Par ailleurs, [X] estime que l'offre du [Z] d'une restitution des [matières textiles] ou de leur contre-valeur ne peut être prise en considération.

[X] conclut au paiement de la somme due augmentée des intérêts, soit au 30 septembre 1953, frs. suisse : … paiement à effectuer soit en francs suisses soit en équivalent de cette somme en francs français au cours du jour du règlement, ainsi qu'au règlement de la commission stipulée dans le contrat, sous réserve des dommages intérêts et autres dus.

Duplique de [Y]

[Y] estime que le fait pour [X] de n'avoir répondu que le 17 novembre 1953 aux mémoires des défenderesses du 8 avril 1952, entraîne l'application de l'article 14 du Règlement de Conciliation et d'Arbitrage de la CCI ou, à défaut, des dispositions du Code de Procédure Civile concernant l'expiration des compromis …

En conséquence, la législation des changes étant d'ordre public, [Y] estime que l'arbitre ne peut que décliner sa compétence par application de l'article 1004 du Code de Procédure Civile.

Subsidiairement, [Y] maintient qu'une novation a eu lieu …

L'arbitre se conformera pour la procédure au Règlement de Conciliation et d'Arbitrage de la CCI et statuera définitivement en fait et en droit. L'arbitre aura pour mission, en tenant compte des mémoires et pièces versés au dossier, des conclusions formulées par les parties, et d'une manière générale, de toutes les circonstances de la cause :

1. de se prononcer sur la recevabilité de la demande ;
2. dans l'affirmative :
   - de dire et juger si la convention … a été exécutée de part et d'autre ;
   - de déterminer en conséquence les obligations contractuelles des parties et de faire droit en tout ou partie à leurs conclusions ;
3. de procéder à toutes décisions, condamnations et déboutements qui, partant, s'imposent ;
4. de déclarer à qui incombera la totalité des frais et dépens de l'arbitrage, y compris les honoraires que la Cour allouera à l'arbitre, ou dans quelle proportion les dits frais et dépens seront partagés entre les parties.

L'arbitre devra rendre sa sentence dans un délai de soixante jours qui commencera à courir cinq jours après l'envoi du dossier par le Secrétariat Général de la Cour. Les parties dispensent l'arbitre de déposer la sentence au greffe du tribunal, sauf réquisition de l'une d'entre elles.

Elles déclarent en outre qu'elles considèrent la sentence à intervenir comme définitive et renoncent à l'attaquer par les voies de recours auxquelles elles peuvent valablement renoncer et qu'elles l'exécuteront. L'acte de compromis d'arbitrage ci-dessus reproduit fut régulièrement présenté à la signature de chacune des parties, mais seule [X] y apposa la sienne.

II. Audience arbitrale

En conformité avec l'article 18(3) du Règlement de Conciliation et d'arbitrage, l'arbitre précité, ayant pris les convenances des conseils représentant les parties, les invita à comparaître à la séance arbitrale qui se tint au siège de la CCI, 38, Cours Albert Ier à Paris, le vendredi 10 décembre 1954 à 10 heures. …

Les conseils des parties exposèrent leurs moyens et développèrent leurs répliques et dupliques. Les conseils de [Y] et [Z] déclarèrent qu'ils n'acceptaient de comparaître à l'audience arbitrale que par courtoisie envers l'arbitre, mais sous toutes réserves quant à sa compétence. Les mêmes conseils furent autorisés à adresser à l'arbitre, après plaidoirie, des notes complémentaires, moyennant communication à [X].

Les débats furent alors déclarés clos et la cause tenue en délibéré.

III. Sentence

Vu les pièces et documents produits ; Après avoir entendu à l'audience du 10 décembre 1954 les conseils des parties et après en avoir délibéré ;

Attendu [qu'en vertu des contrats] [X] a confié à [Y] et à [Z] la transformation, la confection et la vente auprès de leur clientèle extérieure de [matières textiles] achetées par [X] ; que la marchandise devait demeurer sa propriété exclusive jusqu'à réalisation et le produit en être affecté à l'apurement [du compte] ouvert auprès de la [Banque] ou de ses correspondants à l'étranger pour y être réparti conformément aux directives ci-après :

a. apurement à due concurrence du compte n° …
b. versement de la commission au crédit de [X] à la [Banque],
c. versement du solde sous déduction des frais et débours, conformément aux instructions de [X] ;

Attendu que l'article 6 des mêmes contrats prévoyait, au profit de [X], que la commission précitée serait calculée à raison de 2% du produit brut des réalisations, pour autant qu'il soit porté au crédit de [X] dans les six mois à partir du paiement de la marchandise brute, pour chaque mois ou fraction de mois supplémentaire ladite commission étant augmentée de 30% ;

Attendu, enfin, qu'après avoir défini, en son article 7, la nature des débours que la demanderesse était autorisée à porter en compte, le contrat dispose, en son Article 8, que l'entière responsabilité de la fabrication et de la vente des marchandises dans un délai qui ne devra pas excéder neuf mois de la date à laquelle les dites marchandises seront parvenues en France incombe à [Y] et à [Z], ce qui signifie, selon l'interprétation qu'en donne le contrat lui-même, qu'à l'issue de ce délai de neuf mois, le compte devra être intégralement apuré sous la responsabilité des deux [Sociétés] précitées ;

Attendu qu'il n'est pas contesté que [X] a effectivement acheté [les matières textiles] qu'elle en a payé le prix et qu'elles sont parvenues à destination selon les instructions données par [Y] et [Z] ; que la seconde défenderesse se reconnaît expressément débitrice des [matières textiles] ou de leur contre-valeur ;

Attendu que [X] se déclare, en conséquence, créancière d'une somme qui, au 30 septembre 1953, s'élève à … Frs. suisses dont le paiement sera effectué, selon une option qu'elle laisse à [Y et Z], soit en francs suisses, soit en équivalent de cette somme en francs français au cours du jour du règlement, somme à majorer des intérêts et de la commission stipulée dans le contrat, sous réserve des dommages et intérêts et autres dus ;

1. Sur la recevabilité.

Attendu que [Y] et [Z] résistent à la demande en invoquant « *in limite litis* », l'incompétence de la Cour d'Arbitrage de la CCI et de l'arbitre désigné par elle motifs pris :

- de l'expiration du délai prévu à l'article 112 du Code de Procédure Civile français et 14 du Règlement de Conciliation et d'Arbitrage de la CCI,
- de la nullité de la clause compromissoire en une matière communicable au Ministère public, parce qu'intéressant l'ordre public (art. 81 et 1004 du Code de Procédure Civile français),
- d'une novation au contrat originaire qui serait intervenue et qui rendrait l'action non seulement sans fondement, mais aussi non recevable, parce que la nouvelle convention avenue entre parties … ne contiendrait pas la clause compromissoire déférant les litiges éventuels à l'appréciation de la Cour d'Arbitrage de la CCI.

Sur le premier moyen

Attendu que les parties n'ayant point déterminé, par le libre jeu de leurs volontés, la loi nationale qui serait applicable au contrat qu'elles souscrivaient, il échet de choisir la loi du pays où le contrat doit recevoir son exécution, c'est-à-dire, en l'espèce, la loi française ;

Attendu qu'aux termes de l'article 1012 du Code de Procédure Civile français, le compromis finit … par l'expiration du délai stipulé ou de celui de trois mois, s'il n'en a pas été réglé ; Attendu qu'il ressort de la combinaison des articles 1007 et 1012 du Code précité que la durée du compromis peut dont être conventionnelle ou légale ; qu'il en ressort que les parties peuvent donc fixer, comme elles l'entendent, la durée du compromis ;

Attendu qu'il n'est pas contesté que la clause compromissoire, insérée dans contient référence au Règlement de Conciliation et d'Arbitrage de la CCI, lequel attribue à la Cour d'Arbitrage, en son article 14, le droit de fixer la durée de la validité des pouvoirs accordés aux arbitres ; que faisant application de cet article 14, la Cour d'Arbitrage a fixé le point de départ du délai, dans lequel l'arbitre doit statuer, au cinquième jour qui suit l'envoi du dossier par le Secrétaire Général de la Cour et en a fixé la durée, conformément à la règle générale inscrite à l'article 14.2°, à 60 jours depuis l'envoi du dit dossier ;

Attendu que cet envoi eut lieu le 3 novembre 1954 et partant, que les pouvoirs de l'arbitre prenaient normalement fin le 7 janvier 1955 ; mais attendu que le Règlement de Conciliation et d'Arbitrage, auquel il est fait expressément référence dans le compromis, en dépit de son silence sur cette faculté particulière, permet à la Cour d'Arbitrage de prolonger le délai selon les circonstances ;

Attendu que par lettre du 30 décembre 1954, l'arbitre fut informé qu'en sa session du 15 décembre 1954, la Cour d'Arbitrage avait prolongé, jusqu'à fin janvier 1955, le délai pour le prononcé de la sentence ; que ce délai fut ensuite régulièrement prolongé d'abord jusqu'à fin février, puis jusqu'à fin mars 1955 par la Cour, en ses sessions du 12 janvier et du 16 février 1955.

Attendu qu'il suit de ces considérations que le compromis, bien que daté du 18 mars 1954, conserve, par l'application même du Règlement de Conciliation et d'Arbitrage que les défenderesses invoquent, mais erronément, sa pleine efficacité, que le premier moyen doit donc être écarté ;

Sur le deuxième moyen

Attendu que les défenderesses soutiennent que la convention litigieuse déférée à l'appréciation de l'arbitre intéresse l'ordre public et partant, qu'étant sujette à communication au Ministère public, la clause compromissoire qui en est l'accessoire s'en trouve invalidée par application de l'article 1004 du Code de Procédure Civile ;

Attendu que les défenderesses tentent de justifier pareil soutènement en faisant valoir que le mécanisme du contrat litigieux s'analysant, en définitive, en une vente sous une condition suspensive des [matières textiles] importées en admission temporaire, intéresserait la réglementation des changes, laquelle est en soi d'ordre public et partant, rendrait nulle « à priori » la clause compromissoire et obligerait, dès lors, l'arbitre saisi à se déclarer incompétent, sans même être autorisé à statuer sur sa propre compétence (Cass. 29/11/50 ; *Gaz. Pal.* 2/2/51) ;

Attendu qu'il est, cependant, de doctrine et de jurisprudence que les arbitres tenant leurs pouvoirs de juger de la volonté des parties ont le devoir de vérifier si, eu égard aux termes de la clause compromissoire, l'action introduite devant eux entre dans le cadre de leur compétence (Paris 3/12/31, Gazette du Palais 1932, 1, 415 ; Cass. Franç. 22/2/49, Sir. 1949, T. 73 ; *Rev. trim. dr. civ*. 1949, 445) ;

Attendu que c'est de la sorte qu'il faut interpréter l'expression courante selon laquelle les arbitres ont le droit, avant de juger au fond, de statuer, sous le seul contrôle des tribunaux ordinaires, sur la validité de leur investiture (*Chauveau*, tome 4, n°3.281 ; Mongalvy, n°172 ; *Garsonnet*, tome 8, n°278 ; Hebrand, Le recours à l'arbitrage, *Le chef d'Entr*., 1952, 359) ;

Attendu qu'il incombe, dès lors, à l'arbitre de se prononcer sur l'exception d'incompétence fondée sur l'article 1004 du Code de Procédure Civile qui lui est opposée ; Attendu que les défenderesses dans leurs notes et mémoires s'efforcent d'établir que certaines dispositions du contrat litigieux relatives au règlement des ventes effectuées par les défenderesses transgresseraient certaines dispositions de la réglementation des changes, mais n'administrent pas une preuve suffisante, du fait que la contestation relative au contrat devrait être nécessairement communiquée au Ministère public, parce qu'intéressant l'ordre public ;

Attendu qu'il n'apparaît pas que l'ordre public soit intéressé par les dispositions que les parties ont contractuellement arrêtées, lesquelles supposent que le marché litigieux ne pourra être exécuté qu'en respectant la réglementation des changes et tant qu'il n'est pas demandé aux arbitres de décider en infraction à cette réglementation ou de se substituer à l'administration compétente pour ordonner des règlements dont celle-ci est maîtresse ;

Attendu qu'il suffit de constater que selon la convention des parties, ainsi qu'il sera exposé plus bas, le règlement litigieux pouvait être effectué à un compte ouvert en France, en francs français ; Attendu que les défenderesses soutiennent encore que la convention litigieuse vient également transgresser l'ordre public, parce qu'elle serait contraire à la réglementation des changes contenue dans le 1e décret du 15 juillet 1947 (art. 27) ; qu'aucun transfert de fonds conservés à l'étranger et provenant de la revente des marchandises à l'étranger, ou en raison d'indemnité pour inexécution du contrat n'eut pu être autorisé, parce que cette opération eut violé l'article 5 du décret du 9 septembre 1939 ; que la procédure Imex, ressortant d'un avis du Ministère de l'Economie Nationale aux importateurs et exportateurs (J.O. du 30/5/46), prévoyait que les demandes d'autorisation d'importation recevraient une suite favorable, pour autant que l'importateur s'engageât à réexporter, après transformation, dans un délai aussi bref que possible, l'intégralité du produit importé, et qu'en outre, il fournît les garanties suffisantes de bonne fin de l'opération ; que, dès lors, méconnaissant ces diverses dispositions impératives ou interprétatives, le contrat et la clause compromissoire qui en dépend étaient frappés d'une caducité entraînant l'incompétence de l'arbitre ;

Attendu qu'elles appuient aussi leurs dires sur une injonction de l'Office des Changes du 3 mars 1950, adressée à [Y], disant que la marchandise étant demeurée propriété suisse, il lui appartenait de la mettre à la disposition de la demanderesse en facturant le montant des travaux à façon effectués par ses soins ;

Attendu que pareille injonction ne contredit pas les clauses du contrat qui prévoyait que le produit des réalisations pourrait être liquidé entre les mains des correspondants de la [Banque], à l'étranger, donc en France ;

Attendu que, tout en prenant en considération l'article 1351 du Code Civil et l'article 1022 du Code de Procédure Civile, il a été jugé, en des termes dénués d'équivoque, par la Cour d'Appel de Paris, dans un arrêt du 13 avril 1953, statuant sur le recours formé par la seconde défenderesse contre les sentences prononcées le 4 juillet 1951 que la convention conclue entre parties et dont les clauses étaient absolument semblables à celles actuellement déférées à l'arbitre, n'étaient pas, en soi, en contrariété avec l'ordre public interne français, ni avec la réglementation sur le contrôle des changes qu'elle aurait, au contraire, pu être exécutée sans que son exécution constituât une infraction à ladite réglementation ;

Attendu que la décision prononcée par cette haute juridiction faisait justice de cet argument en ne se reposant pas seulement sur la carence des défenderesses quant à l'administration de la preuve des autorisations qu'elles eussent dû demander à l'Office des Changes, mais sur l'analyse du contrat lui-même, faite par ses soins ;

Attendu que se trouve de la sorte réduite à néant, l'exception d'incompétence tirée de l'article 1004 du Code de Procédure Civile ;

Sur le troisième moyen

Attendu que le moyen tiré d'une motivation éventuelle du contrat originaire du 13 octobre 1946 ne saurait porter atteinte à la compétence de l'arbitre ; qu'en effet, la novation invoquée ne concerne que le mode de paiement des sommes dues par les défenderesses, mais n'affecte nullement la validité et l'efficacité du contrat lui-même dont la clause compromissoire forme un des accessoires ; que le moyen n'est donc pas fondé ;

2. Quant au fond

Attendu que les défenderesses allèguent que la correspondance échangée entre parties depuis 1947 jusqu'au seuil de l'année 1952 et notamment la lettre adressée par [X] à la première défenderesse [en] décembre 1950, aurait conféré un effet novatoire aux deux contrats précités par la survenance de deux éléments nouveaux :

- La prolongation de la durée d'exécution du contrat, autrement dit, le délai de fabrication et de vente des [matières textiles transformées] et
- La fixation de modalités spéciales de règlement de sommes dues ;

Attendu qu'il est constant qu'ayant égard aux circonstances économiques défavorables de l'époque, aux difficultés d'exportation et au coût imprévu de transformation des marchandises fournies, la demanderesse accorda effectivement plusieurs sursis aux défenderesses et envisagea de modifier, pour la première, les bases de calcul de la commission ; qu'après avoir introduit sa requête en arbitrage auprès de la CCI le 24 janvier 1949, la demanderesse, sur la foi de certaines promesses, en différa le déclenchement jusqu'au début de l'année 1952 ;

Attendu que les accommodements consentis par la demanderesse, que le mobile en soit sa bienveillance ou le désir de conserver de bonnes relations commerciales avec ses clientes, n'eurent d'autre portée que de permettre aux défenderesses, en tenant compte de certains évènements imprévus d'elles lors de la conclusion du contrat, de s'acquitter, néanmoins, de leurs obligations contractuelles sans que l'objet essentiel de la convention, son économie générale et ses autres clauses fussent altérés en quelque manière de ce chef ;

Attendu que pareille interprétation gouverne également les arrangements intervenus entre parties quant au mode de paiement, en vertu desquels aurait été substitué au règlement à l'étranger et en monnaie étrangère, de la contre-valeur des [matières textiles], un règlement en France après rapatriement des devises, sous forme de crédit ouvert en banque en faveur de [X] à concurrence du montant des ventes effectivement réalisées ;

Attendu qu'il ressort des documents versés aux dossiers que la demanderesse a effectivement accepté de recevoir en France, en francs français, les deniers provenant du règlement de son compte, en application du contrat et conformément aux dispositions impératives de la règlementation des changes ;

Attendu que, sous cette forme, la demanderesse accepta, par une lettre du … donnant suite à celle que lui adressait la première défenderesse, le … , tant en son nom qu'en celui de ses co-contractants

> « qu'un compte ouvert sous le nom des défenderesses auprès d'une banque française puisse être régulièrement transféré au nom de la … demanderesse, éventuellement sous forme de compte bloqué qui serait entièrement mis à sa disposition après l'accomplissement des formalités réglementaires, le transfert des fonds à l'étranger devant ensuite s'effectuer avec l'accord de l'Office des Changes » ;

… Attendu que la demanderesse soutient, à bon droit, que la seule modification apportée au contrat consiste, en définitive, dans l'ouverture au nom des défenderesses d'un compte bloqué à son profit … compte qui serait entièrement mis à sa disposition après l'accomplissement des formalités règlementaires auprès de l'Office des Changes ; qu'il s'agit, en l'occurrence, d'un compte d'attente individuel, provisoirement ouvert au nom d'un résident, dont l'ouverture n'est subordonnée à aucune autorisation de l'Office des Changes, appelé à recevoir les sommes en francs revenant à leur titulaire et dont l'Office des Changes n'a pas autorisé, ou n'a pas été invité à autoriser l'inscription à un compte étranger ;

Attendu qu'il s'ensuit que la demanderesse n'a jamais entendu que le montant des crédits portés à ce compte fût limité au produit des ventes réalisées par les défenderesses pour constituer un apurement définitif des obligations de celles-ci envers elle ; que si certains comptes bancaires ont effectivement été ouverts par la deuxième demanderesse au nom des personnes connues d'elle sans participation préalable de [X] à cette mesure, cette dernière n'a pas été tenue fidèlement au courant de leur fonctionnement et n'a connu, ainsi que l'attestent les lettres versées au dossier, que sur sa propre demande les sommes qui y avaient été versées ;

Attendu qu'il ressort des considérants qui précèdent que les résultats des négociations intervenues entre parties quant au mode de règlement des dettes contractées par les défenderesses, n'a, dès lors, eu qu'une portée limitée à cet objet, mais n'a nullement emporté une novation quelconque des contrats originaires, pour le surplus ; Attendu qu'au demeurant, la novation invoquée ne se serait opérée selon aucun des modes prévus par l'article 1271 du Code Civil ; qu'en outre la novation ne se présume point et que la volonté de l'opérer doit résulter clairement d'un acte (article 1273 du Code Civil) ;

Attendu que les défenderesses sont donc mal fondées à soutenir qu'une dette nouvelle se serait substituée à l'ancienne, laquelle se serait éteinte ou que les défenderesses se seraient acquittées de l'intégralité de leurs obligations envers la demanderesse par les versements déjà effectuées au compte ouvert, en application de l'accord confirmé par la lettre du … ;

Attendu que les obligations contractées par les défenderesses n'auront, dès lors, été entièrement exécutées, conformément aux contrats originaires, quant à leur étendue, leur montant et quant aux modalités de paiement, telles qu'elles furent réglées entre parties selon la correspondance déjà mentionnée, que lorsque la demanderesse aura été dûment créditée, dut-ce, en France, en franc français, du montant total des sommes auxquelles elle a droit par l'effet [des contrats].

3. Sur les objections particulières formulées par la première défenderesse

… Attendu que la façon dont la première défenderesse s'est acquittée de ses engagements à l'égard de la deuxième défenderesse est entièrement étrangère au contrat dont l'arbitre est saisi dans le cadre du présent compromis ;

Attendu qu'en effet, par les conventions souscrites … les défenderesses se sont engagées conjointement envers la [X] et dans les mêmes termes ; que le respect de cette convention s'impose, dès lors, à la première défenderesse au même titre qu'à la seconde, quelle que soit la ponctualité qu'elle ait apporté, par ailleurs, à l'accomplissement de ses engagements à l'égard de la deuxième défenderesse ; qu'à supposer que les errements de cette dernière lui aient occasionné un tort quelconque, il lui appartient de se pourvoir, comme de droit ;

Attendu que les moyens invoqués par la première défenderesse manquent, dès lors, de fondement tant en fait qu'en droit ;

4. Sur la solidarité

Attendu que la demanderesse postule que les défenderesses soient condamnées conjointement et solidairement ; Attendu que la convention litigeuse ne contient aucune allusion à une obligation solidaire entre les défenderesses ; Attendu qu'il est vrai que l'article 1202 du Code Civil dispose que la solidarité ne se présume point, il est, au contraire, conforme à l'esprit du droit commercial, ici applicable, de la présumer ;

Attendu que la majorité de la jurisprudence belge estime qu'à défaut de convention contraire, la solidarité est de droit entre débiteurs tenus d'une même obligation commerciale : voyez Commerce, Courtrai, 1er juin 1907, J.C. Flandres, n°3275 ; Commerce, Gand, 28 avril 1925, J.C Flandres, 1926, n°4629, Bruxelles, 8 juin 1929, P.P. 1930, 10 ; que les auteurs français enseignent même que la solidarité se présume entre co-débiteurs en vertu d'un usage antérieur à la rédaction du Code du Commerce et que les considérations propres à la sauvegarde du crédit commercial ont maintenu depuis lors ; que le créancier fait foi à ses débiteurs parce qu'il escompte obtenir d'un seul d'entre eux le paiement complet (Colin et Capitant, *Droit civil français*, tome II, P. 181 ; Lyon-Caen n° 381, Pothier, *Traité des obligations* n°266) ; que la Cour de Cassation de France a sanctionné cette doctrine par un arrêt du 20 octobre 1920 (D.P. 1920, I, 161) ;

Attendu qu'il échet, en conséquence, de condamner solidairement les défenderesses.

Par ces motifs,

Nous arbitre, statuant contradictoirement et en dernier ressort,

- Rejetant toutes autres conclusions plus amples ou contraires,
- Nous déclarons compétent dans les limites du compromis,
- Disons la demande recevable et fondée,
- Condamnons les défenderesses à payer conjointement et solidairement à la demanderesse soit la somme de … Frs. suisses, soit l'équivalent de cette somme en francs français au cours du jour du règlement, majorée des intérêts judiciaires au taux de 5 ½% l'an depuis le 18 mars 1954, sous déduction des sommes déjà payées,
- Disons que, conformément à l'accord complémentaire conclu entre parties, les sommes restant dues seront versées en francs français, au profit de la demanderesse à un compte d'attente ouvert auprès d'une banque en France,
- Condamnons les défenderesses à supporter la totalité des frais et dépens de l'arbitrage, y compris les honoraires et frais de l'arbitre, s'élevant à la somme de … Frs. Français.
- Déclarons par la présente sentence exécutoire par provision nonobstant tout recours et sans caution.

16. SENTENCE ARBITRALE Affaire CCI n° 768 (Paris, 1954)

Au nom de la Cour d'Arbitrage de la CCI, je soussigné [Avocat américain] nommé arbitre par la Cour d'Arbitrage en sa session du 18 novembre 1953, pour procéder à un arbitrage entre **1.** [X] [France], ci-après désignée [demandeur] d'une part, et **2.** [Y] [Pays d'Asie] ci-après désignée [défendeur] d'autre part,

Avons assuré l'arbitrage de cette cause et rendons la sentence suivante :

Conformément au Règlement de Conciliation et d'Arbitrage de la CCI, le soussigné nommé arbitre unique dans l'affaire sous rubrique, ainsi que dans les affaires connexes … a notifié la tenue à la CCI, à Paris, le lundi 18 janvier 1954. La CCI reçut en réponse à cette notification une lettre du défendeur par l'entremise de son avoué, datée du 5 janvier 1954, laquelle rappelait qu'un procès était actuellement en cours devant [un tribunal national de la juridiction du défendeur] entre les deux parties au présent arbitrage et qu'en conséquence cet arbitrage était illégal et qu'il n'y prendrait pas part.

Le 18 janvier 1954, l'audience fût tenue à la CCI, comme prévu. Etaient présents : … [Mr. A] Directeur de [X], accompagné de … Personne ne s'étant présenté pour le défendeur, [Y], qui d'ailleurs avait indiqué dans sa lettre ci-dessus mentionnée qu'il ferait défaut, l'arbitre décida, en vertu de l'Article 18(3) du Règlement de Conciliation et d'Arbitrage [de 1922, tel que révisé en 1947], que l'arbitrage aurait lieu malgré l'absence du défendeur.

Après avoir examiné les pièces au dossier de la CCI, ainsi que celles présentées par le demandeur, et ayant tenu compte des arguments que le défendeur aurait vraisemblablement présentés s'il avait choisi d'être présent à l'arbitrage, l'arbitre a constaté ce qui suit :

Exposé des faits

Voici les faits brièvement exposés :

En novembre 1946, [Mr. B], représentant [X], ainsi que de [C] et [D] a … entreprit des négociations [en Asie] avec le défendeur en vue de prendre ce dernier comme agent exclusif pour la vente des produits fabriqués par ces sociétés. Un contrat préliminaire fût signé à cette époque, et il fût décidé que des discussions complémentaires auraient lieu à Paris. [E] et [F], représentant [Y] se rendirent donc à Paris en décembre 1946, où fût signé, le 27 décembre 1946, un nouveau contrat remplaçant celui qui avait été établi [dans un Pays en Asie] [« contrat »].

Aux termes du [contrat], [Y] devenait Agent exclusif pour la vente des [produits] dans [un Pays d'Asie]. Ce contrat était fait pour une durée de

> « trois années entières, à courir du 1er janvier 1947 au 3 décembre 1949 ».

Il se renouvelait par tacite reconduction, sauf notification par l'une des parties ou l'autre. Aux termes de l'Article 4 du contrat, [Y] était dans l'obligation d'acheter une certaine quantité minimum de produits de [X] et devait verser une indemnité à [X] pour le cas où ce minimum ne serait pas atteint. Il était également stipulé qu'[Y] fabriquerait certains produits [X] pour les vendre dans les territoires ci-dessus indiqués, en payant une redevance de 12% sur le montant des ventes des produits fabriqués.

D'autre part, [X] devait remettre à [Y], à titre gratuit, des

> « articles de publicité, échantillons et panonceaux publicitaires pour la vente des produits [X] ».

[Y], de son côté, devait investir certaines sommes pour la publicité des produits [X] dans les territoires ci-dessus indiqués. Le contrat n'indique cependant pas à qui incombait la responsabilité de l'organisation des ventes dans ces territoires, ce qui, comme nous le verrons plus loin, est un argument principal de cette affaire.

En vertu de l'article 6 du contrat, [Y] devait effectuer le paiement des produits [X] achetés contre remise de connaissements, etc… dans certains cas, par l'ouverture de lettres de crédits à Paris. Au même moment, le 27 décembre 1946, [Y] signa des contrats semblables avec [B] et [C] … A la suite [du contrat], [X] expédia à [Y] des marchandises, d'une valeur de £ … devant être vendues dans [un Pays d'Asie] … Par une modification des termes du contrat, il fût convenu qu'[Y] paierait au comptant 25% de la valeur des produits expédiés, le restant devant être payé par trois traites acceptées d'un montant identique, payables les 3 août 1947, 3 novembre 1947, et 3 février 1948 ([C] et [D] avaient également expédié des marchandises à [Y] et les mêmes arrangements pour le paiement avaient été conclus avec ces deux sociétés).

Le paiement au comptant fût effectué et les traites à échéance aux dates ci-dessus indiquées, signées par [Y]. Le montant total des 3 traites tirées était de £ … car elles couvraient non seulement les sommes dues à [X], mais également les sommes dues aux deux autres sociétés. Ces traites, bien que présentées à leurs dates d'échéance respectives, ne furent jamais honorées. La somme que [X] réclame comme lui étant due sur ces 3 traites est de £ … D'après notre dossier, [Y] n'a jamais contesté l'exactitude des sommes.

Le 20 Septembre 1948, l'avoué de [Y] écrivit à [X] que

> « en considération des restrictions imposées par le Gouvernement en ce qui concerne l'importation de produits étrangers, spécialement en provenance des pays n'ayant pas la livre-sterling comme monnaie d'échange, ainsi que d'autres circonstances propres à ce pays, le [contrat] ne peut plus rester en vigueur. Aussi, veuillez bien le considérer comme nul et résilié ».

Lorsque la première traite revint impayée, [X] porta l'affaire devant la CCI pour un arbitrage, en vertu de l'Article 13 du [contrat], lequel stipulait que :

> « Tout litige (« litigation ») en ce qui concerne la validité, l'interprétation ou l'exécution du présent contrat sera définitivement tranché à Paris, conformément au « Règlement de Conciliation et d'Arbitrage » de la CCI, 38 Quai Albert Ier, Paris, par un ou plusieurs arbitres nommé(s) conformément à ce Règlement. »

Les Sociétés [C] et [D] demandèrent également un arbitrage. En 1950, [Y] introduisit une action, devant [un tribunal national] contre [X] et les sociétés [E] et [F], exposant les termes des contrats avec ces trois maisons et déclarant qu'il avait été amené à conclure ces contrats par des manœuvres frauduleuses de [Mr. A], directeur de ces trois maisons, Ce dernier avait prétendu, affirmait [Y], que [Mr. B] représentant en Asie de ces trois sociétés, alors que cependant aucune d'elles, pas plus que [Mr. B], n'avaient jamais eu l'intention d'une telle organisation … [Y] demanda [au tribunal national] de déclarer les contrats illégaux par suite de ces manœuvres frauduleuses, de les annuler et d'interdire aux défendeurs toute activité engagée sous toute forme en vertu desdits contrats.

[Y] demandait également que les défendeurs soient condamnés à lui verser la somme de … qu'il avait pu débourser pour les marchandises qui lui avaient été expédiées, ainsi que les intérêts et dépens.

Dans une note écrite [au tribunal national] [Y] disait avoir découvert lesdites manœuvres frauduleuses le ou aux environs du 17 juin 1947. Il est intéressant de noter que la lettre qu'adressa l'avoué de [Y] à [X] le … avisant [X] que le contrat était « nul et résilié » ne fait pas mention de telles manœuvres frauduleuses.

En dehors de sa plainte pour manœuvre frauduleuses, il n'apparaît pas qu'[Y] accuse [X] de violation d'une clause quelconque du contrat. Il pourra être noté que [Y] a déclaré devant [le tribunal national] que les marchandises qui lui ont été expédiées par [X] ainsi que par les autres maisons n'avaient pas été commandées par lui, mais ceci ne paraît pas avoir été affirmé comme moyen de défense, et en tout cas il apparaît que [Y] a renoncé à dénoncer toute irrégularité en ce qui concerne ces expéditions en les acceptant et en payant ¼ du prix d'achat ainsi qu'en acceptant des traites pour la différence.

[X], ainsi que les autres sociétés, comparurent devant [le tribunal national] pour défendre leurs intérêts. Ils demandèrent un « Stay of Suit » conformément à [la loi d'arbitrage de la juridiction d'Y], en considération de la demande d'arbitrage faire à Paris. [Le tribunal national] refusa d'accorder le « Stay of Suit » dans des attendus très soigneusement motivés, auxquels il sera référé ci-après ...

L'acte de compromis demande que l'arbitre réponde aux questions suivantes :

1. D'examiner sa compétence à la lumière des observations formulées tant par la défenderesse que par [le tribunal national de la juridiction de défendeur] saisi par celle-ci ;
2. Dans le cas où il s'estimerait compétent, de dire et juger s'il y a lieu de faire droit, en tout ou partie, aux cinq chefs de la demande et, partant, de procéder à toutes décisions, condamnations, et déboutements qui s'imposeront ;
3. De déclarer à qui incomberont les frais et dépens de la procédure d'arbitrage y compris les honoraires que la Cour allouera à l'arbitre, ou dans quelle proportion lesdits frais et dépens seront partagés entre les parties.

Conclusions

1. Sur la compétence de l'arbitre.

L'arbitre conclut que la clause compromissoire, objet de l'Article 13 du contrat, est valable et produit tout son effet, que le différend qui oppose les parties et qui est le fond de cette affaire est bien de ceux que les parties ont convenu de soumettre à arbitrage et que l'arbitre est compétent.

C'est un principe bien connu que, sauf loi contraire, presque tous les différends peuvent être soumis à arbitrage. Donc si la clause d'arbitrage le stipule, l'arbitre peut très bien déterminer si le contrat contenant la clause d'arbitrage est valide, et dans le cas où le contrat ne le serait pas, par suite de manœuvres frauduleuses, si la clause d'arbitrage, elle, est valable.

La clause d'arbitrage contenue dans l'Article 13 du [contrat], mentionne clairement l'arbitrage en cas de différend sur la « validité ou interprétation ou exécution » du contrat. Il est exact que l'Article 13 emploi le mot « litige » (litigation) au lieu des mots plus usités de « différend » ou « contestation », avoir recours aux tribunaux et qu'en utilisant le mot « litigation » (litige) l'intention des parties n'était pas de demander un arbitrage seulement après qu'une action en justice ait été introduite. Ainsi que [le tribunal national] l'a souligné, le contrat du 27 décembre 1946 a été rédigé en langue anglaise par des personnes qui, de toute évidence, n'avaient pas la pratique courante de cette langue. Un certain nombre de constructions grammaticales paraissent avoir été traduites du français. Le mot « litigation » (tel qu'il y figure en anglais) peut très bien avoir été traduit du mot français « litige » qui a un sens plus général que le mot anglais « litigation ». L'arbitre est donc arrivé à la conclusion que le mot « litigation » tel qu'il est utilisé en anglais dans l'Article 13 du contrat est synonyme de « contestation » ou « différend » (dispute) (différence).

En attaquant le contrat pour manœuvres et allégations frauduleuses qui auraient été faites par [X], [Y] attaque manifestement la « validité du contrat ». Il ne fait aucun doute que l'Article 13 du contrat s'applique précisément à ce différend.

Devant [le tribunal national] [Y] a prétendu que l'arbitrage ne pourrait avoir lieu, car si le contrat était nul, la clause d'arbitrage était également nulle. [Le tribunal national] a rejeté cet argument ainsi que d'autres présentés par [Y]. L'arbitre et arrivé à la même conclusion ; c'est-à-dire qu'il a le pouvoir de décider sur la question de validité du contrat. Si [le tribunal national] a néanmoins refusé un « Stay of Suit », c'est seulement parce qu'elle a pensé que si l'arbitre devait déclarer le contrat nul par suite de manœuvres frauduleuses il serait dans l'incapacité de satisfaire à la demande de [Y], à savoir en l'espèce le remboursement de ...

Il est donc clair que ce dilemme, prévu par [le tribunal national] aurait été résolu si l'arbitre jugeait que le contrat en son entier était valide. Ainsi qu'il le sera démontré plus loin, l'arbitre est arrivé à cette conclusion qu'aucune manœuvre frauduleuse n'a été commise et que le contrat est valable en son entier.

Une action en justice n'était pas l'unique issue offerte à [Y]. Il n'a pas jugé bon de prendre part à l'arbitrage, mais l'aurait-il fait, et aurait-il fait une demande reconventionnelle pour la somme de … l'arbitre n'en aurait pas moins été qualifié pour connaître cette demande reconventionnelle.

Il est de plus évident que [le tribunal national] bien que rejetant une demande de remise, n'avait pas l'intention de mettre obstacle à l'arbitrage en cours car elle aurait alors fait droit à la requête de [Y] demandant qu'il soit interdit aux sociétés françaises d'agir en vertu du contrat, de quelque manière que ce soit. Au contraire, elle a expressément reconnu la compétence de l'arbitre en ce qui concerne les différents problèmes traités ci-après.

Il est également clair que le défaut du défendeur à l'arbitrage ne limite en aucune façon la compétence de l'arbitre. L'article 13 du contrat stipule que l'arbitrage aura lieu « conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale ». Autrement dit, les termes du « Règlement » sont acceptés dans le contrat lui-même. Ces dispositions, et particulièrement les Articles 16 et 18 du Règlement, règlent la procédure lorsque le défendeur refuse ou néglige de prendre part à l'arbitrage et cette procédure a été soigneusement appliquée dans le cas présent.

Il peut être soutenu que puisque [X] s'est présentée devant [le tribunal national] à la suite de l'action intentée, elle ne devrait pas insister maintenant pour obtenir une décision d'arbitrage. Si [X] avait été le Demandeur dans l'action intentée devant [le tribunal national] cet argument aurait pu avoir quelque valeur. Cependant, [X] a comparu dans cette action seulement pour défendre ses intérêts et plus particulièrement pour demander un « Stay of Suit », en raison de l'arbitrage en cours. Si [X] avait fait défaut, nous pouvons présumer qu'un jugement par défaut aurait été rendu à son encontre et admettre que sa comparution pourrait rendre l'arbitrage nul serait permettre à [Y] d'éviter la sentence arbitrale par le simple stratagème d'une action en justice.

2. Le fond de l'affaire

Puisque l'arbitre conclut à sa compétence et à la validité de la clause d'arbitrage, il s'agit d'aborder le fond du problème. Etant donné le défaut du Défendeur, l'arbitre s'est assuré des pièces figurant au procès intenté devant [le tribunal national] afin de connaître la nature des griefs de [Y] de même qu'il a examiné soigneusement la correspondance et les documents sui lui ont été présentés afin d'avoir l'idée la plus précise des arguments qui auraient pu être présentés par [Y] pour sa défense. [Y] a remis [au tribunal national] une note écrite, en date du … La base essentielle de sa réclamation est que [Mr. A], agissant pour le compte de [X] et des deux autres sociétés, a allégué frauduleusement que [Mr. B]

> « organiserait [en Asie] la vente [de produits] importés par [Y] »

et qu'en raison de ces allégations, [Y] s'est trouvé amené à signer le contrat de décembre 1946, et que

> « ni ces sociétés ni [Mr. A] lui-même n'avaient jamais eu l'intention d'organiser ainsi la vente desdits [produits], et que dans ces conditions les contrats étaient illégaux et nuls ».

Il aurait été évidemment plus indiqué pour [Y] de fournir plus de détails à ce sujet. Quand, comment et de quelle manière précise [X] était-elle obligée « d'organiser les ventes » et quelles sont exactement les promesses que [X] n'a pas tenues. Cette nébuleuse accusation n'a jamais été expliquée.

Il est intéressant de noter que le juge … a dit à la fin de son exposé, et après avoir refusé de donner son accord pour un « Stay of Suit » :

> « Je ne me déclare pas convaincu qu'il y ait même en apparence (*prima facie* case) de manœuvres frauduleuses et j'ai de graves doutes quant à la bonne foi (*bona fides*) du Plaignant ».

L'arbitre n'a pas connaissance des considérations qui amènent le juge … à avoir une telle opinion, mais il conclut après examen des faits et preuve en main qu'il n'y a pas trace de manœuvres frauduleuses de la part de [X] ou de quelqu'un agissant pour son compte. Le contrat écrit ne contient aucune clause stipulant que [X], ou ses agents ou employés sont requis d'organiser la vente des [produits] dans le territoire de [Y]. On peut même supposer que [Y], étant donné sa plus grande familiarité avec les conditions locales existantes et ses contacts dans les affaires locales, aurait été mieux qualifié … pour assumer la responsabilité de l'organisation des ventes. Reste l'hypothèse que [Y] ait

reçu des promesses qu'il ait pu s'attendre à être aidé dans l'organisation de ces ventes et que [Mr. B] se soit rendu [en Asie] avec l'idée bien arrêtée de remplir le rôle d'aide. Cependant, même ceci ne signifie pas qu'il y ait eu obligation assumée par [X] ou par [Mr. B] à cet égard.

C'est un principe constant que les participants d'un contrat doivent stipuler par écrit les clauses essentielles de ce contrat. Il est donc vraisemblable que si [X] avait assumé l'obligation d'organiser les ventes, cet engagement peut habituel aurait fait l'objet d'une clause spéciale dans le contrat. De toute façon, il faudrait qu'il y ait la preuve claire et convaincante qu'une obligation aussi importante ait été créée en dehors des termes écrits du contrat et l'arbitre n'a pas en sa possession une telle preuve. Bien plus, même si l'arbitre était convaincu – comme il ne l'est pas – que [X] ait pris verbalement l'engagement d'assumer la responsabilité de l'organisation des ventes dans le territoire, ceci n'amènerait pas nécessairement à la conclusion que [X] était fautive pour manœuvres frauduleuses mais plutôt pour simple rupture de contrat. Il y aurait manœuvres frauduleuses s'il pouvait être démontré, également au moyen de preuves claires et convaincantes, que [X] avait fait intentionnellement et en connaissance de cause des allégations frauduleuses afin d'inciter [Y] à signer le contrat. Il y a totale absence de telles preuves.

Etant donné qu'[Y] prétend que l'organisation des ventes aurait dû être faite par [Mr. B], l'arbitre a examiné avec attention toute la correspondance et les pièces ayant trait à [Mr. B], qui sont nombreuses. Il suffit de dire que tout ce qui peut être déduit de ces pièces est qu'on s'attendait à l'aide de [Mr. B] pour l'organisation des ventes … à condition que cette aide ne le gêne pas trop dans ses autres activités. Le fait, mentionné plus haut, que [Y] ait proposé à un moment donné à [Mr. B] de s'associer à son affaire … indique que [Y] traitait avec lui en raison de ses capacités personnelles et pas du tout en sa qualité de représentant de [X]. Il apparait trop clairement d'après les pièces au dossier que la raison réelle pour laquelle [Y] ne désirait pas poursuivre avec ces accords était la situation économique et politique qui se développa [en Asie] après la signature du contrat.

A la lumière de tout ceci, il n'est pas possible d'éviter de conclure que [Y] résilia le contrat parce que celui-ci devint pour lui improfitable et onéreux, et non par suite de manœuvres frauduleuses ou de rupture de contrat avec [X]. L'accusation de manœuvres frauduleuses est manifestement un moyen imaginé postérieurement par le Défendeur pour nier la compétence de la cour d'arbitrage. Autrement, l'avoué du Défendeur n'aurait pas eu la possibilité d'écrire, le 28 septembre 1948, c'est-à-dire un an après que [Y] ait prétendu avoir découvert la fraude, que le contrat était considéré comme nul et résilié en raison des « restrictions d'importation » et « autres circonstances prévalant actuellement dans ce pays » qui rendaient l'accomplissement du contrat impossible.

Pour les raisons ci-dessus, l'arbitre déclare l'accusation de manœuvres frauduleuses de la part de [X] sans fondement. La seule défense que puisse invoquer [Y] est l'impossibilité d'exécution ou *force majeure*. Il n'y a pas de preuve pouvant amener l'arbitre à conclure que le contrat n'était pas exécutable, autre que l'affirmation non étayée par preuve, contenue dans la lettre de l'avoué de [Y] du 28 septembre 1948. [Y] lui-même n'a pas jugé cet argument d'une grande force puisqu'il ne l'a pas présenté [au tribunal national] bien que [ce tribunal national] eût été à même de déterminer, dans les meilleures conditions possibles, si les conditions locales étaient susceptibles d'empêcher l'exécution du contrat.

Il s'ensuit que le Défendeur, sans aucun droit ni raison, a délibérément rompu le contrat de décembre 1946 et doit payer au Demandeur les traites non honorées ainsi que tous dommages pour le préjudice causé à celui-ci par cette rupture de contrat.

En particulier, le Défendeur doit payer au Demandeur les sommes suivantes : … En ce qui concerne les frais et dépens de l'arbitrage, y compris les honoraires de l'arbitre, ils doivent être également à la charge du défendeur.

Par ces motifs :

Nous, arbitre soussigné, statuant en dernier ressort, disons et jugeons :

1. [Y] est condamné à payer à [X] la somme de £ … et fr. … avec des intérêts de 5% jusqu'au jour du règlement.
2. [Y] supporte les frais de l'arbitrage s'élevant à …

17. ARBITRAL AWARD
ICC Case no. 787 (Stockholm, 1951)

Whereas a dispute has arisen between [X] [France], and [Mr Y] [Australia] and whereas the dispute has been referred to arbitration in accordance with the [1927, with 1947 amendments] Rules of Conciliation and Arbitration of ICC,

The Court of Arbitration of ICC has … appointed me … Judge of the Court of Appeal [Sweden] to the sole arbitrator to determine the said dispute and I have accepted that reference. The statement of the case is to be found in the Submission, signed by the claimant [in] October, 1950.

The defendant has refused to sign the Submission and has contested the jurisdiction of the Court of Arbitration in this case.

The Court of Arbitration has, in conformity with article 10, para. 2, and article 16, para. 2, of its Rules of Conciliation and Arbitration, ordered that the arbitration should be proceeded with, notwithstanding the refusal of the respondent to submit to arbitration and to sign the form of submission.

The parties were summoned to appear before me … The defendant failed to appear without any excuse as much as the summons was duly served upon the respondent and it did not advance any valid excuse, I proceeded with the arbitration, hearing the arguments adduced by the duly accredited representation of the claimant.

I find the following facts:

After negotiations … between [X] and [Mr Y], Managing Director of the respondent company … [X] handed over to [Mr Y] a letter, dated … stating the principles which they had agreed upon. According to this letter, the claimant … granted the respondent, the exclusive rights of reproducing a number of [designs] created by [X]. The letter laid down the basic conditions of collaboration between the two companies, the period of the agreement (fixed at 5 years, renewable by agreement between the parties), the territories to which the exclusive rights would apply and the royalties, including the minimum annual royalty … for the subsequent financial years.

It was furthermore stipulated that the agreement was binding upon the parties until such time as a final contract had been drawn up between them on that basis. This letter which contains a general submission to the arbitration without specifying how the arbitrator is to be appointed, was duly signed by [Mr Y] on February … 1949.

A draft final contract signed by the claimant was sent in March 1949 to [Mr Y]. On the subject of this draft the parties exchanged a number of letters which have been filled by [X]. This correspondence shows that the respondent while executing the contract put forwards counter-proposals on the financial clauses.

The negotiations came to an end in February 1950 when the respondent refused to sign the draft final contract. As the respondent refuses to submit to arbitration under the Rules of Conciliation and Arbitration of ICC the first question I have to determine is whether the respondent is bound by an arbitration clause to submit to arbitration under these Rules.

[X] has submitted the present dispute to the Court of Arbitration by virtue of a clause in the letter of February … 1949, worded as follows:

> "As the present agreement is entered into in good faith, the parties declare that, should the application of the present convention and the contract which is to follow, lead to differences of interpretation between the parties, they wish to have recourse to arbitration procedure",

supplemented by the following clause in the draft final contract, which clause the respondent accepted by letter [in] November 1949:

> "In the case of disagreement between the parties over the appointment of one or more arbitrators, any dispute arising out of the present agreement will be finally settled according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules".

It has to be observed that the last clause according to the wording only refers to the final contract.

The respondent has emphasized that even if the letter of February … 1949 should amount to a contract binding the respondent which he denies, the said letter contained no specifications in the matter in question and that if it were true that the draft final contract, signed and put forward by [X] in March 1949, contained a stipulation that disputes should be referred to arbitration in accordance with the Rules of ICC, it … is uncontested that the draft final contract was never accepted by the respondent. The draft final contract forms a whole and the arbitration in it cannot, even if this clause has been accepted by the respondent in a letter dated … November 1949, be imported into the agreement of February … 1949, if any.

In consequence hereof and as the claimant has not even asserted that the respondent has otherwise agreed to refer any disputes arising out of the pretended contract of February … 1949 to arbitration under the Rules of ICC.

I have come to the conclusion that the respondent cannot be bound to submit to this arbitration.

For these reasons I direct

1. that the case cannot be referred to arbitration under the Rules of Conciliation and Arbitration of ICC;
2. that [X], before receipt of the original or certified copy of this award, shall pay to the ICC its costs …

Given under my hand and approved as to its form by the Court of Arbitration.

18. SENTENCE ARBITRALE Affaire CCI n° 889 (Paris, 1954)

Au nom de la Cour d'Arbitrage de la CCI, nous soussignés … Professeur de droit … nommés arbitres par la Cour d'Arbitrage pour procéder à un arbitrage entre **1.** [X], actuellement dénommée [X'] [Pays d'Europe de l'Est "Pays A"] (demanderesse), d'une part, et **2.** [Y] [Etats-Unis d'Amérique] (défenderesse) d'autre part, nous avons procédé à cet arbitrage conformément au compromis ci-après reproduit, signé le 26 juin 1954 par la demanderesse et rendons la sentence suivante : …

… III. Faits

A la suite de négociations qui se sont déroulées en 1947 entre [X] et [Y], ces deux parties ont passé un contrat sous forme d'échange de lettres [en] octobre 1947 …. Ce contrat prévoyait différentes fournitures par [Y] pour la construction [dans le Pays A] d'une usine … comprenant des machines et installations, des éléments de documentation et d'assistance technique, plans, brevets, procédés de fabrication, l'instruction technique de personnel de [X] aux Etats-Unis, et l'envoi [dans le Pays A] de techniciens d'[Y]. Le montant total à payer par [X] pour ces différentes fournitures était U.S. Dollars … à verser de la manière suivante : …

Aux termes de ce contrat, les livraisons d'[Y] … devaient commencer au plus tard 3 mois après réception du montant payable à la commande, et se terminer dans les 12 mois de cette même date. Ce contrat contenait une clause compromissoire ainsi conçue :

> « En cas de différend, les deux parties se soumettent à la Cour d'Arbitrage de la Chambre de Commerce Internationale à Paris ».

En exécution de ce contrat, certaines livraisons furent effectuées par [Y], et certains payements effectués par [X].

Devant la nécessité de procéder au développement de la production, les parties conclurent un autre accord [en] juin 1948 … Ce deuxième accord stipulait expressément que les dispositions du premier contrat restaient en vigueur, sauf les modifications et compléments ajoutés dans le nouvel échange de lettres. Ce second accord avait pour but principal d'augmenter la capacité de production de l'usine en installation, et donc les fournitures d'[Y], dont la valeur totale était portée à U.S. Dollars … Les différentes machines et fournitures faisaient l'objet d'un document annexe intitulé « Proposal » incorporé au contrat, contenant une liste tant descriptive qu'estimative. Les diverses spécifications de production et de garantie étaient modifiées pour tenir compte de la nouvelle capacité de production stipulée.

Les conditions de paiement étaient les mêmes que dans le premier contrat, les chiffres correspondant respectivement à 33%, 62% et 5% du prix total … Les obligations de livraison du matériel couvert par le premier contrat n'étaient pas changées. Quant au nouveau matériel, d'une valeur totale de Dollars … il devait être livré … dans les 12 mois de la réception du montant payable à la commande … Le contrat était conditionnel à l'approbation de [la Banque].

Ce deuxième contrat ne contenait pas la clause compromissoire. Cependant, la clause compromissoire du premier contrat était reprise explicitement, suivant le paragraphe de l'accord ainsi conçu :

> « autrement les dispositions de la commande [d']octobre 1947 restant entièrement applicables à l'ensemble de la livraison entière, toutefois avec les modifications, respectivement avec les compléments qui suivent. »

En exécution de ce deuxième contrat, des livraisons furent effectuées par [Y] et des payements par [X]. Toutefois, de nombreuses difficultés s'élevèrent entre les parties, donnant lieu à un échange de correspondance abondant. [X] reprochait à [Y] des retards de livraison, le fait de facturer des sommes dépassant les prix convenus, et le fait d'avoir prélevé sur certains accréditifs 100% des prix facturés au lieu des 62% stipulés ; [Y] de son côté, reprochait à [X] des retards dans l'établissement des accréditifs, rendant impossible l'expédition dans les délais prévus, et entraînant de ce fait des frais et une augmentation des prix de revient aux Etats-Unis.

Après une longue correspondance et des entretiens personnels, les représentants … se rencontrèrent finalement [et] signèrent un document [en] mai 1950, intitulé « contrat additionnel » …

Ce « contrat additionnel » contient les dispositions suivantes … :

> « 1. [X] tout comme [Y], sont désireuses d'accommoder à l'amiable les contestations issues des livraisons des installations de machine.
>
> 2. Les deux parties contractantes constatent de nouveau la validité des contrats conclus par elles [en] octobre 1947 et [en] juin 1948.
>
> 3. Les représentants de [X] déclarent être prêts à ne point tirer de conséquences des défauts … causés selon leur avis, par les fautes de [Y].
>
> Par contre, [Y] se désiste sans réserve de toute prétention à une indemnité quelconque du préjudice survenu suite au retard apporté aux ouvertures d'accréditifs par [X].
>
> Dans l'avenir il sera procédé comme suit : »

Suivent dans le contrat les clauses suivantes :

> « 1. [X] renonce à recevoir livraison de certaines pièces figurant à la « Proposal » … Le montant total de l'achat … n'est pourtant pas modifié, le renoncement à ces livraisons se traduisant par une augmentation des prix d'[Y] fondée sur l'augmentation des prix et des salaires aux Etats-Unis, et acceptée par [X].
>
> 2. Dans le délai d'un mois à compter de la signature, [X] doit ouvrir un accréditif … se décomposant comme suit : …
>
> 3. Une somme … est tenue par [X] à la disposition de [Y] et payable … à l'occasion du voyage et du séjour des techniciens qu'[Y] doit envoyer … pour superviser le montage et la mise en route de l'usine.
>
> 4. [Y] doit faire son possible pour effectuer les livraisons des Etats-Unis ; cependant au cas où une livraison ne serait pas possible ou bien si l'envoi des livraisons des Etats-Unis entrainait des retards, [Y] doit effectuer des livraisons au Japon, tout en observant la qualité et la quantité garanties.
>
> 5. En raison des nécessités de montage, [Y] s'engage à livrer certaines machines spécifiées dans les 4 mois de la signature, et le solde dans un ordre convenable dans les 8 mois.
>
> 6. [Y] s'engage à mettre à la disposition de [X] dans un mois à partir de la signature toutes notices techniques, dessins, etc… nécessaires au montage et à l'installation comme prévu dans les contrats.
>
> 7. [Y] s'engage à observer pleinement les obligations de garantie prévues dans les contrats, bien qu'elle doive recevoir le solde de 5% du prix d'achat dès l'expédition du dernier envoi.
>
> 8. Le contrat est conditionnel à l'approbation de [la Banque].

Enfin, ce contrat n'a été signé par Mr. … pour le compte de [Y] qu'après qu'il ait rajouté à la main une clause ainsi conçue :

> « [Y] ne répondra pas des retards survenus dans les livraisons si ceux-ci ont leur origine dans des cas de *force majeure* (grève, etc.) ».

Au moment de la signature de ce troisième contrat, [Y] avait en sa possession une licence d'exportation lui permettant d'expédier le matériel à [X]. Cette licence, valable un an, expirait le 28 juin 1950. En mai 1950, [Y] déposa auprès du « Department of Commerce » [Etats-Unis d'Amérique] une demande d'extension de validité de cette licence.

Le 15 juin 1950, [X], n'ayant pas reçu d'avis d'expédition, réclamait les livraisons à [Y]. Le 19 juin 1950, [X] écrivait à [Y] qu'elle avait donné à sa banque l'ordre d'ouverture de l'accréditif. La Société [Y] envoyait le 14 juin 1950 pour Dollars … de marchandises et le 28 juin 1950 pour Dollars … soit en tout pour une valeur facturée de …

Ce 28 juin 1950 était le dernier jour de la validité de la licence d'expédition d'[Y], et le Department of Commerce n'avait pas pris de décision de renouvellement. Fin juin, la guerre éclatait en Corée.

Un échange de lettres et de télégrammes portant sur une assez longue période s'ensuivit, [Y] faisant part à [X] de ses difficultés à obtenir les autorisations d'expédition, et [X] insistant pour que les livraisons soient effectuées, les contrats étant toujours valables.

Cependant, le Department of Commerce demandait des renseignements supplémentaires à [Y] [en] août 1950, et finalement [le « Department of Commerce »] écrivait [en] janvier 1951 que, en raison des conditions consécutives à la guerre de Corée, il avait été décidé de ne pas proroger la validité de la licence d'exportation. Dans l'intervalle, [Y] avait essayé d'obtenir la possibilité d'exporter au Japon ; une demande de licence d'exportation pour le Japon avait été déposée par Y le 11 décembre 1950 …

[En] janvier 1951, [Y] envoyait une lettre à [X] confirmant l'impossibilité d'effectuer des livraisons des Etats-Unis, informant que … était revenu du Japon avec une réponse négative des autorités américaines au Japon, et informant enfin que le 12 janvier, le « Department of Commerce » avait pris un arrêté refusant la licence d'exportation pour le Japon, toujours en raison des conséquences de la guerre de Corée. [Y] se déclarait prête à dégager l'argent immobilisé sous forme d'accréditif.

[X] a répondu alors en mettant en demeure [Y] de lui rendre ces comptes exacts et de restituer les sommes prélevées en plus des marchandises livrées. En réponse, [Y] a renvoyé [en] février 1951 la somme de … soit le montant de l'accréditif ouvert par [X] à la suite de la signature du contrat de mai 1950, diminué de 25% de la valeur des deux livraisons effectuées depuis par [Y]. Dans une lettre [de] mars 1951, [Y] déclarait à [X] qu'elle considérait les comptes comme définitivement réglés, toutes contestations antérieures au contrat [de] mai 1950 ayant été réglées par ce contrat, et les comptes depuis cette date se trouvant eux-mêmes réglés par le renvoi de Dollars … ; [Y] ajoutait qu'elle prenait note du désir de [X] de considérer les contrats comme toujours en vigueur, et qu'elle continuerait à étudier les possibilités d'exportation, espérant que les conditions permettraient à nouveau d'effectuer des livraisons dans un avenir pas trop éloigné.

[X] a protesté contre le point de vue d'[Y] en ce qui concerne la façon d'établir les comptes, estimant notamment être en droit d'exiger la restitution de la partie du prix d'achat payé d'avance correspondant au prix des machines non livrées.

De plus, [X] mettait en demeure par lettre [de] juin 1951 [Y] de lui faire parvenir les notices techniques, brevets d'invention, procédés de fabrication. [En] juillet 1951, [Y] répondait en faisant parvenir copie d'un arrêté du Department of Commerce … refusant d'autoriser ces envois ; il s'ensuivit de multiples négociations, mais chaque partie restant sur ses positions, ce fut sans résultat. Par lettre du 3 octobre 1951, [X] demandait à [Y] de payer Dollars … représentant des fournitures payées et non livrées, et Dollars … de dommages-intérêts supplémentaires, lui laissant jusqu'au 15 novembre 1951 pour faire connaître son point de vue.

Par lettre du 22 décembre 1951, [Y] répondait que le contrat de 1950 avait emporté transaction sur toutes réclamations antérieures, stipulant pour l'avenir la livraison par [Y] de matériels pour une valeur de Dollars … Le 30 avril 1953, … assistant de [X], envoyait à [Y] une lettre l'informant que [X] n'était pas disposé à attendre davantage pour régler l'affaire, et mettant une dernière fois [Y] en demeure.

IV. Thèse des parties

D'après les différentes conclusions déposées par les parties et développées oralement par leurs avocats, et d'après des mémoires et notes additionnels déposés par les avocats tant avant qu'après l'audience, les thèses respectives des parties peuvent être résumées comme suit :

A. Thèse de [Y]

1. La demanderesse ne justifie ni de sa qualité de successeur de [X], ni de sa capacité juridique.

- [X] n'a été inscrite au Registre des Entreprises que … 5 ans après sa fondation. Il s'agit d'une nouvelle inscription postérieure à l'instauration du régime communiste …
- Il n'est pas établi que [X'] est successeur de [X].

2. …

3. Ni la Cour, ni le Tribunal ne sont compétents pour connaître du litige.

- Il n'y a pas de clause compromissoire applicable. En effet, si le marché de 1948, n'était en réalité qu'un amendement au marché de 1947, qui lui contenait une clause compromissoire, celui de 1950, est un contrat juridiquement distinct et indépendant, reconnaissant la validité des contrats antérieurs sans pour autant proroger leurs dispositions, contenant une transaction réglant tous litiges passés sur la base des contrats 1947 et 1948 sans qu'il soit alors fait recours à l'arbitrage, emportant ainsi novation des obligations anciennes, et réglant en détails les obligations futures. Les contrats antérieurs et en particulier la « Proposal » de 1948, n'ont dès lors plus d'autre valeur que celle d'une référence commode. Toute demande ne peut donc s'appuyer que sur ce troisième contrat qui ne contient pas de clause compromissoire.
- La clause compromissoire du contrat de 1947, d'ailleurs inapplicable, ne se réfère à aucun règlement.
- Il n'y a pas de compromis, [Y] refusant de se soumettre volontairement à l'arbitrage. Or, c'est la loi française, *lex fori*, qui s'applique aux questions de procédure, et l'article 1006 du code de Procédure Civile exige la passation d'un compromis à peine de nullité de la sentence. Cette disposition d'ordre public fait échec à l'Article 16(2) du Règlement de Conciliation et d'Arbitrage de la CCI.

4. **Les arbitres sont incompétents pour statuer sur leur propre compétence**. S'il est vrai que le Tribunal arbitral peut apprécier l'étendue d'une clause compromissoire dont la validité n'est pas contestée (Cass. 22 février 1949), par contre la jurisprudence française considère que le Tribunal Arbitral, juridiction d'exception, ne peut sans excès de pouvoir statuer sur la validité même de son institution (Cass. 2 août 1842, Lyon 30 avril 1951), (exemple : lorsque la nullité du contrat contenant la clause compromissoire est invoquée). Or, [Y] soutient qu'il n'y a pas de clause compromissoire applicable. La contestation est plus sérieuse encore qu'une contestation de validité.

5. En l'absence d'un compromis donnant pouvoir aux arbitres de se prononcer comme amiables compositeurs, les arbitres doivent statuer en conformité avec les règles de droit (article 1019 Code de Procédure Civile et Article 17(4) du Règlement inapplicable, mais conforme).

6. Les arbitres doivent rendre une sentence séparée et motivée sur la question de compétence. En vertu de l'article 1009 du Code de Procédure Civile, les parties et les arbitres doivent suivre, dans la procédure, les délais et les formes établies pour les tribunaux, si les deux parties n'en sont pas autrement convenues.

Il en résulte :

- Que comme tout tribunal judiciaire, le tribunal arbitral devra statuer sur l'exception d'incompétence par une sentence séparée ;
- Que cette sentence doit être motivée, pour permettre aux organes judiciaires, sur appel, d'exercer éventuellement leur contrôle.

Ces règles, d'ordre public en France, s'imposent à peine de nullité de la sentence …

B. Theses de [X]

1. Sur la capacité et la qualité de [X']. L'inscription au Registre des Entreprises de 1951 correspond à la transformation de l'Ancien Registre du Commerce en Registre des Entreprises. Les nouvelles dispositions portent uniquement sur l'administration des registres et n'affectent en rien ni l'existence ni la nature juridique des entreprises qui y sont inscrites. L'extrait du Registre des Entreprises établit que [X'] est successeur de [X], et les certificats de coutume versés au dossier établissent que [X'] jouit de la capacité juridique d'une personnalité juridique propre.

2. ….

3. Sur le défaut de clause compromissoire. Le contrat de 1950 a maintenu en vigueur le contrat antérieur 1947-1948, y compris la clause compromissoire, en y apportant uniquement des amendements quant aux prix livraisons, délais, etc… Seuls les chefs de réclamations spécifiquement mentionnés (défaut de livraison de la part d'[Y], retards à l'ouverture des accréditifs de la part de [X]) ont fait l'objet d'une transaction.

Il est faux de prétendre que la demande de [X'] ne s'appuie que sur le contrat de 1950, puisque l'origine des réclamations de [X'] réside dans le défaut de la livraison du reste des machines (payées d'avance) prévue dans le contrat de 1947-1948, puisque le contrat de 1950 maintenait en vigueur les contrats 1947 et 1948 sans faire aucune exception sur l'article … relatif à des modifications à ce sujet qui ont été versés aux débats sont en contradiction sur ce point.

4. Sur le défaut de référence à un règlement. Il est de jurisprudence constante que la clause portant soumission à un organisme arbitral préconstitué comporte, sauf stipulation expresse contraire, soumission au règlement dudit organisme.

5. Sur le défaut de compromis. L'Article 16(2) du Règlement de Conciliation et d'Arbitrage de la CCI prévoit que la Cour d'Arbitrage peut ordonner que la sentence sera rendue nonobstant le refus ou l'abstention de l'une des parties, lorsque les parties ont convenu de soumettre leur différend à l'arbitrage de la CCI, ce qui est le cas.

La Cour de cassation a décidé que dans le cas où l'une des parties refuserait de signer le compromis, les arbitres eux-mêmes peuvent l'établir sur la requête de la partie poursuivante (arrêt *Sauvageon*, 30 mars 1949).

6. Sur la compétence pour statuer sur la compétence elle-même. Les arrêts déniant aux arbitres le droit de statuer sur leur propre compétence ne concernent que des cas où la nullité des contrats contenant la clause compromissoire est invoquée, ce qui n'est pas le cas puisque les contrats ont été reconnus valables et ont été exécutés, et que d'autre part, le tribunal est juge du caractère sérieux ou non de la demande qui leur présentée.

L'arrêt de la Cour de cassation du 22 février 1949 a décidé que les arbitres étaient juges de leur propre compétence précisément dans une espèce où la clause compromissoire ne figurait pas dans un second contrat dont l'exécution était invoquée.

7. Sur la nécessité de rendre une sentence en droit. Il est exact qu'à défaut d'accord des parties sur ce point, les arbitres ne peuvent trancher en *amiables compositeurs*.

8. Sur la nécessité d'une sentence séparée et motivée sur la compétence. S'il est exact que les règles de procédure française exigent une sentence motivée, la nécessité d'une sentence séparée sur la compétence ne s'applique qu'en matière de tribunaux civils (Art. 172 du Code de Procédure Civile). La jurisprudence n'étend pas cette règle en matière commerciale, en appel d'une décision de première instance, en matière disciplinaire, c'est-à-dire d'une matière générale en matière de juridiction d'exception. Il n'est pas contesté que l'arbitrage soir une juridiction d'exception. Les arbitres peuvent donc rendre une sentence séparée sur la compétence, mais n'y sont pas tenus.

9. Sur le fond

...

V. Conclusions

A. Sur la compétence et la procédure

1. Sur la capacité et la qualité de [X']. Les arbitres estiment que les deux parties ont qualité pour comparaître devant leur tribunal comme ... devant un tribunal de droit commun. En ce qui concerne [X'], des documents versés au dossier ont convaincu les arbitres qu'elle jouit d'une personnalité morale indépendante et de la pleine capacité juridique ; que, d'autre part, cette entreprise est identique à l'entreprise [X], seul le nom ayant été changé.

2. ...

3. Sur les pouvoirs de la Cour d'Arbitrage et du Tribunal Arbitral

(a) Fonctions administratives de la Cour

La Cour d'Arbitrage n'arbitre pas elle-même les différends qui lui sont soumis. Elle n'intervient que sur le plan administratif pour examiner s'il existe, *prima facie*, une clause d'arbitrage en vertu de laquelle la partie demanderesse peut exiger la constitution d'un tribunal arbitral appelé à connaître de ses prétentions.

C'est ainsi que la Cour d'Arbitrage a décidé, le 31 mai 1954, la constitution du Tribunal arbitral en raison de l'insertion d'une clause d'arbitrage dans le contrat intervenu en 1947 entre [X'] et [Y], mais cette décision n'a pas préjugé de la question réservée au tribunal arbitral de la compétence de celui-ci pour juger le présent différend.

(b) Pouvoirs des arbitres de statuer sur leur propre compétence

Vu l'existence *prima facie* d'une clause compromissoire, et conformément à une jurisprudence constante, le Tribunal arbitral considère qu'il a le pouvoir et le devoir de se prononcer sur la question de savoir si cette clause est toujours en vigueur et, dans l'affirmative, sur l'étendue de sa compétence quant au présent différend, s'exécutant ainsi de la mission à lui confiée en application de l'Art. 10(3) du Règlement de Conciliation et d'Arbitrage de la CCI.

(c) Sur l'absence d'une clause d'arbitrage valable

Ainsi qu'il a été précisé dans l'exposition des faits, ladite clause arbitrale comportant soumission ... en cas de litige, à la Cour d'Arbitrage de la CCI, figure explicitement dans le contrat d'octobre 1947 et est maintenu, par voie de référence expresse, dans le contrat de juin 1948.

A la majorité, le Tribunal arbitral estime, en outre, que l'accord additionnel de 1950 comporte également la clause d'arbitrage par voie de référence du fait qu'il se déclare « additionnel » et se réfère aux deux contrats antérieurs pour en confirmer expressément « à nouveau » la validité.

En tout cas, à l'unanimité, le Tribunal arbitral estime qu'il subsiste des litiges au sujet des engagements pris en vertu des contrats 1947 et 1948 et qui ne sont pas couverts par la transaction du contrat [de] mai 1950 ; affirmant à nouveau l'existence de ces deux premiers contrats et la subsistance d'une clause d'arbitrage, en vertu de ceux-ci, le Tribunal arbitral s'attribue à l'unanimité compétence pour connaître de ces litiges.

4. Sur le défaut d'une référence expresse au Règlement de Conciliation et d'Arbitrage de la CCI. Le Tribunal arbitral estime qu'il est en effet de jurisprudence constante que, sauf stipulation contraire, toute clause d'arbitrage par laquelle les parties stipulent la soumission de leurs différends éventuels pour règlement arbitral à la Cour d'Arbitrage de la CCI comporte *ipso facto* une référence au Règlement de Conciliation et d'Arbitrage de la CCI, la Cour d'Arbitrage de la CCI ne pouvant, en vertu de ses statuts, procurer la solution arbitrale des différends qui lui sont soumis que dans le cadre de ce Règlement.

De même, les arbitres recevant leur mission de ladite Cour d'Arbitrage sont tenus de se conformer, en ce qui concerne la procédure, aux dispositions dudit Règlement qui, dans son Article 17(3) précise que, dans le silence de celui-ci, ce sont les dispositions de la loi française qui s'appliquent.

5. Défaut de signature du compromis. Le Tribunal arbitral considère qu'après avoir stipulé la clause d'arbitrage de la CCI portant application du Règlement de celle-ci, [Y] ne saurait éluder, par son refus de signer l'acte de compromis établi en vertu des dispositions de l'article 15 dudit Règlement, la procédure prévue par les parties pour le règlement de leurs différends éventuels.

Par ailleurs, l'Article 16(2) du Règlement stipule expressément ce qui suit :

> « Lorsque les parties étaient convenues de soumettre leurs différends à l'arbitrage de la Chambre de Commerce Internationale, et que l'une d'elles refuse ou s'abstient de signer le compromis, la Cour d'Arbitrage ordonne que la sentence sera rendue nonobstant. »

La validité de la disposition précitée en droit français applicable en l'espèce a été confirmée par les Tribunaux.

6. Sur la prétendue nécessité d'une sentence séparée sur la compétence. Le Tribunal arbitral estime qu'il n'est pas nécessaire de rendre une sentence séparée sur la compétence, pareille nécessité n'existant qu'en matière de tribunaux civils alors qu'en matière commerciale, l'Art. 425 du Code de Procédure civile Français dispose que :

> « le même jugement pourra, en rejetant le déclinatoire, statuer sur le fond, mais par deux dispositions distinctes : l'une sur la compétence, l'autre sur le fond … »

C'est en vertu de cette disposition applicable en l'espèce – le présent litige étant d'ordre commercial – que le Tribunal arbitral a notifié, le 6 septembre 1954, aux parties sa décision de joindre l'incident au fond.

7. Nécessité d'une sentence en droit. Le Tribunal arbitral ne prétend en aucune manière s'arroger le pouvoir de juger en *amiable compositeur*, pouvoir qu'il ne saurait recevoir, conformément au Règlement de Conciliation et d'Arbitrage de la CCI, qu'en vertu d'un accord des parties.

B. Sur le fond

….

19. SENTENCE ARBITRALE Affaire CCI n° 907 (Amsterdam, 1956)

Au nom de la Cour d'Arbitrage de la CCI, nous soussigné : ... [Pays-Bas] nommé arbitre unique par la Cour d'Arbitrage à sa session du 16 février 1955, pour procéder à un arbitrage entre **1.** [Mr. X] [Pays d'Amérique Latine "Pays A"] (demandeur) et **2.** [Y] [Allemagne] (défenderesse), conformément à l'acte de compromis signé par les parties les 28 mars et 12 avril 1955, rendons la sentence suivante, le délai fixé dans ledit acte de compromis pour le prononcé de la sentence ... ayant été prolongé ...

I. Le soussigné a pris connaissance des pièces énumérées ci-après sur lesquelles il a basé sa sentence :

... Le soussigné établit les faits comme suit :

a) Par la convention de représentation précitée, [Y] a engagé [Mr. X] comme agent chargé de la vente de ses produits à [Pays A]. Comme rémunération de ses activités, [Mr. X] devait recevoir une commission de 10% sur les montants nets de tous les ordres provenant directement ou indirectement de [Pays A]. [Mr. X] avait la faculté, au cas où il ne serait pas en mesure de travailler suffisamment [Pays A] à lui seul d'engager des sous-agents et des voyageurs qui travailleraient sous sa responsabilité et qui visiteraient régulièrement la clientèle, ceci afin de stimuler le plus possible la vente.

b) La convention de représentation avait été passée pour une période allant de la conclusion du contrat jusqu'au 30 novembre 1951, étant entendu qu'elle serait reconduite tacitement d'une année à l'autre, à moins que l'une des deux parties ne l'eût résiliée par lettre recommandée trois mois avant son expiration.

c) [Y] a résilié la convention de représentation vers la fin de la deuxième année du contrat.

d) [Mr. X] pose qu'il a droit à une commission pour ce qu'il appelle des ordres indirects passés par des acheteurs [provenant du Pays A; "locaux"], qu'il nomme, à des exportateurs allemands qui de leur côté se fournissaient auprès de [Y] desdites marchandises.

e) [Y] conteste en premier lieu que les ordres visés sous (d) doivent être considérés comme des ordres indirects dans le sens de la convention signée [en] novembre 1950 ; [Y] conteste aussi que pendant la durée de ladite convention les exportateurs allemands qui se fournissaient auprès de lui de certains produits aient livré ces derniers à des acheteurs [locaux].

f) Persistant dans sa position que ceci est bien réellement le cas, [Mr. X] réclame de ce chef une somme de $... à [Y], d'où il ressort que pendant ladite période des livraisons pour un montant net de $... (départ usine) auraient eu lieu en vertu de ce que [Mr. X] appelle des ordres indirects.

g) Par ordonnance datée du 11 octobre 1955, le soussigné a décidé :

- L'audition ... d'un ou plusieurs représentants de la firme [Z] [en Allemagne], à titre de témoins dont il échet à [Y] d'assurer la comparution au lieu et date indiqués ;
- La précision par [Mr. X], avant le 15 novembre 1955, de ses moyens de preuve susceptibles d'établir ses affirmations quant aux destinataires des produits de [Y], nommément énumérés par lui, sous forme notamment de production de copies dûment certifiées conformes de factures qui auraient pu être établies au nom des acheteurs [locaux] ou encore sous forme de déclaration faite sous la foi du serment ou, à défaut, sur l'honneur, par les représentants légaux des firmes [locales] en question.

h) A l'audience fixée au 15 novembre 1955, nul mandataire de [Z] ni quel qu'autre ne s'est présenté.

i) Par lettre datée du 3 décembre 1955, le requérant [Mr. X] a fait savoir qu'il n'est pas en mesure de remplir les conditions contenues dans la seconde partie de l'ordonnance précitée.

j) Le différend est maintenant dans un tel stade qu'une décision définitive doit être prise.

III. Le soussigné considère en droit ce qui suit :

a) Les parties diffèrent d'opinion au sujet de la question de savoir ce qu'il faut entendre par « ordres indirects ». De l'avis du soussigné, il faut aussi entendre en l'occurrence par ordres indirects, les ordres provenant d'acheteurs établis [dans le Pays A] et passés à des exportateurs établis en Allemagne qui se fournissent de certains articles auprès de [Y] et qui vendent lesdits articles à des acheteurs [locaux]. Il est établi dans le cas présent par les propres déclarations de [Y] qu'avant de confier la vente de ses articles à [Mr. X], [Y] travaillait le marché [du Pays A] par la voie de maisons d'exportation établie en Allemagne. Du moment que [Y] travaillait le marché [du Pays A] via [Mr. X], on pouvait donc exiger [d'Y] qu'elle prenne des mesures pour que, raisonnablement parlant, ses articles n'arrivent pas sur

le marché [local] par le canal des exportateurs établis en Allemagne. Rien ne montre que [Y] ait pris de telles mesures et les pièces produites permettent plutôt de conclure que [Y] n'a effectivement pris aucune mesure en ce sens.

b) [Mr. X] a bien posé que pendant la période au cours de laquelle il représentait [Y] les acheteurs [locaux] qu'il nomme se sont en effet fournis de marchandises de [Y] par le canal d'exportateurs allemands, mais jusqu'ici il n'a encore prouvé en aucune façon cette assertion. La thèse de [Y] est que si pendant ladite période des articles similaires aux siens ont fait leur apparition sur le marché [local], il doit s'agir de contrefaçons de ses produits lancés par des maisons concurrentes.

c) Les considérations susmentionnées ont incité le soussigné à charger [Mr. X] d'administrer la preuve, comme le décrit l'ordonnance.

d) [Mr. X] n'a pas donné suite à cette ordonnance. Le soussigné n'est pas convaincu par l'assertion de [Mr. X] qui dit qu'il est impossible d'obtenir des importateurs [locaux] qu'ils remettent des copies de factures ou même éventuellement des déclarations sous serment montrant qu'au cours de la période en question ils ont acheté, soit directement, soit par l'intermédiaire d'exportateurs allemands, des marchandises de [Y].

e) [Mr. X] a bien répété qu'il est certain qu'au cours de la période en question [Y] a livré ses marchandises [dans le Pays A], ou du moins que par l'intermédiaire d'exportateurs il a introduit ses marchandises sur le marché [local], mais comme [Y] a persisté à nier, la seule assertion de [Mr. X] ne peut convaincre le soussigné du bon droit de [Mr. X].

IV. Par ces motifs

L'arbitre soussigné, jugeant en premier et dernier ressort,

- déboute [Mr. X] de ses prétentions
- condamne [Mr. X] à supporter les frais de l'arbitrage …

20. ARBITRAL AWARD
ICC Case No. 927 (Oslo, 1955)

In the name of the Court of Arbitration of ICC, I the undersigned … [Norway] appointed arbitrator by the Court of Arbitration at its session held on 15th December 1954, to proceed to an arbitration between: [X] [Country in Europe], hereinafter called "Claimant" and [Y] [USA], hereinafter called "Defendant", have conducted the arbitration of this case and rendered the following award:

The arbitrator's mission

In accordance with Article 15 of the Rules of Conciliation and Arbitration, the arbitrator's mission was defined by document drawn up by the ICC's Court of Arbitration and signed by [X] on the 28th March, 1955. In view of [Y]'s omission to sign the document, the Court decided by virtue of Article 16(2) that the award should be rendered notwithstanding. The document reads as follows:

"Form of submission

… Under a contract, [Y] delivered to [X] a consignment of … tons of [a chemical].

[X] claims that, in accordance with the samples tested by the [laboratory], [the chemical] should allow of a [chemical] recovery of at least …%. However, as it indicates in detail in the documents filed, the consignment recovered yielded only …% of [the chemical] on the average, or …% less than was expected.

Under the circumstances, pleading the arbitration clause in the contract, [X] claims … as damages, on the basis of the figures given in their request for arbitration.

In reply to this request, [Y] answers that in its opinion, it is not bound to submit to arbitration, on the grounds that the contracts providing for arbitration outside the judicial district in which the defendant may be sued, are not enforceable in the United States and, more especially, that the contract between the parties failed to provide that an arbitrator's award may be enforced by the entry of judgment thereon.

Moreover, [Y] considers that [X] are not in a position to base any claim on the grounds that [Y] had represented that the material would yield …% of [chemical] since even if such representation were made, [X] placed no reliance upon it but had the material tested and inspected by their own agent, the [laboratory], prior to making purchase.

Considering that [Y] does not deny the existence of the arbitration clause, the Court of Arbitration ruled that any dispute on the validity of the said clause was a matter for the arbitrator … The arbitrator shall conform, as regards procedure, to the Rules of Conciliation and Arbitration of the International Chamber of Commerce, the application of which was stipulated by the parties, and shall give his award in accordance with the facts of the case and the law.

The arbitrator shall, more especially, after giving due consideration to the memoranda and documents filed, the claims made by the parties and, generally speaking, to all the circumstances of the case:

1. decide whether the arbitration clause in the contract of … May 1954 binds the parties;
2. a) if not, declare that he has no jurisdiction as regards the claims put forward by [X];
   b) but if so, examine the claims made by [X] and award such sum or sums as he may judge fit;
3. declare who shall pay the costs and expenses of the arbitration procedure, or in what proportion the said costs and expenses are to be shared between the parties.

The arbitrator shall make his award within sixty days from the date on which the General Secretariat of the Court of Arbitration communicates to him the memoranda and documents filed by the parties, subject to the power of the Court of Arbitration to allow any extensions that may prove necessary, in accordance with Article 14 of the Rules of Conciliation and Arbitration."

Arbitral audience

Having thus been named sole arbitrator in the above matter, the undersigned sent registered letters to both parties notifying them that a hearing in the case would be held in [Norway]. At this hearing [X] had empowered [Mr …] to represent it. According to Article 18(5) of the Rules of Conciliation and Arbitration of ICC which requires a fortnight's (two weeks) notice in case of a party being represented by Counsel, the arbitrator therefore postponed the hearing, notifying both parties by registered letters that the hearing in the case would be held in [Norway] …

The defendants' counsel had notified ICC by two letters … of [Y]'s refusal to submit to the arbitration and, consequently, did not answer the arbitrator's summonses. On September 17th, 1955, the hearing was duly held in Oslo, Norway, with the attendance of [Mr …] representing [X].

No one having appeared for [Y] which had indicated in the letters mentioned above that it would not participate in the proceedings, the arbitrator decided, in accordance with Article 18(3) of Rules of Conciliation and Arbitration to proceed with the arbitration nonetheless.

Having examined the documentary evidence available in the file of ICC in this case and that offered by the claimant, and having taken into account the defenses which [Y] would presumably have presented had it chosen to participate in the arbitration, the following award is made:

The facts

By contract dated April … 1956 and May … 1954, [Y] sold to [X] approx. … tons [of chemicals] at a unit price of $ … Clause 9 of the contract provided for the goods to be inspected by the buyer's representative prior to the forwarding of the goods from the plant …

The contract furthermore included a provision for settlement of possible disputes reading:

> "Unless specifically stated in §9 all disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with the Rules".

The said clause 9 contained no provision contrary to the quoted arbitration clause.

The … contract did not define in detail the quality of the goods to be shipped. As will be appreciated, however, the quality formed an important part of the agreement reached and certainly was defined in detail and agreed to during the contract negotiations. This, of course, was of vital importance as naturally the quality was decisive for the unit price finally arrived at. In order to get a clear picture of the contents of the agreement in that respect it shall be necessary to outline the essence of the communications exchanged between the parties during the negotiations.

… A lot was offered for sale by [Y] but before entering in agreement [X] wanted a sample to be analyzed. This could only be done by melting of a sample of several tons and through his [US] representatives … instructed [the laboratory] to be present during the melting and make the analysis.

A couple of days later, [X] advised [its representative in the USA] by telex-message that he had decided to buy … tons of [the chemical] of a quality corresponding to that of the melted samples provided that [the laboratory] was given the opportunity to be present at the plant when the goods were to be forwarded. Following some communications back and forth, [X] formally placed his order with [Y] on April … 1954, for … tons of [chemicals] "as inspected by [the laboratory] and melted in their presence". The order was formally acknowledged by the seller in an undated statement received by [X].

When melted and analyzed upon arrival in [the jurisdiction of X], [the chemical] appeared to be of a quality far inferior to the one contracted for. The buyer immediately called in the recognized testing firm … to perform analysis of samples which were melted … A report was set up on June … 1954, showing the results found and emphasing that by the melting process used practically no [chemical] was left in the residue.

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

[Y] has declined to compensate the loss suffered by [X] for which reason it has been necessary to refer the matter to arbitration as stipulated in the contract entered into by the parties.

Conclusions

The jurisdiction of the arbitrator

[Y] has neglected to defend the case before Arbitrator appointed and has contested the validity of the arbitration clause on the ground that an award by the Arbitrator cannot be enforced in [U.S. State]. The defendant has produced no evidence in support of this allegation which, moreover, is contradicted by the well-established fact that foreign awards have frequently been enforced successfully in U.S. Courts.

Reference to the decision in the case *Gilbert vs. Burnstine* (Court of Appeal of New York, 1931-255 N.Y. 349, 174 N.E. 706) as well as to articles by Martin Domke: "On the Enforcement Abroad of American Arbitration Awards" (1952) 17 *Law and Contemporary Problems* 545 and by Morris S. Rosenthal: "Arbitration in the Settlement of International Trade Disputes", (1946), in *Law and Contemporary Problems* 823. The arbitrator is therefore convinced that his award will be enforceable in the U.S. if in conformity with the applicable law and the Rules of procedure stipulated by the parties.

The parties have expressly by contract agreed to Arbitration in accordance with the Rules of Conciliation and Arbitration of ICC. The arbitrator cannot imagine that the law of [U.S. State] forbids American businessmen to enter such an international agreement and still less allow them to disregard a signed agreement to arbitrate abroad. Such a stand would be utterly inconsistent with the fundamental principle of the freedom of contract …. Thus there exists by his own express action and indisputable obligation on the part of [Y] to submit to ICC arbitration when so called for the claimant within the scope of the said Rules.

No provision in these Rules does form an obstacle to the rendering of an award in the present case; it is then entirely immaterial to the arbitrator whether or not the Courts of [a U.S. State] of in will give their assistance with a view to enforcing an award rendered against [Y], since the arbitrator is obliged under the Rules to give his award.

The merits of the case

As to the merits of the case, [Y] has disclaimed liability on the grounds that by being represented for inspection of the goods prior to shipment [X] has accepted the goods. From the inspection provision included in clause 9 of the contract, [Y] furthermore deducts that it is not responsible for the [defect]. These objections are entirely unfounded.

From what has been stated above on the basis of the documents of evidence presented it is proved beyond doubt that [Y] offered for sale [of the chemical] an out turn of at least …% and that it was an express condition on the part of [X] that such quality be supplied. On that basis, [Y] certainly was not entitled to ship [the chemical] of any quality yielding a lower recovery, even down to …%. It does not exempt [Y] from liability that [X] had and exercised the right to inspect the goods prior to shipment since for obvious reasons such inspection intended to serve the sole purpose of checking the quantity intended to be shipped and the external condition of the goods. From what has previously been stated, the quality of the goods could be checked only by melting and analyzing large samples of the [the chemical] which was not to be performed by [X] until reception of the goods in [jurisdiction of X]. [Y] then had no right to prepare for shipment [the chemical] and leave it to the inspector to detect the low quality on the spot.

As for the amount claimed reference is made to figures given by [X] in its letter to the ICC of September 17, 1954. The statement presented to this effect quotes the purchasing price to … instead of $ … stated in the contract. However, this difference is made up by the agreed commission of ½ cent which was to be added …

Consequently, the undersigned arbitrator comes to the conclusion that, in accordance with the claims lodged by [X], it is his duty:

a) to rule out the objections raised by [Y] and, more especially, to state that he has jurisdiction to determine the present dispute;
b) to award [X] the sum of … to be paid by [Y];
c) to direct [Y] to pay the costs of the arbitral procedure which amount to U.S.$ …
d) to disallow [X]'s claim for compensation for its own expenses connected with the arbitration, since the Rules of Conciliation and Arbitration of the ICC do not provide for such reimbursement (Art. 23(2)).

Award

I, the undersigned arbitrator, therefore award and determine as follows:

1. The parties are bound to submit to arbitration and the arbitrator has, therefore jurisdiction to determine the present issue:
2. [Y] is directed to pay [X] the sum of …
3. [Y] is directed to pay the costs of this arbitration amounting to U.S.$ …

21. SENTENCE ARBITRALE Affaire CCI n° 974 (Paris, 1958)

Nous soussigné … Conseiller de droit international [France] nommé arbitre unique par décision du … de la Cour d'Arbitrage de la CCI dans l'affaire entre **1.** [A], ingénieur, directeur de [X] [Suède] (demandeur) et **2.** [Y] [Pays d'Afrique] représentée par son président-directeur général … (défenderesse) avons procédé à l'arbitrage conformément au Règlement de Conciliation et d'Arbitrage de la CCI et rendons la présente sentence :

Attendu qu'une convention est intervenue entre les parties à Paris en date du … mars 1952 [la convention] ; que l'exécution de ladite convention a donné lieu au présent différend soumis à la Cour d'Arbitrage de la CCI ;

que la défenderesse a répondu par mémoire en date du … octobre 1956, en opposant à la requête l'exception d'incompétence, motif pris de la nullité de la convention litigieuse tout en demandant subsidiairement de surseoir à statuer jusqu'à ce que le Tribunal [national] ait statué sur la demande en nullité, par elle formée, d'un brevet d'invention … et, très subsidiairement, de débouter le demandeur quant au fond de ses prétentions, toujours au motif de la nullité de cette convention ;

Attendu que, dans ces conditions, la Cour d'Arbitrage de la CCI a ordonné, en application des dispositions de l'article 13, chiffre 3 de son Règlement de Conciliation et d'Arbitrage, sans préjuger de la décision ultérieure de l'arbitre quant à la recevabilité ou le bien-fondé du déclinatoire, que l'arbitrage aura lieu ;

Qu'après la saisine de l'arbitre, chacune des parties a versé un nouveau mémoire au dossier portant et sur la compétence de l'arbitre et sur le fond ; Qu'en possession des dits mémoires et de leurs annexes, l'arbitre a établi, en présence des parties, l'acte visé à l'article 19 ayant pour objet de définir sa mission dont le texte est reproduit ci-après :

« Acte précisant la mission de l'Arbitre

… I. Prétentions des parties

[A] demande que [Y] soit condamnée à lui fournir les factures, ainsi que les comptes rendus des chiffres d'affaires réalisés dans les territoires pour lesquels [Y] s'est engagée, par [la convention], à lui payer une redevance de 2% sur les chiffres d'affaires pour l'ensemble des années 1954-1955 dans les territoires où ses filiales sont licenciées, avec intérêts de retard à compter du 1er janvier 1955 ;

- A verser une somme provisionnelle de … francs suisses sur lesdites redevances dans le mois qui suivra la sentence et le solde dans les trois mois à compter du jour de la sentence, inclus les intérêts ;
- De déclarer ladite convention … résiliée de plein droit à partir du 31 décembre 1955 ;
- De condamner [Y] à des dommages-intérêts fixés à titre provisionnel à … francs suisses ;
- De déclarer que [Y] doivent faire transcrire la marque « [Y] » en France et sur le registre international de Berne, au nom de [B], modifiant sa dénomination sociale.

[Y], répudiant la compétence de l'arbitre, assigne [A] comparaître par devant le Tribunal [national] pour s'entendre déclarer :

- Que le brevet … délivré à [A] le … sous le numéro … est nul, comme entaché d'antériorité ;
- Que les modèles internationaux déposés … ne peuvent faire l'objet d'un droit de propriété protégé par la loi du 14 juillet 1909 ;
- Que [B] n'a aucun droit sur la marque « [Y] » qui est la légitime propriété de la société [Y] ;
- Que la convention du … et les subséquentes sont nulles par application des articles 1126 et 1131 du Code civil ;

Voir condamner [A] à restituer la somme de … francs indûment perçue, augmentée des intérêts de droit ; Le voir condamner en outre à payer à [Y] la somme de … de francs à titre de dommages-intérêts ; Et voir condamner [Y] en tous les dépens …

II. Détermination des points litigieux

Des prétentions des parties exposées ci-haut il résulte que :

Un accord avait été signé pour l'exploitation [de certains] brevet et procédés moyennant paiement d'une redevance de 2% de la part de [Y] à [A] sur les chiffres d'affaires que la société réaliserait et qu'elle devrait documenter moyennant le double des factures.

Cette convention … et annule les contrats du 23 janvier et du 20 février 1950 était modifiée par une autre convention du 29 janvier 1955, qui faisait état d'un procès [A], dont a été saisi un Tribunal [national] ;

Tandis que [A], Directeur de [X] invoque la clause arbitrale, [Y] invoque de son côté la nullité de la convention … et par voie de conséquence, de la clause compromissoire, comportant institution arbitrale, qui s'y trouve contenue.

Subsidiairement [Y] demande qu'il soit sursis à statuer jusqu'à ce qu'il ait été définitivement statué par les tribunaux français sur la demande par elle formée aux termes de son assignation …

Compte tenu des circonstances de la cause, la détermination des points litigieux à résoudre peut se résumer comme suit :

- En présence de la nullité de la convention … et de celle de la clause compromissoire y insérée, telles qu'invoquées par la société [Y], l'arbitre est-il juge de la validité de son institution ?
- La clause compromissoire [de la convention] est-elle valable ?
- L'action engagée devant le Tribunal [national], tendant à voir déclarer nul le brevet litigieux, justifie-t-elle qu'il soit sursis à statuer par l'arbitre jusqu'à ce que cette action ait été définitivement jugée ?

Subsidiairement, au fond :

Des conventions existent-elles entre les parties et ces conventions sont-elles valables ? Dans quelle mesure ont-elles été respectées ?

[Y] et ses filiales doivent-elles faire transcrire la marque « [Y] » en France et à Berne au nom de [A], en étant ainsi obligées de modifier leurs dénominations sociales ?

Des sommes sont-elles dues à titre définitif ou à titre provisionnel à [A] ou respectivement à [Y] ?

Quel en est le montant, ainsi que celui des intérêts de droit, des dommages éventuels et des dépens ? Quelles seraient, le cas échéant, les modalités éventuelles de versement ? …. »

Que le délai pour le prononcé de la sentence qui a commencé à courir à cette date, a été prorogé par la Cour d'Arbitrage comme suit : …

Attendu que les parties invitées à se prononcer à ce sujet, n'ont pas exigé qu'une audience ait lieu, qu'au contraire le demandeur a fait savoir qu'il estimait avoir éclairci sa position "de manière suffisante et précise par les mémoires" et que la défenderesse s'est contentée de déclarer qu'elle donnerait suite à une convocation en laissant ainsi à l'arbitre le soin de décider de l'opportunité d'un débat oral ; Que les mémoires versés au dossier et les pièces y annexées permettant en effet de dégager les faits et éléments essentiels de la cause sans qu'il soit nécessaire d'ouvrir un débat oral ; Attendu que la convention litigieuse … a été signée, d'une part, du demandeur, d'autre part, du président du conseil d'administration et de quatre administrateurs de la défenderesse …

Attendu qu'il est incontesté que la défenderesse a exploité la concession et, satisfaisant aux dispositions de l'article 2 qui l'engagent à payer au demandeur, en contrepartie de ladite concession, une redevance de 2% sur le chiffre d'affaires réalisé dans les territoires concédés, a payé pour les exercices 1952 et 1953 la somme de … francs ;

Attendu que le litige naît du refus de la défenderesse d'exécuter, pour les exercices ultérieurs, la convention litigieuse, en l'attaquant comme nulle, pour (1) défaut de brevets valables et (2) défaut de valeur des droits concédés … ;

Attendu que, toujours au motif de la prétendue nullité de la convention, la défenderesse soulève l'exception d'incompétence, en contestant à l'arbitrage le pouvoir de connaître de la validité de la clause d'arbitrage, qui se trouve insérée dans la convention et, de la sorte, également attaquée en nullité ;

Mais attendu que l'arbitre est juge de sa propre compétence ; et que, jugeant dans le cadre du Règlement de Conciliation et d'Arbitrage de la CCI dont les parties ont stipulé l'application en l'occurrence, l'arbitre est même appelé, à l'exclusion des tribunaux ordinaires bien que sous réserve du contrôle judiciaire de sa décision de ce chef, à connaître du déclinatoire de compétence … ;

Attendu, au surplus, que le déclinatoire de compétence et notamment le moyen sur lequel il est fondé, tant en ce qui concerne la valeur juridique des brevets visés à la convention que quant à la valeur économique des droits concédés en vertu de ladite convention apparaissent sans fondement ;

Attendu qu'en effet, les chiffres d'affaires réalisés sont d'une importance telle, compte tenu notamment de l'augmentation considérable enregistrée en 1954 selon les pièces justificatives versées au dossier, qu'il échet d'écarter le moyen de défaut de la valeur économique de la concession du procédé « Y » faisant l'objet essentiel de la convention litigieuse ;

… considérant que, de la sorte, tous les aléas tant au sujet des anciens brevets de [l'inventeur] qu'en ce qui concerne les droits « en cours » … avaient été expressément mis en évidence, aux fins de préciser que non seulement aucun défaut de brevet, modèle déposé ou marque y visés ne saurait libérer le concessionnaire des obligations acceptées en contrepartie du droit d'exploiter industrielle dans les marchés concédés le procédé « Y », mais qu'au contraire le concessionnaire est responsable de l'entretien des droits en cours, de la mise en vigueur des anciens brevets comme des nouvelles demandes qui pourraient s'avérer nécessaires ;

Attendu, dès lors, que l'arbitre ne saurait pas envisager non plus la proposition subsidiaire de la défenderesse qu'il soit sursis à statuer, compte tenu de la demande par elle formée devant le Tribunal [national], en nullité des droits de propriété industrielle susvisés …

Attendu que la résiliation du contrat aux torts et griefs de la défenderesse entraîne le principe de dommages-intérêts à sa charge ; Attendu que le demandeur réclame, à ce chef, à titre provisionnel la somme de … francs suisses ; Attendu que si, ultérieurement, le demandeur a réaffirmé se réserver une augmentation, il n'a pas avancé d'autres chiffres ;

Attendu dès lors, qu'il échet, l'arbitre ayant les éléments d'appréciation suffisants, de considérer comme justifiée l'attribution à titre de dommages-intérêts, de la somme de … francs suisses ; considérant, en ce qui concerne le libellé en francs suisses, que rien en effet ne semble s'opposer à ce choix compte tenu du fait que les parties toutes deux établies à l'étranger ont stipulé dans leur contrat le règlement des redevances au siège de la défenderesse … « dans l'une des monnaies y ayant cours » ;

Attendu enfin que la résiliation entraîne surtout la restitution obligatoire de tous le droits et avantages obtenus par la défenderesse en vertu du contrat résilié et l'obligation de celle-ci de ne plus troubler la jouissance des droits restitués ;

Attendu qu'il en est ainsi à plus forte raison, eu égard à l'article 6 dudit contrat aux termes duquel, en cas de défaillance de la part de la défenderesse de régler les redevances, le demandeur « pourra reprendre ses droits dans les pays concédés » ; Attendu que la défenderesse ne saurait résister à cette revendication même en ce qui concerne la marque « [Y] » bien qu'enregistrée à son nom ;

Attendu en effet qu'en vertu de la concession faisant l'objet du contrat qu'elle a conclu, en 1950, avec … la défenderesse était tenue de faire enregistrer ladite marque au nom du demandeur ; qu'au mépris de cet engagement, l'un de ses administrateurs … a néanmoins déposé la marque en 1951 à son nom, pour la céder aussitôt à … un autre administrateur de la défenderesse, qui l'a, à son tour « apportée » à la défenderesse, le tout, ainsi qu'il ressort des pièces versées au dossier, évidemment à l'insu du demandeur, et, de toute façon, en outrepassant les prérogatives stipulées en faveur de la défenderesse ;

Mais attendu que, quoi qu'il en soit, toutes marques enregistrées au nom de la défenderesse à la suite de la concession litigieuse, doivent maintenant faire retour en concédant de l'exploitation industrielle dont lesdites marques sont inséparables ; Attendu enfin que la présente revendication des dites marques n'a pas pour objet leur propriété au sens de la loi du 23 juin 1857 ni aucun autre titre d'application de cette loi ;

Attendu en effet que l'arbitre est appelé en l'occurrence à connaître les rapports contractuels réciproques ; et que dès lors, à supposer même qu'une action fondée uniquement sur la loi précitée ne puisse faire l'objet d'un arbitrage, la présente revendication est en tout cas arbitrable, à titre d'action contractuelle dans une matière non soumise à communication obligatoire au ministère public et sur laquelle les parties ont le droit de disposer librement et, par suite, de compromettre valablement … ;

Attendu que c'est donc à bon droit que le demandeur réclame la restitution de la marque « [Y] » – qu'en fin de compte la défenderesse n'a pu obtenir que grâce au contrat résilié – et en même temps exige que la défenderesse s'abstienne désormais d'utiliser pour elle-même ou pour ses filiales une raison sociale empruntée à ladite marque ;

Par ces motifs

Jugeant contradictoirement et en dernier ressort, dans les limites de l'acte en date du … définissant notre mission et reproduit ci-dessus, sur les divers chefs des actions principale et reconventionnelle ;

Nous déclarons compétent et disons n'y avoir lieu de surseoir à statuer ;

Constatons la validité du contrat intervenu entre les parties … et, partant, de la clause d'arbitrage y insérée portant soumission du présent litige à l'arbitrage de la CCI ;

Condamnons la société défenderesse [Y] à fournir au demandeur [A], dans un délai d'un mois à compter de la date de la présente sentence, les factures et les comptes rendus des chiffres d'affaires réalisés par la défenderesse et ses filiales en France [et à l'international] ;

Condamnons la société défenderesse à payer au demandeur une redevance de 2% calculée sur les chiffres d'affaires ainsi établis, avec intérêts de 5% sur ces redevances à compter de la date de la présente sentence ;

Prononçons la résiliation au 31 décembre 1955 aux torts et griefs de la société défenderesse du contrat … ;

Condamnons la société défenderesse à payer au demandeur la somme de … francs suisses, payable en cette monnaie ou en toute autre monnaie ayant cours au lieu d'exécution, selon le choix du demandeur, la contre-valeur devant alors être calculée au taux du change du jour du paiement ;

Disons que la société défenderesse a l'obligation de restituer au demandeur la marque [« Y »] et d'en effectuer, dans un délai d'un mois à compter de la date de la présente sentence, la transcription au nom du demandeur ;

Disons que la société défenderesse a l'obligation de supprimer, dans sa propre raison sociale ainsi que dans celle de ses filiales, la dénomination [« Y »] et d'effectuer, dans un délai d'un mois à compter de la date de la présente sentence, les modifications qui dès lors s'imposent ;

Accueillons quant à ce la demande principale du demandeur, et déboutons la société défenderesse de sa demande reconventionnelle ;

Rejetons toutes autres conclusions plus amples ou contraires ;

Disons que la totalité des frais et dépens de l'arbitrage en ce compris les honoraires de l'arbitre s'élèvent à Francs français … seront supportés par la société défenderesse.

22. ARBITRAL AWARD
ICC Case No. 983 (London, 1958)

... By letter dated the 8th March, 1956, the Plaintiffs Messrs. [X] [USA] requested arbitration under the [1955] Rules of Conciliation and Arbitration of ICC pursuant to Article 14 of an agreement [in] December, 1955, which provided that all disputes under the contract should be finally settled under the aforesaid Rules.

I ... was nominated as sole arbitrator on the 28th March, 1956. I have considered all the documents submitted to me including those not annexed to this award and taken into consideration all the arguments propounded at the oral hearings. ...

In accordance with rule 19 of the Rules of Conciliation and Arbitration of ICC I drew up a statement defining my terms of reference containing the matters listed ... The said statement which is hereinafter called "l'acte" ... was signed by the parties and by myself and was submitted for approval to the Court of Arbitration. The Defendant signed the submission with reservations which are contained in the said document and to which reference is made hereinafter.

I. As appears from l'acte the first issue is "La clause compromissoire stipulée par les parties est-elle valable ou non ?".

A. The first question is under what system of law this issue must 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 of interpretation of this contract.

b) As to American law, there is the fact that two of the parties one on each side [X] and [Y] 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 the reference to French currency, indicate the application of French internal law. The law applicable is, as the Defendants contended ... French law.

B. The second question is whether the arbitration clause in this contract is valid in French law.

This raises subsidiary questions on which I have taken into consideration the notes submitted on this matter Annex V and the oral arguments that the hearings.

1. Is the validity under French law to be judged on the basis the contract is a national or an international contract ? The contract under discussion is international because it contemplates the creation and distribution of films, gramophone records and television shows in all the countries of the world ... However, although the contract is international, it must be subject to some internal law. This is stated in the reasoning of the decision of the Cour de Cassation Civile of the 21st June, 1950, referred to by the Claimants where it is stated:

> "Attendu que si tout contract international est nécessairement rattaché à la loi d'un Etat". In that case the Court stated "Attendu qu'il appartient aux parties, en un tel contrat, de convenir, même contrairement aux règles imperatives de la loi interne appelée à régir leurs conventions."

but in this case the "loi interne" or the law to which the contract is subject ("rattachée") is French law so that it results that the question whether the arbitration clause is valid or not must be decided according to French law which means French internal law since there is no foreign law which would be applied in this case.

It is immaterial as argued by the claimants whether the invalidity of the arbitration clause in French law is a matter of public policy or not since the invalidity of the clause falls to be decided by French internal law that being the law governing the contract (loi de rattachement du contrat).

2. By French internal law is the arbitration clause valid ? The Defendants maintain that the contract concerns a louage de services and is therefore not commercial with the consequence that the arbitration clause is invalid. The claimants maintain that the contract is an "association en participation" and therefore of a commercial character which would render the arbitration clause valid.

It is to be noticed that (1) according to the contract, [Y] has a right to participate in the profits. (2) the contract deals with the production … of shows and … by means of limited companies of which the Defendants will get 80% of the profits and the claimants 20%.

3. The contract has the effect that [Y] has to approve the story … the [performer] and the time for [the project] as is shown by the actions of the parties when they began to carry out the contract as regards the first [project].

These characteristics appertain to a partnership ("association en participation") rather than to a contract for services ("louage de services"). The two elements required for a partnership namely a contribution (un apport) and the sharing of the loss are present here in that the contribution on the part of [Y] is their "travail et industrie" while their share of the loss is represented by their possible loss of the monies to be paid to them if losses prevent this payment.

[Y2] is shown by the provisions of the contract and its execution until it was terminated is equally to be characterized as an "associé" since he represented and assisted [Y] and there were no services on his part which had to be given to either of the Claimants.

For these reasons the contract is an "association en participation" and not a "louage de services" and I hold that the arbitration clause is valid.

II. The second issue on which I have considered [based on Defendants' note] and the oral arguments addressed to me at the hearing is:

> "Subsidiairement et pour le cas ou par impossible, la réponse à la précédente question serait affirmative, Monsieur l'Arbitre est-il compétent pour se prononcer sur le différend dont il s'agit ?"

Article 6 of the Rules on Conciliation and Arbitration is as follows:

> "il existe auprès de la Chambre de Commerce Internationale un organisme international d'arbitrage dont les membres sont nommés par le Conseil de la Chambre de Commerce Internationale et qui, sous le nom de Cour d'Arbitrage, a pour mission de procurer, de la façon indiquée ci-après la solution arbitrale des différends d'ordre commercial ayant un caractère international."

The requirements are therefore that

1. the dispute must be a business dispute.
2. it must have an international character.

As to (1). For the reasons set out [above] the dispute is of a business character. The French words in the rule "Ordre commercial" are less restrictive than "matière commerciale" in the principle of law as to the validity of the arbitration clause. It is therefore a matter of a fortiori reasoning that if the dispute is a "matière commerciale" it is "d'ordre commercial" within the meaning of rule 6. Even if the dispute were not a 'commercial matter' it has a business character being between business men concerning the business of [entertainment].

As to (2). The same reasoning applies. If the contract is "international" as stated in paragraph 5 then the dispute has an international character. Even if the contract is not "international", the dispute nevertheless has an international character by reason of the matter set out in paragraph 5 and having regard to the nationality of the parties and of the calculation in dollars of the French franc equivalent which last factors do not make the contract an "international" contract but which reinforces the international character of the dispute as having the characteristics referred to in Paragraph 5 which constitute the contract an international contract. For these reasons the arbitrator is competent to decide the dispute.

III. The third issue

.....

IV. The fourth issue as formulated in l'acte is as follows:

[I]s the claimant entitled to the following or any other relief.

a) [Y] to be directed to comply with the [the contract] to obtain releases of all commitments determined to conflict with the terms of the agreement between the parties, and to furnish a bond in the amount of $... guaranteeing conscientious performance of their obligations under the agreement. A Supervising Director to be designated at [Y's] expense to follow continuously execution of the agreement and to be present during [Y]'s performance to determine whether the provisions of the agreement and of the bond have been complied with.

b) [X] to be awarded, in the event that [Y] is unable or unwilling within a specified period to obtain releases from conflicting engagements and to provide a bond for conscientious performance, their full expenses and damages or such alternative or additional relief as the Arbitrator may think just. The [X] to be awarded the right to receive a percentage of [Y]'s earnings from [the projects] during the term of [the contract].

c) Damages as set out in Section C of l'acte.

As regards the relief ... above the fact that as regards carrying out the contract, the parties have completely separated, makes it impracticable to order this relief. Moreover, it is not relief which it would be possible to enforce.

The claims listed in Section C ... were revised by the claimants ... and are as follows:

They request,

1. Their expenses: ... dollars.
2. Their loss of profits during the first one and one-half years of the term of the contract. Claimants have shown their prospective loss of profits during the full six-year term of the contract to be ... One fourth of this amount is ...
3. A decision that [the contract] is in full force and effect and ordering Defendants to comply therewith during the term of the contract still to run.
4. An order that [the Defendant], within 30 days after the date of the award, furnish a performance bond in the amount of $... guaranteeing faithful and conscientious performance of the agreement by Defendants. Claimants request that the Arbitrator award [the Defendant] damages of $... per month for each month or portion thereof during which Defendants fail to furnish a performance bond as directed.
5. Alternatively to (2), (3) and (4) if the Arbitrator determines that he is without power to direct Defendants to furnish a performance bond as requested in (4), an award declaring the contracts which are the subject of this arbitration at an end relieving Claimants of the duty to perform same and directing [Defendant] to pay [Claimant] their loss of profits during the full six-year term of the agreement, or $...
6. Special damages of $... for injury to the [Claimant's] reputation in the motion picture industry.

I have already dealt [above] with the principle of the claims in (2), (3) and (4) and given my reasons for rejecting them. As regards claim (5), I make a declaration as prayed in claim (4) that the contract which is the subject of this arbitration is at an end and that the claimants are relieved from the duty of performing the same. As regards claim (6) on which the [y] submitted a short note ... I reject this claim as not having been include in the original submission and, on the merits, that the activities of the claimants in the picture industry since this contract was breached show on the contrary that their reputation has not been impaired.

As regards claim (1) for expenses of $... the material for this claim as submitted to me by the Claimants ... Having considered all the material submitted to me both documentary and orally award the sum of $... to be paid by [Y] to [X]. Some of the expenses were not incurred as the result of the contract but a great part were incurred in fulfilling the contract by seeking the finance and assembling the talent for the [projects] contemplated by the contract.

As regards claim (5) for loss of profits, having considered the matters submitted in the request ... and the arguments addressed to me at the oral hearings I award $... to be paid by [Y] to the [X]. The latter's loss of profits was directly due to the breach of contract by [Y] though allowance must be made of the uncertainties of [the business] and the difficulties which would be likely to be met by the Plaintiffs.

VI. The last issue in l'acte is as follows:

> "Dans tous les cas Monsieur l'arbitre statuera sur les dépens. I award that costs be paid by the Defendants as the Plaintiffs have succeeded in most of their claim."

The time for the making of the award has been from time to time extended by the Court of Arbitration in accordance with the powers given to it under Article 23(2) of the Regulations. The following are the successive extensions …

[Y] a signé l'acte sous les réserves suivantes:

> "Les défendeurs signent le compromis ci-dessous, sous les réserves qui y sont exprimées et, en outre, sous la réserve suivante:
>
> Le 9 mars 1957 un accord est intervenu qui a mis fin à toutes les difficultés existant entre les parties. Les demandeurs ont refusé d'exécuter le dit accord. Les défendeurs les ont, en conséquence, assignés devant le Tribunal [national] pour les voir condamner à la dite exécution.
>
> C'est sous toutes réserves de cette dernière instance et en raison uniquement du fait que la Cour d'Arbitrage a cru devoir ordonner que Monsieur l'Arbitre passerait à l'exécution de sa mission, que les défendeurs acceptent de signer et de comparaître à l'arbitrage."

En ce qui concerne les réserves des défendeurs, les dites réserves ne figurant pas parmi les points en litige spécifiés dans l'acte dressé devant l'arbitre et signé par lui et les parties en conformité de l'art. 19 du Règlement; elles ne sont pas non plus mentionnées parmi les moyens de défense opposés dans leur exposé par les défendeurs; et ceux-ci, loin d'en faire l'état devant l'arbitre, lui ont fait déclarer par leur conseil qu'elles n'appelaient de sa part aucune obligation de les viser dans le dispositif de sa sentence; ils n'ont pas davantage demandé qu'il leur en soit donné acte.

For these reasons I the Arbitrator decide:

A. The applicable law being French law, the arbitration clause is valid in such law.
B. The validity of the arbitration clause thus being established, the contention of the Defendant that the arbitrator has no jurisdiction is rejected and I declare that I am competent the dispute being of a business and international character.
C. The claims by the [X] under 4(a) and (b) that the [Y] should be directed to comply with the [the contract] and give a guarantee are rejected.
D. As regards the damage suffered by the [X] I fix this at … and order that this sum of … dollars shall be paid by the [Y] to the [X].
E. As regards the costs, the Claimants having succeeded on the greater part of their heard of claim I order that the Defendants do pay all the costs amounting to … dollars.

23. SENTENCE ARBITRALE
Affaire CCI n° 986 (Paris, 1957)

Dans l'affaire … entre **1.** [X] [Pays d'Europe] (demanderesse), et **2.** [Mr. Y] [Pays d'Europe] (défendeur),

Le Tribunal Arbitral composé de … Ayant établi en présence des parties et de leurs conseils l'acte prévu par l'Art. 19 du Règlement [de 1955] leur donnant faculté d'agir comme compositeurs amiables,

Après avoir pris connaissance des mémoires des parties … Et après avoir examiné les documents soumis au Tribunal dont l'authenticité ne fut pas contestée, notamment : … Et après avoir entendu la déposition du témoin … Et les plaidoiries des Conseils des parties … a passé la sentence suivante :

La demanderesse affirme qu'elle avait conclu par échange de lettres des 25-26 Juillet 1955 un contrat d'option avec le défendeur concernant la majorité des actions de [Z] d'après les termes du contrat, la demanderesse dut verser une somme de … sur un compte bloqué de la succursale [de la Banque], engagement qui fut rempli immédiatement par la demanderesse. Le défendeur d'autre part avait à remettre dans un délai, en principe d'un mois, 51% du capital, soit … du capital-actions de [Z] en titres de gage pour compte de la défenderesse ainsi que des documents énumérés dans le contrat.

Bien que le défendeur eût affirmé par lettre complémentaire de même date que les actions étaient sa libre propriété, il n'aurait pas rempli son obligation. Malgré plusieurs appels adressés par lettres recommandées des 31 août et 6 octobre 1955, ainsi que sous forme de sommation du 2 novembre 1955 et signification du 15 décembre 1955, par acte extrajudiciaire, le défendeur n'aurait fait aucun dépôt des titres aux caisses [de la Banque]. Il eût même répondu le 10 novembre 1955 en faisant de nouvelles propositions.

Se fondant sur ces faits, la demanderesse demandait au Tribunal de prononcer la résiliation du [contrat d'option] et l'application de la clause pénale de contrat. Le défendeur releva *in limine litis* l'imprécision de la demande dont l'énonciation ne permettrait pas de connaître, de façon chiffrée, les prétentions exactes de la requérante et, par ailleurs, que la demande n'indiquait pas, comme l'exige l'art. … du [code civil], l'exposé des moyens.

Au surplus, il constatait que, d'après les termes mêmes du contrat, le paiement de la somme fixée en francs français à titre de pénalité contractuelle était subordonné à la preuve de l'existence d'une faute du défendeur. Il s'agissait dans cette affaire d'un fait du prince. Le contrat aurait été d'ailleurs subordonné à l'accord du Gouvernement … une condition qui ne pût être remplie.

A l'occasion de l'établissement de l'acte d'après l'Art. 19 du Règlement, les parties s'accordaient :

1. pour constater l'impossibilité définitive d'exécution des accords des … ;
2. pour concourir, de part et d'autre, à la libération [de la somme consignée à la Banque]. Les mêmes parties s'engageaient à donner [à la Banque] toutes instructions nécessaires à cet effet.

Et la demanderesse précisait sa demande, à savoir que [Mr Y] soit condamné, soit en application de la clause pénale au paiement d'un montant de … soit subsidiairement à une somme de … à titre provisionnel de dommages-intérêts.

A l'occasion de la séance du 25 février 1957, le défendeur retire les objections de forme qu'il avait faites *in limite litis*, toutefois en ajoutant à sa défense un argument nouveau, à savoir que la demanderesse n'avait plus d'intérêt légal à sa cause. …

… Malgré le fait que la demanderesse avait de son côté exécuté ses propres obligations, le défendeur n'a, jusqu'au moment de la résiliation du contrat, pas rempli l'engagement qu'il avait pris, à savoir de déposer 51%, soit …, capital nominal de [Z] aux caisses [de la Banque]. En vérité, il n'était pas en état de le faire parce que la propriété de ces titres était cédée depuis l'année … au gouvernement …

Cette cession avait eu lieu à l'occasion d'une augmentation du capital social de [Z] par … qui avaient été payés par le gouvernement … Malgré l'affirmation du défendeur, dans sa lettre complémentaire du 25 juillet 1955, la situation actuelle le jour de la conclusion du contrat était donc qu'en réalité ce n'était pas le défendeur, mais le gouvernement … qui disposait du capital nominal de … des actions de [Z] …

Le défendeur a donc insisté sur le fait qu'il était tout d'abord connu de la demanderesse que le contrat était conditionné par l'accord [du gouvernement] et que c'était la demanderesse elle-même qui avait voulu qu'une telle clause ne parût pas dans le contrat. Il est vrai que le témoin … a déposé que la demanderesse savait que 51% des actions étaient aux mains du gouvernement … et que, pour cette raison, un accord formel était nécessaire. Toutefois, le même témoin a aussi déposé qu'il ne pouvait pas dire que la demanderesse était informée sur les détails de la transaction, mais qu'elle avait su qu'un accord du gouvernement … serait nécessaire. Le témoin ne pouvait pas donner réponse à la question de savoir si le défendeur avait informé la demanderesse des conditions politiques du gouvernement …

De plus, il paraît de la correspondance que le défendeur lui-même avait des différences d'opinion avec le gouvernement … au regard de ses droits aux actions parce qu'il avait écrit le 22 juillet … au gouvernement de lui remettre les actions de [Z] en échange de la contre-valeur de … Il n'y a pas d'évidence qu'il eût informé la demanderesse de cette différence d'opinion.

De plus, c'est le défendeur lui-même qui confirmait le 25 juillet à la demanderesse qui, c'est possible, a eu des doutes sur le droit du défendeur aux actions, par lettre complémentaire, que ces actions étaient sa libre propriété, tout en accord avec sa lettre du 22 juillet au Gouvernement … A cette lettre, le Gouvernement … répondit le 16 août que la lettre du 22 juillet écrite par le défendeur était écrite en méconnaissance de la situation en fait et en droit. Il n'y a donc pas d'évidence que la demanderesse fut informée de ces différences d'opinion au moment de la conclusion du contrat. Aussi, plus tard, quand le défendeur était déjà mis en demeure par la lettre de la demanderesse du 31 août 1955 … il n'y a pas d'évidence que le défendeur ait donné des informations complètes. Au contraire, c'est premièrement dans sa lettre du 26 septembre que la situation a été éclaircie …

… De plus, il est à noter qu'il n'y a pas eu d'accord entre les parties en ce qui concerne la loi applicable. L'affirmation du défendeur qu'il n'était pas commerçant n'a pas été contestée de même qu'il n'y avait pas de contestation que la clause du domicile (art. 21 du Contrat) n'impliquait pas le choix de la loi [de la juridiction du demandeur].

En ce qu'il s'agit d'abord de la loi applicable, le Tribunal Arbitral est de l'avis que c'est la loi [de la juridiction du défendeur]. Cette loi est indiquée par le lieu d'exécution du contrat. La loi du lieu d'exécution d'un contrat est la loi préférable d'après le Droit International Privé [de chacune des juridictions des parties].

Comme le défendeur n'est pas commerçant, ce sont les règles du Code Civil … qui sont applicables, dont le paragraphe … donne le droit au Tribunal de réduire une pénalité prévue par contrat.

Etant donné que les documentations soumises au Tribunal sont très claires et complètes, il semble au Tribunal que c'est au défendeur qu'il doit attribuer le fardeau de la preuve de ce qu'il y avait d'autres faits et stipulations dont on n'avait pas fait allusion par écrit. Il semble au Tribunal que le défendeur n'a pas pu établir d'une manière incontestable qu'il avait donné à la demanderesse des informations assez complètes et c'est en ce point qu'on doit attribuer la faute au défendeur.

Le Tribunal est de l'avis que la demanderesse n'aurait pas conclu ce contrat, ou au moins, aurait attendu le consentement du Gouvernement … avant de verser la somme de … dans un compte bloqué si elle avait été complètement informée.

D'autre part, il est certain que la situation politique … a joué un rôle important dans cette affaire, et c'est une raison politique qui était au fond de la décision négative du Gouvernement … Cette décision négative ne peut pas être attribuée à la faute de [Mr. Y].

Il semble donc au Tribunal que la demanderesse a droit aux dommages-intérêts, soit par raison que l'information donnée par le défendeur n'était pas assez complète, soit en application de la cause pénale qui doit être réduite pas le Tribunal en accord avec le paragraphe … du Code Civil de la loi [de la juridiction du défendeur] à une somme appropriée ; c'est-à-dire en ce sens, le montant des dommages-intérêts.

En ce qu'il s'agit du décompte des dommages-intérêts, ce sont seulement les frais [de la Banque] et les intérêts légaux (4%) de la somme de … que le Tribunal peut attribuer, les frais de la constitution et de la gérance de la demanderesse ne peuvent pas constituer un dommage, c'est de même pour les frais de cette procédure. Les frais de consultation n'étaient pas concrétisés. …

Par ces motifs

- En droit et en équité, disons et jugeons que la demande de [X] est recevable et fondée, à concurrence de la somme de … que [Mr. Y] est condamné à lui verser,
- Rejetons la demande pour le surplus,
- Disons que les frais, y compris les honoraires des arbitres, s'élevant au total à … seront partagés dans la proportion de 2/5 à la charge de [X], soit … et de 3/5 à la charge de [Mr. Y] soit …

24. ARBITRAL AWARD
ICC Case no. 998 (Paris, 1957)

… We the undersigned arbitrators … Conseiller à la Cour d'Appel de [town in Sweden], acting as Chairman of the Arbitral Tribunal, appointed third arbitrator by the Court of Arbitration at its session held on 13th March 1957; … Avocat [France], … nominated arbitrators by each of the parties and confirmed as such by the Court of Arbitration at its session held on 13th March 1957, to proceed to an arbitration between: **1.** [X] [France] represented by … (Claimant); and **2.** [Y] [State in Asia].

Have conducted the arbitration of this case and rendered the following award:

I. The arbitrators' mission

In accordance with article 19 of the Rules of Conciliation and Arbitration, the arbitrators' terms of reference were defined by the "Minute" … approved by the arbitrators and the parties in documents signed on 27th March 1957, 11th April 1957 and 24th April 1957.

II. Arbitral audiences

The Arbitrators have had meetings at the Head Office of ICC in Paris on … with the two Parties. In conformity with the Rules of Conciliation and Arbitration of ICC, the Arbitrators have heard the two Parties through their Counsellors and examined all the documents.

The Arbitrators having ordered a new meeting with the Parties on … have, at that meeting, received from them a document containing an amicable settlement of the case (hereinafter under III).

III. Amicable settlement reached by the parties

This document signed in five original copies in Paris on the 10th of May 1957 reads as follows:

> "The Representatives of [X], on one part, and of [Y], on the other part, have to-day reached an amicable agreement on the above mentioned case.
>
> Owing to this agreement it has been mutually agreed upon that [X] will receive from the Republic of [Y] a total amount of French Francs …

The amount which [X] has already received from [Y] viz. French francs … shall definitely remain the property of [X], as being a part-payment of the above stated amount of French francs …

Further, the difference between French francs … and French francs … viz, French francs, will be paid by [Y] to [X] in the coming forty-five days from the date of signing of this document.

[Y] undertakes to effect the payment of the above amount in the above-mentioned time.

Further, [Y] herewith undertakes not to take advantage of the "immunité de juridiction," so not pay the above amount, or so to delay the payment of same.

Further, it has been agreed that the expenses and fees of the Arbitration will be borne equally by each Party.

The above constitutes the terms of the amicable settlement reached between the Parties."

IV. Arbitral award made by consent of the parties

We the undersigned arbitrators therefore award and determine as follows:

- The parties are bound to conform to the terms of the above recorded amicable settlement which constitutes the award directed by the arbitrators.
- The expenses and fees of the Arbitration as defined in the terms of reference of the arbitrators, i.e. dealing only with the fees and expenses of the Chairman of the Arbitral Tribunal and the administrative charges, amounting to … Frs, will be borne equally by each party.

25. SENTENCE ARBITRALE Affaire CCI n° 1007 (Paris, 1959)

Nous soussigné, … [Belgique] désigné en qualité d'arbitre unique par la Cour d'Arbitrage de la CCI lors de sa session du 13 mars 1957 pour statuer à Paris, entre **1.** [X] [France], demanderesse, assistée de son Conseil … d'une part et **2.** [Y] [Allemagne] défenderesse, représentée … d'autre part, avons procédé à cet arbitrage conformément au Règlement de Conciliation et d'Arbitrage de la CCI et dans les limites de l'acte dressé par nos soins, le 27 mars 1958, selon prescrit de l'Article 19 du Règlement de Conciliation et d'Arbitrage [de 1955].

Ledit acte fut revêtu de la signature de chacune des parties et agrégé par la Cour d'Arbitrage. Il dit et stipule ce qui suit :

« Les parties ont conclu, le 1er juin 1955, une convention, en vertu de laquelle la défenderesse concède à la demanderesse la licence exclusive et illimitée pour la France d'une invention, protégée à titre de modèle d'utilité dans la République Fédérale d'Allemagne, pour la fabrication [de vêtements] et d'un know-how afférent à l'utilisation et à la mise en valeur industrielle de ladite invention.

En contrepartie, la demanderesse s'engageait à déposer une demande de brevet de cette invention en France, en se prévalant de la priorité allemande]. Les frais de cette demande, ceux de la mise en valeur du brevet et le paiement des annuités courantes étaient à charge de la demanderesse.

Ledit contrat était assorti d'une clause compromissoire (article 10) attribuant à un tribunal d'arbitrage, siégeant actuellement [à] Paris … et appliquant le Règlement d'Arbitrage de la CCI, les controverses pouvant résulter de la convention. L'alinéa 3 de cet article 10 ajoute que la clause d'arbitrage est spécialement reconnue par les parties …

S'appuyant sur cette clause, la demanderesse adressa une requête … au Secrétariat Général de la Cour d'Arbitrage et déposa un mémoire exposant le différend,

Sur la foi de ladite clause, la Cour d'Arbitrage a conclu « *prima facie* » à l'existence d'une clause d'arbitrage et, en conséquence, a saisi l'arbitre soussigné du litige, en lui demandant de se prononcer conjointement sur l'existence et la validité de la clause d'arbitrage et, dans l'hypothèse où sa décision serait affirmative, sur le fond même du différend.

1. Sur la compétence

A. Contestant la réalité de la clause d'arbitrage, la défenderesse soutient que seul doit être soumis à l'appréciation de l'arbitre le problème de la compétence de la juridiction arbitrale, mais aucunement le fond du différend.

Escomptant que l'arbitre saisi se déclarera incompétent, elle ne développe l'ensemble de ses moyens quant au fond …

B. La défenderesse dénie ensuite la validité de la clause d'arbitrage, pour les motifs ci-après :

1. le contrat du 1er juin 1955 n'aurait jamais reçu aucun commencement d'exécution de la part des parties, la demanderesse n'ayant entrepris aucune préparation des bases industrielles nécessaires à la fabrication (achat de locaux, de machines et autres) et aucune coopération entre les parties ne s'étant manifestée.

2. les rapports contractuels n'auraient nullement consisté en la mise à la disposition de la demanderesse des brevets, know-how, matières premières, etc… la demanderesse elle-même aurait fourni à la défenderesse des matières de provenance françaises à ouvrager par cette dernière. L'exportation de France en Allemagne en était autorisée, à titre temporaire, par les Services de Douane des deux pays, qui, par ailleurs, exerçaient un contrôle sur les mouvements des matières premières et des marchandises fournies.

En conséquence, les parties se seraient trouvées liées par un contrat de louage d'ouvrage, la défenderesse fabriquant elle-même dans ses propres usines et selon ses propres procédés, les articles prévus.

3. il ne faut point confondre une licence de fabrication avec une licence d'importation, équivoque qu'aurait commise la demanderesse dans son mémoire introductif du 31 décembre 1956, où elle évoque les difficultés qu'elle éprouva quant à l'exécution du contrat de louage d'ouvrage,

4. le contrat de licence n'aurait visé que deux parties contractantes, tandis que l'ensemble des éléments formant le contrat de louage visait quatre parties, la demanderesse ayant dû s'assurer, d'une part, le concours d'un fournisseur de [matières premières], en la personne de [A] qui exportait les matières premières à la défenderesse en Allemagne, tandis qu'un homme de paille, en la personne [Z], obtenait les licences d'importation requises pour l'introduction des [vêtements] en France.

Or, ce contrat, totalement différent, a fait l'objet d'un certain nombre de confirmation de commandes écrites sur les formules de la défenderesse, auxquelles étaient annexées des conditions générales de vente et de livraison attribuant compétence judiciaire aux tribunaux [nationaux].

5. Les rapports contractuels compliqués, avenus entre parties, n'étaient nullement fonction de l'article 4 du contrat de licence. Un contrat cadre peut comporter un nombre plus ou moins grand de dispositions plus ou moins importantes parfois en prévoyant des alternatives au cas où les parties ne connaitraient pas encore les possibilités exactes de telles ou telles coopération, ceci n'étant pas le cas des parties litigantes qui avaient fixé très précisément leur accord de fabrication sous licence. La demanderesse s'étant trouvée dans l'impossibilité financière et matérielle d'exécuter ledit contrat, ne peut donc en aucune manière en invoquer la clause compromissoire.

En conclusion, la défenderesse demande que le Tribunal arbitral se déclare incompétent pour statuer sur le litige ci-dessus, en laissant à la demanderesse le soin de se pourvoir comme de droit devant les tribunaux ordinaires.

A cette argumentation, la demanderesse répond qu'il est faux d'alléguer que la demande qu'elle forme n'est pas fondée sur le contrat du 1er juin 1955, mais sur un ou plusieurs autres contrat, qualifiés par la partie adverse de louage d'ouvrage sans lien avec le contrat précité, en manière telle que la clause d'arbitrage serait, de la sorte, inexistante. Elle appui ses dires sur les moyens suivants :

1. Le contrat du 1er juin 1955 est un contrat de licence exclusive, non seulement de fabrication, mais aussi d'importation et, à ce dernier titre, contrat-cadre par rapport aux commandes ultérieures qui ont donné lieu au précédent litige.

2. La défenderesse a insisté sur le fait que les obligations assumées par la demanderesse dans le contrat du 1er juin 1955 doivent être exécutées indépendamment du commencement de la fabrication par celle-ci. Elle le justifie par la lettre du 30 juin 1955 de la défenderesse, demandant le paiement par la demanderesse des frais de prises de brevet en France, obligation dont la source se trouve dans le paragraphe 2 du contrat du 1er juin 1955 et portant référence à des marchandises fabriquées par la défenderesse à une époque où aucun commencement de fabrication n'a pu avoir lieu.

3. Une lettre du 10 septembre 1956, dans laquelle la défenderesse, se référant au paragraphe 6 du contrat du 1er juin 1955, propose un avenant modificatif à ce paragraphe, substituant le terme « [B] » au nom « [C] », originairement prévu.

4. Le contrat du 1er juin 1955 servit, en outre, d'assise aux commandes ultérieures et à la publicité faite par la demanderesse sur le marché français en faveur [de vêtements], publicité qui n'eut point été entreprise sans que la demanderesse n'ait été assurée d'un droit d'exclusivité.

5. La demanderesse ne s'est pas résignée à abandonner le contrat de licence ; c'est la défenderesse qui a suggéré de ne pas entreprendre une production en France, en procédant plutôt par voie d'importation [de vêtements] fabriquées en Allemagne, moyennant exportation de [matières premières] en France, dans le cadre du contrat du 1er juin 1955.

La demanderesse infère donc de ces considérations que, même au mois de novembre 1956, la défenderesse estimait que le contrat du 1er juin 1955 fonctionnait et devait fonctionner comme base des rapports d'affaires entre les deux parties, sous réserve de ceux qui, par leur objet, ne pouvaient jouer qu'en cas de fabrication en France.

C. La défenderesse conteste, enfin, la validité de la clause d'arbitrage, insérée dans le contrat du 1er juin 1955, en disant qu'elle n'a pas été contresignée spécialement par les parties, comme elle aurait dû l'être, en vertu du par. 10 alinéa 3 dudit contrat.

La demanderesse réplique que la clause arbitrale figurait dans la traduction du contrat jointe à la lettre adressée par la défenderesse à la demanderesse, le 5 octobre 1955. La demanderesse en infère que cette clause était couverte par les signatures au bas de l'acte du 1er juin 1955 et qu'une signature spéciale en bas de ladite clause arbitrale n'était nullement indispensable.

2. Sur le fond

La demanderesse expose dans son mémoire du 31 décembre 1956, documents et correspondance à l'appui, que la défenderesse s'est rendue coupable de manquements contractuels graves justifiant l'allocation de dommages-intérêts s'élevant à … Frs fr …

La demanderesse indique, en outre, que l'obligation de renoncer à l'affaire « [B] » lui causera un dommage qu'elle évalue forfaitairement à … Frs soit la somme globale de … Frs fr.

La défenderesse résiste à cette demande, en faisant valoir, sous le bénéfice des réserves formulées ci-dessus quant à la compétence, les moyens soulevés dans sa lettre du 7 octobre 1957 :

1. En ce qui concerne les obligations de la demanderesse :

Cette dernière a-t-elle effectivement exécuté ses engagements résultant du contrat de fourniture ? En particulier, les livraisons de [matières premières] indispensables pour le règlement comptant [de vêtements] par la défenderesse ont-elles eu lieu en quantités suffisantes et à échéances régulières ?

La défenderesse était-elle, selon les bases contractuelles, en droit d'exiger le règlement comptant ou des rentrées de [matières premières] préalables à l'exécution de l'ouvrage ?

Par ailleurs, est ce que les défaillances de livraisons de [matières premières] ne sont pas dues au fait que le tiers chargé desdites livraisons, à savoir [A], n'ont pas été payés par la demanderesse ?

2. En ce qui concerne les obligations de la défenderesse :

Est-ce que la défenderesse a exécuté ses engagements, en particulier, a-t-elle, dans la mesure où les [matières premières] lui ont été fournis, exécuté les commandes provenant de la demanderesse ?

Au surplus, la défenderesse a-t-elle été obligée de faire revenir de France un envoi de marchandise que la demanderesse a laissé impayé ?

3. En ce qui concerne les sommes, objet de la demande :

La défenderesse demande que soit justifiée l'allocation … Frs fr à titre de dommages-intérêts. Elle postule que l'arbitre vérifie la base juridique et la justification de la somme de … Frs en sus.

L'arbitre, statuant à Paris, entendra les parties au cours d'une ou plusieurs audiences arbitrales, se fera éclairer par toute documentation et notes qui lui seront fourniers par elles, moyennant communication à la partie adverse ?

L'arbitre aura pour mission :

- de se prononcer sur son droit de statuer, en vertu de l'investiture qui lui a été donnée par la Cour d'Arbitrage, par une même sentence sur la compétence et, en cas de réponse affirmative, sur le fond,

- quant à la compétence, de dire :
  - si une clause d'arbitrage existait matériellement entre parties dans le contrat du 1er juin 1955,
  - si oui, de dire si elle a été effectivement acceptée par les parties, alors qu'elle n'avait pas fait l'objet d'une signature séparée, comme l'aurait exigé le par. 10 dudit contrat,
  - de dire si elle concerne des relations d'affaires en rapport avec le contrat invoqué par la demanderesse.

3. quant au fond :

- d'examiner le bien-fondé des griefs articulés par chacune des parties quant à la bonne exécution de leurs obligations respectives, nées du contrat du 1er juin 1955 ou d'autres conventions quelconques existant entre elles,
- de se prononcer sur le bien-fondé et l'exactitude des dommages-intérêts postulés par la demanderesse et s'élevant à … Frs fr,
- de dire à qui incomberont les dépenses de la présente instance, en ce compris les frais et honoraires de l'arbitre.

Si l'une des parties refuse de participer à l'établissement dudit acte ou de le signer alors qu'elle est liée par une clause visant l'arbitrage par la CCI, la sentence sera rendue normalement, après expiration d'un délai imparti par la Cour d'Arbitrage pour obtenir cette signature.

Ainsi fait à Paris, le 19 février 1959 »

Une première audience arbitrale eut lieu sous la présidence de l'arbitre … Après plaidoiries et répliques des conseils, il est apparu que des éclaircissements et des compléments d'information devaient encore être fournis à l'arbitre concernant les livraisons respectives des parties et l'évaluation du préjudice prétendument souffert par la demanderesse. L'arbitre leur enjoignit, en conséquence de remettre ces notes complémentaires avant le 31 mai 1958, après quoi une nouvelle audience arbitrale serait tenue, en continuation. Celle-ci eut lieu le 15 septembre 1958 … Après nouvelles plaidoiries et répliques des conseils respectifs des parties, l'arbitre déclara les débats clos et la cause tenue en délibéré.

Les pouvoirs de l'arbitre furent régulièrement prorogés par la Cour d'Arbitrage lors de ses sessions des 14 mai, 11 juin, 9 juillet, 10 septembre, 5 novembre, 10 décembre 1958 et 14 janvier 1959 jusqu'au 28 février 1959.

Chapitre 1. Sur le droit de l'arbitre de statuer au fond

Attendu que la défenderesse contestant l'existence de la clause d'arbitrage prétend, tout d'abord, que le seul différend que l'arbitre est présentement habilité à vider est celui de la compétence de la juridiction arbitrale à l'exclusion de celui qui porte sur le principal ;

Attendu que pareil soutènement ne trouve appui ni dans la commune intention des parties, ni dans les enseignements de la doctrine et de la jurisprudence … ni dans le Règlement de Conciliation et d'Arbitrage de la CCI ;

Attendu que la demande de disjonction des deux chefs advient, dès lors, sans fondement.

Chapitre 2. Sur la validité de la clause d'arbitrage

Attendu que la défenderesse allègue que le contrat dit de licence du 1er juin 1955 n'aurait jamais reçu aucun commencement d'exécution de la part des parties, motifs pris :

1. de ce que le contrat du 1er juin 1955 serait demeuré sans efficacité juridique, à défaut des autorisations nécessaires à accorder par les Offices de change français et allemand ;

2. de ce que la demanderesse n'aurait pas entrepris la préparation des bases industrielles nécessaires à la fabrication (achats de terrains, de locaux, de machines, etc.) et de ce qu'aucune coopération entre parties ne se serait manifestée ;

3. de ce que les rapports contractuels n'auraient nullement consisté en la mise à la disposition de la demanderesse des brevets, know-how, matières premières, etc… celle-ci ayant seulement fourni à la défenderesse des produits de provenance française à œuvrer par cette dernière, en Allemagne, à la faveur d'autorisations temporaires d'exportation accordées par les Services Douane des deux pays ; que la demanderesse aurait, en définitive, confondu licence de fabrication avec licence d'importation ;

4. de ce que les parties se seraient ainsi trouvés liées par un contrat de louage d'ouvrage visant quatre parties, la défenderesse fabriquant, en définitive, elle-même dans ses propres usines et selon ses propres procédés, les articles finis prévus, tandis que la demanderesse devait s'assurer, d'une part, le concours d'un fournisseur de [matières premières], en la personne de [A] qui exportait les matières premières à destination de la défenderesse, tandis qu'un homme de paille, en la personne de [Z] obtenait les licences d'importation requises pour l'introduction des [vêtements] en France ;

5. de ce que pareil contrat se trouverait régi par les conditions imprimées de livraison et de paiement dont un exemplaire avait été joint à la confirmation de commande du 25 avril 1956, passée par la demanderesse et portant attribution de juridiction au Tribunal de … et non point, dès lors, par l'article 10 contenant la clause compromissoire invoquée par la demanderesse ;

6. de ce que le Tribunal [national] par un jugement du … dont la défenderesse produit copie, aurait affirmé la compétence de ce tribunal dans un procès intenté au cours du présent arbitrage par la défenderesse à la demanderesse, aux fins d'obtenir des dommages-intérêts pour avoir refusé de prendre livraison de [vêtements] commandé[s] au mois de janvier 1957 par la demanderesse, donc postérieurement à la demande d'arbitrage formée par elle ;

7. de ce que la clause compromissoire, insérée dans le contrat du 1er juin 1955 (art 10) n'a pas été contresignée spécialement par les parties, comme elle aurait dû l'être en vertu de l'alinéa du même paragraphe ;

Attendu que la confrontation du contrat du 1er juin 1955 avec les échanges de correspondance qui ont suivi sa conclusion, l'examen des divers documents versés par les parties aux débats, ne viennent nullement vérifier les allégations formulées par la défenderesse ; qu'au contraire, il apparaît bien que le contrat du 1er juin 1955 a reçu un premier commencement d'exécution de la part de la demanderesse, lorsqu'elle a acquitté les frais de dépôt du brevet, visés au paragraphe 2, alinéa 3 dudit contrat et ce conformément à la requête expresse de la défenderesse consignée dans sa lettre du 30 juin 1955 ;

Attendu qu'il est, en outre, constant que le contrat litigieux du 1er juin 1955 a, en tant qu'attributif d'exclusivité à la demanderesse, servi de fondement à toutes les commandes ultérieures faites par elle, y compris celle du 25 avril 1956 et cautionna la campagne de publicité et de prospection faite par la demanderesse en faveur de [vêtements] d'un type nouveau ;

Attendu que pareil rattachement ressort également de la lettre adressée par la défenderesse le 10 septembre 1956 à [X], dans laquelle elle incite, avec insistance, la demanderesse a signer un avenant à l'article 6 du contrat principal du 1er juin 1955 en vue de substituer dorénavant le vocable « [B] » à celui de « [C] » ; que la demanderesse signa effectivement cet avenant le 14 septembre, la défenderesse le 17 novembre 1956, soit à une époque où la fabrication, en France, par la demanderesse n'était plus envisagée ; que la défenderesse se voyait ainsi assurée de pouvoir utiliser la marque « [B] » après l'expiration du contrat, en vertu même de l'article 6 précité ;

Attendu que le lien entre le contrat de 1955 et les contrats de vente de [vêtements], parmi lesquels celui né de la commande principale du 25 avril 1956, ressort encore du fait qu'à l'instar de la demanderesse, la défenderesse, par une lettre du 24 mai 1957 adressée par son conseil de l'époque, [N], nanti des pouvoirs indéniables de mandataire la par procuration du 6 février 1957, a elle-même tiré argument de l'inexécution prétendue par [X] de ses obligations nées d'une commande passée le 14 janvier 1957 pour dénoncer le contrat litigieux du 1er juin 1955 et ce moyennant le préavis prévu par celui-ci même … ;

Attendu que la défenderesse doit, dès lors, s'incliner devant l'indivisibilité du contrat du 1er juin 1955 dont elle a, en diverses occurrences, réclamé le bénéfice tout en arguant aujourd'hui de sa nullité ; Attendu que la portée … dudit contrat doit d'abord être déterminée en fonction de l'intention commune des parties et ensuite des règles objectives du droit applicable ;

Attendu que les parties, en libellant le texte … ont voulu lui donner une force particulière assurée par la mise en évidence de la clause compromissoire, mais qu'elles n'ont point exigé, pour autant, par là que ladite clause dût faire l'objet d'une adhésion explicite et spéciale manifestée par l'apposition de signatures.

Attendu que l'acceptation de cette clause compromissoire par la défenderesse peut être, en tout cas, tacitement mais certainement inférée du fait qu'ayant rédigé le contrat en langue allemande et y ayant inséré la clause arbitrale … elle a envoyé ce texte avec sa signature à la demanderesse, ladite signature valant également pour la clause arbitrale ; qu'au surplus , cette dernière se trouve encore dans la traduction française, envoyée par elle à la demanderesse en annexe à une lettre [en] octobre 1955 ;

Attendu que la reconnaissance spéciale de la clause arbitrale était, par ailleurs, surérogatoire, tant dans l'hypothèse où le droit allemand serait applicable que dans celle où ce serait le droit français ; qu'en effet, en vertu de ce dernier contrat principal et, dans le cas où serait applicable le droit allemand, elle ne serait pas davantage imposée, en raison de la position de commerçant de plein exercice des deux parties contractantes et la transaction étant une opération commerciale dans le chef des deux parties (par. 1027, al. 1er du Code de procédure civile), que le moyen, est dès lors, sans relevance ;

Attendu que les conditions de livraison et de paiement dont le texte avait été joint par la défenderesse à la confirmation de commande passée le 25 avril 1956 n'avaient, au demeurant, ainsi que le soutient pertinemment la demanderesse, qu'un caractère supplétif du contrat du 1er juin 1955 dans ses points demeurés ouverts, mais n'abrogeaient aucunement ses dispositions déjà arrêtées, telles que la clause d'arbitrage ;

Attendu que le moyen pris de l'inefficacité, voire de la nullité absolue, du contrat de licence de fabrication et partant, de la clause d'arbitrage dont il est assorti pour défaut d'autorisation des Offices de change allemand et français, moyen développé par la défenderesse dans deux mémoires parfaitement recevables des 20 juin et 4 juillet 1958, ne saurait être accueilli davantage ; qu'en effet, à supposer que pareilles autorisations eussent été indispensables – ce que les documents produits par la défenderesse laissent présumer- et qu'elle ait accompli, du côté allemand, les diligences qui lui incombaient pour l'obtenir, ce n'est point la validité même du contrat qui eût été affectée par leur carence, mais son exécution seulement qui aurait été paralysée jusqu'à régularisation ultérieure, faculté ouverte par la loi des changes (art. 3) ;

Attendu qu'au reste, l'article 12 du contrat ici dénié subordonnait l'application du contrat aux acceptations administratives nécessaires « avant tout (sic) au point de vue des devises », modalité qui laissait intangible de par la volonté des parties la clause d'arbitrage dès l'instant où le contrat était aménagé selon les règlementations cambiaires ;

Attendu qu'il était aussi normal que les parties manifestassent le souci de découvrir, comme elles y ont réussi après négociations, courantes en matière commerciale, le moyen de modifier leurs engagements mutuels et leurs prestations corrélatives, en fonction et compte tenu des réglementations en vigueur et d'autorisations particulières ; qu'ainsi l'aspect de « contrat-cadre » – comme le qualifie la demanderesse – de la convention du 1er juin 1955, conforme aux intentions de la défenderesse elle-même, est mis davantage en évidence ;

Attendu qu'enfin avec raison, la demanderesse rejette en la cause, l'autorité des décisions du tribunal [de X], du juillet 1956, lesquelles, bien que prononcées entre les parties litigantes ne concernent qu'un défaut de paiement dans une marché conclu [en] janvier 1957, postérieurement au dépôt de la requête arbitrale et nullement la portée et la validité de la clause figurant au contrat du 1er juin 1955, la demanderesse ne l'ayant, à tort ou à raison, pas invoquée ;

Attendu qu'il n'existe, dès lors, ni litispendance, ni force de la chose jugée entre ce jugement d'un tribunal allemand et la présente procédure arbitrale, d'autant plus que le prédit jugement est rendu dans une procédure sommaire sur pièces laissant ouvert un recours, conformément à l'article 599 du Code de procédure allemand auquel il est fait référence en finale de la décision ;

Attendu qu'il ressort des considérations que précèdent que la clause d'arbitrage est donc valablement invoquée par la demanderesse et partant, que la compétence de l'arbitre est établie.

Chapitre 3. Sur la responsabilite de l'inexecution de la convention

Attendu que l'acte dressé … indique les points que la défenderesse souhaite voir vider par la présente sentence ;

Attendu que le premier porte sur la ponctualité apportée par la demanderesse à fournir aux échéances les quantités de [matière première] indispensables à la fabrication [de vêtements] ; que le second, lié au premier, vise le droit qu'aurait eu la défenderesse d'exiger le règlement comptant ou des rentrées de [matière première] préalables à l'exécution de l'ouvrage par elle ;

Attendu qu'il sied d'abord de se référer aux termes de la commande du 25 avril 1955 portant sur [quantités] de [vêtements] : … Attendu que les explications fournies par les conseils des parties et les mémoires, notes et missives adressés en grand nombre par eux à l'arbitre ne sont pas concordants sur la façon dont ces deux clauses ont été respectées ; qu'il en est de même de la correspondance versée aux débats et des tableaux de livraison dressés par les parties d'où aucune lumière décisive n'apparait ; qu'il en est notamment ainsi de la lettre du 21 juillet 1955 – où le terme « commandés » est équivoque –, de la réponse faite par la demanderesse, dans sa lettre du 26 juillet, et enfin de la lettre de la défenderesse du 8 mai 1956 qui s'exprime plus nettement :

> « Conformément à ce qui a été convenu, nous mettrons les premières [quantité] fabrication avant la mi-juillet et la livraison pourra alors s'effectuer par suite. Pour les livraisons ultérieures, nous serons obligés d'attendre d'avoir reçu le deuxième envoi [de matière première], que nous avons demandés [à A] et nous continuerons alors nos fabrications au fur et à mesure des fournitures [de matière première]. »

Attendu que si cette correspondance consacre, de manière certaine, le principe de solidarité entre la livraison de [vêtements] et la fourniture de [matière première] par la demanderesse, elle ne précise cependant pas, de façon péremptoire, l'antériorité de celle-ci sur celle-là, l'appréciation de cette perplexité étant d'autant plus malaisée que la fourniture de [matières premières] doit, tantôt constituer un approvisionnement en matières premières destinées à la fabrication de [vêtements] à livrer, tantôt un mode de paiement des factures envoyées …

Attendu que la demanderesse reconnaît elle-même, d'ailleurs, dans son mémoire … que l'envoi des [matières premières] nécessaires à la fabrication était une condition préalable ; Attendu que, dans cette optique, la défenderesse produit divers états récapitulatifs et tableaux des commandes [de vêtements], passées par la demanderesse depuis 1955 et des fournitures effectuées par elles destinées à faire ressortir un déficit de livraison de[matière première] en regard des quantités commandées, en vue de fabriquer les [vêtements] réclamées par la demanderesse ;

Attendu que l'analyse de ces tableaux fait, au contraire, apparaitre une disproportion entre les quantités de [vêtements] dont la livraison a été promise dans la confirmation de commande du 25 avril 1957, d'autre, même en y comprenant des sociétés livrées en exécution d'autres commandes que celles de [quantités] du 25 avril 1956, objet du présent litige ;

Attendu que les livraisons de [matières premières] n'étaient dues que pour la fabrication et le règlement des [vêtements] commandées et qu'il est donc vain de souligner la discordance entre les quantités de [matières premières] demandées et celles effectivement livrées à l'intervention de la demanderesses ;

Attendu qu'il échet de s'en tenir, dès lors, uniquement au tableau … produit par la défenderesse, mettant en exergue l'insuffisance de livraisons de [matières premières] en regard de celles de [vêtements] ;

Attendu qu'il appert des autres pièces versées aux débats et notamment des licences d'importation … que le nombre [de vêtements livrés] en exécution du contrat litigieux est de … et non de … ce dernier chiffre comprenant des fournitures des 21 et 27 septembre, 9 et 12 octobre, étrangères à la commande du 25 avril, [de vêtements] refusé[s] parce que défectueu[x] … ou fourni[s] le 28 janvier 1957, après l'introduction de la requête arbitrale ;

Attendu qu'à bon droit, la demanderesse dénie que [des matières premières] devaient être fournis en contrepartie de la doublure [des vêtements], lesquel[s] se composent [de matières textiles] aisément trouvables en Allemagne à meilleur compte ;

Attendu que la défenderesse a sensiblement exagéré les quantités de [matières premières] nécessaires à la fabrication des [vêtements] en prétendant qu'étaient nécessaires pour [quantités de vêtements], soit [quantités de matières premières] pour la confection de [quantités de vêtements] ;

Attendu que cette exagération ressort notamment des attestations de l'Administration des Douanes Françaises et de ses laboratoires affirmant que le poids [des matières premières] à la confection des [vêtements] ne devait pas dépasser … du poids total ; …

Attendu … qu'avant son mémoire du 26 août 1958, la défenderesse, ainsi qu'en fait foi la correspondance, n'a jamais avancé que la demanderesse aurait manqué de fournir près de la moitié des [matières premières] indispensables ;

Attendu qu'il ressort, en conclusion, de ce qui précède que, même à s'en tenir aux chiffres avancés par la défenderesse, celle-ci n'aurait livré au total que [quantités de vêtements] jusqu'au mois de janvier 1957, alors qu'en contrepartie, la demanderesse a effectué livraison des quantités de [matières premières] promises, nécessaires à la fabrication, encore qu'elle ne l'ait pas toujours fait avec l'exactitude désirable ; que la défenderesse a donc transgressé la convention en demeurant en défaut, sans justification, de se livrer les [quantités de vêtements] par mois convenues à partir du mois d'août 1956 et jusqu'à un total de [quantités de vêtements] ;

Attendu qu'il est ainsi surabondant de rechercher si les défaillances reprochées à tort à la demanderesse quant aux livraisons de [matières premières] seraient imputables au fait que le tiers qui en était chargé, à savoir [A], n'ont pas été payés par elle ...

Attendu assurément, par ailleurs, soit qu'elle fît un peu confiance à la solvabilité de la demanderesse, soit que l'écoulement des [matières premières] sur le marché allemand s'avérât plus difficile, la défenderesse a tenté d'imposer diverses modifications de caractère fondamental aux conditions de règlement de la commande du 25 avril 1956, en imposant la consignation d'une somme de ... entre les mains de [A] ou en exigeant de la demanderesse un paiement en [Deutsche Mark] au lieu d'un paiement en [matières premières], voire un règlement comptant, dès réception, de la marchandise (espèce contre documents) au lieu des délais habituels pratiqués entre parties ;

Attendu que la demanderesse manifesta, à cet égard, une bonne volonté suffisante en offrant de consigner les fonds correspondant aux factures de la défenderesse dans une banque française jusqu'à la livraison des [matières premières] d'une valeur des changes que pareille offre ne procurât point un résultat satisfaisant à la défenderesse ;

Attendu que vainement aussi la défenderesse fait grief à [X], demanderesse, de n'avoir point fourni, en temps utilise, les précisions et préavis nécessaires à l'exécution du marché litigieux (qualité, couleur, pointures, quantités, etc...) ;

Attendu qu'il ressort, au contraire, de la commande du 25 avril et de la correspondance que ces détails étaient réglés d'avance et que dans ses appels à des livraisons plus rapides correspondant avec les approvisionnements saisonniers, la demanderesse fournit à sa contractante les indications souhaitables ;

Attendu que la défenderesse n'a donc pas exécuté ponctuellement et intégralement les commandes dans la mesure où les [matières premières] lui ont été fournis ; qu'il est sans relevance de savoir, si elle fut contrainte de faire revenir de France un lot de marchandises impayées, la demanderesse ne contestant pas avoir refusé [quantités] non-conformes ... ;

Attendu qu'il échet, dans les circonstances de ce litige, d'appliquer cette règle d'or qu'évoque, au reste, le paragraphe 242 du Code Civil allemand, cité par le tribunal ... dans son jugement ... dont les parties auraient pu davantage s'inspirer et qui veut que les conventions commerciales soient exécutés, de part et d'autre, de bonne foi sans que des manquements légers, tels que les retards de livraison ou de paiement, non expressément prévus comme étant de rigueur, puissent entraîner la résolution des engagements souscrits ;

Attendu que la bonne foi et la confiance devant présider aux relations entre parties, doivent se manifester essentiellement par l'équilibre des prestations corrélatives, prévues par la commande du 25 avril 1956 ;

Attendu qu'à la lumière des considérations qui précèdent, la défenderesse était donc mal venue de dénoncer elle-même le contrat en cours, par application de son article 7, alors que son comportement, contraire à la tolérance et à la compréhension usuelles dans la négoce, autorise, par contre, la demanderesse à postuler qu'il soit déclaré résilié aux torts et aux griefs de la première ;

Attendu qu'il est constant qu'en dépit des livraisons insuffisantes de son contractant aux échéances fixées, la demanderesse qui avait un solde créditeur le ... accusait, par contre, un solde débiteur ... malgré la réception de marchandises pour une valeur de ... ; que certains retards dans l'envoi de [matières premières] ont donné lieu à des doléances légitimes de la défenderesse (cfr. Lettre ...) ; que ces infractions bénignes au contrat, bien que ne justifiant pas l'initiative de la résiliation prise par la défenderesse, le 24 mai 1957, doivent néanmoins entrer en considération dans la fixation des dommages-intérêts équitablement dus à la demanderesse par sa partenaire de contrat ;

Attendu qu'il échet, maintenant, de fixer, à la lumière de ces données, l'étendu du dommage que la conduite de la société défenderesse a fait subir à la demanderesse et dont elle est fondée à obtenir réparation :

Chapitre 4.- Sur le montant des dommages-interets

Attendu qu'en suivant la ligne de dialectique générale, la défenderesse refuse de discuter le détail de divers chefs de dommage avancés par la demanderesse se bornant à alléguer qu'ils ne sont pas étayés sur des « pièces justificatives et authentiques » qu'elle invite, toutefois, l'arbitre à en vérifier le fondement juridique et la justification …

Attendu qu'il est, à suffisance, établi que sur les [quantités de vêtements] commandées le 25 avril 1956, … seulement ont été fournies, dont … impropres à l'usage, soit un manquant final de …

Attendu qu'il est conforme au droit applicable au présent litige que le créancier de la prestation, fautivement non remplie, a droit à des dommages-intérêts compensatoire représentant la perte qu'il a faite et le gain dont il a été privé, pourvu qu'ils aient été prévus ou qu'on ait pu les prévoir lors du contrat (Art. 1149 et 1150 du Code Civil français) ;

Attendu que s'agissant de dommages-intérêts non déterminés par le contrat, l'arbitre, à l'instar du juge, dispose d'un pouvoir souverain d'en évaluer et d'en régler le montant (Cass. Franç. 26 juin 1899, Pas. 1900, I, 101) ;

Attendu que la demanderesse postule d'abord, à titre de dommages-intérêts, pour perte subie une somme de … se décomposant comme il suit …

Attendu que si le premier de ces postes est dûment justifié par la copie des factures produites, l'estimation de deux autres paraît excessive et doit être ramenée respectivement, pour le deuxième, aux trois quarts et, à la moitié pour le troisième, soit au total … Frs.

Attendu qu'il convient de répartir ce fardeau proportionnellement entre les quantités de [vêtements] livré[s] et non livré[s] … Attendu que la demanderesse indique que la « renonciation forcée à l'affaire [B] » lui causera un préjudice qu'elle évalue à … ;

Attendu que, conformément à la pratique en cas de non-livraison fautive il est permis de déterminer le gain perdu par suite de l'inexécution partielle du contrat litigieux en multipliant le nombre des unités non livrées par la marge bénéficiaire unitaire exactement calculée ; Attendu que la demanderesse justifie qu'elle eût réalisé sur la vente de chaque [vêtement] un bénéfice unitaire de … Fr. ; que son manque à gagner immédiat est, de la sorte, de … Frs ;

Attendu que, pour le surplus, s'il entrait effectivement dans l'intention des parties, lors de la commande « dite de démarrage » du 25 avril 1956, de développer leurs relations commerciales de façon à permettre à la demanderesse de lancer sur le marché des quantités toujours plus grandes de [vêtements], pareille ambition, commune à tout homme d'affaires entreprenant, se trouve démentie dès le départ et au fur et à mesure de l'exécution du contrat par les nombreuses complications de tous les ordres de sa mise en œuvre et de sa réalisation et par l'incapacité matérielle de la défenderesse faire face, selon la cadence souhaitée par la demanderesse, à des fabrications aussi importantes que celles envisagées par elle ;

Attendu que le chiffre avancé par la demanderesse de [quantités de vêtements] qui auraient été vendues durant la campagne 1956-1957, apparait ainsi comme purement conjecturale et d'un excessif optimisme ;

Attendu qu'en fonction des pièces versées aux débats, du comportement respectif es parties durant l'existence de leurs liens contractuels et notamment des retards de règlement de la demanderesse, du chiffre des ventes de [vêtements] envisagées durant l'exercice antérieur … des prévisions normales du marché et ses fluctuations, il paraît de bonne justice de le ramener « *ex aequo et bono* » à … de francs le montant des dommages-intérêts revenant à la Demanderesse du chef des bénéfices escomptés à moyen terme, du contrat résilié aux torts et griefs de la défenderesse ;

Que le total du manque à gagner s'élève, de la sorte, à … Frs fr. :

Par ces motifs

Nous arbitre, Statuant contradictoirement, conformément aux prescriptions du Règlement de Conciliation et d'Arbitrage, dans les limites de notre mission, prorogée régulièrement par la Cour d'Arbitrage les 14 mai, 11 juin, 9 juillet, 10 septembre, 5 novembre, 10 décembre 1958 et 14 janvier 1959 jusqu'au 28 février 1959.

Rejetant toutes autres conclusions plus amples ou contraires,

1. Nous déclarons compétent pour statuer en une même sentence et d'un seul contexte, en vertu de l'investiture qui nous a été donnée par la Cour d'Arbitrage, tant sur notre compétence que sur le fond du litige.

2. Quant à la compétence :

- disons qu'une clause d'arbitrage existait matériellement entre parties en vertu du contrat du 1er juin 1955 ...
- disons qu'elle a été effectivement acceptée par elles, même en l'absence d'une signature séparée,
- disons qu'elle concerne les relations d'affaires faisant l'objet du présent différend.

3. Quant au fond :

- Déclarons résilié aux torts et griefs de la défenderesse le contrat du 1er juin 1955, faisant l'objet de l'avenant des 25 avril et 8 mai 1956,
- Condamnons, en conséquence, la défenderesse à payer à la demanderesse, à titre de dommages-intérêts, la somme globale de ... Frs.
- Condamnons, en outre, la défenderesse à supporter la totalité des frais et dépens de l'arbitrage, en ce compris les frais et honoraires de l'arbitre, soit au total une somme de ... Frs.

26. ARBITRAL AWARD
ICC Case no. 1010 (Oslo, 1958)

... I the undersigned ... [Norway], appointed arbitrator by the Court of Arbitration at its session held on ... to proceed to arbitration between: [X] [France] (Claimant), and [Y] [USA] (Defendant) have conducted the arbitration of this case and render the following award:

I. The arbitrator's mission

In accordance with article 19(2) of the [1955] Rules of Conciliation and Arbitration the arbitrator's mission was defined by document drawn up by the ICC's Court of Arbitration and signed by [X] on October 7, 1957 and the arbitrator on December 16, 1957.

The document was sent to [Y] by registered post on September 20, 1957 with a deadline for signing it by October 20, 1957. As the arbitrator did not get any communication from defendant within this date, he sent him a new letter on November 22 with a new deadline set by the Court of Arbitration under Article 19(2), for signing the document within 15 days from receiving the letter. Defendant received the letter on November 26, 1957.

As the arbitrator did not get the document signed from the defendant he informed the Court of Arbitration on December 16, 1957. The Court has decided by virtue of Article 19(2) that the award should be rendered notwithstanding.

The document reads as follows:

"TERMS OF REFERENCE

... In a contract dated August ... 1951 [the contract], [X] conceded to [Y] the licence for certain countries to manufacture patented gadgets or appliances intended for the production of hollow paper or card-board or thin metal recipients.

[X] claims that [Y] unlawfully failed to carry out its obligation under the contract to manufacture the said goods. [X] further claims that as a consequence of this failure he is now entitled to annul the contract. Pleading the arbitration clause in the contract, [X] has requested an award which establishes the annulment of the contract.

The Court of Arbitration has duly notified [Y] of [X]'s request according to the Rules of Conciliation and Arbitration. The Court having received no reply from [Y] to the said request has proceeded with the arbitration under Article 13(2) of the Rules and appointed as sole arbitrator ... (Norway). The arbitration shall take place in Oslo.

The arbitrator shall conform, as regards procedure, to the Rules of Conciliation and Arbitration of ICC, the application of which was stipulated by the parties, and shall give his award in accordance with the facts of the case and the law.

The arbitrator shall, more especially, after giving due consideration to the memoranda and documents filed, the claims made by the parties and, generally speaking, to all the circumstances of the case:

- decide whether, as claimed by [X], the contract in question shall be annulled,
- declare who shall pay the costs and expenses of the arbitration procedure, or in what proportion the said costs and expenses are to be shared between the parties.

In accordance with Article 23 of the Rules of Conciliation and Arbitration the arbitrator shall make his award within sixty days from the date of his signature of the present statement subject to the power of the Court of Arbitration to allow any extensions that may prove necessary.

The term for the making of the award has been extended to the end of February 1958, at the sitting of the Court of Arbitration on the 12th February 1958, in accordance with the powers given to it under Article 23(2) of the Rules of Conciliation and Arbitration."

II. Arbitral audience

Having examined the documentary evidence offered by claimant and having taken into account the defenses which defendant would presumably have presented, had it chosen to participate in the arbitration, the following award is made by the undersigned appointed sole arbitrator.

III. The facts

Claimant is owner of the following French patents … The patents and their additions cover gadgets or appliances intended for the manufacturing of special recipients of paper, card-board of thin metals, made in one piece without joints.

By [the contract] claimant granted defendant a license to manufacture and sell under any application for U.S. letters patent covering the subject matter of the above-mentioned French patents. Defendant agreed to pay a royalty of 3% of the amount of sales in the territories covered by the licence. The first year defendant should pay claimant a royalty of at least $ … and the next years at least $ … per year.

Claimant agreed to manufacture or have manufactured for defendant a set [of components], further described in the contract. It was stipulated in the contract that defendant should use the [components] in production by 60 days from the day he received the said [components], unless prevented by "*force majeure*" or governmental restrictions. The [components] should have a capacity of at least … In any rework should be necessary to achieve this result, claimant undertook to pay this work at a rate of $2 per man hour.

The [components] were shipped to defendant by … As paragraph 23 of the Contract, the parties agreed that:

> "All disputes arising in connection with the present contract shall be finally settled under the Rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules."

In his claim of February … 1957 the claimant alleges that although defendant has been in possession of the said [components] and more than 60 days has lapsed since the reception of the [components], defendant has not yet started any production, and that this conduct constitutes such a serious violation of defendant's obligation as to justify a demand for cancellation of the contract. Claimant furthermore points out that neither "*force majeure*" nor governmental restrictions nor bad function has prevented defendant from starting the production. The [components] had in fact a capacity of … Defendant has neither returned the [components] for correction nor requested claimant to go to the U.S. to instruct him in the use, as stated in the contract. Claimant consequently alleges that defendant has no legal motives for his passivity.

Claimant asks for annulment of the contract in order to regain his freedom to utilize and negotiate his patents. He does not demand damages or interest.

IV. Conclusions

A. The jurisdiction of the arbitrator

[Y] has neglected to defend the case before the arbitrator. It has failed to submit to arbitration and has not signed the arbitrator's terms of reference. The arbitration has nevertheless been proceeded with and the award given in accordance with the "Rules of Conciliation and Arbitration" of ICC, Article 13(2) and 19(2). The parties have expressly by contract agreed to arbitration in accordance with these Rules.

Thus there exists by his own express action and indisputable obligation on the part of the defendant to submit to ICC arbitration when so called for by claimant, within the scope of the said Rules.

B. The merits of the case

As defendant has refused to answer letters from the Arbitration Court, the arbitrator has to base his finding of facts in the case on the information given by claimant, as well as on the contract of August … 1951 between the parties.

Claimant seems to have certified out all his obligations of the contract. Defendant, on the other hand, has failed to start any production or recipients in spite of the agreement expressly stated in paragraph 6 of the contract, after which defendant undertook to use the [components] in production within 60 days after having received them. The first set of [components] was shipped to defendant in June 1953 and the last set in June 1955.

There has been no evidence showing any justifiable motives for defendant's failing to start the production. The arbitrator therefore finds this conduct a substantial breach of contract. One may raise the question whether defendant may free himself from the obligation to start manufacturing containers by paying the minimum royalty agreed upon, $… the first year after having received the [components], and thereafter $… a year. It seems that he has paid this minimum fee regularly.

The arbitrator finds, however, that claimant's fundamental interest in the license contract is to get developed in … the manufacture of his patented containers. He has only a secondary interest in the minimum fee, in case the sale of article, one or more years, should not be as high as calculated. His main purpose with the contract must have been to get his patents utilized in the highest possible degree in the Western Hemisphere. If defendant fails to start production of the recipients, contrary to the contract, claimant will have a justifiable interest in regaining his freedom, so that he may negotiate with other prospective licensees, and thereby obtain the full use of his patents.

Such a conception of the contract will, as far as the arbitrator can see, be the only logical and fair one, and in agreement with the law of most civilized countries. The arbitrator, consequently, finds that defendant's conduct in, without reason failing to undertake the manufacture of recipients agreed upon, is a substantial breach of the license contract of August … 1951, justifying a cancellation of the contract.

The claimant not having demanded the termination to be effective from any particular date, the arbitrator will deem the contract terminated as from the day of his signing the present award.

The arbitrator furthermore finds that defendant, having lost his case completely, must pay the cost of arbitration, amounting to $…

Award

I, the undersigned arbitrator, therefore award and determine as follows:

1. The parties, [X] and [Y] are relieved from all obligations under the contract … the said contract being terminated as from the date on which the award is signed.
2. [Y] is directed to pay the costs of this arbitration amounting to US$ …

27. SENTENCE ARBITRALE Affaire CCI n° 1024 (Paris, 1959)

I. Acte

établi conformément à l'Article 19 du Règlement de Conciliation et d'Arbitrage [de 1955] de la CCI entre les soussignés : [X] Docteur-Ingénieur [Allemagne] représenté à l'effet du présent acte, par … (demandeur) d'une part, et [Y] [France] ci-après désignée [Y], représentée, à l'effet du présent acte, par … défenderesse d'autre part, il a été exposé et convenu ce qui suit :

« Exposé sommaire des prétentions des parties

Entre les parties est intervenu un protocole provisoire préalable en date du 12 mars 1951 suivi d'une convention définitive signée à Paris le 29 mai 1954, aux termes desquels [X], propriétaire de brevets concernant une fabrication nouvelle d'articles … appelé … concédait à [Y] la propriété de ses brevets et l'exploitation de ceux-ci en France, dans l'Union française et sur le territoire mondial, à l'exception de l'Allemagne et des pays scandinaves.

La clause 8 de la convention définitive précise que :

> "tous différends susceptibles de découler de la présente convention seraient tranchés définitivement par arbitrage ; que l'arbitrage aura lieu à Paris et que le règlement de la Chambre de Commerce Internationale sera applicable".

Conformément à cette clause, [X] a saisi la Cour d'Arbitrage de la CCI du différend né entre lui et [Y] du fait :

- que la convention litigieuse serait entachée d'un vice de consentement ;
- que les obligations de [Y] seraient assorties de conditions potestatives ;
- que le prix stipulé dans le contrat serait purement fictif ;
- que la condition suspensive de ratification par l'Office des Changes allemand n'a pas été remplie ;

Par ces motifs

[X] demande à l'Arbitre de déclarer nulle la convention du 29 mai 1954.

Subsidiairement, il demande la résiliation de la convention aux torts et griefs de [Y], pour inexécution grave et fautive de son obligation d'exploiter et le paiement de … de francs français par provision à valoir sur les dommages et intérêts, le montant exact du préjudice subi étant à déterminer par expert.

[Y] se basant sur la nullité de la convention invoquée par [X] conteste la compétence de la Cour d'Arbitrage pour la raison qu'une clause compromissoire figurant dans un contrat nul, ne saurait avoir d'effet.

En conséquence :

[Y] demande à l'Arbitre de se déclarer incompétent ;

Subsidiairement

- de débouter [X] sur l'ensemble de ses prétentions et de le condamner aux dépens de l'arbitrage ;
- de lui réserver le droit de faire sanctionner le comportement de [X] par des dommages et intérêts.

Objets de l'arbitrage – Enoncé des circonstances de la cause – Détermination des points litigieux à résoudre

L'arbitrage portera sur les contestations survenues entre les parties, à savoir sur celles se rapportant à la validité, l'exécution ou l'inexécution de la convention du 29 mai 1954. [X] affirme en premier lieu que la convention à laquelle il a adhéré est nulle car son consentement a été surpris par les agissements de [Y] qui lui aurait soumis un texte dans une langue qui lui était étrangère et rédigé avec un sens juridique consommé de manière à faire profiter [Y] d'avantages exorbitants en privant [X] de disposer de son invention, sans lui assurer une mise en valeur effective.

En outre, [X] prétend que la condition suspensive prévue dans la convention n'a pas pu être réalisée faute de l'accord de l'office allemand des changes et que, dès lors, il s'est refusé à recevoir les paiements que lui proposait [Y].

Subsidiairement, [X] soutient que la convention doit être résiliée aux torts et griefs de [Y] pour exécution insuffisante de son obligation d'exploiter et pour n'avoir pas apporté à la fabrication des appareils le véritable appui de sa situation technique et commerciale.

[Y] prétend, au contraire, que [X] connaît très bien le français ; qu'avant la signature de la convention litigieuse, les conditions stipulées furent attentivement examinées par les parties ; qu'à cette fin [X] se fit assister de son conseil juridique … et d'un interprète … ; que la convention définitive diffère relativement peu des accords provisoires de 1950 et 1951.

[Y] expose, en outre, que ses obligations, nées de la convention, ne sont pas assorties de conditions potestatives ; que le taux des redevances dues à [X] n'est pas anormal et qu'il résulte des marchés effectivement passés et en application d'un pourcentage fixé par la convention.

Enfin, [Y] fait remarquer que l'absence de garanties spéciales en faveur de [X] dans la convention ne saurait entraîner la nullité de cette dernière. En conséquence, [Y] estime que la convention du 29 mai 1954 est valable.

Finalement [Y] soutient qu'il a rempli ses obligations contractuelles. Il affirme avoir mis tout en œuvre pour assurer l'exploitation des brevets qui lui furent concédés et prétend que des résultats marquants ont été enregistrés après une période d'essais au cours de laquelle elle a dû surmonter des difficultés d'ordre technique et commercial. En conséquence, elle estime injustifiée la demande en résiliation de la convention, introduite subsidiairement par [X].

Les points litigieux à résoudre portent sur les points suivants :

1. [X] a-t-il été victime d'une erreur viciant son consentement ?
2. L'obligation a-t-elle été contractée sous une condition potestative de la part de [Y] ?
3. La convention présente-t-elle un caractère lésionnaire ?
4. La condition suspensive de la convention, de sa ratification par les organismes officiels de change est-elle définitivement défaillie ?
5. [Y] a-t-elle manqué à son obligation d'exploiter l'invention ?

[Y] ayant contesté la compétence de la Cour d'Arbitrage de la CCI, la Cour d'Arbitrage réunie en sa session du 10 juillet 1957 a estimé qu'en vertu de la clause d'arbitrage au sens de l'Article 13(3) du règlement, prévu dans la convention, il convient de donner suite à la demande formulée par [X], en laissant à l'Arbitre le soin de se prononcer sur sa propre compétence.

La Cour d'Arbitrage a désigné comme arbitre … Conseil en Brevets, Docteur en Droit, Ingénieur, à Bruxelles. L'Arbitre aura pour mission, en tenant compte des mémoires et documents versés au dossier, des conclusions formulées par les parties et d'une manière générale, de toutes les circonstances de la cause :

- de se prononcer sur sa compétence ;
- le cas échéant de résoudre les points litigieux se rapportant à la convention ;
- de faire droit en tout ou partie aux conclusions des parties ;
- de procéder à toutes décisions qui s'imposent, notamment à la désignation d'experts ;
- de déclarer à qui incombera la totalité des frais et dépens de l'arbitrage, y compris les honoraires éventuellement dus aux experts et ceux que la Cour d'Arbitrage pourra allouer à l'Arbitre, ou en quelle proportion lesdits frais, dépens et honoraires seront partagés entre les parties.

L'Arbitre se conformera pour la procédure au Règlement de Conciliation et d'Arbitrage de la CCI. L'arbitrage aura lieu à Paris.

Ainsi fait en deux exemplaires, Düsseldorf, le 17 Sept. 1958 …. »

II. Instruction de la cause

Vu les pièces de la procédure et notamment :

1. la requête et la réponse des parties ainsi que la correspondance échangée entre elles ;
2. les conclusions des parties et les pièces versées aux débats à l'appui de celles-ci ;
3. l'acte reproduit ci-avant.

Entendu les parties au cours d'une audience contradictoire tenue à Paris le 9 février 1959.

Attendu que le délai prévu à l'acte précité expirant le 19.1.1959 a été prorogé par la Cour d'Arbitrage en vertu de la faculté prévue à l'Article 23(2) du Règlement jusqu'au 31 octobre 1959.

III. Faits de la cause

Attendu que l'action mue à la requête de [X], demandeur, tend à faire déclarer nul un contrat signé le 29 mai 1954 avec [Y], défenderesse, et subsidiairement à la résiliation de ce contrat, ainsi qu'à faire condamner celle-ci à payer au demandeur une somme de … francs français à titre provisionnel à valoir sur les dommages et intérêts, le montant exact du préjudice subi étant à déterminer par expertise.

Attendu que la défenderesse conclut en ordre principal à l'incompétence de la Cour d'Arbitrage ; en ordre subsidiaire au déboutement du défendeur, de ses prétentions avec condamnation de celui-ci aux dépens de l'arbitrage et au paiement de dommages et intérêts pour le préjudice subi par le comportement du demandeur.

IV. Sur la compétence

Attendu qu'entre les parties est intervenue à Paris le 29 mai 1954, une convention définitive annulant et remplaçant un protocole provisoire d'accords généraux du 12 mars 1951, pour l'exploitation d'articles … en France et à l'étranger, sauf en Allemagne et dans les pays scandinaves, cette convention portant notamment sur la cession de brevets concernant cette technique.

Attendu que les parties ont expressément prévu que tous différends susceptibles de découler de ladite convention seront tranchés définitivement par arbitrage, que celui-ci aura lieu à Paris et que le règlement de la CCI sera applicable.

Attendu que la défenderesse soutient que la Cour d'Arbitrage est incompétente pour connaître du présent litige ; qu'elle invoque le fait que lorsqu'une partie allègue la nullité d'un contrat dans lequel est insérée la clause compromissoire, seule la juridiction de droit commun est compétente, le litige mettant nécessairement en cause la validité même de la clause compromissoire.

Attendu qu'il est cependant sans importance que le contrat, dont la clause compromissoire fait partie intégrante, est argué de nullité par le demandeur ; que le règlement de la Cour d'Arbitrage, auquel les parties ont décidé de se soumettre, prévoit expressément (Art. 13(4)), que "sauf stipulation contraire, la prétendue nullité ou inexistence du contrat n'entraîne pas l'incompétence de l'arbitre".

Attendu que dans le contrat, les parties n'ont formulé aucune réserve valant stipulation contraire et qu'une réserve formulée unilatéralement à l'occasion des faits du litige, ne saurait rétroagir.

Attendu au surplus que :

> "la compétence des arbitres ne se limite pas à la possibilité de vérifier la nature et l'étendue de leurs pouvoirs, mais s'étend à la validité ou la nullité de l'acte qui institue leur juridiction, une fission de la notion de leur compétence ne s'imposant ni en droit ni en fait."

(Cour d'Appel de Paris 22 janvier 1957, réformant un jugement du Tribunal Civil de la Seine du 7 septembre 1956 ; *Revue de l'Arbitrage*, oct.-déc. 1956 p. 134).

Attendu que l'Arbitre est donc compétent pour déterminer les droits respectifs des parties, et statuer sur leurs demandes et conclusions.

V. Sur le fond

A. Dispositions essentielles du contrat du 19 mai 1954

Substance

Attendu que le contrat du 29 mai 1954 est intervenu en vue de liquider un protocole provisoire du 12 mars 1951 et de le substituer par un nouveau, sans solution de continuité au précédent, et portant sur la cession d'inventions et de brevets relatifs à la fabrication d'articles de ...

Obligations du demandeur

Attendu que cette convention prévoit :

- La liquidation du protocole provisoire moyennant versement forfaitaire global à [X] d'une somme de ... fr à régler dès l'autorisation de l'Office des Changes.
- La confirmation par [X] de la cession à [Y] de la toute propriété des brevets et perfectionnements pour la France, l'Union Française et l'Etranger (sauf Allemagne et les pays scandinaves) sans garantie de validité des brevets.
- La confirmation du concours technique de [X] à [Y] suivant des modalités précisées.

Obligations de la défenderesse

Attendu que cette convention prévoit en outre :

- La confirmation par [Y] de son apport à la construction et à la fabrication des appareils faisant l'objet des brevets cédés et de l'appui de toute sa situation technique et commerciale.
- La rémunération de [X] précisée comme suit :
  - Confirmation du droit au remboursement des frais de déplacement et de procédure pour l'obtention des brevets.
  - Pendant 4 ans, en date du 1er janvier 1954 au 1er janvier 1958 les montants définis ci-après à titre d'honoraires de collaboration technique ...
- Pendant 8 ans à dater du 1er janvier 1954 pour rémunérer plus particulièrement la cession de brevets et procédés, une rémunération complémentaire de 2 % du montant hors taxes et en ateliers du chiffre d'affaires de l'ensemble des [produits].
- En cas de cession ou concession de brevet ou de licence ... à l'étranger, [X] aura droit à une rémunération égale à 50 % des bénéfices nets aussi longtemps que ces bénéfices résultent à la fois de l'apport de [Y] et de l'apport de [X], la rémunération de 50 % sera limitée à 5 ans.
- Du 1er janvier 1956 au 1er janvier 1962, [Y] pourra à tout moment reprendre son entière liberté à l'égard de [X] avec préavis d'un mois :
  - en lui restituant la propriété de ses brevets
  - en lui versant jusqu'à l'expiration du préavis, les rémunérations précitées, augmentées d'une indemnité égale à ...
- Passé le délai du 1er janvier 1962 [Y] deviendra définitivement propriétaire des brevets. Elle pourra conserver les brevets de perfectionnement moyennant certaines conditions de rémunération déterminées.
- Une clause compromissoire faisant référence au Règlement de la CCI est prévue pour tout différend pouvant découler de la présente invention.

Attendu que la convention litigieuse confirme que les clauses précitées sont soumises à la condition suspensive de leur ratification par l'Office des Changes ou de tous organismes officiels compétents.

B. Validité du contrat du 29 mai 1954

1. Du consentement

Attendu que le demandeur prétend que la convention du 29 mai 1954 serait entachée d'un vice de consentement, qu'il apporta sa signature en fin de texte établi dans une langue qui ne lui était pas familière et sans avoir eu une connaissance exacte et suffisante de la nature des dispositions.

Attendu que la défenderesse fait valoir que le demandeur reste en défaut d'établir l'existence d'une erreur grave sur l'objet, la substance ou la cause de la convention susceptible d'être qualifiée "vice de consentement", qu'il soutient que le demandeur connaît très bien le français, que la convention définitive a été élaborée à la demande expresse de celui-ci et envoyée pour examen un mois environ avant la signature.

Attendu qu'il échet d'examiner les circonstances antérieures, à la signature du contrat. Attendu qu'il résulte des documents versés aux débats que [X], propriétaire en Allemagne de plusieurs inventions brevetées concernant des articles … a cédé à [Y] la propriété des droits intellectuels qui en résultent pour la France et l'étranger, à l'exception de l'Allemagne et des Pays Scandinaves.

Attendu que les conditions et modalités de cette cession ont été élaborées et arrêtées provisoirement en date du 30 octobre 1950 et modifiées en date du 12 mars 1951 ; Attendu que ces accords ont été, pendant trois ans, concrétisés par l'expérimentation des [procédés] dans les ateliers de [Y], assistée de la collaboration technique de [X] en vue de mettre au point la fabrication des dits [produits].

Attendu qu'au cours de conversations échangées à Paris le 2 mars 1954 et confirmées par correspondance du même jour, les parties ont convenu d'établir un contrat définitif ; Attendu que par lettre du 13 avril 1954, [X], par l'intermédiaire de son conseil juridique, sollicite de [Y], dans le cadre des entretiens du 2 mars 1954, un nouveau projet de contrat qui viendrait arrêter définitivement les dispositions contractuelles.

Attendu que le 30 avril 1954 [Y] a envoyé à [X], pour examen, un projet d'accord définitif en double exemplaire. Attendu que ce contrat est établi dans la même langue que les protocoles provisoires et ne diffère que fort peu, notamment par le % de la rémunération de la cession …

Attendu que le 29 mai 1954, de passage à Paris, [X] signa le contrat arrêté aux conditions énoncées ci-avant sous le point A.

Attendu que le demandeur ne conteste pas qu'au moment de la signature du contrat, il était assisté d'un interprète … qui suivit tous les pourparlers.

Attendu que le 6 août 1954, la défenderesse adressait au demandeur, copie d'une lettre du 20 juillet 1954 émanant de l'Office des Changes français qui marquait son accord sur les termes du contrat.

Attendu que cette lettre reproduit clairement le montant des rémunérations en faveur de [X]. Attendu que le demandeur accepta cette lettre sans protestation …

Attendu en outre que la thèse du demandeur n'est appuyée par aucun document qui établirait l'absence d'effet entre les parties, et qu'au surplus le caractère véridique de cette correspondance est confirmé par une lettre du 26 avril 1955 ; qu'il appert en effet expressément de cette dernière, qu'environ un an après la signature de la convention de 1954, le demandeur, soulignant la différence … entre les rémunérations prévues aux accords de 1951 et 1954, écrit à la défenderesse que malgré cette différence il a intérêt à donner à la convention de 1954 une valeur "définitive", bien que, ajoute-t-il, pour satisfaire l'administration des changes de son pays, il souhaite discuter à nouveau le montant de la rémunération ; que ce souhait exprimé après écoulement d'un an ne peut que confirmer l'accord antérieur.

Attendu au surplus que le silence du demandeur, à la réception de la lettre de l'Office des Changes français, confirmant les termes de la convention de 1954, d'une part, et le contenu de la lettre du 26 avril 1955 d'autre part, établissent qu'il y a eu, au moment de la signature du contrat de 1954, un accord complet entre les parties, concernant les conditions auxquelles la cession est intervenue.

Attendu que de toute manière le demandeur est un industriel averti ; que la suite des événements et des dispositions prises sont conformes à un déroulement normal d'une discussion entre contractants et ne font apparaître aucune erreur de consentement.

Attendu dans ces conditions que l'erreur de consentement invoquée par le demandeur n'est pas fondée.

2. Sur les obligations

Attendu que le demandeur soutient en conclusion, que les obligations de [Y] sont assorties de conditions potestatives. Attendu que la défenderesse fait observer que le demandeur ne précise pas les clauses prétendument affectées de telles conditions.

Attendu que cependant dans sa note complémentaire, le demandeur vise d'une part la clause 6 de la convention, par laquelle la défenderesse s'est réservée, pendant un délai déterminé, la faculté de restituer la propriété des brevets moyennant certaines conditions d'indemnisation en faveur de [X].

Attendu qu'il y a lieu de constater que cette faculté a été stipulée dans le protocole provisoire de 1951 ; que le demandeur n'a jamais formulé d'objection à son sujet. Attendu qu'il est constant qu'une cession peut être consentie pour partie seulement de la durée des brevets …

Attendu que jusqu'à l'échéance du délai fixé à l'article 6, la cession a simplement la forme d'une cession dite à terme résolutoire. Attendu dès lors que la clause facultative prévue dans la convention litigieuse ne revêt par un caractère potestatif d'où dériverait la nullité de la convention.

Attendu que le demandeur soutient d'autre part que le mode de rémunération prévu en sa faveur est potestatif. Attendu que le contrat prévoit plusieurs clauses … définissant le mode de rémunération du demandeur. Attendu que le prix peut revêtir des modalités très variables.

Attendu qu'il peut, comme en l'espèce, consister en sommes successives payables annuellement pendant toute la durée du contrat, compte tenu du chiffre d'affaires réalisé (clauses …) ou des bénéfices réalisés (clause …).

Attendu qu'il n'est pas exact de soutenir que cette rémunération dépend uniquement de la décision arbitraire de la défenderesse ; qu'en fait elle dépend de la réalisation du chiffre d'affaires. Attendu qu'eu égard aux considérations qui précèdent, le demandeur ne saurait valablement soutenir que le mode de rémunération stipulé en sa faveur est potestatif.

3. Du prix

Attendu que [X] soutient en outre que le prix stipulé dans la convention, en particulier la redevance de 2 % sur le chiffre d'affaires réalisé par [Y], pour la rémunération de la cession est fictif ; qu'il invoque à titre de comparaison, la rémunération de 5% dont il bénéficie de la part de [Z].

Attendu que la défenderesse conteste le caractère dérisoire de la rémunération octroyée à [X] ; qu'elle soutient que le demandeur ne saurait trouver dans l'accord intervenu avec [Z], un élément de comparaison pertinent, du fait que le demandeur est le principal actionnaire de cette société.

Attendu que la cession ne peut se faire que par pays, qu'il est constant que les conditions varient d'un pays à l'autre, qu'au surplus la cession des brevets a été faite sans garantie de validité de la part du cédant.

Attendu que dans ses observations complémentaires le demandeur déclare que la rémunération aurait été conçue en prévision d'un chiffre d'affaires minimum important.

Attendu cependant que la convention définitive comme d'ailleurs le protocole provisoire, ne prévoit pas pour [Y] l'obligation de fabriquer un minimum prédéterminé ; qu'il est constant dans ce cas que le cessionnaire assume implicitement l'obligation d'exploiter en bon père de famille, et s'interdit de créer une concurrence aux produits du brevet (voir Puillet n° 254 ; Paris 1er juin 1886 – *Annales de la Propriété Industrielle* 1889 – 173).

Attendu que dans ces conditions la rémunération de 2% prévue au contrat constitue un prix réel.

4. De la lésion

Attendu que le demandeur affirme vainement que la défenderesse bénéficie d'avantages disproportionnés à la valeur des brevets cédés.

Attendu qu'en effet, comme observe la défenderesse le droit français applicable en l'espèce, n'admet pas la lésion dans ce cas. (*Code Civil* art. 1674 et suivants – voir Colin & Capitant, Tome II, livre II, titre II p. 466 n°2 et 3) (voir également Henri Allart – *Traité des brevets d'invention* chapitre XI, section III, n° 224).

C. Conditions suspensives

Attendu que le contrat du 29 mai 1954 est intervenu sous la condition suspensive de sa ratification par les organismes officiels des changes.

Attendu que le demandeur affirme que cette autorisation a été refusée par l'Office Allemand des Changes. Attendu que la défenderesse affirme que le demandeur n'aurait pas pris les dispositions nécessaires en vue d'obtenir l'autorisation de l'Office Allemand des Changes.

Attendu que par lettre du 26 avril 1955, [X] faisait savoir à [Y] qu'il éprouvait des difficultés dans ses démarches auprès de l'administration allemande pour le motif que la rémunération de la cession était environ la moitié de celle qui lui était accordée par [Z], que dans cette même lettre [X] souhaitait remettre en discussion le montant de la rémunération.

Attendu que pour faire face aux difficultés avec lesquelles [X] était aux prises, [Y] proposait en date du 10 mai 1955 de modifier le mode de rémunération. Attendu que [X] n'a pas donné suite à cette proposition, se bornant à réclamer dans une lettre du 27 juin 1955 une augmentation de la redevance et une limitation territoriale des brevets cédés à [Y].

Attendu que le demandeur ne produit aucun élément prouvant qu'il s'est efforcé d'obtenir la réalisation de la condition suspensive.

Attendu que le demandeur s'est en outre totalement abstenu de fournir une preuve quelconque à l'appui de ses dires relatifs au prétendu refus de l'Office Allemand des Changes.

Attendu que la défaillance de la condition suspensive alléguée par le demandeur n'est pas confirmée en fait. Attendu, au surplus, qu'en cas de défaillance, [X] ne pourrait s'en prévaloir aussi longtemps qu'il n'aura pas prouvé avoir fait les efforts nécessaires pour l'empêcher.

D. Exécution du contrat du 29 mai 1954

Attendu que l'obligation essentielle du cessionnaire consiste à payer le prix de la cession ; qu'en l'espèce il consiste en une rémunération proportionnelle aux marchés effectivement passés par la défenderesse.

Attendu que la convention de 1954 comme celle de 1951 est muette quant à la quantité minimum d'objets à vendre par la demanderesse. Attendu qu'il y a lieu de déduire de ce silence que la défenderesse s'est engagée à exploiter l'invention en bon père de famille. Attendu que le demandeur fait grief à la défenderesse de n'avoir pas suffisamment exploité l'invention, n'y d'y avoir apporté tout l'appui de sa situation technique et commerciale.

Attendu que la défenderesse expose dans ses lettres des 10 mai et 16 juillet 1955 les difficultés rencontrées dans l'exploitation de l'invention sur une échelle industrielle et annonce des progrès sensibles pour les années futures ; que dans le cadre des activités nationales, la vente s'élève mensuellement à 80 appareils tandis quand dans le cadre des exportations, des affaires ont été réalisées en Iran, Venezuela, Turquie et Brésil.

Attendu que les 25 novembre 1955 et 26 mars 1956, [Y] adresse à [X], respectivement pour les années 1954 à 1955 un relevé de commandes [des produits] sur la valeur desquelles des redevances de … Fr sont versées au crédit de [X].

Attendu que l'examen de ces relevés fait apparaître que durant cette période l'exploitation de [Y] prenait en surface une extension qui permettait de supposer pour les années suivantes une exploitation plus considérable.

Attendu qu'en se basant sur les résultats d'exploitation des années 1954 et 1955, le demandeur n'était en tout cas pas fondé de demander la résiliation du contrat ; qu'en effet, lorsqu'un inventeur a cédé son brevet moyennant partage des bénéfices provenant de l'exploitation du dit brevet, l'inventeur peut, s'il n'existe pas de bénéfices obtenir une indemnité pour la valeur de son brevet, dans la propriété duquel, il ne peut en tout cas demander à être réintégré …

Attendu que pour apprécier si dans le cadre de la Convention de 1954, la défenderesse a exécuté ses obligations, il y a lieu de prendre en considération les années durant lesquelles la défenderesse poursuit leur exécution. Que celles-ci s'étendent annuellement sur 5 années.

Que la défenderesse soutient avoir pour cette période, rempli ses obligations, qu'à l'appui de son argumentation, elle produit un tableau montrant l'évolution comparée des chiffres d'affaires s'étendant des années 1954 à 1958 incluses … Attendu par ailleurs la défenderesse affirme qu'elle a investi pour plus de … Fr applicables à l'équipement en machines modernes. Attendu que ces chiffres ne sont pas contestés par le demandeur.

Attendu que sur le plan de la publicité, la défenderesse justifie au moyen de revues et prospectus qu'elle a entrepris des efforts dans ce domaine. Attendu qu'il résulte de ce qui précède que la défenderesse, dans le cadre de ses obligations, ne peut être suspectée de ne pas exploiter l'invention en bon père de famille.

Que le cédant a suivi la foi du cessionnaire ; si celui-ci exploite en bon père de famille, d'après ses capacités et ressources, le cédant doit supporter les conséquences du contrat aléatoire qu'il a librement accepté …

Qu'au surplus le demandeur ne rapporte pas la preuve d'une faute commise par la défenderesse dans l'exécution de ses obligations contractuelles. Que l'action manque donc de fondement.

E. Dommages et intérêts

Attendu que la défenderesse réclame le droit de faire sanctionner le comportement du demandeur par des dommages et intérêts.

Attendu que la défenderesse n'établit pas que les agissements du demandeur lui aient causé préjudice.

Décision

Par ces motifs, l'arbitre :

Rejetant toutes autres conclusions plus amples ou contraires :

- Se déclare compétent
- Dit l'action principale mal fondée en tant qu'elle poursuit l'annulation de la convention litigieuse ; la déclare non fondée également pour le surplus, en déboute le demandeur et le condamne aux dépens y compris les honoraires de l'Arbitre, s'élevant à Fr. …
- Dit qu'il n'y a pas lieu d'octroyer des dommages à la défenderesse.

28. ARBITRAL AWARD ICC Case no. 1073 (St. Gallen, 1961)

(Claimants) [Australia] represented by … versus (Defendants) [Belgium] represented by … the undersigned, appointed as sole arbitrator by the Court of Arbitration of ICC on 8th July 1959, has made the following award within the fixed period, extended in accordance with Articles 23 of the Rules of Arbitration until 31st December 1961.

1. The undersigned arbitrator gathered the facts from the statements submitted by the parties as contained in the Statement of 31st October 1960 scheduled hereto.

The Claimants stated in their letter dated 22nd November 1960 that it was not practical for them to appear before the arbitrator personally. The defendants similarly informed the arbitrator by letter on 30th December 1960 that they would not appear personally before the arbitrator.

The parties have supplemented their statements as follows:

The Claimants sent a letter dated … February 1961 concerning the law which was applicable, and submitted a certificate dated … October 1957 issued by the Australian Customs Import Entry regarding the arrival of [a vessel]. The Claimants likewise submitted by letter dated … July 1961 with a certificate issued by the … Chamber of Commerce and dated … July 1961. The Defendant's solicitor informed the arbitrator [in] December 1960 that the aforementioned Statement was to be supplemented with the remark:

> "The [products] thus taken back by the defendant were then sold to European customers, without giving rise to complaints."

The arbitrator replied that the text of the Statement ought not to be altered, but that it was correct that there existed a letter dated … confirming that the said goods had been processed to the entire satisfaction of this firm. The Defendant's solicitor submitted a note by letter dated 10th June 1961, dealing in:

1. with the law which was applicable; and in
2. with the failure to deliver the goods in accordance with the contract.

2. The following was taken into consideration:

a. The first question to be considered is that of the law which is applicable. The Claimants maintain that Australian law is applicable since the contract was concluded with the Defendant's agent in [Australia]. The Defendants, for their part, refer to this contract according to which they had to deliver the goods …, and maintain that therefore Belgian law is applicable, as most legal authorities take as the criterion the place where the contract is to be fulfilled.

According to the Swiss rules concerning the conflicts of laws which have been developed recently by the Swiss Federal Court, especially with regard to the sales contract, the first question is whether or not the parties have chosen a specific law, either by an express agreement or by a circumstantial agreement. If, as here, this is not the case, and the will of the parties concerned cannot be ascertained from the circumstances, the law of that country is applied with which the legal relationship has the closest spatial connection. In this connection, the place where the contract is to be fulfilled has outstanding importance.

In general, the law of that country is therefore applicable. In the present case, this would seem to speak for the application of Belgian law (vide decisions of the Swiss Federal Court, *Recueil officiel des arrêts du tribunal fédéral suisse*, vol. 72, Part II, page 411: *Schönenbergergäggi Commentary on the Code of Obligations 1961*, General Introduction N 53, N 260, and quoted literature N. 267). The applicable law is, in general, to be applied uniformly to the entire contractual relationship. The theory whereby the contract may be split up and each part to be governed by another law ("système de la coupure du contrat") is generally rejected by the Federal Court. (*Recueil officiel*, vol. 78, Part II, p. 85). However, an exception is made in the

case of sales contracts, in that all questions relating to claims arising out of the nature or quantity of the goods shall be governed by the law of the country in which the goods are located at the time at which such claims had to be notified. In other words, all questions which relate to the formalities of the claim regarding the nature or quantity of the goods are to be judged according to Australian law (vol. 78, Part II, p. 85).

The Federal Court's opinion is thus in agreement with the legal theory which is at the base of The Hague Convention of 15th June 1955 relating to the purchase of movable goods. Article 4 of this Convention lays down that the form and the time-limits for the examination of the goods as well as for the notification of the claims shall be governed by the law of the place where the goods purchased are to be examined.

b. A general distinction is made between evident and hidden defects. The criterion is whether or not these defects are recognizable at the time of the customary examination after receipt of the goods. What is meant by this depends on the commercial practice in each trade. The Claimants could at the outset limit themselves to a superficial examination of the goods. It was not until the goods were processed that any defects could be detected. It was not until then that the Claimants were obliged formally to notify the defects. The general practice is that the goods do not have to be examined until after processing (*Schweizerishe Juristenzeitung* vol. 46 S, p. 192; Collection of Decisions by the Federal Court, vol. 76, Part II, p. 223). This practice is also confirmed in the Certificate dated 4th July 1961 and issued by the Secretary of the … Chamber of Commerce, who bases his statements specifically on the opinion of experts. In particular, it is confirmed in this Certificate that it was not necessary for the purchaser to make a reservation on receipt of the goods. In any case, it is not the purchaser's business to look for defects.

The main characteristics promised by the Defendants are stated in the contract … These contracts have been performed to the satisfaction of the purchaser.

c. However, in the Defendants' letters … to their Agents … it is stated that the [quantity] involved in the last contract concluded will be procured from a different manufacturer, but that the Defendants will obtain an undertaking from the manufacturer to supply the same quality. It is uncertain whether Claimants' attention was drawn to these facts in good time, and if it was, in what manner. This point does not, however, need to be taken any further, since the Defendants in any case promised to supply the same quality, with [one] sole difference [but that it] was to be "otherwise identical in all respects."

d. According to the first statement of the case in the arbitral request, the goods were received "in late October 1957 … According to the certificate issued by the Australian Custom Import Entry, the [vessel] arrived from Antwerp on … The goods were subsequently processed at once…. Slightly over [quantity] were treated, and found to be defective during processing. However, the Defendants claim that the defects in question would have been evident, if the goods had been properly examined. The aforementioned Certificate is in itself sufficient to testify to the commercial practice according to which the purchaser was entitled to process the yarn without previously testing it. All the more so as the earlier deliveries had given no cause for complaint.

e. There is still the question whether in fact the Claimants had received a sample of the goods. … The claim that a sample was submitted, has therefore been refuted – and by the Defendants' own agent.

f. After it was established that the goods were defective, the Claimants were equally justified in objecting to that part of the goods so tested.

g. The Claimants maintain that their tests established an unusual variation in the lengths. This was confirmed by an [independent test]. When they had carried out adequate tests, the claimants … and forwarded samples to the Agent. The Agent submitted a sample to the manufacturers … as early as 13th November. We are not aware what answer [the manufacturer] gave, because the reply was obviously sent to the sellers directly.

h. The defendants' main argument is that the defects in question were evident, recognizable defects, and did exist at the time the sale took place. However, they also dispute the claim that the defects have been proved … It was not necessary to have recourse to a contradictory procedure in which the sellers would have had to cooperate, in order to establish the defects. The claimants base their claim mainly on a report … issued by [an institute] in addition to the aforementioned … test and the customers' evidence. The goods are described therein as … which leads one to conclude that they are the goods supplied to the claimants and rejected by them. The claimants allegations were confirmed in detail, and the Institute's conclusion …

The defendants base their defence on a report dated 28th November 1957 and issued by [the manufacturer], which states that the material is of a good degree of purity and that a staple diagram was prepared on the basis of the sample submitted, which does not quite correspond to that of a normal section of fibre top …

The arbitrator nevertheless wondered whether another expert examination should not be carried out. In view of the relatively small sum in dispute, of the discretionary power of the arbitrator and of his own expert knowledge and of the authority of the Institute appealed to by the claimants, it was however felt that adequate proof had been furnished. It can therefore be assumed that the defects claimed to exist have been sufficiently attested.

i. The defendants refer to their sales to [C] and claim that there were no complaints in this case. The defendants have in fact supplied proof that [the product] quality were processed by [C]. The defendants have filed this firm's statement to the effect that the goods concerned were processed "to our entire satisfaction". Quite apart from the fact that this statement is very briefly worded, the demands made by the European market are different and we do not know in what circumstances these goods were processed here.

j. As to the amount to be awarded, we must proceed from the fact that the claimants base their estimate of damage on the [quantity] … The lost profit and the costs incurred must be added to this sum … The claimants' estimate of damage gives the impression of being quite accurate and reliable. The defendants themselves have not disputed the quantity … and the sums indicated, so that these figures can be depended upon.

The claimants reserved the right to ask the arbitrator to grant them any further sums which would appear to be justified … This unsubstantiated request, couched in general terms, cannot be met.

k. With regards to the costs to be refunded to the claimants, the following calculation is made …

3. For these reasons, we, the undersigned arbitrator, direct and award as follows:

1. The defendants shall pay to the claimants the sum of £ … or the counter-value in Belgian francs at the date of payment;
2. The defendants shall pay the claimants the sum of Swiss francs … as compensation for the cost they incurred, or the counter-value in Belgian francs at the date of payment;
3. The defendant shall bear the cost of the arbitration procedure amounting to Swiss francs … or the counter-value in Belgian francs at the date of payment.

29. ARBITRAL AWARD ICC Case no. 1124 (Frankfurt/Main, 1961)

Between: [X] [France] (Applicant) and [Y] [England] (Respondents). The undersigned: … Docteur de l'Université de Paris, acting as sole arbitrator, has rendered the following award:

The arbitration has taken place on the basis of the statement drawn up in accordance with Article 19 of the Rules of Conciliation and Arbitration of ICC. This statement has been signed by the parties to the arbitration and the arbitrator on October 13, 1960. The text of the statement is attached to this award and forms an integral part of it. The Rules of Arbitration of ICC as of 1st of June 1955 are applicable.

The arbitrator was bound by the Agreement dated 1st October 1949 which provides that the Agreement in case of litigation shall be construed according to the laws of England, to apply English law. Since the award has been rendered in Frankfurt/M., Germany, the Rules of the Code of Civil Procedure of the Federal Republic of Germany apply …

A hearing has taken place on October … 1960, in Frankfurt/M., whereby … Avocat à la Cour de Paris, was representing the applicant and the applicant was personally present, while … Solicitors, London, represented the interests of the respondents. Likewise present was … barrister-at-law, London, as a legal expert of the English law, called upon by the respondents' party to testify on questions of English law. A second hearing has taken place on December 1, 1960, to amplify the legal side of the issue …

At the end of the hearing, the arbitrator unsuccessfully appealed to the parties to seek a compromise. The time limit for notifying the award has been extended until the end of January 1961.

In the statement of October 13, 1960, the mission of the arbitrator is clearly stipulated under Article V. The questions of law and fact that had to be dealt with are specified under 1, 2 and 3 of such statement. The parties in the hearing agreed to drop 2 and to deal only with 1 and 3 as follows:

1. How are the provisions of clause 9 and 10 concerning the renewal of the contract to be construed ?
3. Did applicant suffer loss and to what extent by the alleged breach of contract by respondents ?

It has been decided that

1. The Agreement in question has been renewed and is still operative.
2. The applicant has not suffered loss.
3. The costs of the arbitration amounting to … as well as the costs of legal representation are to be borne by the respondents at two thirds and by the applicant at one third. The additional costs that have arisen by the fact that a second hearing took place shall be borne by the respondents at two thirds and by the applicant at one third. The additional costs that have arisen by the fact that a second hearing took place shall be borne by the applicant.

As to 1 Clauses 9 and 10 read as follows:

> "9. This agreement shall remain in force for ten years from to-day's date [issue 3] and shall be renewable by automatic tacit consent for a further similar period or periods, but it may be cancelled at the option of [Y] if [X] group fail to purchase from [Y] or alternatively, manufacture and sell, or pay … per gallon on a total or … of [Y] products, which in principle will be considered as follows: …
>
> 10. If [X] Group fail to dispose of the above stipulated quantity of [the product] over the ten years period of this agreement, they undertake to pay to [Y] … pence.. per gallon compensation for any quantity by which the actual sales during the ten years period fall short of the stipulated quantity of … Upon completion of such payment the contract will be without further notice, considered as renewed, as above specified."

The clauses have to be read as a whole. It is not permitted to depict words or parts of sentences, attach certain values to them and finally read them together whereby the senses of each word or each part of sentence, as construed before, remains separated.

G.H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama (1957) A.C.169:

> "My Lords, I can see no conflict. The contract contained in the bill of lading must be read as a whole."

Elderslie Steamship Co. v. Borthwich (1905) A.C. 93, 96 per Lord Halsbury:

> "[A]nd one rule construction which must prevail is that you must give effect to every part of a document if you can – you must read it as a whole."

The meaning of the clauses read together without separating words or part sentences has to follow the normal reaction of a human being and in the case pending the rules of commerce and the attitude that commercial people would adopt.

Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd (1959) A.C. 161-2, 174-176; (1958) 2 *Weekly Law Report* 701-2, 713-4:

> "My Lords, I must now approach the construction of the relevant documents and endeavour to answer the four questions already stated. In approaching this task I shall bear in mind, and strive to apply, three well-known principles of construction, to which reference was made in the course of the argument. The first principle is stated by *Lord Wright in Hillas & Co. Ltd. v. Arcos Ltd*. in words which have often been quoted: Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defect; but, on the contrary, the court should seek to apply the old maxim of English law, '*verba ita sunt intelligenda ut res magis valeat quam pereat*'."

It is true that visualizing the matters retrospectively one would phrase clauses 9 and 10 more clearly and unequivocally to reflect what the parties meant to say. On the other hand, it cannot be denied that their meaning in the context is not unclear so as to allow the arbitrator to find the clause unintelligible or only partly plausible and therefore to set aside the clauses altogether or part of them and so to disrupt the – whatever uncommon phrasing may have been adopted – ordinary sequence of the contract.

Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. (1959) A.C. 133, 177: Lord Wright then goes on to state the second well-known principle as follows:

> "That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail."

In *G. Scammell & Nephew Ltd. v. Ouston*, Lord Wright said:

> "The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not form. It will not be deterred by mere difficulties if interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract."

Since clause 10 provides for the applicant the possibility of repairing a lack in the fulfillment of the contract in the case of a sale of [Y] products in an amount of less than … gallons per ten years and enables him to make good such lack by the payment of … per gallon without requiring an element of consent, it is not persuasive that in the case where he acted regularly, i.e. sold more than the double amount of gallons, such element of consent should be required. This is the truer since the words "by automatic tacit consent" require nothing of the sort. Automatic means in any language something that occurs *ipso facto*. It cannot be seen, therefore, that tacit consent should be something different when there is open dissent. It would mean to construe the sentence through an act – dissent – that lies outside the contract.

Halsbury's Laws of England Volume XI Paragraph 646:

> "Extrinsic evidence generally excluded. Where the intention of the parties has been reduced to writing it is, in general, not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instruments, drafts, articles, conditions of sale or preliminary agreements, either to show that intention, or to contradict, vary, or add to the terms of the document."

Chuen v. Li Po Kwai (1932) A.C. 715 at p. 727:

> "Tindal C.J.'s statement of the law on this subject in Shore v. Wilson has never been departed from. It may be useful to recall his words: "The general rule," he says, "I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

It may very well be that "renewable" as standing alone is to be construed as capable of being renewed, but it certainly has no such meaning in the context of "automatic tacit consent" in clause 9 and the reference in clause 10 clearly saying that the contract "… shall be renewed, as above specified." Construing this sequence otherwise would give weight to one word over a reasonable construction of the two clauses altogether. The word cancel as opposed to renewable does make sense. It does not mean the contrary of renewal. I may refer here again to the above cases which accept the fact that businessmen are sometimes using words that a professor of law or languages would not have used. But this does not mean that these words pretend to mean something mysterious as long as common sense allows a normal construction.

The same misinterpretation ensues from depicting the ten-year period as the dominant object of the contract since, no doubt, the parties have envisaged a further period or periods. It has been put forward that the applicant requires a right of perpetual renewal and that while giving way to a *ipso facto* renewal of the contract after ten years the contract would be undeterminable, both contentions being contrary to the English law.

In fact the applicant has not required a right of perpetual renewal. All he wants – even if he had not said so – is a renewal after the first ten years period since the contract had been signed in 1949 and today I have to deal with the events of 1959 and not those of 1969.

It may be mentioned at this place that the lack of fulfillment of a yearly quantity within the ten years cannot lead to a [disruption] of the contract. Not only are the quantities a guideline irrespective of the no-guarantee" of quantity for the first year, a very common expression of commercial language in such context – here again it would mean an overstraining of the correct approach, if the applicant had a possibility to make good for the lacking quantity at the end of the ten year period while a failure during such period would lead to the end of the contract.

It has been put forward that a contract of commercial agency needs a particular regard to confidence and trust of the parties to a contract and that, therefore, any such contract ought to be determinable. This may be true and in fact the *Hartnell v. Berker Sportcraft Ltd*. 177 L.T. 420 case says something to that end:

> "No doubt there are a great many contracts of that kind: a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes – all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties. Here is a contract which does not involve a great deal of trust and confidence and a great deal of necessity for being mutually satisfied with each other's conduct, and a certain amount of personal relations and some delegation of authority inasmuch as Berketex Limited are empowered to affix a label bearing Mr. Hartnell's name to the dresses manufactured by them. It seems to me that argument would have very great force of this agreement had contained no provision for determination at all."

If this were of importance here, it has to be said with equal truth that if parties to a commercial agency agreement provide that only special causes for determination should prevail in the contract, this is also a sign of confidence and trust and in no case it should give the parties a right for determination for other reasons than those mentioned in the contract.

What really matters, however, is the fact that the parties did provide for a continuance of the contract for a further similar (ten years) period or periods. It was one of their intentions to continue collaboration unless a specific commercial failure on the side of the applicant would bring the contract to an end. Whether the contract is undeterminable or not is, therefore, not a question that can possibly be of legal importance for the first two or three periods of the ten years. The *Hartnell* and the *Martin Baker* cases do not say anything to the contrary.

Hartnell v. Berker Sportcraft Ltd. 177 L.T. 420:

> "It seems almost inconceivable that a business agreement of this kind should be entered into with an express provision for determination in certain events, both with an intention beyond and behind that, that in addition to determination in those events there should be an over-riding power on either side to determine on a particular notice. That seems to me to be almost inconceivable, and the very fact that the parties define with meticulous care the events in which either of them can determine the agreements shows that their minds were directed to the question of determination, and that they decided that the best thing to do was to give only these limited and contingent powers of determination. If they had meant the agreements to be determinable at the end of any year by six months' notice or any other notice, they would almost inevitably have said so."

Martin Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Ltd. (1955) 2. Q.B. 556:

> "But to my mind the question whether a contract such as this is permanent or revocable does not depend upon the insertion of an implied term, but depends upon the true construction of the language used."

It has further been said that the commercial reciprocity and mutuality would not carry on to be prevailing after the first ten year period, since there were no stipulated quantities provided for. Even if this were so and the ten year period were not be construed as to mean any ten year period within the agreement, there remains the fact that the respondents have entered into such agreement. It seems that it was worth to them to enter into it under these circumstances. In addition there is still the commercial interest of the applicant to selling [Y] products. In fact he does so, since the respondents were fair enough for whatever reasons to continue delivery to applicant pending arbitration.

As to 3. Finally, and for the reasons expressed in the last sentence, the applicant cannot be granted compensation for loss allegedly suffered by the threatened rupture of the contract. The decision as to cost is based on the fact that applicant's claim has been rejected as to point 3 of the statement and that applicant has caused to have a second hearing held in Frankfurt/M.

30. ARBITRAL AWARD ICC Case No. 1158 (Athens, 1962)

In the Matter of Arbitration Between [X] [Country in the Middle East] (Claimants) and [Y] [Germany] (Defendants). The tribunal consisting of … [Greece] (Chairman) [Jurisdiction of Claimant] (Co-Arbitrators) [Germany] has, subject to the provisions of Article 26 of the [1955] Rules of Conciliation and Arbitration of the ICC, decided and made the following Award in Athens, Greece.

1. The Defendants shall pay to the Claimants the sum of Pounds Sterling … with interest at the rate of 12% … per annum from 3rd July 1960 until final and full payment.
2. The Defendants shall pay to the Claimants the sum of Pounds Sterling … in the manner detailed in this award on issue No. Nine thereinafter, i.e. against delivery by the Claimants of the equipment of their workshop as established by them under Article 4 Paragraph 1 of their contract or on receipt by the Defendants of the Claimants' offer of such delivery.
3. All other claims made under the present case are dismissed.
4. The costs, fees and expenses of the Court of Arbitration and Arbitration Tribunal amounting to £ … shall be borne to the extent of 60 per cent by the Defendants and 40 per cent by the Claimants.
5. The Claimants and the Defendants, however, shall each bear their own costs in respect of litigation and other expenses.
6. The litigation value of all matters decided on in this award has been assessed at Sterling pounds …

Statement of facts

1. (A) On or about the 1st May 1956, the Claimants were appointed by the Defendants as their exclusive distributors in [Claimant's jurisdiction] for the following products (amongst others) manufactured and/or distributed by the Defendants: motor vehicle equipment, electrical tools [and appliances]. The Claimants for their first orders for the above products in October 1956 and the parties' relations were formalised by contract signed by the Defendants … and subsequently by the Claimants …

(B) The Defendants' terms for delivery and payment as generally provided by the Defendants for their export sales … were to be applied only regarding "payment for goods bought by" the Claimants "on their own account".

(C) The contract states in Article 2, paragraph 7:

> "Each will endeavour to prevent any third parties from importing Contract-Product into the Contract Area, but [Y] cannot assume any guaranty for the success of such endeavours."

(D) The contract obligates the Claimants to set up a workshop for service and repairs, to keep sufficient stock of the Defendants' products, to establish distribution organizations for each branch of the industry concerned, and to promote at its own expense the interests of the Defendants (Article 4, 5 and 6).

(E) The contract was made for an indefinite period and was stated to be terminable quarterly by either party by registered letter sent not less than three months prior to the date of termination. It was further provided that:

> "where the Agreement relates to a firm outside Europe, the dispatch of the registered letter must be confirmed by cable (Article 10)".

By the contract also there was reserved the right for the Defendants alone to terminate it in the event of any change in the management or ownership of the Claimants by three months' notice (Article 12).

(F) Article 14 entitles the Defendants to make preparations in order to confer the distributorship upon another firm in case of notice of termination of the contract by either party. Article 15 states as follows:

> "The Firm will without right of remuneration transmit to [Y] any customer's orders in respect of all individual Contract-Products already placed with the Firm at the time of termination of this Agreement.
>
> At the time of the termination of this Agreement the Firm shall offer to [Y] its remaining stock of Contract-Products for sale. [Y] shall be entitled, but shall be under no obligation, to take over the whole or part of this stock …"

2. The Defendants sent a notice of termination of the contract registered letter dated 10th February 1960, to the Claimants, the termination to be effective 30th June 1960. The notice was given as follows: "with reference to Article 12 para 1, and in accordance with Article 10, para. 1". In fact, no change has occurred in the ownership or management of the Claimants, and no cable was sent by the Defendants confirming the registered letter. Further, by correspondence sent by the Claimants to the Defendants during March, May and June 1960, they declared the termination to be unjustified and invalid.

3. In May 1960, and over a period of three weeks, the Claimants sold a considerable part of their stock of contract-products in addition to bins, drawers and boxes in which they are kept, to [A], owners of [B] [Claimant's jurisdiction] who were newly appointed distributors in [Claimant's jurisdiction] of the Defendants' products.

Prior to the time of termination, viz. 30th June 1960, the Claimants had transmitted to the Defendants and had placed with them various orders bearing dates which were earlier or later than the date of the notice of termination, viz. 10th February 1960, which orders had been already partly accepted by the Defendants, who, nevertheless and in spite of that refused to deliver the goods ordered thereby to the Claimants. Part of the products ordered by the Claimants, as above stated, were actually delivered to [A] prior to 30th June 1960. …

4. The Claimants allege and hold:

1. That the termination notice was invalid for the following reasons:
   a) Lack of confirmation by cable
   b) Inapplicability of article 12 of the agreement, vitiating also termination under article 10.
2. That the termination constituted an abuse of right in view of the Claimants' heavy investments, satisfactory performance and the Defendants' assurances before the termination.
3. That the Defendants have caused damage to the Claimants by not having employed their best efforts to prevent third party imports of the Defendants' products into [Claimant's jurisdiction] (Art. 3(7) of the agreement).
4. .....
5. That the Claimants are entitled to be compensated by the Defendants also for their still remaining investment in the work-shop.
6. That the deliveries of contract-products by the Defendants to their new distributors until the end of June 30, 1960, were in violation of the parties' agreement.
7. That the Defendants were obligated under the agreement to deliver the orders until June 30, 1960, by the Claimants.

The Claimants have moved the Tribunal to adjudicate the Defendants to pay to the Claimants material and moral damages as follows: …

> "Together with legal interest and costs."

5. The Defendants refute the allegations of the Claimants and have moved the Tribunal:

To dismiss all claims raised by the Claimants with all costs in and out of court to be borne by the claimants. Eventually the Claimants to bear all the costs of a second hearing.

The Defendants allege:

1. Article 10 of the agreement constitutes a sufficient ground for termination in itself and without the need for giving reasons.
2. That the Defendants were motivated by good business reasons to change their distributor; that the Claimants were not sufficiently cooperative, active and successful.
3. That the Claimants had consented to a change-over to the new distributor de facto already by the end of May by their own conduct, especially the sale of part of their stocks and sales-shop equipment to the new distributor. That the Defendants were thereupon, also entitled to refuse to deliver Claimants' still outstanding orders and that thereby by the Claimants had also accepted the termination of the agreement as lawful.
4. .....
5. The Defendants declared further that in the event of any award in favour of the Claimants, the Defendants declare their counter-claims to offset against such award damages in the amount of … owing to the Defendants from the Claimants for negligence in the conduct of the business under the contract.

6. As to the details of the parties' allegations, facts, arguments, exhibits, or other evidence or offers of evidence, motions in procedure or other relevant act before the Tribunal, reference is made to the parties" briefs and pleadings. The Tribunal has held hearings of the case … and taken statement of the parties and witnesses in evidence. The Tribunal has considered all data and rendered its decision for the following reasons:

Issue no. 1: Law applicable

It was agreed by the Parties that Greek Law should apply to this case and cover all of the items included therein. Consequently, the Tribunal has taken cognizance of the aforementioned agreement and based its award on Greek Law. No commercial practices have been invoked by the Parties in this case.

Issue no. 2: Notice of termination of the contract

The Tribunal holds that the notice of termination dated 10th February, 1960, sent by the Defendants to the Claimants through registered mail – providing termination of the contract as from the end of the quarterly period ending on 30th June 1060 – was a valid notice under Article 10 of the contract.

The lack of confirmation of said notice by cable does not, in the view of the Tribunal, render the notice invalid. The presumed intention of the Parties with respect to the requirement of the cable confirmation could not have been that the absence of such confirmation would render the notice of termination invalid and of no effect. It follows, therefore, that as the tribunal entertains no doubt as to the intention of Parties with regard to said requirement, Article 159, paragraph 2 of the Greek Civil Code could not be applied to this case.

Further, as no reason had to be given for termination of the contract under Article 10 thereof, the established fact that the reasons given by the Defendants, while invoking Article 12 of the contract, did not hold good, does not affect the validity of the notice of termination giver under both Articles 10 and 12 of the contract.

Issue no. 3: Abuse of right

According to Article 281 of the Greek Civil Code, the exercise of a right is forbidden if such exercise obviously transgresses the limits imposed by good faith or proper morals or the social or economic purpose of the right.

Also according to Article 914 of the said Code, in order that the Claimants be able to secure an award for damages in respect of any loss or damage sustained thereby, under the circumstances envisaged by Article 281, the subjective element of fault should be proved to have been present with the Defendants in addition to the objective elements mentioned in the said Article.

Although some circumstances of the behavior and conduct of the Defendants which have preceded or accompanied the act of termination of the contract lead to the conclusion that the Defendants thereby failed to take due notice of or give adequate consideration to the interests of the Claimants, the Tribunal did not arrive to the conclusion that the exercise of the right of termination obviously transgressed the limits stated in Article 281 above referred to, nor that the subjective element of fault required by Article 914 existed.

Consequently, the Tribunal does not consider that, under the circumstances, the exercise of the right of termination was abusive, nor does it give rise to a claim for damages.

Issue no. 4: Non-acceptance of notice of termination

Under Greek Law, notice of termination sent by one party to a contract to the other party is not affected by non-acceptance on the part of the party to whom the notice was sent.

Consequently, the Tribunal holds that the validity of the notice of termination sent by the Defendants to the Claimants is not affected by non-acceptance thereof by the Claimants.

Issue no. 5 and 6: Damages

Whereas the Tribunal has not held that the termination of the contract by the Defendants be unlawful, contrary to the provisions of the contract or abusive, no damages are awarded to the Claimants in respect of said termination.

Issue no. 7: Third party exports to contract area

The Tribunal holds that Article 3, Paragraph 7, of the Contract constitutes a legal obligation on the Defendants whereby they are required to take all legally possible and reasonable steps to prevent third party exports to be "Contract Area" which is [Claimant's jurisdiction], where the right of exclusive sales has been granted to the Claimants by the contract.

Clauses included in the sales contract usually entered into by the Defendants or other measures adopted thereby for the purpose of preventing re-sales of their products may be deemed illegal or open to be declared illegal under the laws of certain countries. However, such steps do not seem to be objectionable nor deemed to constitute illegal restraints of trade in other countries, such as [Claimant's jurisdiction]. These steps would, therefore, be operative against resale into [Claimant's jurisdiction] as long as they would not, at the same time, constitute an illegal restraint in the exporter's country.

Be this as it may, the evidence before the Tribunal shows two cases where the Defendants have not, in the opinion of the Tribunal, lived up to their obligations under Article 3 Paragraph 7 of the Contract. The details of said cases are as follows:

Case 1: The Defendants' products were supplied by [A] [Defendants' jurisdiction] to [B] [Claimant's jurisdiction] as evidenced … The Claimants, on learning of this delivery, took immediate steps to obtain a copy of the invoice covering the same and transmitted it to the Defendants requesting appropriate action. A few months passed without any action having been taken by the Defendants. On further pursual of the latter by Claimants, the Defendants informed them that the copy of the invoice previously sent to the Defendant could not be found and thus a second copy was required. The Claimants transmitted another copy to the Defendants who still did nothing more than address a letter to [A] asking for their explanation regarding the contents of the invoice. No evidence has been given of any action on the part of the Defendants in this respect other than and beyond this request for an explanation. The Tribunal holds that the Defendants have then failed to take all legally possible and reasonable measures, including legal action which might well lead to recovery of damages from third party exporters concerned in which case such damages could have been passed on to the Claimants in lieu of profit lost by them as a result of these deliveries.

The total ex-works price of this delivery, as would have been charged to the Claimants by the Defendants less 40% trade discount (given by the Defendants to the Claimants on basis of former's D Mark price list), plus 35% for custom duties, freight, expenses, etc… would amount to DM … or £ … (rate: … at that time). By normal calculations customary in the Claimants' business with the Defendants, this consignment would have earned a total local price of £ …

Thus the profit lost by the Claimants on this consignment is £ …

Case 2: The Defendants' products for the value of £ … (ex-works price) have been sold through third party exporter to [C] [Claimant's jurisdiction] during the second quarter of 1959. This is established by evidence submitted in the files …

The profit lost by the Claimants in respect of this third party sale to the "Contract Area", if calculated in the same manner as in case 1 above would amount to £ …; which it is held the Defendants are under legal obligation to pay to the Claimants as damages.

By their own admission, the Defendants have even failed in this case No. 2 to investigate whether they would be in a position to find the source and method of sanction in respect of these illicit transactions. They, in fact, failed to do all they reasonably could to prevent it and are, therefore, liable to compensate the Claimants for loss of profit sustained as a result of this transaction.

On the evidence before it, the Tribunal can only award to the Claimants in the foregoing two cases 1 and 2 the total amount of £ … as damages for profit lost by them.

Issue no. 8: …

This matter has been friendly settled by the parties.

Issue no. 9: The workshop

The Tribunal holds that Article 288 of the Greek Civil Code has the effect of placing the parties to a contract under a legal obligation to act in accordance with the requirements of good faith and business morals.

Based on the foregoing, and, in spite of the absence from the contract of any provision creating an obligation on the Defendants to purchase from the Claimants the equipment of the workshop established by them under Article 4 Paragraph I of the contract for the purpose of servicing the products of the Defendants, the Tribunal holds that the Defendants are under an ancillary obligation to minimize the damage resulting to the Claimants from the termination of the contract

by the Defendants, especially in view of the fact that said termination was made in such circumstances and at such times as to preclude due consideration from having been given by the Defendants to the interests of the Claimants.

The foregoing obligation would, in the opinion of this Tribunal, be fulfilled by the Defendants' purchase of said equipment from the Claimants at its original purchase value of £ ... less the sum of £ ... in respect of depreciation at the rate of 8% per annum, thus leaving a balance of £ ...

The Tribunal accordingly holds that the Defendants are to pay to the Claimants the sum of £ ... against delivery by them to the Defendants of the said equipment at the site of the workshop in [Claimant's jurisdiction] or on receipt by the Defendants of notice from the Claimants of their willingness and readiness to deliver said equipment to the Defendants at the workshop site in [Claimant's jurisdiction].

Issue no. 10: Deliveries to the new distributor

According to Article 14 of the contract, the Defendants gave the right to "make the preparations in order to confer the exclusive sale upon another firm". The Tribunal considers that the foregoing right includes the delivery by the Defendants of their products to the new distributor around the time the old distributorship terminates and the new one commences.

The quantities of products so supplied and the means utilized for the transport thereof as submitted to us in evidence do not lead us to the conclusion that said deliveries went beyond preparations as envisaged by Article 14 above quoted. It has not been established either that the products sold by [C] prior to 30th June, 1960, were those supplied thereto from the Defendants rather than those sought by them from the Claimants.

The Tribunal, however, considers that the fact of deliveries of the Defendants' products having been made thereby prior to 30th June, 1960, to [C], could lead to the interpretation that such deliveries could not be deemed deliveries made for the purpose of preparation for conferring the sale on the new distributor, who according to the evidence, is [B]. But, having taken all the facts into consideration, especially the ownership of the latter firm by the same owners as those of the former and their intention to operate the franchise conferred on them by the Defendants through the latter firm, the Tribunal decided to overlook what might have been considered an inaccuracy concerning the identity of the recipient of the orders in question. Consequently, the deliveries contested under this use do not constitute a breach of the contract on the part of the Defendants and do not give rise for an award of damages to the Claimants.

Issue no. 11: Non-delivery of claimants' orders

The Tribunal holds that the contract between the Parties, with all the rights and obligations therein provided, continued binding and operative until the end of the termination notice period which ended on 30th June, 1960.

It necessarily follows, therefore, that the orders transmitted by the Claimants to the Defendants prior to the aforementioned date viz. 30th June, 1960, had to be executed by the Defendants who were under legal obligation to do so irrespective of the date or dates of delivery of the goods so ordered. Article 15, paragraph 1, of the contract exclusively refers to and deals with orders placed with the Claimants and not transmitted thereby to the Defendants at the time the contract terminates, viz. 30th June, 1960. The interpretation to the contrary would render the three months' notice of termination under Article 10 of the contract meaningless and devoid of any value.

Further, the Tribunal holds that no conclusive evidence has been submitted before it to prove that the orders placed by the Claimants prior to 30th June, 1960, and refused and/or accepted but not delivered by the Defendants were not orders placed therewith by the Claimants in the normal course of business.

The Tribunal also holds that the fact that the Claimants have sold to [A], the owners of [B] a considerable part of their stocks of the Defendants' products and of the sales-shop equipment could not be accepted as a reason or legal justification to refuse delivery of said orders.

Consequently, the Tribunal holds that refusal on the part of the Defendants to execute the above orders constituted a breach of contract for which the Defendants are answerable in damages equal to the profit of which the Claimants have been deprived as a result of this breach.

Evidence brought before this Tribunal establishes that the loss of profit mentioned in the forgoing paragraphs amounts to £ ... which sum the Defendants shall pay to the Claimants as damages under this issue.

Interest

Under Greek Law, interest is ordered by the Court on the value of the judgment as awarded at the rate of 12% per annum from the date of warning until final and full payment of the sum awarded.

It was established before this Tribunal that the Claimants published their notarial notice addressed to the Defendants on 3rd July, 1960, and as such, interest at the rate of 12% p.a. on the amount of £ … awarded to the Claimants as per paragraph 1 of the award, shall be paid by the Defendants to the Claimants with effect from 3rd July, 1960, until final and full payment of said sum shall be made. …

Counterclaims

While it may be doubtful whether the set-off of counterclaims of the Defendants should have been included in the points at issue as agreed upon by the Parties and approved by the Court of Arbitration, the Tribunal holds that there is no evidence to sustain such counterclaim and that set off is therefore denied. (Article 21 para. 6 of the ICC Rules of Conciliation and Arbitration).

Costs

In making its decision on the question of costs of the present arbitration proceedings, the Tribunal has taken cognizance of all the facts of the case, and consequently holds that the costs, fees and expenses of the Court of Arbitration and the Arbitration Tribunal should be borne 60% by the Defendants and 40% by the Claimants. The costs of each party shall be borne by itself.

31. ARBITRAL AWARD ICC Case no. 1281 (Frankfurt am Main, 1964)

Between: [X] [Belgium] (Applicant) And [Y] [England] (Respondents). The undersigned: … Docteur de l'Université de Paris [Germany], acting as sole arbitrator, has rendered the following arbitral award:

The arbitral proceedings have taken place on the basis of the statement drawn up in accordance with Article 19 of the [1955] Rules of Conciliation and Arbitration of ICC. This statement has been signed by the parties to the arbitration and the arbitrator on January 21st, 1964, and forms part and parcel of the award.

The parties to the arbitration accepted that English law should prevail for which reason the arbitrator had to apply English law. Since the arbitral proceedings have taken place in Frankfurt (Main), Germany, the rules of civil procedure of the Federal Republic of Germany were to be applied.

The arbitrator has taken cognizance of several opinions and a number of statements of case presented by the parties … A hearing has taken place … whereby … Avocat à la Cour d' Appel de Bruxelles, was representing Applicant, while … Barrister, London, and … Solicitor, London, were representing Respondents. … was heard as witness for Respondents.

The statement of January 21st, 1964, clearly stipulated the mission of the arbitrator as follows:

1. Was there a valid contract between the parties ?
2. Did contractual relations exist between the Applicant and the Respondents ?
3. Has a breach of contract been committed by the Respondents ?
4. Did the Applicant suffer damages and to which extent ?
5. Is the Applicant barred by the Statute of Limitations ?

As to 1 and 2:

At first sight – looking at the problem as to whether a contract had been entered into as between the parties – everything seems to speak in favour of the Applicant, all circumstances seem to indicate the validity of the contract and, therefore, the contractual relationship between the parties.

It is of no interest and concern of this arbitration to consider the chain of contracts that was intended to be executed, but to ascertain whether a contract existed between the parties to this arbitration it is necessary to say this: Applicant could not export to Eastern Germany … but [Y] could make use of existing English legislation which allowed transactions with Eastern Germany. There is evidence that [Y] has made it quite frequently; it almost looks as if it were their only business to have dealings with Eastern Germany and that for this purpose their cooperated closely with [Z]. The relations between the two companies, although juridically two legal entities, were so close that [Z] could make – in print – reference to [Y] and had available [Y]'s letter paper.

No one, not even Respondents denied that the *sedes materiae* – the order … was issued on paper with letterhead [Y] and addressed to [C]. Similarly clear are the signatures under the said document …

It appears only reasonable that Applicant as any other merchant has taken for granted that he had entered into a contract be it with [Z] be it with [Y] notwithstanding their being two separate legal entities.

Applicant could, however, not submit evidence to prove the authorization of [B] to sign on behalf of [Y]. The mere fact that [B] did sign under the above described circumstances does not qualify his signature as binding for [Y].

[Y], on the other hand, has never, in the course of events, recognized either expressly or implicitly that they had in fact authorized [B] to sign on their behalf. Indeed, in their letter of August 10, 1953, addressed to [C], they expressly stipulated to be under no obligation as towards the Applicant. They have, therefore, indicated that there was no legal relationship between them and Applicant.

It is, therefore, decided that no contractual relations existed between the parties to the arbitration.

As to 3 and 4:

It is futile to go into the subject-matter as to whether a breach of contract had been committed by Respondents and as to damage suffered by the Applicant, since there is no valid legal ground for such claim.

As to 5:

Even if the Applicant did have a valid claim against Respondents such claim would be statute barred. The Limitation Act of 1939 (Section 2(1)) provides that no action shall be brought after the expiration of six years from the date on which the cause of action accrued. The question, therefore, as to when a claim accrued is of primary importance.

In the present case it arose at the latest when Applicant wrote to Respondents by letter of December 24, 1955, to indicate that arbitration proceedings would be initiated unless Respondents opened a letter of credit. The actual opening of arbitration, however, occurred over six years later. Whether Applicant's letter of May 3rd, 1962, or any later date is the actual date of commencement is immaterial, because it is later than six years after the accrual of the claim anyway. It does not make any difference that the Applicant sued [Z] in Belgian Courts, because they are not [Y].

The least that must be required is that the *proper* Respondent must be sued and the action be opened against the proper contract partner. It is, therefore, of no value that Applicant has sued [Z] in Belgian Courts, they were not the contractual partners. Therefore, the proceedings in the Belgian Courts did not interrupt the statutory bar. Nothing has prevented the Applicant – since she knew that there were difficulties in assessing the proper partner – to sue [Y] in time as well.

Whether [Y] in fact did have knowledge of the proceedings against [Z] does not change the situation. It would be against the very intention of a Limitation Law to provide security in business relations, to infer that any action whatsoever directed any person notwithstanding whether such person does have anything to do with the contract, would mean an interruption of the statutory bar. [Z] can neither be considered to be the agent of [Y], so as to imply in an action against [Z] that who is meant is [Y]. Although it existed the above described close links of fact between the two companies, they are separate legal entities. Applicant could not show anything to the effect that [Y] had authorized [Z] to act on their behalf in the specific case. The mere appearance does not suffice.

It has been brought forward that since the arbitration proceedings have taken place in Frankfurt, the *lex fori* for the procedure is not English law but German law. Indeed, this is a recognized principle of the Conflict of Laws, and in fact the arbitrator applied German procedural law, e.g. when hearing a witness. Applicant meant to say that since under English law the Limitation Act is considered to be within the realm of procedural law, this very Act and its effects are of no value because *the lex fori* provides for the application of German procedural law. The Applicant referred to the period of 30 years under German law, so as to escape the six-year period of the Limitation Act.

Since under German law the limitation provisions refer to substantive law – which is excluded under the circumstances because English law applies – this would lead to the impossible conclusion that no limitation at all would prevail in the case. German Courts in the last century followed that rule, but later decisions have abandoned it.

Whatever period a limitation act provides, its purpose, according to German legal conceptions is to put a visible term to business relations. It is, therefore, not against German Public Policy to apply a foreign statute of limitation, even if the period of six years is shorter than that provided in German law, viz. 30 years. …

On these grounds, it is decided that the Applicant's claim must fail as statute barred.

I furthermore order that the costs of the arbitration amounting to … be borne by the Applicant, and that each party shall bear its own costs and expenses.

32. ARBITRAL AWARD ICC Case no. 1315 (Cologne, 1965)

In the arbitration proceedings between [Plaintiff] [Country in Europe] and (Defendant) [Country in Asia]; … West Germany, appointed as single arbitrator by the Court of Arbitration of ICC, has given his award on the basis of the relevant documents as follows:

1. The arbitrator has jurisdiction in the present case.
2. The suit is dismissed.
3. The plaintiff is to pay all costs of the suit.

Motivation

1. … the plaintiff runs an establishment producing equipment for shoe-factories. The defendant runs a shoe-factory. Per contract of January 26th, 1963, the parties agreed upon the defendant being supplied 25 pairs of shoe-moulds for [sport shoes] at the rate of … US dollars. Drawings of the shoes which were to be produced with the moulds … were being made available for the plaintiff by the defendant. Before commencing manufacture the plaintiff, in accordance with Clause 5 of the contract, was to manufacture and send to the defendant for approval samples of the shoes which can be produced by the moulds. Accordingly, the plaintiff repeatedly forwarded shoe samples to the defendant the acceptance of which the defendant, however, refused every time. As the plaintiff had already produced all the 25 pairs of moulds before he sent any shoe samples to the defendant, he was not in a position to comply with the alteration of the moulds as demanded by the defendant.

The plaintiff claims to have manufactured the moulds as per the instructions of the defendant. After production of the moulds the defendant had asked for alterations which were not in accordance with the previous instructions. As per Clause 5 of the contract, the defendant was only entitled to refuse the sample received if they deviated from the mould-making instructions given on conclusion of the contract. As this had not been the case the defendant was bound to take delivery of the moulds and to pay the price agreed upon.

The defendant declares that he declines to submit to arbitration for the reason that as far as his firm is concerned there had been no breach of contract on his part which justifies arbitration. The breach, he claims, is on the part of [the Plaintiff] who refuses to comply with the letter of the contract.

The defendant states moreover that none of his communications with the Secretariat should be construed as an implied submission to the jurisdiction of the ICC Court of Arbitration.

Subject to the foregoing, the defendant claims the moulds not to be produced according to the shoes samples made available to the plaintiff. Only because the plaintiff against the terms of the contract had produced all moulds ordered without having waited for the defendant to have approved of the sample the plaintiff was not in a position to make the alteration asked for. The defendant himself would be prepared to take delivery of and make payment for the moulds as soon as they would be supplied according to the contract.

The plaintiff demands:

> "The defendant may be condemned to effect payment of … US dollars against storage receipt or shipping documents evidencing delivery of the moulds."

The defendant demands:

> "The suit should be dismissed."

2. Contrary to the view held by the defendant, a valid arbitration agreement is to be found in clause 12 of the contract of June 26th, 1963, entered into between the parties. The arbitrator therefore has jurisdiction, notwithstanding the defendant's refusal to sign the document drawn up in accordance with the provision of Article 19 of the ICC's [1955] Rules of Conciliation and Arbitration. In such a case it is provided under Article 19(2), para. 2 of the Rules of Conciliation and Arbitration, that "the award shall be made notwithstanding after the expiry of a period granted by the Court to the arbitrator for obtaining the signature of the party concerned. At its Session on September 23rd, 1964, the Court of Arbitration decided upon a period of one month for the signature of the document by the defendant. As this period has expired the arbitrator is entitled to give his award without further ado. There is no need for a hearing since this was rejected by the plaintiff and no application for a hearing by the defendant was received by the final date fixed at April 10th, 1965, and later postponed to May 10th, 1965.

The claim is unfounded.

In clause 12 of the contract of January 26th, 1963, the parties agreed that disputes arising from the contract should be dealt with according to [the law of Claimant's jurisdiction]. As from the legal point of view there is no objection to such an agreement, the arbitrator is bound to apply [such] law.

The contract of January 26th, 1963, is a contract of sale in the sense of the [law of sales of Claimant's jurisdiction]. According to para … of this law the purchaser is entitled to retain the purchase money until the goods are placed at his disposal. As it is evident from what both parties state on this point, the plaintiff did not offer the defendant the moulds, to be supplied as agreed in the contract. Per article 5 of the contract, the plaintiff was not supposed to start producing the 25 pairs of moulds before the defendant had approved the shoe-samples from a mould produced as a specimen in the first instance. Though the plaintiff repeatedly sent shoe-samples to the defendant, the defendant rejected all of them in good time, i.e. within a period of five days, as was provided for in the contract. As thus, according to contract, the conditions for producing the moulds were lacking, the defendant was not obliged to accept the moulds which had been produced contrary to the terms of the contract. As a matter of fact, according to [the law of Claimant's jurisdiction], the defendant is entitled to retain the purchase-money as long as the plaintiff does not offer him the goods in accordance with his obligations under the terms of the contract.

The fact that the plaintiff stated that the shoe-samples and drawings sent by the defendant did not correspond is of no importance for a decision on the dispute. It is equally irrelevant whether, according to the contract, the plaintiff was obliged to produce the first mould on the basis of the shoe-sample or the drawing. Therefore no hearing of witnesses is necessary. The plaintiff would have been obliged at any rate to comply with the requests for alteration made by the defendant in accordance with article 5 of the contract after receipt of the samples. In as far as these requests for alteration were caused by ambiguous or misleading information from the defendant, given at the time of entering into the contract, it is possible that the plaintiff might claim compensation for the costs arising out of the production of the first mould. There is, however, no need to decide whether such a claim is substantiated since the plaintiff did not sue the defendant for damages but solely for breach of contract.

3. As the claim is unfounded the plaintiff is condemned to pay the costs of the dispute fixed at a total amount of US …

33. ARBITRAL AWARD
ICC Case no. 1383 (Munich, 1966)

Between [Applicants] [Austria] and [Respondents] [USA], an Agreement signed … following long negotiations, stipulated the terms under which Respondents purchased machinery from Applicants, said Agreement taking the place of a previous Agreement … between the same parties …

The purchase by respondents of [quantity] machines at a total price of … U.S. dollars, which should have taken place in October 1960, according to the August 1959 Agreement, did not materialize. Applicants were in legal and financial difficulties which hampered the upkeep of their machines and allegedly their ability to negotiate with Respondents on an even basis.

Consequently, Applicants were obliged to negotiate with Respondents anew and the results were the above-mentioned Agreement of August 1961 which altered the conditions considerably to the detriment of Applicants.

Payments for the machines was to be partly effected through monthly installments and the corresponding cash payments were to be reduced in time but not in total amount. A parallel contract was made on similarly reduced lines with a subsidiary company …

Applicants were in need of cash in order to prevent forced sales of machines which had been seized by various creditors, notably the Austria fiscal authorities, and in general for the purpose of continuing production and of assuring the proper upkeep of specialty machinery.

On the brink of collapse, Applicants felt compelled to accept the new conditions but did so allegedly on the understanding that they would obtain from respondents an irrevocable letter of credit for the total amount of the contract, namely … U.S. dollars. Such a letter of credit was allegedly intended to enable them to obtain from their local bank cash advances, to be reimbursed by future payments from Respondents, to be made upon delivery of the machines.

Respondents eventually acquired the machines as stipulated in the Agreement but failed to furnish an irrevocable letter of credit. Respondents have alleged that they never had the intention of opening such a credit and

> "never had any particular interest to concern themselves with Applicants' Financial troubles of long standing. They really could not care less whether or not Applicants could discount their commitment for the purpose of obtaining a loan". …

In Article 10 of the Agreement of August … 1961, the following is provided:

> "The parties agree on arbitration procedure as established by the ICC, Paris, in the event of a dispute or controversy as to the meaning of the terms of this Agreement or in performance thereunder of either party. The arbitration shall take place in Munich".

According to Article 11: both the English and the German text have identical meaning.

According to Article 16 of the [1955] Rules of Arbitration of the ICC:

> "The rules by which the arbitration proceedings shall be governed shall be… those of the law of the country in which the arbitrator holds the proceedings".

The Applicants having by letter of July 15, 1964 requested arbitration and that the Arbitral Tribunal be composed of three Arbitrators, the Court of Arbitration of ICC, Paris, duly appointed … [Austria] proposed by Applicants, … American attorney [France] chosen by ICC on behalf of Respondents, … [Denmark] retired banker, residing in Paris, chairman of the Tribunal.

… The main issue in the case being an alleged breach of contract resulting in losses to Applicants to the extent of … U.S. dollars, Applicants claim this amount should be awarded against Respondents, together with costs and legal fees.

In essence, the Terms of Reference required the Arbitrators to determine:

- Which meaning should prevail in the English and German texts of the Agreement in the event of a conflict ?
- What substantial rules of German law would govern the case ?
- Whether or not an irrevocable credit was required and if so, established ?
- Whether the Agreement was a complete statement of rights and obligations, or would the text be conditioned by oral undertakings apparently made during negotiations ?
- Whether the alleged disparity of bargaining power was a legitimate ground to the Arbitrators to reinterpret the written Agreement ?
- If damages should be paid, what amount ?

The terms of Reference were signed by the parties in Austria and USA by, the two Arbitrators and finally by the Chairman (December … 1965). The Chairman advised counsel for Respondents at the beginning of December, 1965, by registered airmail, of the expiration of the 60 days period which would be the end of February 1966, and asked him what date within that period would suit him best for attending the coming Hearing … The Chairman received no reply and felt obliged to ask the Court of Arbitration to be prepared to prolong the 60 days period.

Having ascertained that all Arbitrators as well as the Applicants could attend the Hearing on the 15th March, the Chairman advised, accordingly, the counsel of Respondents, by registered airmail, dated February 1, 1966. The Chairman received no reply but the American Arbitrator received a letter from counsel, dated February 2, in answer to the Arbitrators' letter of January 27, following the latter's unsuccessful attempt to reach counsel in [the USA].

In his letter of January 27, 1966, [the American arbitrator appointed by ICC for the respondent] had mentioned the date of March 5th as a day after which the Hearing might take place. Counsel in his reply of February 2, stated that he could be available in Munich after that date and that he thought his witnesses also could be available. Counsel, in the same letter, until April 15, after which date he would not be free until the beginning of May. The date of March 15 fixed by the Chairman's letter of February 1st thus stood as convenient and acceptable to all concerned …

Consequently March 15, 1966, was maintained as the date for the Hearing … the date on which all the parties and all the Arbitrators had previously agreed as acceptable and convenient. The maintenance of this date was confirmed again by the Chairman to all the parties, including counsel of Respondents … Neither Respondents nor their counsel appeared at the Hearing …

At the beginning of the proceedings the Chairman telephoned … the representative of Respondents at the negotiation of the August 1961 Agreement … inviting and giving him an opportunity to appear. [Respondents' representative] who had received a copy of Respondents' counsel's letter to [the American arbitrator] was willing to cooperate. However, he felt that he must first call Respondents' counsel in USA in order to obtain his agreement.

[Respondents' representative] did not succeed in contacting counsel, despite several attempts, which he said, he had made. He informed the Chairman the next morning that he would not be able to attend.

At the Hearing it was confirmed by the legal expert from [a Bank], where the Hearing was held (Dr. … attorney and Deputy manager of the Bank), that under German law *intention* is determinative when making a contract and that it governs even if the parties neglect to use customary technical expression used in credit transactions. He testified that the August 1961 Agreement in effect contained an obligation for Respondents to open an irrevocable credit in favour of Applicants at least under the terms of the German text and more specifically the expression "*in bind ender* Form". (Respondents had maintained that this German expression is equivalent to the word "certification" used in the English text).

A documentary-credit expert, from the same bank, … declared that the intention in the German text, objectively, was to require an irrevocable credit, while the text of the English version could not be interpreted in the same way. At best, he felt, the word "certification", which has no meaning in connection with documentary credits, carried the general meaning: "to inform".

Both versions being declared authentic, the Arbitrators were faced with the problem of deciding which text was to prevail and what true intention or objective result could be deduced from the two inconsistent versions in the circumstances of the transaction.

The Arbitral Tribunal was impressed by the fact that:

a) Applicants' intention obviously was that an irrevocable credit should be opened and that such a credit was the condition for signing an Agreement which meant a reduction in immediate cash payments, much needed by Applicants.

b) Respondents and … their local lawyer-representative, a man versed both in English and German, who also acted as a translator, obviously knew this.

c) The German version was admittedly prepared by Respondents' representative who, as indicated, knew both languages, while … who signed for Applicants, knew German only.

d) Respondents' legal representative-translator used in the German translation of the English version, prepared for an Applicants' signature, language which experts declare establishes an intention of irrevocable credit.

Now we, the said Arbitrators, having heard and duly weighed the written and oral allegations of the Applicants, only party present at the Hearing, and the written arguments submitted by Respondents' American counsel, as well as the evidence submitted by [Respondents' representative] by letter of April 7, sent in response to the Chairman's letter of March 19.

Do hereby make and publish our Final Award of and concerning the matters so referred to us in the manner following:

1. We adjudge that we have jurisdiction in this dispute, both parties having been given peremptory notices in proper time and having indicated that the date of the Hearing … corresponded to the possibilities of their time-schedules.
2. We adjudge that the proper law of said contract is the law of the German Federal Republic.

3. We adjudge that even if both parties did not intend an irrevocable credit, the Applicants at least did, and that, while Applicants alone may have intended an irrevocable credit, the Respondents knew this and represented or acquiesced through the German text of the [August 1961 Agreement], made by Respondents' representative and lawyer-translator … that such a credit was expected and intended.

We award and adjudge

that Applicants are entitled to recover from and to be paid by Respondents the sum of … U.S. dollars as part compensation for losses sustained by Applicants in connection with forced sales of machinery by creditors of Applicants, losses which could have been avoided or diminished, if Respondents had acted in accordance with the objective intention expressed in the German text and to which text we give preponderant weight for reasons stated above. (Said compensation being computed on the basis of the officially assessed value of said machinery sold at auction, less the proceeds of the sales. The Austrian schillings being converted into US dollars at the current approximate rate of exchange).

We further award and adjudge

that the costs of the Arbitration, amounting to U.S. Dollars … be borne by Respondents, it being understood that each party shall bear its own costs including counsel's fees.

This award is final and irrevocable for the parties, which, by submitting their dispute to Court of Arbitration of ICC, Paris, have undertaken to carry out such award delay and to waive their right to any form of appeal (Art. 29).

34. ARBITRAL AWARD
ICC Case no. 1448 (Paris, 1966)

I, the undersigned … [France] named as sole Arbitrator by the Court of Arbitration of ICC at its session on 10th November 1965 for settlement of the dispute between: [X] [Germany] (Applicants) and [Y] [USA] (Respondents);

Give the following award.

As to the procedure

By the Terms of Reference signed by the parties and then by the Arbitrator on the 18th day of May 1966, the latter was required to decide the following points:

1. Insofar as it is provided in §8 of the Agreement dated 20th June 1961 that such Agreement shall be construed and the legal relations between the parties be determined in accordance with the Laws of the German Federal republic, what are the substantive Rules of German Law governing the 1961 Agreement ?
2. Do the restrictive clauses of 1961 Agreement violate U.S. Antitrust Laws, and if Respondents are obliged to abide by them, what are the consequences for the parties with regards to past and future performance under the 1961 Agreement ?
3. Did Applicants and Respondents properly perform the 1961 Agreement until the arbitration proceedings were initiated ?
4. Does the creation of [the joint venture] violate the 1961 Agreement ?
5. Insofar as the creation of the joint venture is not a violation of the 1961 Agreement, what field of [the product] is open to the joint venture's manufacturing operations ?
6. Is the joint venture obliged to abide by the restrictive clauses of the 1961 Agreement in its sale operations ?
7. What know-how received from Applicants are Respondents restrained from disclosing either to the joint venture or to other third parties ?
8. How did Applicants and Respondents enter into negotiations with [Z] and which of them actually interfered detrimentally with the other's activity ?
9. Having regard to the answers given to questions 1 to 8 above, what claims should be allowed or rejected as the case may be, and to what extent, if any, should damages be awarded ?
10. In what manner are the costs and expenses of this arbitration to be allocated as between the parties ?

Each of the Parties has submitted to the Arbitrator its statements, counterstatements, claims and counterclaims together with supporting documents, copies of which have been sent to the other party and duly received by the latter.

The Arbitrator held two hearings with the parties … At the second hearing, in affidavit dated 15th July 1966 signed for [Y] by … and duly communicated to [X], [Y] put forward specific claims totalling US$ … which were expressly denied by [X] …

The declarations of the parties and their evidence have been taken into consideration by the Arbitrator only to the extent that they were not contradictory to each other and to the extent they were supported by the submitted documents.

The Court of Arbitration of ICC has extended the time-limit for making the award (Art. 23 of the Rules), the last time until the 31st December 1966.

As regards the above-mentioned questions for Decision

1. The Agreement dated 20th of June 1961, hereafter called the … License Agreement, under which [X] granted [Y] an exclusive license in the USA and Canada to manufacture and sell [the product] is governed by the laws of the German Federal Republic, and the substantive Rules governing the 1961 Agreement are the following paragraphs of the German Civil Code:

> "§133: When interpreting a declaration of intention, the actual intention is to be looked for it should not be adhered to the formal meaning of the expression.
>
> §157: Contracts are to be interpreted as may be required by good faith considering customs of business.
>
> §242: The debtor is bound to perform his obligation as may be required by good faith considering customs of business.
>
> §273: In case the debtor has a due claim against the creditor resulting from the same legal relation on which his obligation is based, the debtor is entitled to refuse the performance of his obligation until the claims due to him are fulfilled unless the obligatory relation requires otherwise (Right of retention) … The creditor is entitled to prevent the execution of the right of retention by providing a security. A security by guarantors is excluded.
>
> §320; If anyone is obliged by reciprocal contract, he is entitled to refuse the performance of his obligation until the counter-performance is effected unless he is obliged to act prior to same. In case the performance has to be effected to several creditors, the debtor is entitled to refuse each single creditor the part of the performance due to the later until fulfilment of the entire counter-performance.
>
> §273: sub-clause 3, is not applicable."

2. It is not established beyond any doubt that the restrictive provisions of the … License Agreement violate the US antitrust Laws.

Respondents which have raised this point in their case, declare having abided by such restrictive provisions in the past and having the intention to abide by them in the future.

Respondents themselves claim damages for infringements by [X] of such provisions through sales in the USA: in their own Agreements of 1965, with the joint venture, Respondents have agreed on restrictive clauses of the same nature. The question of the consequences of US Antitrust Laws on the performance of the … License Agreement calls therefore for a negative answer.

3. Since 1962, and up to the application for Arbitration – at which Respondents stopped paying royalties and Applicants stopped their supply of information (§273 and 320 of the German Law) – the performance by Applicants of the provisions of the … License Agreement has been questioned by Respondents as follows:

3. (i) Technical performance

…. Therefore, until the arbitration proceedings were initiated, the … Licence Agreement was properly performed in its technical clauses except as regard the supply of …

3 (ii) Commercial performance

Applicants and Respondents each complain of violations by the other party of the Territorial Restrictions of sales. Short of more specific definitions the reserved territories of sales are the territories of delivery. In addition, §4(5) of the … License Agreement implies that installation of [the product] may be performed by third parties independently of their manufacture or delivery.

Therefore, after [the sale] in the proper contractual territory, whether [products] were installed or not, transportation or resale thereof to any country did not come under the jurisdiction of the License Agreement and consequently cannot be considered a *mala fide* indirect export to unauthorised territory … Complaints of the parties on this ground are therefore unfounded.

4. The creation of the joint venture was presented to the Japanese Authorities, under the signatures of Respondents and their Japanese Partner [Z] … In any and all documents Respondents obligate themselves to transfer to the joint venture complete and detailed engineering, written data and information pertaining to [the product components].

More specifically Respondents obligate themselves "to supply parts to the joint venture including [parts for the product] until such time as [the joint venture] is able and desires to make all parts for the Products". Such sales would be a breach of the … License Agreement (§3).

5. The parties agree that under the several names used for sealings here above quoted, the same and identical [product] manufactured concurrently by Applicants and Respondents are meant.

In two out of several documents pertaining to the joint venture, namely in the "Transfer of Property Agreement" and in the "Technical assistance Agreement", it is pointed out that Products (licensed) refer … "the manufacture and sale of which by [the joint venture] may be authorised and assisted by [Y] without infringing or contributing to infringement of the patents or other proprietary rights of any third person". The respect of "proprietary rights of any third person" does not coincide with the obligation of Respondents towards Applicants under the "… License Agreement". These obligations have a contractual status as long as the License Agreement is in force, irrespective of whether Applicants' know-how has become more or less disclosed prior to or after the … License Agreement. Nowhere in the … License Agreement are respondents liberated of their obligations to keep confidential information received from Applicants, even if third parties may acquire such information from the public domain or by their own research.

It is to be pointed out that in a draft transfer of Property Agreement and in a draft technical Assistance Agreement dated 6th July 1964 both related to the creation of the Japanese joint venture, the Products … made by respondents and on which rights and know-how were to be transferred to the joint venture were qualified:

> "the manufacture and sale of which by [joint venture] may be authorized and assisted by [X] without violation of any agreement to which it is bound".

Such provision was in line with Respondents' liabilities.

Therefore, the creation of the joint venture violates the License Agreement insofar as Respondents' commitments towards this joint venture infringe their own obligations towards Applicants.

It should however be considered:

- that Respondents do not own a controlling interest in the joint venture,
- that Respondents assert that, though under the joint venture by-laws they are entitled to 3 directors out of 7, one of them actively participating in the daily management and operation thereof, they actually have only 2 directors none of whom participate in the management and operation,
- that Respondents have no technical member of their own personnel working or helping at the joint venture's premises,
- that Respondents assert that they have not transmitted to the joint venture any drawing, information, etc., revised from Applicants,
- that Respondents have established that by reverse engineering Applicants' [product] could be duplicated from information found in Applicants' catalogues and documents distributed to dry dock operators,
- and that Applicants have not brought home evidence to the contrary.

Therefore, subject to a formal waiver by Respondents of their commitments in violation of the 1961 License Agreement, no limitation could be enjoined to the joint venture's manufacturing operations.

6. The joint venture is not a party to the License Agreement. Therefore, the joint venture is not obliged to abide by the restrictive clauses of the License Agreement.

7. The transfer of know-how is entirely governed by the contractual obligations of the parties under the … License Agreement, wherein passing to third parties drawings, information, instructions etc. … received by Respondents is prohibited without reservations or qualifications. Therefore, Respondents are prohibited from passing to the joint venture or to any other third party any and all drawings, information – whether reports on failure or defects -, instructions etc. … from Applicants even when these have become public property through disclosure by Applicants or third parties.

8. Before June 1964, negotiations between Respondents and [Z] had been initiated for the creation of a joint venture in Japan for the manufacture and sale of certain of Respondents' products, and on the 11th June a confidential disclosure agreement was signed between the parties involved.

Negotiations of Applicants with [Z] on a License of Applicants' know-how to manufacture their [product] took place end of 1964; the negotiations nearly succeeded in December but ultimately failed …

Now, therefore, I the undersigned Arbitrator do hereby award and direct as follows:

Having regard to the express volition of the parties that the 1961 Agreement should not be terminated in application of §6-2 thereof:

1. Respondents are enjoined to make it clear, by means of a specific reference in the by-laws of the [joint venture], and in their Agreement with said joint venture, that limitation to their license and to their supply of parts information, drawings, instructions or other technical data are subject to their obligations under their … License Agreement with Applicants.
2. Respondents are prohibited from granting any license or sublicense to the [joint venture] or a third party for the design, manufacture and sale of [a similar product].
3. Respondents are prohibited from making accessible to the [joint venture] or to any third party any information, drawings, instructions or other technical data on the design and manufacture of [the product] either received from Applicants or wherein reference is made wholly or in part thereto;
4. Respondents are prohibited from taking any direct or indirect control of the [joint venture], or from participating actively through a managing Director or through technical personnel, in any activity of the said joint venture relating to the manufacture and sale of [a similar product].
5. Respondents are enjoined to pay to Applicants Royalties accrued to this date under the … License Agreement and withheld after the current litigation was initiated, and to resume their full compliance with said Agreement:
6. Applicants are enjoined to supply Respondents with all information, drawings, instructions or other technical data pertaining to the design and manufacture on [their product] acquired up to date and to resume their full compliance with the … License Agreement;
7. Applicants are prohibited from notifying any purchaser of Respondents' sealings of parts thereof delivered in the USA or Canada, either directly or through published statements, that the export of such sealings or parts thereof for installation outside these countries is not authorized, except where such export would violated industrial property rights of Applicants;
8. Applicants shall pay to Respondents the costs of replacing parts of the [product].
9. Neither the Applicants nor the Respondents are entitled to any other compensation.
10. The Costs of arbitration amounting to … shall be borne equally by the parties, each of which shall pay its own expenses of and incidental to the arbitration.

35. ARBITRAL AWARD
ICC Case no. 1453 (Paris, 1968)

Whereas:

1. Following a meeting in Paris on 17th February 1966 between the respective Arbitrators then in office Terms of Reference in accordance with Article 19 of the [1955] Rules of Conciliation and Arbitration of the Chamber were settled and were duly signed by the parties and by the three arbitrators and approved by the Court of Arbitration.
2. .....
3. Before the Hearings the initial Respondents were by "fusion" succeeded by [Y] [France] and the Terms of Reference were amended accordingly with the approval of the Court of Arbitration.
4. Two hearings were held, namely on 25th May 1967 and 18th November 1967.
5. The terms of voluntary settlement suggested by the Arbitrators to the parties at the conclusion of the hearings on 25th May 1967 (and made without prejudice to the eventual continuance of the arbitration) were rejected by the Claimants [X] [Germany] and by the Respondents.

6. Following the hearing before the Arbitrators on 25th May and 18th November 1967 respectively, the parties were given the opportunity to supplement their statement of fact and to express their further opinion on the other side's statement, in relation to the claim and counterclaim respectively. The exchange of statements was completed on 5th February 1968.
7. Extensions of the time-limit for making this Award were duly granted by the Court under Article 23 of the Rules.

Now be it known

That the undersigned being a majority of the Arbitrators appointed hereby make our award in regard to the issues set out in the recited Terms of Reference (and without herein repeating the facts and contentions appearing in the recited Terms of Reference or in the Pleadings) as follows:

1. Under paragraphs 16 and 18 of the Agreement of 17th February 1964 [the agreement] voluntarily entered into by the parties, German Law is applicable and our decision has regard to that Law. As to the Claim: There is due from the Respondents to the Claimants under the said agreement the sum of …

2. Interest on amounts not paid within the agreed time was due under clause 6 of the claimants' standard terms of Delivery and Payment … which Terms were by clause 4, first paragraph of the [agreement] incorporated in that Agreement. The rate specified was the customary banking rate, but not less than 3% above discount rate from due date to date of payment. Such an arrangement is, in our view, not *contra bonos mores* §138, of the German Civil Code (BGB) (*Guten Sitten*); nor are the claimants in applying it at the rate in question offending against §242V, BGB (*Treu und Glauben*). It is not disputed that the appropriate rate is 8% and we hold that interest is payable at that rate.

3. The point or points of the time which interest is to run is ascertainable as follows.

By mutual verbal agreement on 24th March 1965 confirmed in the Claimants' letter of 26th March 1965, the Claimants extended the Respondents' time for settling their indebtedness. The existence of that agreement is admitted in the Respondents' Statement … In our view that agreement was not contrary to §138 nor to §242 BGB. The agreement therefore remained valid despite subsequent Notice, as under German Law Notice operates only towards the future. … It follows from that correspondence that interest is payable at the rate of 8% from 1st April 1965 on … from 2nd May 1965 on … and from 2nd July 1965 on the remainder … all until date of payment

4. As to the Counterclaim: No claim can be sustained in respect of damaged or defective [machines], both because of the Delivery Conditions of 17th February 1064 and because the Claimants took effective steps to remedy any such damage or defects.

5. It is noted that clause 4 of [the agreement] expressly makes clear that deliveries are to be subject to the Claimants' Condition of Delivery and Payment and the Respondents having voluntarily entered into the agreement must be taken to have accepted the Conditions and cannot be regarded as having been in any was forced to accept them. We are convinced that neither the agreement to accept the Conditions nor the Conditions themselves can be regarded as *contra bonos mores* (*Guten Sitten*), §138 BGB. Moreover by relying on this Conditions the Claimants did not offend against §242 (*Treu and Glauben*) and the Respondents did not object on that score at the time.

6. The fact of delays on their part in deliveries has not been denied by the Claimants. Such delays might be excusable under clauses 1 and 2 of the Conditions. We are sure that the exclusion of liability was not contrary to §138 BGB (*Guten Sitten*). Whether in the particular case it would be contrary to §242 (*Treu und Glauben*) if the Claimants relied on Conditions excluding liability is a question we need not to answer in view of the grounds for our decision on the Counterclaim as set out below.

7. Conversely, we need not decide whether the Claimants were at fault in not applying the Conditions to the delays in deliveries. We cannot accept the Respondents' contention that the Claimants were obliged to manufacture the [machine] in their own factory.

8. The respondents' Counterclaim to damages on account of late deliveries fails in the first place because, despite hints given by them, they have not given sufficient factual details to enable the Arbitrators to be sure whether damage did in fact arise owing to such delays and, if so, to evaluate the amount of any such damage.

The burden of proof of any such damage rested upon the Respondents. The provisions of §252 BGB and of §287 of the Civil Procedure Ordonnance ZPO, require the respondents to specify in detail the factual material on which they base their claim to anticipated profits according to the ordinary course of events or the special facts of the case and to produce proof thereof in proceedings. (v. decision of the Federal Court, BGH of 17th December 1963 reported in *Neue Juristische Wochenschrift* 1964, p. 661).

Despite an express indication by the Arbitrators, the respondents have failed to produce detailed particulars of loss of anticipated profit to enable any assessment of damage to be made. The figure of 10,000 [machines] was stated in the Respondents' letter to the Claimants of … December 1964 as representing unsold stock and that figure was adhered to in the first hearing before us. Even supposing that the true figure for stock at the end of 1964 was not 10,000 but, as stated in the Respondents' written statement of … December 1967, was really 7,720 the true stock position would have been higher than indicated by the number of [machine] delivered by the Claimants in November and December 1964. In these circumstances the Respondents were under a duty to furnish concrete evidence that they could in act have sold in the year 1964 the [machines] which were subject to delay in delivery on the part of the Claimants.

The information furnished to us by the Respondents is insufficient to meet the requirements of §252 BGB as proof that in the ordinary course of events it could be anticipated that their turnover in 1964 would be as high as or higher than in 1963. Such anticipation is not justified by the Table … put in by the respondents. We gather from that table that the value of the Respondents' 1964 sales fell to a greater extent than indicated by the lower number of [machines] sold. It is therefore fairer to infer that there were other reasons for the Respondents' failure to maintain the 1963 turnover. The letters from branches and wholesalers are of no value to us as a proof.

The Respondents have not proved to our satisfaction their claim that in December 1964, the Claimants admitted damages to the extent of … No such admission is to be inferred from the interview of 8th December 1964 nor from the Claimants' letter to the Respondents of 10th December 1964, which, we would point out, named that sum "sous reserve" – subject to their receiving money from their suppliers.

It was an indispensable condition precedent to the bringing of any claims by the Claimants against their suppliers that such claims would be supported by evidence furnishable by the Respondents on the alleged damages.

9. As our decision set out in the previous section 8 was based on the respondents' failure to provide adequate proof of their alleged claim to loss of anticipated profits due to Claimants' delays in deliveries we have considered whether they should be given further opportunity to adduce evidence. Our answer is in the negative, as we note that by [the agreement] the Respondents renounced once for all their claim to alleged damages. That agreement is confirmed in the Claimants' letter of 26th March 1965 … That renunciation was not affected by the subsequent Notice.

10. We regard as legally valid Notice (*Kundigung*) given by the Claimants to the respondents as appearing in their telegram to the respondents dated 1st April 1965 containing the words:

> "nous faisons usage du chiffre 13 para. 2 de notre contrat du 17 février 1964 et dénonçons par la présente le contrat au 30 juin 1965 en maintenant en même temps vos obligations."

The said clause 13(2) provided for three month-notice in the case of "*grober Vertragsverstoss*". We find that that was legally binding and applicable and rendered unnecessary the sequence of *Mahnung*, *Fristsetzung* and *Ablehnungsandrohung* contemplated (in the absence of any express provision such as here exists) in §326 BGB. As the Claimants' Notice was effective as at 30th June 1965, the Respondents cannot base any claim for damages on the non-delivery of additional [machines].

11. We further find that a "*grobe Vertragsverletzung*" arose both from the amount … of unpaid purchase money and the Respondents continuing failure to make substantial payments of their indebtedness, in accordance with the promises in their letter to the Claimants of …

12. We reject the Respondents' argument that they were entitled by law to a right of retention – *Zurückbehaltungsrecht*. In our view, §320 BGB, if invoked, would be more likely to be of advantage to the Claimants and justify them in withholding further deliveries until receipt of payment for past deliveries. Accordingly the Respondents cannot base any claim on the Claimants' refusal, having regard to the amount of the Respondents' indebtedness before the agreement … to deliver further [machines].

13. We note that the Respondents did not avail themselves of the Claimants' offer 6th April 1965 of terms under which Claimants' Notice or denunciation would be automatically withdrawn and we are thus strengthened in our view of "*grobe Vertragsverletzung*" as stated above.

14. The respondents cannot uphold their suggestion that the [agreement] only held good on the footing that the original contractual relationship would continue. Even assuming that in renouncing their claim to damages the Respondents tacitly implied that the contractual relationship would continue, they could not rely on that as it would be contrary to the provisions of §162 BGB. The Respondents themselves prevented the continuance of any contractual relationship based on [the agreement], as they failed to meet their obligation on 31st March 1965 and as they also refused the Claimants' offer to continue the contract if the Respondents would settle the payment outstanding under [the agreement]. According to a decision of the Federal Court (RGZ 122,247) it is contrary to the *Treu und Glauben* provisions if a party prevents the operation of a condition in a manner contrary to the meaning and purpose of a transaction.

The meaning and purpose of [the agreement] was to obtain a clear basis for the continuance of the contractual relationship. That required that the Respondents should pay one third of the outstanding debt by 31st March 1965. By not doing that in due time and by refusing the offer that the contract would be continued if the payment were honored, the Respondents were themselves responsible for the conflict with the *Treu and Glauben* provisions.

15. As regards the Respondents complaint that they were not told in advance of the formation by the Claimants of [a] French subsidiary. We note that the Claimants handle [household machines] form only a part of their business; so we attach no importance to the formation of that company for the purpose of this arbitration and we reject the Respondents' claim to damages on that score.

16. Although our interpretation of German law as applied to the material before us has required us to reject the Counterclaim, we have considered whether there could be any decision "*ex aequo et bono*".

We have noted that before any such decision could be contemplated we should need to be specially empowered in accordance with Article 19(3) of the Chamber's Rules involving the agreement of the parties. We have not been so empowered. At the first hearing we did make a suggestion to the parties of voluntary settlement under Rule 22 which each of them declined. We were thus obliged to confine our decision to the appropriate law as applied to the facts of the case.

17. The Costs of this Arbitration are payable by the Respondents in accordance with Rule 25 of the relevant Rules of the Chamber (which result is also consistent with §91 ZPO).

18. In accordance with the foregoing we do hereby order:

1. That the Respondents do pay to the Claimants the sum of … with simple interest at the rate of eight per annum calculated from the points of time indicated … above …;
2. That the Counterclaim be rejected; and
3. That the Respondents do pay the Costs of this Arbitration and Award calculated in accordance with the Chamber's Rules, which have been fixed at a total sum of … French francs].

… the majority of the arbitrators … certified that the other arbitrator … declined to sign.