Title:
Berger, Klaus Peter, International Economic Arbitration, Deventer, Boston 1993

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or later on during the arbitral proceedings if the local judge is called upon to act as juge d'appui.\textsuperscript{617} Such tactical manoeuvres are also encountered after the rendering of the award when the defendant seeks to have the award set aside before the courts of the seat of the arbitration\textsuperscript{618} or when the claimant tries to have the award enforced before foreign courts under the enforcement system of the New York Convention.\textsuperscript{619}

It becomes clear from this short tour d'horizon that the legal rules governing the arbitration agreement and the adherence to them by the parties have a decisive impact on the smooth running of the arbitral proceedings. The crux of the matter lies in the fact that these provisions aim at a point in time which lies well ahead of the commencement of the proceedings, namely the moment of the conclusion of the contract and the arbitration agreement contained therein, when the parties usually do not even consider the possibility of dis-

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putes arising between them. Even if the applicable law does not impose rigid requirements the parties should therefore not adopt a laissez faire attitude towards the drafting of the arbitration agreement. Instead, parties are well advised to be more demanding than the law usually is and to draft their arbitration agreement in a form and with respect to subjects which cannot later give rise to any discussion as to their intention to resort to arbitration.\textsuperscript{620}

If, in spite of these precautions, a dispute arises over the validity of the arbitration agreement, the task of the tribunals and the courts would be made much easier if all questions pertaining to the validity of the arbitration agreement would be governed by the same law. From a theoretical point of view, this aspired-to synchronization of legal systems applicable to the arbitration agreement and the arbitral proceedings\textsuperscript{621} is hard to achieve, since the various elements that bear on the formal or substantive validity of the arbitration agreement are partly governed by conflict-of-laws rules, and partly, for reasons of efficiency and practicability, by substantive legal rules of international private law. In addition, the rules of domestic arbitration law are superseded by unified treaty law, the relation of both being sometimes far from clear. What makes things even worse is that the arbitration agreement may be looked at from four different angles.\textsuperscript{622} The legal viewpoint may change depending on whether questions pertaining to the validity of the arbitration agreement have to be decided by the arbitral tribunal itself, the competent judge at the seat of the arbitration as juge d'appui or in setting-aside proceedings or by the foreign judge who is dealing with an application to recognize and enforce the award. In spite of the substantial progress made in recent years in the unification of international arbitration law, the assessment of the formal and substantive validity of the arbitration agreement still resembles a "legal puzzle game".\textsuperscript{623}

Fortunately, this complex legal pattern is based on solid dogmatic ground. Two fundamental principles serve as a safe starting point for the analysis of the arbitration agreement under all arbitration laws. First, agreements about existing disputes (Schiedsvertrag, compromis, 'submission agreement') and, more important in practice, about future disputes (Schiedsklausel, 'arbitration clause', arbitraal beding, clause compromissoire) are subject to the same rules.\textsuperscript{624} Secondly, all legislatures maintain the principle of 'autonomy' or 'severability' of the arbitration clause, i.e. both kinds of arbitration agreements have to be judged independently from the main contract and under a law which

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may be different from the one that applies to the principal contract.\textsuperscript{625} Defects which lead to the invalidation of the main contract do not necessarily affect the arbitration clause contained therein. This is true even for cases where the initial invalidity of the contract is due to fraud in the inducement or similar allegations relating to the initial invalidity of the main contract.\textsuperscript{626} The arbitral tribunal may therefore decide that the main contract is invalid without destroying the basis of its own jurisdiction. The invalidity of the contract will, however, extend to the arbitration agreement if the contract was non-existent \textit{ab initio} due to a lacking official approval from the government or other public authority, a missing power of attorney, coercion or personal incapacity of one of the parties as well as other defects pertaining to the personal capacity of the parties to enter into contractual relationships and the arbitration agreement has been concluded together with the contract.\textsuperscript{627} A contrary decision would disregard the fact that, as a matter of commercial reality, the arbitration agreement forms an integral part of the contract. The contract may also be invalid for other reasons, such as violation of Art. 85 of the EC Treaty, thus

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involving aspects of arbitrability.\textsuperscript{628} In these cases, the doctrine of severability applies, albeit rather for practical reasons and due to the respect for the will of the parties than for strictly dogmatic grounds, since the nullity of the contract might as well be seen as extending to the arbitration agreement incorporated in it.\textsuperscript{629} In spite of these dogmatic fractions, the severability rule has already developed into a transnational principle of international economic arbitration law.\textsuperscript{630}
B. FORMAL VALIDITY

3. Formal Validity Requirements of Arbitration Agreements

a. Both Parties Have Agreed in Writing

Both the new laws and Art. II Sec. 2 of the New York Convention accept the arbitration agreement as formally valid if it is contained in a contract which is signed by the parties or in an exchange of letters, telegrams or telex/telefax messages which need not necessarily be signed by the parties or refer to the arbitration agreement. Going beyond the current case law relating to the New York Convention, the new laws leave room for arbitration agreements concluded through other modern means of telecommunication and data transmission such as "EDIFACT", "Teletex", "Btx", "electronic courier", data transmission via satellite and other means of electronic data inter-change (EDI) which are still unknown today. These means of communication may establish a formally valid arbitration agreement, if they help to record the body of the agreement for future proceedings and make the parties aware of the fact that they oust the jurisdiction of domestic courts. However, one should include only those agreements that appear on a computer screen and are then saved in the memory of the computer terminals. Only in these cases is the text of the arbitration agreement and the conditions of its conclusion known to the parties at the time of its conclusion and also the agreement can be reproduced in written form later. Thus, the arbitration agreement is reproduced in "visible and sufficiently permanent form". The possibility of having the agreement reproduced at a later stage complies with the formality requirements of the new arbitration laws as soon as the message is stored in the computer memory. A recent UNCITRAL survey on contractual interchange agreements - which do not have the force of statutory law but apply only if the parties concerned have so agreed - that have been or are currently being developed in various sectors of business activity, reveals that even though the content of such agreements varies considerably according to the various needs of the different categories of users they intend to serve, there are some generally accepted principles as to the necessary quality of EDI messages. In order to put EDI messages and paper documents on an equal footing with respect to formal validity requirements, one has to require that:

- the parties involved in the data transmission process expressly agree that receipt of an EDI message shall have the same force and effect as the exchange of paper documents and shall be considered to be "in writing";

- the identification, authentication and verification of electronically exchanged documents is ensured through some kind of "call-back" and/or test-keys (identification of the transmitting machine) and an electronic identification consisting of a specified symbol, code or digital signature which has to be affixed to or contained in each document transmitted by such party and which this party acknowledges as sufficient to verify that this party originated such document;

- all parties involved in the data transmission process are required to keep a record or "log" of the EDI messages, meaning that the recording methods employed by the parties preserve both sent and received messages in their original format, provide a chronological record of those messages and that they ensure that the recorded EDI messages are accessible in a human readable form, for example through a printing device.

It can be foreseen that commercial situations involving the use of EDI will undoubtedly become more frequent in the near future as EDI will develop into a more widespread technology evolving from closed networks to a more open environment particularly through the use of integrating systems which bring different EDI networks into contact. These modern means of telecommunication should therefore ultimately be included in the autonomous interpretation of Art. II Sec. 2 New York Convention, since the text of
the Convention is adaptable to technological changes. The text of the Convention mentions only "telegrams" which constituted the most modern means of long-distance communication in the 1950s when the Convention was negotiated. This has not prohibited domestic courts to adopt a more liberal approach towards the interpretation of the Convention. The underlying rationale of this provision, which should be the guiding maxim in a "reality-oriented" interpretation of the Convention, was to take account of the particularities of long distance transactions. The character of these transactions has changed markedly in the past decades and will still continue to assume new and faster forms of data transmission. The latest revision of the INCOTERMS are based on the assumption that transport documents will be replaced by messages of electronic data transmission. The new ICC Uniform Rules For Demand Guarantees acknowledge that "[t]he expression "writing" and "written" shall include an authenticated teletransmission or tested electronic data interchange ("EDI") message equivalent thereto". Likewise, the International Maritime Committee (CMI) has developed "The CMI Rules for Electronic Bills of Lading". The final point of this development has not yet been reached. Technology in this field changes so rapidly that document practices which have been accepted for years worldwide can be outdated within a short period of

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time. Such transport documents usually include an arbitration agreement, mostly through reference to a set of standard contract conditions. The autonomous interpretation of Art. II Sec. 2 New York Convention has to take into account this development of contemporary commercial practice. One might even go so far as to say that the wide uniform interpretation of the formal validity requirements contained in the new laws might eventually lead to a more liberal interpretation of the Convention. In all the cases listed above, the on-line computer or satellite link and the storage on the computer discs suffice for the exchange of documents required by the text of the Convention. If, however, there exist documents signed by either party but there is neither a formal exchange nor a computer link between the parties, as in the case of "office-memoranda" about the conclusion of a contract via telephone, the arbitration agreement is not covered by the Convention but would still be within the scope of the new Dutch and Swiss law which do not require an "exchange" of documents. In most of these cases, the question of dispute settlement is not dealt with expressly but left to the general contract conditions which are included in the contract by a sweeping reference to fill the contract with life.

In any case, both the strict requirements of the New York Convention and the liberal provisions of the new laws are complied with, if, after a dispute has arisen, the parties initiate arbitration proceedings by exchanging documents, telex messages or by another means of communication mentioned above in which they expressly refer to the possibility of arbitration. If the claimant makes a proposal by telex and by letter to submit a dispute to arbitration and the defendant designates his arbitrator in a telex message which refers expressly to the messages of the counter party the parties have met the formal validity requirements of the Convention. Even at a further moment in time, parties may establish the competence of the arbitral tribunal through a formally valid arbitration agreement if they exchange (written) statements of claim and defense in which the existence of an arbitration agreement is alleged by one party and not denied by the other. This alternative applies only to the arbitration procedure itself and not to related proceedings before a domestic court. Indeed, one may be able to bring these cases under the New York Convention since the procedure comes close to the exchange of letters mentioned in Art. II Sec. 2 of the Convention. As these cases require an express reference from only one of the parties, while the other party acquiesces in the initiation of the arbitration, they come close to establishing the tribunal's jurisdiction through the foreclosure rules contained in Art. 16 Sec. 2 ML, Art. 1052 Sec. 2 Dutch Act and applied under the general principle of non concedit venire contra factum proprium where the jurisdiction is based on the fact that the respondent is estopped from invoking the invalidity of the arbitration agreement once he has submitted his defense on the merits. The effect of both formal validity and foreclosure rules is the same: the tribunal can proceed notwithstanding objections as to its jurisdiction based on the absence of a valid arbitration agreement. The difference is that in the case of Art. 7 Sec. 2 ML and related constellations, written statements exist from both parties while under the preclusion rules the tribunal's jurisdiction is established by the mere procedural conduct of the respondent party. This may have consequences if it comes to the recognition and enforcement of the award and the submission of the written arbitration agreement is required by the lex fori of the enforcement judge. This differentiation is, however, a rather theoretical one as virtually every arbitration is introduced by an exchange of written documents from both parties, the request for arbitration or a statement of claim that refers to the arbitration
agreement and the respondent’s written answer.  

If doubts still remain as to the validity of the arbitration agreement, the formal requirements of the new laws may be complied with if the parties sign the "Terms of Reference" set up by the tribunal unless one of the parties includes an express reservation as to the validity of the arbitration agreement. If the parties make a statement in the minutes of the proceedings the tribunal must ensure that the minutes are signed by the parties in order to create a formally valid arbitration agreement.

[...]

Chapter III The Arbitral Tribunal: Constitution and Competence

B. CONTRACT BETWEEN ARBITRATOR AND PARTIES

2. Arbitrators Immunity from Liability

Parties who are dissatisfied with the conduct of the arbitral proceedings and the outcome of the case may consider to sue the arbitrator(s) for damages. Contractual claims for damages for the alleged 'wrong' decision of the case can be based on the contract between the parties and the arbitrator only in very rare cases. As in the case of the parties' action for specific performance of the receptum arbitri, this restrictive view is a direct consequence of the arbitrators' unique position which, at least with respect to the characteristics of his decision-making, resembles that of a judge in the ordinary court system. To ensure their free and independent decision-making, the arbitrators are granted far-reaching immunity from liability. The NAI provides an express waiver of liability clauses in its arbitration rules which becomes part of the contract between the parties and each arbitrator. Contrary to the broad wording of the clause and the broad liability granted under American law, general contract law forbids to extend this waiver to liability for grossly negligent or willful acts or omissions in the decision-making process. Even if neither the applicable arbitration law, nor the arbitration rules, nor the receptum arbitri contain special exclusion of liability provisions, the contract between parties and each arbitrator contains an implied limitation of liability. As the Florida Task Force on International Arbitration has noted:

'Arbitrators are not less vulnerable on [the liability issue] than are judges, and both are entitled to immunity. Indeed, unless they are protected it will be difficult to get good people to serve as arbitrators, or to convince arbitrators to reach decisions without being influenced by the likely reaction of a party.'  

This limitation of liability is also applicable under Swiss law. German law goes even farther in that it shields the arbitrator from liability relating to his decision-making unless he commits crimes such as the unlawful acceptance of benefits or corruption under §§ 331 et seq. of the German Criminal Code. As the arbitrator is remunerated by the parties, he may run the risk of being accused of such crimes simply by demanding compensation for his services. Consequently, § 335 a of the German Criminal Code clarifies that an arbitrator’s remuneration constitutes such crime only in those cases where the arbitrator demands or receives it ‘behind the back of the other party’. Here, the German criminal law takes account of the joint liability of the parties and the dangers of partiality where contacts between arbitrator and one of the parties are too close. The mere fact that the award has been set aside by the competent court may not in and of itself serve as a basis for arbitrator liability. However, a successful appeal against the award should be considered as a necessary precondition for a suit against an arbitrator for negligent or wrongful decision-making. A party who accuses the arbitrator of having rendered a wrong decision, but does not attack the award with the means provided for by the arbitration laws has to be suspected of using the suit against the arbitrator as a Surrogate for the missed opportunity to have the award set aside.

A possible liability of the arbitrator might arise out of undue delay of the proceedings or unjustified repudiation of his mandate - in both cases
the immunity of liability, which is limited to the actual decision-making of the arbitrators, does not apply - or from the, albeit highly unlikely, evident misuse of his office. Usually, these and similar kinds of misconduct on the part of the arbitrators will not result in a suit for damages. Instead, parties prefer to challenge the arbitrator and have him removed by the arbitral institution or the court.

Finally, the question remains whether the arbitrator’s duty to create an enforceable award arises out of his mandate with the parties, thus implying that a violation of this duty could render the arbitrators contractually liable. This view is maintained in German doctrine. There is no doubt that in conferring authority upon an arbitrator to settle a dispute arising out of an international transaction, a term is implied in the parties’ contract with the arbitrator that he will render an award which is enforceable under the New York Convention. A court judgment rendered in international proceedings will frequently be enforced against assets located in the Jurisdiction where the court has its seat, thus relieving the judge from considering possible enforcement problems abroad. The international arbitrator, however, sitting in a neutral forum that usually has no connection with the business of either of the parties, carries an enhanced responsibility for the enforceability of his award abroad under the New York Convention or domestic enforcement provisions. Art. 26 ICC-ArbR is thus the expression of a general principle of international economic arbitration. However, ensuring the enforceability of the award is a difficult task, given the multitude of possible enforcement fora. Sometimes, ensuring enforcement will even prove to be impossible if the arbitrators have to reconcile conflicting ordre public principles of those enforcement fora which

they are aware of. Therefore, the international arbitrator’s Obligation to ensure the enforcement of the award is a purely procedural Obligation, a nobile officium which every arbitrator has on his checklist. It is converted into a contractual duty only in those cases where a party draws the arbitrator’s attention to a public policy issue which might stand in the way of enforcement of the ultimate award. Even in these cases, though, a contractual liability of the arbitrator is in place only if a prima facie examination of the case reveals that the arbitrator could have easily avoided the problem, the proof of which will be impossible in most cases.

Chapter V Applicable Law

II. Substantive Law

B. DETERMINATION OF THE APPLICABLE LAW BY THE ARBITRATORS

1. The Different Approaches

All arbitration laws provide special conflict-of-laws rules to be applied by the arbitrators. Art. 187 Sec. 1 of the Swiss SIPL requires the arbitrators to apply an objective test and decide the dispute ‘according to the rules of law with which the case has the closest connection’. The Italian legislature has also followed this approach in its draft law on international arbitration. Imposing a specific choice of law rule on the arbitrators which is well known from international contract law seems conservative and reactionary given the liberal attitude of the new Swiss arbitration law. It also stands in strange contradiction to the rest of the law which provides parties and arbitrators only with a very basic procedural framework leaving the filling of the legislative gaps to the party autonomy or the procedural
discretion of the parties.

The ML advocates the classical 'indirect' or 'conflictual' method. This approach is similar to the new Swiss law in that it also refers to conflict-of-laws rules. Yet, it is more liberal than the Swiss law because the ML does not impose a special conflict-of-laws rule to be used by the arbitrators. Instead, Art. 28 Sec. 2 ML provides that the arbitrators may determine the applicable law by the conflict-of-laws rules which they consider applicable. Similar provisions are included in the DIS-ArbR and the ACB-ArbR. In international arbitral practice, the tribunals either refer to the conflict-of-laws rules of the seat or make a synopsis of the conflict-of-laws rules of those countries that have a sufficient connection with the case. Thus, the arbitrators frequently refer to the convergence of the conflict-of-laws systems of the parties' home countries to make the award more convincing and palatable to the parties. Increasingly, the comparative approach outlined above in the context of the interpretation of the arbitration laws can also be found in the arbitrators' determination of the applicable conflict-of-laws rules. The tribunals apply those conflict-of-laws rules which are common to all or at least the leading legal systems in the world and reflected in international conventions or apply those 'conflict rules which are generally followed in international arbitrations of the kind under consideration'. Even though the ML follows the modern trend in international doctrine and does not require the arbitrators to apply the conflict-of-laws rules of the seat, the approach is criticized for being too conservative and old-fashioned as it still requires the arbitrators to link their determination of the applicable law to a set of conflict-of-laws rules.

The Dutch legislature has reacted to this criticism. Similar to the liberal French law on international arbitration, Art. 1054 Sec. 2 2nd sentence of the new Dutch Arbitration Act leaves room for the so-called direct method (voie directe) in that the tribunal may decide the dispute according to the rules of law 'which it considers appropriate'. This allows the arbitrators to adopt a flexible approach in the determination of the applicable law without having recourse to conflict-of-laws rules, be it because all possible conflict-of-laws systems lead to the application of the same law, which resembles the comparative approach outlined above, or simply because the arbitrators consider a certain legal system as particularly appropriate for a 'fair and reasonable' solution of the case before them.

2. Convergence of the Different Approaches

a. The Conflict-of-laws Problem in International Economic Arbitration

The different approaches taken by the legislatures and the drafters of the ML reflect the core problem of conflict-of-laws issues in international economic arbitration. Conflict-of-laws rules for international arbitrators have to provide the parties with a maximum degree of predictability and certainty:

'The freedom [granted to international arbitrators in the determination of the applicable law] has been useful in some cases. However, it has also led to some unpredictability. With the growing use of international arbitration this uncertainty has become a matter of concern to parties. They see no attraction in unpredictable conflict-of-laws rules. They need some degree of certainty as to the law applicable, when drafting their contracts, when seeking a friendly settlement of their dispute, and when resorting to arbitration. They fear a discretionary choice of law by arbitrators, particularly when they know that in comparable situations arbitrators have relied on certain choice-of-law rules. Even arbitrators seem sometimes to have regretted the existing uncertainty.'

At the same time conflict-of-laws rules for international arbitrators must ensure the flexibility which is required to solve complicated conflict-of-laws problems in transnational economic transactions. The lack of a lex fori for international arbitrations and with it of a predetermined set of conflict-of-laws rules, the strict distinction between a decision according to the rules of law and as amiable compositeur, and the insulation of the arbitrator's application of the law from any judicial review seem to require a restriction of the arbitrators' freedom to determine the applicable law. The efforts of international arbitrators to be guided, more than the state court judge,
practical considerations such as the underlying economic objectives of the contract in dispute, the legitimate expectations and interests of the parties - especially in upholding the validity of the contract and the possible consequences of their choice of law decision for the outcome of the case - require that the arbitrators are freed from the constraints of domestic conflict-of-laws systems.

Viewed against this practical background, the approach of the Swiss legislature seems to be preferable. It provides the arbitrators with a precise and less subjective criterion for the determination of the applicable law than does the voie directe, without forcing the tribunal to apply a prefabricated set of conflict-of-laws rules which may be totally inappropriate to deal with applicable law issues arising in complex international transactions.

b. Uniform Approach to Conflict-of-laws

In fact, the practical difference between the Swiss approach on one side and the ML and new Dutch law on the other side is only marginal. In many cases international arbitrators need not make a final determination of the applicable conflict-of-laws rules because those which have a connection to the case all lead to the application of the same legal system. Also, considerations of conflict-of-laws become moot if the conflict-of-laws rules which bear a connection to the dispute lead to the application of different systems of domestic laws which all lead to the same result. If the arbitrators have to make a conflict-of-laws decision, the voie directe of the new Dutch law does not open the door for the subjective attitude of the arbitrators or allow them to disregard any rules of conflict-of-laws to freely choose what is in its sole discretion: the proper law of the contract. Irrespective of the structure of the underlying conflict-of-laws rule - whether employing the closest connection-criterion, the direct or indirect method - the arbitrators, in determining the applicable law, do not operate in a legal vacuum or have limitless discretion without any normative underpinning. As long as the arbitrators are not authorized to render an award as amiables compositeurs, they have to make a determination of the applicable law which convinces the losing party. This follows from the principles of predictability, objectivity and harmony of decisions which are inherent to both international arbitration and international conflicts of law. All of these principles require the arbitrators to base their conflict-of-laws decision on firm and established legal principles which are rooted in the long-standing doctrine of international conflict-of-laws and not on some vague and diffuse discretionary considerations. The Dutch conflict rule does not force the arbitrators to feel bound by a particular national System of conflict-of-laws, thus favoring the comparative approach that counsel and arbitrators usually follow in determining the applicable law even if the applicable conflict-of-laws rule allows the voie directe. The arbitrators may hence find inspiration in domestic conflict-of-laws systems but not according to their free discretion. Rather, the arbitrators have to make a selection of choice of law principles which they are able to justify before both parties. This will lead them to apply only those principles which are generally accepted in international conflict-of-laws, thus leading to the same result as the direct method or the Swiss approach. Consequently, in international arbitral practice, the reasons which lead arbitrators to select the appropriate applicable law are similar to the connecting factors used in conflict-of-laws rules. This predictability of the choice of the applicable law is also in the strong interests of the parties. Taking account of the legitimate interests of the parties constitutes a determinative value for every decision of the arbitral tribunal. Contrary to A. Bucher, the direct method does not relieve the arbitrators from their burden to give reasons for their decision. To the contrary, one may even say that the direct method requires them to pay more attention to the giving of reasons for their determination of the applicable law than would be necessary in case of reference to a concrete conflict-of-laws rule. Given that the arbitrators' obligation to give reasons for their decision in the award exerts a certain pressure on the tribunal to enter into a careful consideration of the choice of law problem, the obligation to give reasons for their decision is nothing but a choice of law rule. Advocating a complete and unlimited freedom of the arbitrators in the choice of the applicable law also neglects such important indirect 'social' sanctions as possible damage to the arbitrators' reputation caused by untenable decisions and resulting in less future appointments. Finally, the arbitrators' procedural obligation to render an enforceable award serves as an additional safeguard to ensure a reasonable degree of diligence in the determination of the applicable law.

In addition, the conflict-of-laws rule contained in Art. 187 Sec. 1 of the Swiss SIPL reiterates a well-known and generally accepted principle of conflict-of-laws. The principle of the 'closest connection' employed by the new Swiss arbitration law is known in almost all legal systems ('engste Verbindung', 'stärkste Verbindung', 'closest and most real connection', 'most significant relationship', 'liens [rapports] les plus étroits') which consequently also applies in
international economic arbitrations.160 Taken alone, this criterion is a 'non-rule' which is generally regarded as not being able to lead directly to the applicable law without reference to some specific connecting factors.161 There are, however, instances where international arbitrators did resolve the applicable law question before them solely on the basis of the 'non-rule'. One of those instances is reflected in the ICC Award No. 5717:

“In complex international relationships such as that under review, a widely accepted choice of law principle in most jurisdictions . . . is the center of gravity, or the connection test. Under this test, the arbitrator selects the substantive law of the jurisdiction that has the greatest connection with the dispute . . .

It is evident that Swiss law is the neutral system of law with the greatest connection both with the relationship between the parties and with their present dispute. The parties’ contractual relationship is governed by a contract concluded by the parties in Switzerland. The Claimant demands release of the documents stored in the Bank ABC in Geneva, under a contract with the bank governed by Swiss law. The payment of commissions was to have been made in defendant's Swiss bank account, according to the relevant agreements. Compared to these connections, connections to any one of the other relevant jurisdictions are considerably less significant.162

In most cases, however, the 'closest connection' criterion merely serves as a starting point and is required to be supplemented by concrete and workable principles. It would, however, be dangerous to deduce from this a complete discretion the arbitrators have in the determination of these principles.163 Rather, the arbitrators have to take a comparative approach by referring back to the list of standardized criteria contained in international Conventions which represent a comparative ratio scripta of choice of law principles even if they are not yet in force.164 They may also refer back to national systems of conflict-of-laws.165 In fact, this comparative technique is followed by most arbitrators in practice even if they purport not to apply any particular choice of law rule. This is exemplified in the statements of two arbitrators in ICC arbitrations:

‘The arbitral tribunal does not deem it necessary in this to decide on a specific rule of conflict to designate the proper law of the contract in view of the fact that most major rules in some form or another point to the place of the characteristic or dominant work and that in the opinion of the arbitral tribunal there can be no doubt that the dominant or characteristic work performed under the agreement was performed in Georgia, USA’.166

‘Le Tribunal arbitral jouit donc d'un large pouvoir d'appréciation dans le choix du droit applicable, voir d'un pouvoir discrétionnaire . . .

Les règles de DIP suisses, françaises et yougoslaves se réfèrent aujourd'hui toutes à des critères semblables pour rechercher le droit applicable à une obligation contractuelle. Il s' agit tout d' abord de déterminer la prestation caractéristique du ou des contrats à examiner puis de rechercher avec quel territoire cette prestation a le lien le plus étroit ou encore pour reprendre une expression significative du Tribunal Fédéral suisse de localiser le "centre de gravité" du contrat. C'est à cette solution que se rallie aussi la Convention européenne sur la loi applicable aux obligations contractuelles ouverte à la signature des pays membres de la Communauté à Rome le 19 juin 1980."167

The new Swiss law signals to the parties that the arbitrators will apply these general principles of international private law and relieves the parties from the burden of having to enter into complicated and time-consuming disputes on the 'cumulative approach' which the arbitrators should take in the determination of the applicable law.168

The understandable effort to provide parties and arbitrators with clear and predictable criteria for the determination of the applicable law explains that Art. 4 Sec. 2 of the ZuArbR obligates the arbitral tribunal to apply the conflict-of-
Lalive contends that the Chamber of Commerce, the parties there is common but is only bound to apply the restricted notion of International Conflict-of-Laws will always remain an open system which leaves room for the sweeping reference to the applicable law. This view seems to neglect the special character of the conflict-of-laws rule contained in the Swiss act which, just as all the other provisions of the New Act, tries to give maximum room for the autonomy of the parties in order to do justice to the specificity of international economic arbitration. Due to the lack of a lex fori, the application of the conflict-of-laws rules of the tribunal's seat is not mandatory. The reference to the rules of the SIPL contained in the ZuArbR which the parties include in their contract can be regarded as a choice of the parties to apply the Swiss conflict-of-laws. The parties' designation of the choice of law rules to be applied by the arbitrators may be regarded as an indirect choice of law. The admissibility of such an indirect choice of law is acknowledged in international doctrine and has to be recognized under Art. 187 Sec. 1 SIPL. This approach may be impracticable and illogical as the parties' choice does not create the necessary certainty as to the applicable substantive law which every choice of law decisions should provide. The parties have no certainty that the tribunal will actually apply the choice of law rule in the sense anticipated by them at the time of the conclusion of the agreement. Leaving aside these practical considerations, there is nothing to prevent the parties from this kind of indirect choice of law. Even if one is of the opinion that Art. 187 Sec. 1 SIPL concerns only the direct choice of law, Art. 4 ZuArbR does not violate the Statute. Given the liberal attitude of the new law, the choice of law rule contained in Art. 187 Sec. 1 must be deemed to be non-mandatory. If the legislature allows the parties to free the arbitrators from the constraints of a domestic law then, a contrario, the parties must also be allowed to authorize the tribunal to decide according to the rules which a Swiss court would apply in deciding their case. However, the international orientation of the ZuArbR requires that the sweeping reference to the rules of the SIPL excludes all those norms which contravene the task of an international arbitrator. This is true for all those norms which deal with the special relationship of foreign law and Swiss ordre public. There is common agreement in international doctrine that contrary to the courts at the seat of the arbitration, the international arbitrator is no guardian of the seat's broad ordre public but is only bound to apply the restricted notion of ordre public international. One must assume that the ZuArbR as a modern set of arbitration rules do not intend to equate the function of an international arbitrator with that of a Swiss court judge. Instead, the reference in Art. 4 Sec. 2 is merely intended to provide the arbitrators and parties with a workable and predictable framework for the determination of the applicable law which conforms with the modern trends in international private law. This is true for Art. 117 et seq. SIPL which provide modern and concrete criteria for the determination of the applicable law. Art. 4 Sec. 3 ZuArbR reflects that the application of the rules of the Swiss SIPL is no absolute dogma.

The typification of the choice of law criteria evidenced in international conflict-of-laws statutes and conventions leads to a minimum amount of legal certainty and predictability in the determination of the proper law of the contract which is necessary in international economic arbitration. Ultimately, every arbitrator will imperceptibly be guided by his personal experience and the choice of law principles of his legal background. Furthermore, considerations of the applicable law are frequently influenced by other factors such as the possible application of lois d'application immédiate. This uncertainty is no particularity of international arbitration. State court judges are rarely able to render consistent and predictable decisions on the determination of the proper law of the contract. International conflict-of-laws will always remain an open system which leaves room for the influence of domestic notions, habits and doctrines of those who are called upon to decide on the law applicable to a complex contractual relationship. In international arbitration much more than in domestic courts this decision is rendered by experienced international practitioners who offer greater assurance for a fair and equitable determination of the applicable law and the selection of that law which is best suited to provide an acceptable resolution for the parties' conflict.

The above analysis of modern arbitral practice also hints at another main function of the conflict-of-laws rules contained in
the modern arbitration laws. They are intended to clarify that the arbitrators are not ipso jure required to apply the conflict-of-laws system of the seat of the arbitration\textsuperscript{186} and put an

end to the long-lasting\textsuperscript{187} dispute which has evolved around this question in the past decades.

[...]

\section*{Chapter VI Termination of the Arbitration}

[...]

\section*{II. Arbitral Award}

[...]

\textbf{F. INTEREST}

In complex international economic arbitrations, huge amounts of money, sometimes amounting to the annual budget of a small sovereign state, can be at stake\textsuperscript{294} and the proceedings, depending on the legal or factual complexity of the case, can sometimes last over several years. Interest claims thus play

an important, albeit frequently underestimated, role in every international arbitration. In an arbitration involving a claim of US$ 5 Million and lasting over a period of two years, the respondent may have to pay interest amounting to US$ 900,000 if the interest rate is fixed at LABOR plus 1\%. Practice has shown that the arbitration may take so long that the interest claim is finally twice as high as the main claim.\textsuperscript{295} However, the problem of interest adjudication has a significance which goes well beyond the individual case which is before the arbitral tribunal. Throughout this study, we have repeatedly emphasized the danger of dilatory tactics of the losing party which have increased considerably in recent years. As far as interest is concerned, delay in the adjudication of the principal claim may have the effect of a "forced taking of credit" by the respondent to the disadvantage of the claimant which, given the huge amounts claimed, might help the defendant to save considerable amounts of money. This general phenomenon was already acknowledged in the legislative materials of the German Civil Code.\textsuperscript{296} If the arbitrators are constrained, either by the relevant applicable law or by custom and accepted practice, to award interest at a level inferior to full commercial rates, a defendant has little incentive to refrain from these tactics and proceed with the arbitration speedily so as to discharge his ultimate obligation as early as possible.\textsuperscript{297} If, however, the defendant knows that the arbitrators have the power and authority to award interest at full commercial rates, this psychological aspect may serve as an effective means to deter parties from using dilatory or obstructive tactics during the arbitral procedure.\textsuperscript{298} This important "preventive" function of statutory provisions on interest is generally acknowledged and should also be recognized in the discussion on awarding interest in international economic arbitration. Apart from an efficient structuring of the arbitral procedure\textsuperscript{299} and the consideration of the parties' procedural conduct in the decision on costs\textsuperscript{300} the legal treatment of interest adjudication may prove to be a very important way to avoid long delays in international arbitration.\textsuperscript{301} In spite of the importance of the subject matter, very few arbitration laws provide an express provision on interest adjudication.\textsuperscript{302} Also, the problem

does not appear to have yet received a satisfactory solution in arbitral practice.\textsuperscript{303}

[...]
2. General Principles Relating to Interest

a. Simple Interest

In international economic relations, the amount of interest claimed by the creditor cannot be limited to the statutory interest rates since these rates usually do not conform with commercial realities. Yet, many arbitrators confine themselves to the examination and application of statutory rates of interests without entering into a detailed analysis of the relationship of this rate with the circumstances of the case, especially as to its commercial adequacy.

Sometimes, the application of these rates is influenced by overriding principles of law. In the LIAMCO arbitration, the sole arbitrator refused to award interest of 12% as demanded by the claimant (which would have been commercially sound) and applied instead the rate of 5% provided for by the applicable Libyan Civil Code for commercial matters since this rate could not come into conflict with the Islamic *riba* principle which forbids interest rates as an unjustified and usurious means of exploitation.

Conceptionally, however, interest is an item of damage intended as compensation for the temporary withholding of money, and its measure is the cost of such deprivation. The damage-oriented view of interest claims is also acknowledged in many legal systems and has recently been confirmed in the ICSID Award *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*. Even in common law, the rule that interest is not recoverable as general damages for failure to pay money on time is a relic established by a long-since outdated decision of the Kings Bench in 1829 that has no place in a modern system of commercial law. The link between interest and damages has a long-standing tradition. Under Roman law, the taking of interest was prohibited. However, the creditor had an "interest" in the prompt payment of a sum of money due from his debtor. If payment was delayed, the creditor could claim damages, or rather, a conventional penalty from his debtor. The prohibition to demand interest contained in canon law of the Middle Ages was circumvented by relying on the possible quality of interest as damages. A reason why international arbitrators do not take account of this fact may be that, with respect to lost profits, they tend to be rather conservative. If, however, the legitimate interests and the commercial realities are to be the major guidelines for the international arbitrators' decision on the merits, they cannot neglect the impact of the damage-oriented view in the field of interest adjudication. In the case of merchants and other commercial men who have claims against each other which are not duly paid, one can assume *prima facie* that rather than losing return on investments during the relevant period they will have to borrow substitute funds for the period of delayed payment at the rate which is usually charged for unsecured short-term credits in the country where the creditor has his place of business. This principle has also been acknowledged in the UNIDROIT draft Principles For International Commercial Contracts:

> "If a party does not pay off a monetary debt when it falls due, the aggrieved party may [without having to justify any loss] ask for interest upon that sum [from the date of maturity or notice, by application of Article 6.4.2].

> (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the due place of payment; in the absence of such rate, the rate fixed by the law of the State in which money the payment has to be made.

Tax reasons usually force traders to operate their business with a high credit line and low liquidity. This may be regarded as an empirical rule of international commerce and trade. The creditor may thus benefit from an "abstract" method of quantifying the loss which the payment of damages is intended to cover and he therefore does not have to prove that credit was actually taken for the sum in dispute. The application of this principle is exemplified in the ICC Award No. 3820 where the sole arbitrator awarded interest with the following reasoning:
"Claimant has demanded 13% interest per annum on [the sum awarded] as from 5th February 1979. The defendants have not opposed this part of the claim. Inasmuch as an allowance for interest is itself justified because payment was not made on the agreed date and because the rate of interest claimed was not unusual in international trade in the period concerned, this part of the claim is allowable as well.\textsuperscript{332}

However, the creditor may not pass the costs of his bad credit standing and hence his unforeseeably high credit costs on to the debtor. Again, the empirical rule provides sufficient safeguard in that it assumes that the debtor takes credit only to the costs usually charged to creditors with an average credit standing.\textsuperscript{333} Only these costs are foreseeable for the debtor\textsuperscript{334} and are covered by the scope of the liability for damages.\textsuperscript{335} If the currency of the contract and the domestic currency of the creditor are not identical, the interest damage has to be computed on the basis of the amount due in the creditor’s local currency since there is a presumption based on commercial experience that the creditor will upon payment of the sum due, change it into his local currency in due course.\textsuperscript{336} To avoid an unjust enrichment of the creditor\textsuperscript{337} the tribunal always has to check whether the level of compensation awarded extends to the credit costs or if the costs to be reimbursed cover all or at least parts of the credit costs.\textsuperscript{338} This is expression of the general rule that the arbitrators have to take due account of all pertinent circumstances in determining the reasonableness of the rate of interest, such as the nature of the facts generating the damage, the knowledge that the defaulting party could have had of the financial consequences of its default for the other party, the rates in effect on the markets concerned and the rate of inflation.\textsuperscript{339} In spite of this necessity to take into account the special circumstances of the case, the parties and arbitrators will usually seek guidance from some easily accessible and reliable financial data which reflect the borrowing conditions on financial markets such as LIBOR\textsuperscript{340}, FIBOR\textsuperscript{341}, the American Prime Rate\textsuperscript{342}, the Eurodollar interest rate\textsuperscript{343} or the official discount rate at the seat of the creditor.\textsuperscript{344} As most of these data reflect credit costs for inter-bank loans, they have to be increased slightly in order to reflect accurately the credit costs for private parties. The debtor may, of course, force the creditor to refrain from relying on this \textit{prima facie} rule and require him to prove his damage in a concrete way provided that this damage remains within the limits of the doctrine of foreseeableability. The creditor may also claim a higher rate of interest if he proves that the non-payment has caused him a greater loss than the average credit costs.\textsuperscript{345}

\textbf{b. Compound Interest}

Focusing on the inherent function of interest adjudication to compensate for the damage caused by the withholding of the sum due also helps to overcome the highly disputed problem of compound interest.\textsuperscript{346} The prohibition to charge compound interest (\textit{Anatozismus}, \textit{Anatocisme}, "\textit{Anatocism}") belongs to the common core of most jurisdictions and can be traced back to the prohibition to charge interest under canon law and to the multiple limitations on interest rates (\textit{laesio enormis}, usury, rate ceilings, \textit{taux d'usure}). However, the principle no longer conforms with the realities of modern commercial life. It is the usual commercial practice that banks, in some way or another, charge compound interest to finance complex credit facilities or at least apply a method of computing interest which has the same effect as charging compound interest.\textsuperscript{347} Consequently, these costs which the creditor incurs by taking out credit during the period of non-payment are a direct consequence of the nonpayment of compensation and must therefore be awarded by the arbitral tribunal under the same conditions as ordinary interest claims.\textsuperscript{348} Given that the practice of banks varies as to the exact method of compound interest charge, especially if the sum outstanding is calculated on the basis of continued capitalization of interest with quarterly, half-year or yearly rests, the claimant may not rely on a \textit{prima facie} rule as to the amount of compound interest but has to provide the tribunal with detailed evidence substantiating his damages caused by the bank's charging of compound interest.\textsuperscript{349} A major obstacle against awarding compound interest in international arbitration is usually seen in the prohibition to charge compound interest contained in many domestic laws.\textsuperscript{350} Contrary to Langen,\textsuperscript{351} the commercial realities of contemporary economic relations and the damage-oriented view of the interest problem reveal that the prohibition of compound interest may no longer be regarded as a general
principle of transnational law. Even the domestic laws that prohibit compound interest provide for an exception from this rule if the compound interest is part of consequential damage.\(^\text{352}\) Also, the erosion of the principle is reflected in the new German Consumer Credit Act of December 17, 1990 which expressly allows the creditor to charge interest as an item of damage for default on interest on arrears to be paid by the consumer, albeit limited to the (low) statutory interest rate.\(^\text{353}\) In this case, one is not dealing with genuine interest but with a special form of damages for default which is payable on any sum due from the debtor under German law.\(^\text{354}\) Prior to the enactment of the Act the German Federal Supreme Court had already acknowledged the de facto "abolition of the prohibition to charge compound interest".\(^\text{355}\) Given these developments in commercial practice and domestic law, one might even go one step further and state that the provision of domestic law prohibiting compound interest merely serve to clarify the computation of interests thus serving purposes of legal expediency and therefore do not belong to the order public international nor to the group of mandatory laws (loi d'application immédiate) which the arbitrators have to apply irrespective of the applicable law.\(^\text{356}\) As a consequence of this view, the arbitrator may award compound interest even if the lex contractus would not allow the charging of compound interests in domestic contracts.

[...]

\(^{614}\) Von Hülsen, AWD/RIW 1967, at 267, 268; Böckstiegel, Festschrift Bülow, at 1, 2.

\(^{615}\) See infra Chapter III at IV.A.

\(^{616}\) See infra Chapter III at I.

\(^{617}\) See infra Chapter IV at VI.

\(^{618}\) See infra Chapter VII at I.

\(^{619}\) See infra Chapter VII at II.

\(^{620}\) See Derains, in: Sanders (ed.), ICCA Congress ser. no. 4, at 229, 233.

\(^{621}\) Cf. Coing, in Coing/Ellwood/Fouchard/Waehler/Vondracek/Koschucharoff/Lando/Migliazza, at 13; Basedow, in: Glossner (ed.), JPS 1987, at 3, 10; Von Hülsen, Die Gültigkeit von internationalen Schiedsvereinbarungen, at 12 hinting at the desire to achieve "decisional harmony" in conflict of laws.

\(^{622}\) See Mänhardt, Festschrift Ostheim, at 651.

\(^{623}\) Von Hülsen, supra note 621, at 18.

\(^{624}\) Switzerland: arg. e. contr. Art. 178 Sec. 3 SPl; Budin, RdA 1988, at 56; ML: Art. 7 Sec. 1; Netherlands: Art. 1020 Sec. 2 Dutch Act (exception: Art. 1024 Dutch Act).

\(^{625}\) Art. 178 Sec. 2 SIPL; Art. 16 Sec. 1 ML; see for the unfortunate systematic location and wording of this provision Calavros, Das UNCITRAL Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit, at 42; Hußlein-Stich, Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit, at 37; Art. 1053 Dutch Act; Art. 21 Sec. 2 UNCITRAL-AbR ; Swiss Federal Tribunal BGE 59 I 177; LIAMCO v. The Government of the Libyan Arab Republic, ILM 1981, at 1, 40; BGHZ 53, 315; Hoge Raad of December 27, 1935, NJ 1936, No 492; Supreme Court of Hong Kong of October 29, 1991, YCA 1992, at 289, 297 (dealing with Art. 16 ML); cf generally Aden, Internationale Handelschiedsgerichtsbarkeit, at 93; Sanders, in: Hommage á Eisemann, at 31 et seq.; Craig/Park/Paulsson, at 65 ("conceptual cornerstone of international arbitration"); Delaume, Transnational Contracts, § 9.07; Rubin-Sammartano, International Arbitration Law, at 136 et seq.; Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, No. 392 ; Strohhbach, Handbuch der internationalen Handelschiedsgerichtsbarkeit, No. 130; Samuel, Jurisdictional Problems in International Commercial Arbitration, at 155 et seq.

\(^{626}\) Craig/Park/Paulsson, International Chamber of Commerce Arbitration, at 69 ; Prima Paint Corp. v Flood and Conclin Mfg Co, 388 U.S. 395 (1967); Sauer-Getriebe KG v. White Hydraulics Inc., 715 F. 2nd 348, 351 (1983); cf. also Samuel, id., at 175.


\(^{628}\) See generally infra C.3.


Which is mentioned expressly in the Swiss law.

Legal aspects of EDIFACT, especially the uncertainties related to "national laws which require signed paper documents" are currently under review by an ICC Working party, see ICC Doc. No. 460/393, at 4 et seq.; see also the UNCID Rules, drafted by a team of representatives from various international associations, coordinated by the ICC, ICC Publication No. 452.

For a critical comment on the compatibility of domestic formal validity rules and Btx see Päfgen, Bildschirmtext aus zivilrechtlicher Sicht, at 44 et seq.

For Swiss law Vischer/Volken, Bundesgesetz über das Internationale Privatrecht (IPR-Gesetz), Gesetzesentwurf der Expertenkommision und Begleibertib, at 178; Lalive, Le chapitre 12, at 215; Lalive/Gaillard, Clunet 1989, at 931; Giovanoli, Mélanges Piotet, at 425, 433; for the ML, Calavros, supra note 696 at 49 et seq.; Granzow, supra note 702, at 88 et seq.

See for the ML the statement of the US delegation during the deliberations in the UN, UN Doc. A/CN.9/263, para. 4: "... this definition has the necessary flexibility to take into account the wide variety of ways business in different trades is conducted and the modern means of communication utilized - now and in the future. The US interprets the phrase "other means of telecommunication" to include all forms of electronic computer techniques that provide a written record"; Holtzmann/Neuhaus, supra note 718, at 263 hinting at the fact that the Working Group declined to accept an alternative that required that the means of telecommunication "produce a record on paper automatically or at the option of the recipient", id., at fn. 27; cf. for Swiss law A. Bucher, supra note 711, No. 123 in fine; but see for the ML Hußlein-Stich, supra note 718, at 39, fn. 189; see also Giovanoli, id., at 447 who requires that the modern means of telecommunication have reached the quality of a usage.

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UNCITRAL envisages the drafting of a standard communication agreement for use in international trade, intended to achieve harmonization of basic EDI rules for the promotion of EDI in international trade, possibly accompanied by the removal of mandatory requirements in national legislation regarding the use of paper and electronic signatures, id., at 29 et seq.

Cf. Art. 7 Sec. 2 ML UN Doc. A/CN.9/WG.II/WP.37, Art. 3 Sec. 2; but see Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, No. 373, who requires recording in written form; cf. also for Swiss law A. Bucher, supra note 711, No. 123 in fine; but see for the ML Hußlein-Stich, supra note 718, at 39, fn. 189; see also Giovanoli, id., at 447 who requires that the modern means of telecommunication have reached the quality of a usage.

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Cf. Art. 7 Sec. 2 ML UN Doc. A/CN.9/WG.II/WP.37, Art. 3 Sec. 2; but see Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, No. 373, who requires recording in written form; cf. also for Swiss law A. Bucher, supra note 711, No. 123: "The requirement "in writing" does no longer mean that the arbitration agreement exists in this substantive form: it suffices that the agreement is contained in a data carrier which allows the written reproduction and the confirmation of the mutual consent of the parties' (original in German).

UN Doc. A/CN.9/350, at 18 et seq.; UNCITRAL envisages the drafting of a standard communication agreement for use in international trade, intended to achieve harmonization of basic EDI rules for the promotion of EDI in international trade, possibly accompanied by the removal of mandatory requirements in national legislation regarding the use of paper and electronic signatures, id., at 29 et seq.

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Cf. the revised version of the CIF Clause (No. A 8), INCOTERMS in the version in effect as of July 1, 1990, ICC Publ. No. 460, at 56.


Adopted at the thirty-fourth Conference in Paris, June 1990, see UN Doc. A/CN.9/333, para. 89; the International Rail Transport Committee (CIT) is conducting a study to replace the paper-based rail consignment note provided for in the CMI rules with an electronic document, the Electronic CMI document (Docimel) which is intended to be ready for implementation in 1993; the International Road Transport Union (IRU) is preparing a standard EDI agreement for use between enterprises in the road transportation industry and users of road transportation services, see the survey in UN Doc. A/CN.9/350, at 13 et seq.

Schneider, RIW 1991, at 91, 96.


See generally infra d.
See for the inclusion of "reality", i.e. the needs of international practice into the analysis of modern legislation supra Chapter I at III.B.2.

Cf. UN Doc. A/40/17, para. 87, where it was acknowledged that there might be an interrelation between the widening of the scope of the ML’s formal validity requirements and the interpretation of the Convention.

Cf. generally the approach (not limited to arbitration) taken by Basedow, in: Kreuzer (ed.), Abschied vom Wertpapier?, at 67, 104; but see Van den Berg, New York Convention, at 192 who requires the actual exchange of documents.


Cf. immediately infra b.

Cf. immediately infra d.


Art. 7 Sec. 2 ML; Art. 1021 Dutch Act; cf. also Granzow, supra note 702, at 89; the presentation of the written statements suffices in recognition and enforcement proceedings under Art. 35 Sec. 2 ML. Art. IV Sec. 1 New York Convention, Hußlein-Stich, supra note 718, at 41; Granzow, id., at 91; Calavros, supra note 696, at 46, fn. 203 contra Szurski, supra note 718, at 59, fn. 15 ("Without presentation in court of a written arbitration agreement, the recognition and enforcement of the arbitral award is not possible under the appropriate provisions of the draft Model Law, or under Art. IV, para. 1 of the New York Convention 1958"); cf. also UN Doc. A/40/17, para. 87; A/CN.9/264, Art. 35, para. 5, fn. 91 ("As regards [the requirement of submitting the arbitration agreement in recognition and enforcement proceedings], it is submitted that an exception be made for those cases where an original defect in form was cured by waiver or submission, for example, where arbitral proceedings were on the basis of an oral agreement initiated and not objected to by any party. In such case, the supply of any award, which records the waiver or submission, should suffice").

Nöcker, Das Recht der Schiedsgerichtsbarkeit in Kanada, at 73 et seq.; Hußlein-Stich, supra note 718, at 41.

UN Doc. A/40/17, para 87 ("It was pointed out in support of the suggested extension [now contained in Art. 7 Sec. 2 ML] that, although awards made pursuant to arbitration agreements evidenced in that manner would possibly be denied enforcement under the 1958 New York Convention, adoption of that extension in the model law might eventually lead to an interpretation of Article II (2) of that Convention whereby arbitration agreements evidenced in the minutes of arbitral tribunals would be acceptable").

Cf. Sanders, Het nieuwe arbitragerecht, at 49 et seq. ; Böckstiegel, Festschrift Bülow, at 10; Craig/Park/Paulsson, International Chamber of Commerce Arbitration, at 79; Craig/Park/Paulsson, International Chamber of Commerce Arbitration, at 79 ; see also Award No. 12/1974 of the Arbitration Court, Chamber of Foreign Trade, (East-) Berlin, YCA 1976, at 127: "The demand for arbitration, on the one hand, and the participation in the arbitral procedure by the respondent, on the other hand, constitute a valid submission to arbitration by this Court"; cf. generally for the preclusion principles infra Chapter III at IV.C.1.a.

See Holtzmann/Neuhaus, supra note 718, at 484.

Cf. for this "safety net function" of the Terms of Reference infra Chapter IV at II.D.1.

UN Doc. A/40/17, para. 87; UN Doc. A/CN.9/SR.311, para. 11; but see Schlösser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, No. 374.

Art. 66 NAI-ArbR.

This follows from ordinary contract law, cf. Van den Berg, supra note 233, at 64, fn. 16; see also Sanders, TvaA 1991, at 31; Van Hof, Commentary on the UNCITRAL Arbitration Rules, at 49.


Loumiet, ILM 1987, at 949, 964, fn. 22; cf. also Art. 684.35 Florida International Arbitration Act of 1986, id., at 976: 'No person may sue in the courts of this State or assert a cause of action under the law of this State against any arbitrator when such suit or action arises from the Performance of such arbitrator's duty'.

Cf. Rüede/Hadenfeldt, supra note 232, at 157; see also J.-F. Lalive, supra note 248, at 123 et seq.; BGE 79 ii 424, 438.

This follows from the analogous application of § 839 Sec. 2 German Civil Code (immunity from liability of ordinary court judges); Strieder, supra note 228, at 156; Real, supra note 232, at 172; Schwab/Walter, supra note 232, at 94; Schütze/Tscherning/Wais, supra note 235 et seq. ; see also Triebel/Hyden, supra note 235, at 45 et seq.

These contacts may also constitute a ground for challenge of the arbitrator, see infra II.A.

Van den Berg, supra note 233, id. (for Dutch law); J.-F. Lalive, supra note 248, at 124 (for Swiss law).

et seq.; Sanders, *Het nieuwe arbitragericht*, at 64 et seq.; cf. also Robine, AI 1989, at 331 for French law.

The duty to conduct the proceedings in due course is inherent in every *receptum arbitri*. A. Bucher, *Die neue Schiedsgerichtsbarkeit in der Schweiz*, No. 156; Vogel, *supra* note 232, *id.* In administered arbitrations, this duty is frequently reiterated in the applicable arbitration rules, *e.g.* Art. 23 Sec. 3 NAI-ArbR.

The claim for damages arising out of the arbitrator's premature termination of the contract follows from Art. 404 Sec. 2 and 398 Sec. 2 Swiss Law on Obligations, cf. Vogt, *supra* note 228, at 144; under German law §§ 675, 627 Sec. 2 Civil Code apply.

Habscheid, *Festschrift Fasching*, at 201, 'gross violation of duties'; cf. also Introductory Note, Rules of Ethics for International Arbitrators, YCA1987, at 199, stating that arbitrators are immune from liability 'except in extreme cases of willful or reckless disregard of their legal obligations'; cf. the similar terminology in Art. 36 AAA-ArbR ('conscious and deliberate wrongdoing'); this may be the case if the arbitrator violates his duty of confidentiality which constitutes an inherent contractual Obligation of any *receptum arbitri* even without express stipulation by the parties; in institutional arbitrations, this duty is reinforced in the applicable arbitration rules, *see e.g.* Art. 51 Sec. 1 ZuArbR.

See MüKo-Sonnenberger, *Einl. EGBGB*, No. 164; *cf. also* Juenger, *Festschrift Rittner*, at 233, 249 for the arbitrators' consideration of mandatory norms.


See for Swiss law Nuber, *Die objektive Schiedsfähigkeit im Zusammenhang mit der Gültigkeit der Schiedsvereinbarung (anwendbares Recht) und mit der Vollstreckung (Ordre public)*, at 150.

Art. 26 ICC ArbR states in pertinent part: '... the arbitrator ... shall make every effort to make sure that the award is enforceable at law'.

See Craig/Park/Paulssen, *International Chamber of Commerce Arbitration*, at 303; 'While Article 26 of the ICC Rules obliges the tribunal to use every effort to make sure that the award is enforceable at law, there may be occasions when this interest must give way to the need to render an award which conforms to the contractual intention of the parties, particularly if the award may be enforced in other jurisdictions'.

Böckstiegel, RIW 1982, at 706, 709 ('... the arbitrator is not formally bound to consider mandatory norms in connection with a possible subsequent enforcement of the award, but an efficient international arbitrator should regard it as a *nobile officium* to take such norms into account in conducting the arbitration in order to give the parties a wholly enforceable award'); *cf. also* Böckstiegel, RIW 1979, at 161, 166 ('no formal legal duty but a *nobile officium*'); Böckstiegel, in: Sanders, ICCA Congress ser. no. 3, at 185 ('... the arbitrator has at least a moral Obligation to give the parties an award which can be expected to stand, both in case of setting-aside procedures and in case of enforcement procedures, before national courts').


See Art. 834 2nd sentence of the Italian Draft, Senato Della Repubblica 1989, N. 1689, at 18 et seq. 'Se le parti non provenono, si applica la legge con la quale il rapporto è più strettamente collegato'.

See Art. 117 Sec. 1 SIPL ('If no law has been chosen, a contract is governed by the law of the country most closely connected with it').


*Cf. already* Art. VII European Convention on International Commercial Arbitration of April 21, 1961 ('Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable').

Art. 28 Sec. 2 ML.

§ 21.2 DIS-ArbR; Art. 21.2 ACB-ArbR.

*ICC Award No. 5460, YCA 1988, at 106; *cf. also* ICC Award No. 6281, YCA 1990, at 96, 97* where the tribunal applied cumulatively the conflict-of-laws rules of both parties' home country and that of the seat of the arbitration (which all lead to the same result so that the tribunal was not forced to decide which conflict-of-laws rule should ultimately determine the applicable law); *Lew, supra* note 80, at 245 et seq.; *Sausser-Hall, Rec.Cours*, 1952 I, at 469; *Klein, supra* note 40, at 194; Von Hoffmann, *Internationale Handelsschiedsgerichtsbarkeit*, at 111; *Mann, Festschrift Flume*, at 613; *Calavros, at 128.*


A. Bucher, *supra* note 105, at 35.

*See generally* Goodman-Everard, AI 1991, at 161 and *supra* Chapter I at III.B.2.

433, 439: Dasser, Internationale Schiedsgerichte und Lex Mercatoria, at 178 with reference to ICC Award No. 2178 and No. 3894; Toope, Mixed Arbitration, at 55; Von Mehren, in: Études offertes à Berthold Goldman, at 217, 227; cf. also ICC Award No. 1717, Clunet 1974, at 890; No. 2680, Clunet 1978, at 997; No. 3316, YCA 1982, at 106; No. 3880, Clunet 1983, at 897; No. 5713, YCA 1990, at 70, 71 ('general trend in conflicts of law'); No. 6281, Clunet 1991, at 1054 with Note Hascher, id., at 1056 emphasizing that the principles contained in international Conventions are frequently regarded by international arbitrators as universally applicable rules; but see the critical statement of Calavros, note 80, at 295; David, A. Bucher, ICC; Derains, in: Sanders (ed.), ICCA Congress ser. no. 2, at 169; Lalive, RdA 1986, at 351; Gaillard, in: Sanders (ed.), ICCA Congress ser. no. 4, S. 283, 288; in international arbitral practice, arbitrators often

See also ICC Interim Award No. 4710, note 98, No. 108, fn. 433.

See also ICC Award No. 5103, Clunet 1988, at 1207 (cumulative application of French [as the law in force at the seat of the claimant] and Tunisian law (as the law in force at the seat of the respondent]).


Lando, Festschrift Zweigert, at 159; cf. also UN Doc. A/40/17, para. 236; see also for a 'functional conflict-of-laws methodology' for international arbitrators Grigera Naón, Choice-of-Law Problems in International Commercial Arbitration, at 83 et seq.

See infra IV.A.

See for a critical comment on the lacking judicial control of the arbitrators' application of the law Aden, RIW 1984, at 934, 935: 'Those who, like arbitrators, can decide without the supervision of higher courts, decide in a more liberal manner and in a sense also more arbitrarily than the state court judge whose decision-making is subject to the supervision of the higher instance; at least, their decisions can be more influenced by their individual notions and ideas' (original in German).

See the statement of the German delegate during the deliberations of the ML in UN Doc. A/CN.9/263, para. 3: '... businessmen often want a decision not according to the letter of the law but a decision based on practical economic factors'.

Cf., e.g. ICC Award No. 5103, Clunet 1988, at 1207; Derains, in: Sanders (ed.), ICCA Congress ser. no. 2, at 169, 189; Derains, id., in: Sanders (ed.), ICCA Congress series no. 4, at 239 et seq.; Franz, Het Ontwerp Boek IV van het Wetboek van Burgerlijke Rechtsvordering, at 35; Von Mehren, in: Études offertes à Berthold Goldman, at 227; Wenger, Bas.Jur.Mitt. 1989, at 337, 353; Lando, supra note 131, at 169; Lalive, RdA 1986, at 356 et seq.; cf. also the legislative materials for the new Italian draft arbitration law, in Senato Della Repubblica, 1989, N. 1686, at 8; the international arbitrator's obligation to respect the legitimate expectations of the parties is reflected in their duty to take into account the applicable trade usages, David, Arbitration in International Trade, at 347; UN Doc. A/CN.9/263, para. 12 and infra IV.B.

See ICC Award No. 4145, Clunet 1985, at 985; cf. also for the principle favor negotii as part of the lex mercatoria infra III.B.

Gaillard, in: Sanders (ed.), ICCA Congress ser. no. 4, S. 283, 288; in international arbitral practice, arbitrators often prefer a comparative reference to various legal systems in order to 'allow a solution which does justice to the individual case and to the equality of the parties' and in order to provide their decisions with more persuasive power, Böckstiegel, RIW 1984, at 677; this case-by-case approach puts the award close to a decision ex aequo et bono which always requires an express authorisation by the parties; but see for the existing differences between decision in law and ex aequo et bono infra IV.A.1.


Von Hoffmann, id., at 159 for the similar rule of French arbitration law; Drobnig, Festschrift Kegel, at 95, 116 ('deplorable arbitrariness of arbitrators in the determination of the applicable conflict-of-laws rules').

See ICC Interim Award No. 4710, ASA Bull. 1985, at 65, 70.

A. Bucher, Die neue internationale Schiedsgerichtsbarkeit in der Schweiz, No. 242; Lalive, RdA 1986, at 351; cf. also Markert, Rohstoffkonzessionen in der internationalen Schiedsgerichtsbarkeit, at 135.

Cf. infra IV.A.

See Basedow, in: Glossner (ed.), JPS 1987, at 17; cf. also Von Bar, supra note 98, No. 106: 'Whether a decision as
amicable compositeur is possible is a question of international private law . . ., only if this question can be answered in the affirmative may the arbitral tribunal decide unconcerned with any domestic conflict of laws' (original in German); Klein, Schw.Jb.Int.R. 1978, at 106; See for Dutch law Schultz, Mededelingen, at 20; Schultz, RdA 1988, at 222; Duintjert Tebbens, Neth.Int'l.L.Rev. 1987, at 155, fn. 61.


149 Van den Berg, Tva 1984, at 200.

150 UN Doc. A/40/17, para. 237.

151 note 83, No. 289 for Dutch conflict-of-laws; note 83, No. 2 1990, at 22

152, at 918

153 Art. 13 Sec. 3 Benelux Convention on International Private Law, supra note 83; in many cases, this view will lead the arbitrators to take the comparative


157 Art. 28 Sec. 1 1st sentence German Code on International Private Law (EGBGB), ILM 1988, at 18; Art. 4 Sec. 1 1st sentence Rome Convention on the Law Applicable to Contractual Obligations, supra note 83; cf. for the Convention's function as a model for international arbitrators ICC Award No. 1717, Clunet 1974, at 890; No. 4996 Clunet 1986, at 1132; No. 2730, Clunet 1984, at 914 with Note Derains, id., at 918 et seq.

158 § 117 Sec. 1 Austrian Code on International Private Law.

159 Dicey/Morris, at 769 et seq.; Westlake, A Treatise on Private International Law, 2nd ed. 1880, § 212; cf. also Art. 5 Sec. 1 2nd sentence Foreign Economic Contract Law of the People's Republic of China of March 21, 1985, reprinted in Horn/Schütze, Wirtschaftsrecht der Volksrepublik China, at 438, 439; See also for Swedish conflict law Wetter, AI 1986, at 300.

160 § 188 American Restatement of the Law (Second), 'Conflict of Laws'.

161 Art. 13 Sec. 3 Benelux Convention on International Private Law, supra note 83.

162 See Sanders, Het nieuwe arbitragerecht, at 186; Eismann, Festschrift Bülow, at 59, 63; Lalive, RdA 1986, at 356; Robert in: Schultz/Van den Berg (ed.), The Art of Arbitration, at 273, 277; cf. also ICC Award No. 3742, Clunet 1984, at 911 with Note Derains, id., at 912, 913 ('nul doute partie des principes généraux du droit international privé'); No. 4132, YCA 1985, at 49, 52 (absent any other connecting factors the tribunal applied the 'Center of Gravity Test'); No. 2730, Clunet 1984, at 914; No. 4237, YCA 1985, at 52, 55 ('The decided international awards published so far show a preference for the conflict rule according to which the contract is governed by the law of the country with which it has the closest connection'); No. 5717, ICC Bull. No. 2 1990, at 22; cf. also the Award of the Iran-US Claims Tribunal Harnischfeger Corp. v Ministry of Roads and Transportation, 7 CTR 1984, 90, 99.


165 Basedow, in: Glossner (ed.), JöP 1987, at 18; see the catalogue contained in Art. 4 et seq. Rome Convention on the Law Applicable to Contractual Obligations, supra note 83, especially Art. 4 Sec. 2 (law of the country where the party who is to effect the characteristic performance has his habitual residence at the time of the conclusion of the contract); see for details Jayme, id., at 42 et seq.; cf. for the application of this catalogue by international arbitrators, Van den Berg, Tva 1984, at 200; ICC Interim Award No. 4710, ASA Bull. 1987, at 71; cf. also Art. 3 Sec. 2 Hague Convention on the Law Applicable to the International Sales of Goods of June 15, 1955, which was ratified by Switzerland but not by Germany and the Netherlands, see for a practical example ICC Award No. 6281, YCA 1990, at 96, 97; even without formal
ratification, this and other conventions not yet in force may serve as an indication for a general trend in international conflict-of-laws to connect the contract to the law of the seller, see the ICC Awards No. 5713, YCA 1990, at 70, 71; ICC Award No. 2438, Clunet 1976, at 969; No. 6281, Clunet 1991, at 1054 with Note Hascher, id., at 1056, 1057 et seq.; No. 6360, ICC Bull. No. 2 1990, at 24; cf. generally for the 'anticipated effect' of Conventions of International Private Law which have not yet entered into force but reflect the growing harmonization of domestic conflicts of laws rules Basedow, id., at 18; Walter/Bosch/Brönnimann, Internationale Schiedsgerichtsbarkeit in der Schweiz, at 193.

168Art. 28 et seq. German Code of International Private Law (EGBGB), ILM 1988, at 18 et seq.; Art. 117 et seq. Swiss SIPL; in Dutch conflict of laws the closest connection test with its various connecting factors is based on Art. 4 Sec. 1 Rome Convention, supra note 83, and Art. 13 Sec. 3 Benelux Convention, supra note 83, which, even though not ratified expresses a general trend of conflict of laws.

169ICC Award No. 4650, YCA 1987, at 111, 112.

170ICC Award No. 2730, Clunet 1984, at 914.


172Cf. Schnyder, Das neue IPR-Gesetz, at 127.


174Lalive, id., at 37.

175See Schütze/Tscherning/Wais, Handbuch des Schiedsverfahrens, No. 584 in fine ('As a matter of principle, the parties' designation of the applicable conflict of laws rules means nothing but an indirect choice of law'); Lew, Applicable Law in International Commercial Arbitration, at 230; Wetter, AI 1986, at 294, 298.


177See Lew, supra note 172, at 232.

178See Lalive/Gaillard, Clunet 1989, at 946; Lalive/Poudret/Reymond, Le Droit de l'Arbitrage Interne et International en Suisse, Art. 187, No. 7; the parties may therefore also agree to have the conflict-of-laws rule of Art. 33 Sec. 1 UNCITRAL-ArB applied by the arbitrators; but see Lalive, supra note 170, at 34 et seq.

179See for arbitrators acting as amiables compositeurs infra IV.A.


181Art. 17 (no application of provisions of a foreign law if the result is incompatible with Swiss public policy); Art. 18 (mandatory application of Swiss lois d'application immédiates); Art. 19 (taking into account mandatory provisions of a foreign law); see for Art. 19 SIPL Karrer, supra note 173, at 22 et seq.

182See infra Chapter VII at I.C.2.a.

183Böckstiegel, Festschrift Beitze, at 448.

184See the ICC Award No. 2930, YCA 1984, at 105, where the arbitrators state that '[t]he arbitral tribunal is even more convinced with this choice [of the law of Yugoslavia with which the contract has the closest connection] in that the Claimants, being under Yugoslav jurisdiction, are subject to the Yugoslav law controlling import and export control . . .'; see generally Großfeld/Junker, Das CoCom im Internationalen Wirtschaftsrecht, at 140 et seq.

185Cf. the criticism of Ferid, Internationales Privatrecht, No. 1-138 et seq., who claims that cases with an international coloration should be concentrated within certain chambers or even certain specialized courts; cf. also for the phenomenon of 'Heimwärtsstreiben' ('Homewardboundness') of domestic courts in the application of conflict-of-laws rules, Nussbaum, Grundzüge des internationalen Privatrechts, at 36.

186See Art. 4 Sec. 5 2nd sentence Rome Convention on the Law Applicable to Contractual Obligations, supra note 83; Art. 28 Sec. 5 German Code on International Private Law (EGBGB), ILM 1988, at 19 (stating that the presumptions established in the law for the conflicts-of-law connection of a contract to a certain legal system 'shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another state'); Art. 15 Swiss SIPL; Schnyder, supra note 169, at 31.

187See for the maxim of fairness in the application (not the construction) of a law as a guiding principle of conflict of laws, Kegel, Internationales Privatrecht, § 2 l.

188Cf. for the efforts of the American 'better law approach' to reinterpret conflict-of-laws, Juenger, Zum Wandel des Internationalen Privatrechts, at 31 et seq.; attempts to apply this approach in international economic arbitration can be found in Lando, in: Sarcevic (ed.), Essays on International Commercial Arbitration, at 148; the theory may not be suitable in all areas of conflicts of laws, see the critical comments by Kegel, in: Juenger, id., at 35 et seq.; for the field of international economic arbitration, however, the approach corresponds to the legitimate interests of the parties who expect a resolution of their dispute which takes account of the constantly changing and rapidly evolving conditions of international trade and commerce, Blessing, supra note 154, at 68 (an arbitral tribunal has to be capable of 'basing its decision on the most up-to-date principles of international trade'); cf. also Von Hoffmann, in: Böckstiegel (ed.), Die internationale Schiedsgerichtsbarkeit in der Schweiz (II), at 159; see for the consideration of the legitimate interests of the parties (attentes légitimes) by international arbitrators supra II.2.a; ICC Award No. 5103, Clunet 1988, at 1206; Von Mehren, in: Études offertes à Berthold Goldman, at 227.

189This negative function of the conflict-of-laws rules contained in modern arbitration laws is rightly emphasized by A. Bucher, Die neue internationale Schiedsgerichtsbarkeit in der Schweiz, No. 239 in fine; A. Bucher, Festschrift Keller, at
In 1989 in 34.1% of ICC arbitrations, the sum in dispute was between US$ 1 million and 10 million, ICC (ed.), Bulletin de la Cour Internationale d'Arbitrage, June 1990, at 8.

Civil laws from the Continent usually contain statutory rates of interest: Switzerland: 5% (Art. 73 Sec. 1 Obligation Law); if the discount rate at the place where the claim is to be paid exceeds 5% merchants are allowed to compute a rate of interest on arrears which matches this discount rate (Art. 104 Sec. 3 Obligation Law; see for the practical application of this provision the ad hoc award of 1991, ASA Bull. 1992, at 202, 254 et seq. stating that "the place where the claim is to be paid" should not be taken literally but means the discount rate of the currency of the debt); Germany: 4% (§ 246 Civil Code), if the contract is a mercantile transaction for both parties: 5% (§ 352 Sec. 1 Commercial Code); Italy: 10% ( Art. 1284 Codice Civile); Netherlands: regular adjustment of interest rate by decree, since July 1, 1990: 11% (royal decree of June 27, 1990); Sweden: interest rate according to the discount rate plus 8 percent commencing thirty days after request to pay interest by the creditor (Law on Interest of 1975 as amended 1984); France: average interest rate of public treasury bonds of the last twelve months with fixed interest rate for thirteen weeks; in case of adjudication 5% increase until two months after leave, for enforcement of the judgment (Art. 1907 Code Civil, Art. Code Commerce in connection with Art. 1 Sec. 2, Sec. 3 Loi No. 89-421 of June 23, 1989 Code Civil); under English law the judge and the arbitrator have discretion in determining the starting point of the obligation to pay interest and the interest rate, see Hunter/Triebel, J.Int'l.Arb, No. 1, 1989, at 7, 11 et seq.

See ICC Award Nr. 2930, YCA 1984, at 105, 108 (5% according to Art. 104, Swiss Code on Obligations); ICC Award No. 5294, YCA 1989, at 137, 145 et seq. ("the interest rate is the Swiss statutory rate for moratory interest of 5%. Art. 104 of the Swiss Code of Obligations; the higher rates demanded by the claimant have not been sufficiently justified . . ."); ICC Award No. 5485, YCA 1989, at 156, 173 ("Interest should be computed . . . at the Spanish statutory rates").

LIAMCO and The Government Of The Libyan Arab Republic, ILM 1981, at 1, 83; cf. also the recent decision of Pakistan's Federal Sharia Court holding that all forms of interest being paid or charged by banks and financial institutions are contrary to Islamic law and requiring the government to abolish all interest-based banking and financial systems by June 30, 1992; the case is currently on appeal before the Pakistan Supreme Court, see "Bank interest banned", IFLR, March 1992, at 42.

Cf. ad hoc award of July 23, 1981, YCA 1983, at 89, 94 ("The rate of interest must reflect . . . only commercial loss"); ICC Award No. 3226, Clunet 1980, at 959 ; No. 6219, Clunet 1990, at 1047 ("Comme le relèvent de nombreuses sentences arbitrales, les intérêts moratoires sont alloués pour réparer le dommage résultant du fait que le créancier a été privé, pendant un certain délai, de l'usage et de la disposition de sommes qu'il aurait du recevoir"); ICSID Award Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ILM 1991, at 580, 626 ("... in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself ...") Concurring and Dissenting Opinion of Judge Brower to McCollough and Co. v. The Ministry of Post, Telegraph and Telephone, 11 CTR, at 41, 42 ; Wetter, supra note 307, at 21; Mann, in: Mann, Further Studies in International Law, at 377, 382 et seq. ; cf. also Dicey/Morris, at 907; Honnold, Uniform Law for International Sales, at 424 ("commercial fact that failure to receive funds is always a loss").
Art. 106 Sec. 1 Swiss Obligation Law; §§ 288 Sec. 21, 289 German Civil Code; Art. 2028 Sec. 3, Art. 1153 French Code Civil (statutory interest rate as default interest, unless special commercial usages exist); Art. 1224 Sec. Italy's Codice Civile; Rees and Kirby Ltd. v. Council of the City of Swansea, 30 Building Law Rep. 8, 23 [1985]; Dicey/Morris, at 907; Wetter, supra note 307, at 21 et seq., fn. 15 for Swiss law; cf. generally Treitel in: Von Mehren (chief ed.), International Encyclopedia of Comparative Law, Vol. VII ("Contracts in General"), at 88 et seq.

ILM 1990, at 580, 626 (=ICSIID Rev FIIJ 1991, at 526, 5719): "The survey of the literature reveals that, in spite of the persisting controversies with regard to cases involving moratory interests, the case law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself . . . ."


Seckelmann, Zinsrecht, at 88.

Lange, Schadensersatz und Privatstrafe, at 63; Horn, Festschrift Lange, at 769, 776 et seq, with reference to the glossa ordinaria and "Glossa" to the Corpus juris Canonici; cf. also for Islamic law Ali, IFLR, June 1992, at 30, 31 et seq.:

"In case of default of repayment, the financier suffers an additional loss because of the delay in the fulfillment of his client's obligation . . . the defaulting client shall [therefore] pay the damages suffered by the financial institutions. These damages are determined by reference to the average return generated by the institution during the period of the default."

See generally Craig/Park/Paulsson, International Chamber of Commerce Arbitration, at 641.

Cf. for prima facie proof supra Chapter IV at V.E.2.

The principle of basing the rates of default interest on borrowing rates from banks was also acknowledged by Chamber One of the Iran-US Claims Tribunal; to ensure uniformity of treatment of a large number of parties in many cases, the chamber preferred to seek guidance from a rate of interest based on return of investment in "six-months-certificates of deposit (cds)", Sylvania Technical Systems v. The Government of The Islamic Republic Of Iran, 8 CTR 298, 321. This method may not be generalized; see the comment of Judge Holtzmann, id., at 321, fn. 13, pointing out that it is reasonable to assume that most businesses habitually borrow while fewer regularly invest in cds; accord Mann, supra note 317, at 384; in everyday arbitral practice tribunals sometimes leave the question open whether their computation of the interest rate is based on credit costs or lost return on investment, see ad hoc award of January 30, 1984, YCA 1985, at 39, 41 (10%); see also the ad hoc award of July 23, 1981, YCA 1983, at 89, 94.

Bianca/Bonell, Commentary on the International Sales Law, Art. 78, No. 2.1; Honnold, supra note 317, Art. 78, No. 421 for the provision on interest rates of the UN Sales Convention; cf. also Art. 58 (dealing with interest rates) of the Draft of the UN Sales Convention in UN Doc. A/CN.9/SER.A/1976, at 136: " . . . not lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business". cf. also BGH NJW 1984, at 371; Tate & Lyle Food and Distribution Ltd. v. Greater London Council, 1 WLR 149 [1982]; Dicey/Morris, Rule 166 (3), at 906 et seq.

UNIDROIT Study L-Doc. 40 Rev.5, at 35, Art. 6.4.11 (1).

See Asam, RIW 1989, at 942, 946.

See generally for the difference between "concrete" and "abstract" methods of calculating damages Treitel, in: Von Mehren (chief ed.), International Encyclopedia of Comparative Law, Vol. VII ("Contracts in General"), at 44 et seq.; see for the application of this method to interest as damages, id., at 88 et seq.


Brother, supra note 317, at 43 rightly points out that awarding interest cannot serve the creditor to recover his unusually high credit costs from the debtor; cf. also the ICSID Award AGIP Co. SpA v. Government of the Popular Republic of the Congo, YCA 1983, at 133, 143, where the claimant based his interest claim on the lowest interest rate paid in the relevant market.

See for the doctrine of foreseeability as a restriction of any damage claim for default interest Art. 1225 Italy's Codice Civile; Wetter, supra note 307, at 23; Boyd, supra note 321, at 158; cf. also the Holtzmann Concurring Opinion in Starrett Housing Corp. et al. v. The Government Of The Islamic Republic Of Iran, 16 CTR 112, 237, 249 referring to the debtor's knowledge of the creditor's taking of credit and the obligation to pay interest connected with it; cf. generally for the foreseeability doctrine in American law, UCC § 2-714 (1), 2-715 (2); in English law ("test of reasonable contemplation or foresight") The Heron II, Koutos v. C. Czarnikow, Ltd., (1969) 1 A.C. 350 ; see also § 1150 French Code Civil.

The German formula of "adequate causation" (Adäquanz) is more restrictive than the "foreseeability" doctrine, as it refers to the viewpoint of an "optimal onlooker", and more liberal insofar as it does not refer to the moment of the conclusion of the contract but to the moment of the damaging event. However, the doctrine of the "protective function" (Schutzzweck) leads in any event to a restriction of the claim for damages and excludes all costs for a bad credit standing of the creditor, as "no dangers materialize in these costs which the concrete norm or contractual obligation is intended to cover", Cf. generally BGHZ 57, 412; Münchener Kommentar-Grunsky, §§ 249, No. 44.

Cf. v. Caemmerer/Schlechtriem-Eberstein, Kommentar zum Einheitlichen UN Kaufrecht, No. 38 in fine; Asam, supra note 329, at 946; OLG Frankfurt, NJW 1990, at 636; Swiss Federal Tribunal in BGE 109 II 436; see also Bühler/Waltz v.
Eschen, IPrax 1990, at 62, 64; but see also OLG Hamburg, DIS Mitt. 1990, at 51, 55.

332 See for the prohibition of “unjust enrichment” as a principle of the lex mercatoria supra Chapter V at III.B.; Sandrock, in: Glossner (ed.), JPS 1989, at 88 seeks to help in these cases by applying the law governing the currency; see also ad hoc Award of July 23, 1981, YCA 1983, at 89, 94 (“The rate of interest must reflect neither a bonus nor a punishment but only commercial loss”).

333 McCollough and Co. v. The Ministry of Post, Telegraph and Telephone, supra note 308, at 29.

334 Id.; ICC Award No. 6219, Clunet 1990, at 1049; cf. for damages arising out of foreign exchange loss Swiss Federal Tribunal BGE 109 II 436 stating that when a creditor asserts damages in excess of statutory interest for delay, which are comprised of foreign exchange loss as against the currency with official exchange rate at his place of residence, then according to experience and the customary course of things, it is assumed that such damages have occurred. The rule has been applied (Swiss law being the lex causae) in the ICC Award No. 6230, YCA 1992, at 164, 175.

335 London Interbank Offered Rate (interest rate for three- or six-month deposits by international banks in London); the interest rate for a borrower with average credit standing is approx. 1% above LIBOR); see for the practice of the English Commercial Court Cia Barca de Panama S.A. v. George Wimpey and Co. Ltd., 1 Lloyd’s L.Rep. [1980] 598, 615 et seq.; see also the Partial Award Wintershall A.G. et al. v. The Government Of Qatar, ILM 1989, at 798, 809 (“generally prevailing LIBOR rate on the date of the award”); cf. also the claimant’s request in the Sun Oil Arbitration ICC Award No. 4462, ILM 1990, at 567, 578: “Order Sun Oil to pay interest on all amounts [claimed] at a compounded annual rate of two percent above the LIBOR rate prevailing since the date of the filing of the Request for Arbitration”; cf. also Art. 23 MIGA General Conditions of Guarantee for Equity Investments of January 25, 1989, ICSID Rev. FIJI 1989, at 112, 124: “... interest [on any amount of compensation for which it is in default of payment] shall be at the average London Interbank Offer Rate (LIBOR) on six-month deposits of the Guarantee Currency during the time period for which interest is payable under this Article”; cf. also UNCITRAL Legal Guide on Drawing up International Contracts, at 213.

336 Frankfurt Interbank Offered Rate; Frankfurt interbank offered interest rate for three- or twelve month deposits.

337 The Prime Rate is the lowest rate of interest from time to time charged by a specific lender to its best customers for short term unsecured loans, Black’s Law Dictionary, at 1191; cf. the award of the Netherlands Hide and Leather Exchange of October 30, 1980 (Dutch seller/Italian buyer), YCA 1982, at 137, 138 (1% above US Prime Rate).

338 See ICC Award No. 4237, YCA 1985, at 52, 60; where the tribunal, dealing with a contract that was subject to English law, adopted the rate of interest “which is usually applied by the English courts in the type of cases under consideration” which was “2% in excess of the Eurodollar base rate prevailing on the first day of every month of the period during which interest is to be paid”. Alternatively, arbitrators sitting in England also tend to take a rough average rate and apply it over the whole period, Hunter/Triebel, supra note 314, at 7, 12.

339 Cf. Art. 83 Hague Convention 1976, providing for an interest claim of the vendor in case of non-payment of the buyer at the rate of 1% above the official discount rate of the country where vendor has his residence or place of business; Asam, supra note 329, at 946, referring to the practical experience that the lending rates, even the “prime rates”, are never below the discount rate of the country of the taking of credit; § 11 Sec. 1 of the new German Consumer Credit Act (BGBl. 1990, at I 2840) allows the creditor to charge interest on arrears of 5% below the current discount rate of the German Federal Bank, which is the average interest rate charged for overdraft facilities of up to one million Deutsche Mark.

340 See Art. 6.4.11 Sec. (3) UNIDROIT Draft Principles For International Commercial Contracts, supra note 328, at 36.

341 The Iran-US Claims Tribunal has consistently refused to award compound interest, cf. Sylvia Award, supra note 326, id.; R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran, 7 CTR 181, 191; Anaconda-Iran v. The Government of The Islamic Republic of Iran, 13 CTR 199, 234f (contractual compound interest clause); Starrett Housing Corp. et al. v. The Government of the Islamic Republic of Iran, 16 CTR 112, 234 et seq.; see also ICC Award No. 3572 Deutsche Schachtbau- und Tiefbohrgesellschaft et al. v. The Government of the State of R’as Al Khaimah et al., YCA 1989, at 111, 120 et seq., where the tribunal refused to imply from the missing term “simple” (interest) in a contractual stipulation dealing with interest that the parties intended to compound interest; but see The Government of the State of Kuwait v. The American Independent Oil Co. (AMINOL), ILM 1982, at 976, 1042; Mann, supra note 317, at 380 et seq.; Wetter, supra note 307, at 23.

342 See the English decision of the House of Lords National Bank of Greece SA v. Pinios Shipping Co. No. 1 and another (“The Maira”), [1990] 1 All ER 78, 82 et seq., stating that the bank’s right for compound interest, lasting over the whole period during which contractual interest is payable, arises by virtue of a term to be implied into the contract between the parties by reason of a custom or practice of bankers, without the need of acquiescence of the customer or the accounts being “mercantile accounts current for mutual transactions”; Chitty on Contracts, Vol. II, No. 3174; see also Pagets Law of Banking, at 117; Concurring Opinion Judge Holtzmann, Starrett Housing Corp. et al. v. The Government of the Islamic Republic of Iran et al., 16 CTR 110, 237, 252.

343 Mann, supra note 317, at 383 et seq. (“general principle of law”); Wetter, supra note 307, at 23; Boyd, supra note 321, at 159; Schmitz, Allgemeine Rechtsgrundsätze in der Rechtsprechung des Iran-United States Claims Tribunal, at 69; Clagett, Private Investors Abroad 1989, at 12-1, 12-18 for compensation for expropriation; Holtzmann, id., emphasizing that the debtor was “completely aware” of his creditor being forced to pay compound interest charged to him by his bank.
349 Cf. Mann, supra note 317, at 384; Concurring Opinion of Judge Holtzmann, supra note 347, at 252 emphasizing that the claimant "offered uncontested evidence that the banks charged it interest on a compound basis".

350 See, e.g. § 248 of the German Civil Code.


352 See, e.g. § 289 Civil Code: "No interest is due on interest on arrears. The creditor's right for damage caused by default remains untouched".

353 § 11 Sec. 2 Verbraucherkreditgesetz, BGBl. I, at 2840.

354 See § 286, § 288 Sec. 2, § 289 German Civil Code.


356 Von Hoffmann, IPrax 1989, at 261, 265; Münchener Kommentar-Martiny, Art. 32 EGBGB, No. 28; Hunter/Triebel, supra note 314, at 19 et seq.; OLG Hamburg, DIS Mitt. 1990, at 51, 55 (= YCA 1992, at 491); Jarvin, Int'l Bus. Lawy. 1988, at 423 who favors contractual compound interest clauses under English law in order to conform with the interests and customs of international trade; cf. also Art. 1154 French Code Civil, which states that compound interest agreements are principally permissible, provided that the agreement refers to interest which is due for at least one year.

Referring Principles:

- VII.6 - Duty to pay interest
- VII.7 - Right to charge compound interest
- XII.2 - Proof of written contract
- XIII.2.4 - Principle of separability of the arbitration clause
- XIII.2.7 - Immunity of arbitrator
- XIV.2 - Law applicable to international contracts