# The Powers and Duties of an Arbitrator

# The Powers and Duties of an Arbitrator Liber Amicorum Pierre A. Karrer

Edited by Patricia Shaughnessy Sherlin Tung



Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wolterskluwerlr.com

Sold and distributed in North, Central and South America by: Wolters Kluwer Legal & Regulatory U.S. 7201 McKinney Circle Frederick, MD 21704 United States of America

Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Quadrant
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-90-411-8413-9

e-Book: ISBN 978-90-411-8414-6 web-PDF: ISBN 978-90-411-8415-3

© 2017 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal & Regulatory U.S., 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Website: www.wolterskluwerlr.com

Printed in the United Kingdom.

## **Editors**

**Dr Patricia Shaughnessy**, Associate Professor, directs the Masters of International Commercial Arbitration Law Program (LLM) at Stockholm University and teaches and researches in related fields. She chairs the "Arbitration and Dispute Resolution Section" of the Stockholm Centre for Commercial Law at Stockholm University. Patricia is the Vice-Chair of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), having been on its Board since 2006. She sits as an arbitrator and acts as an expert in international cases and, as a consultant, she has led numerous projects related to commercial law and dispute resolution in a number of countries.

**Sherlin Tung** is currently the Litigation and Arbitration Counsel with Semperit AG Holdings, an international conglomerate specialized in industrial rubber products. Prior to Semperit, Sherlin was a Deputy Counsel with the Secretariat of the ICC International Court of Arbitration where she had the unique opportunity of working in both of its satellite offices (Hong Kong and New York). Sherlin supervised over 300 international arbitration matters with a focus in Asian, Australian, Middle Eastern and North American matters. She began her career in international arbitration in Zurich, Switzerland, where she worked under the direct supervision of Dr. Pierre A. Karrer. She has acted as tribunal secretary in over forty complex international arbitration matters (institutional and ad hoc).

# Contributors

**Gerald Aksen** has many years of experience as counsel and arbitrator in domestic and foreign arbitrations in eighteen different countries. He has acted as arbitrator and mediator with the American Arbitration Association, National Futures Association, International Chamber of Commerce, London Court of International Arbitration, Japan Commercial Arbitration Association, Arbitration Institute of the Stockholm Chamber of Commerce and under UNCITRAL, ARIAS, BERMUDA FORM and other ad hoc rules, as well as with the United States District Court for the Eastern District of New York Early Neutral Evaluation Program. Gerald Aksen has also been an adjunct professor of law at New York University School of Law for thirty years, teaching courses on domestic and international arbitration.

**Chiann Bao** is the Asia Pacific Counsel for Skadden, Arps, Slate, Meagher & Flom and is based in its Hong Kong office where she focuses on international commercial disputes arising from Asia. Prior to joining Skadden, Ms. Bao served as the secretary-general of the Hong Kong International Arbitration Centre (HKIAC), where she managed hundreds of arbitrations before tribunals in Asia, with a specific focus in China. Ms. Bao worked at an international law firm in New York before joining HKIAC in 2010 where she advised clients in ad hoc and administered arbitrations. She was an adjunct professor at Hong Kong University (2014–2016) and is a frequent lecturer and author on international arbitration.

Louise Barrington FCIArb, C.Arb., is an Independent Arbitrator with over twenty years' experience, based in Hong Kong, Paris and Toronto. She has sat on ICC, HKIAC and ad hoc arbitrations, as sole arbitrator, party-nominated arbitrator and tribunal president, in Europe, Asia and North America. Her experience includes CISG, construction, shareholder agreements, distribution and licensing contracts and insurance. She regularly trains and assesses arbitrators for the Chartered Institute of Arbitrators and is chief editor of "The Danubia Files: Lessons in Award Writing from the Vis Moot." Louise speaks fluent English and French and conversational Spanish.

Klaus Peter Berger is Professor of domestic and international business and banking law, comparative and private international law at the University of Cologne and Director of the Institute for Banking Law and the Center for Transnational Law (CENTRAL) at the Cologne law faculty. He has been Honorary Lecturer and Member of the Global Faculty at the Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, Scotland, and visiting professor at the University of Virginia School of Law and at Columbia Law School, New York City. He is also a Board Member of the German Institution of Arbitration (DIS)

**George A. Bermann** is Professor of Law at Columbia Law School (New York City) where he also directs the Center for International Commercial and Investment Arbitration (CICIA). He has served as international arbitrator since 1980. He presides over the Global Board of Advisors of the NY International Arbitration Center and is member of the Standing Committee of the ICC International Chamber of Commerce. He has authored many books and articles and spoken at many conferences on international arbitration, transnational litigation, comparative law, EU Law and related topics. Professor Bermann is also Chief Reporter of the American Law Institute's Restatement of the US Law of International Commercial Arbitration.

**David J. Branson** has been engaged in the practice of international arbitration for forty years. He was a partner with Charles Brower at White & Case when Pierre Karrer was selected by the ICC to serve as the Chair arbitrator in the case Mr. Branson chose to write about in honor of Pierre.

Nadia Darwazeh is a partner in the International Arbitration Group of Curtis, Mallet-Prevost, Colt & Mosle LLP, based in Paris. She is a Solicitor Advocate and Rechtsanwältin. Nadia has extensive arbitration experience, acting both as counsel and arbitrator. Before joining Curtis, Nadia headed up the EMEA team at the ICC International Court of Arbitration. Prior to the ICC, Nadia practiced for a decade at leading international law firms in Shanghai, Frankfurt and London. Nadia is the first Secretary General of the Jerusalem Arbitration Centre, an ICC joint-venture. Nadia is fluent in French, German and English. She also speaks Dutch and Mandarin Chinese.

**Dr. Mariel Dimsey** is an international commercial and investment arbitration specialist based in the Hong Kong office of Hogan Lovells. She has over ten years' experience acting as advisor, advocate and arbitrator in numerous international arbitrations covering a wide range of legal systems and industries. She is an Australian Lawyer and received an LLM degree from the University of Cologne and a doctorate in law (Dr. iur.), *summa cum laude*, from the University of Basel, both in investment arbitration. She speaks and publishes regularly on international arbitration and international commercial law topics.

**Professor Dr. Siegfried H. Elsing, LL.M. (Yale)** is partner in the Düsseldorf office of Orrick, Herrington & Sutcliffe LLP and co-chair of the firm's International Arbitration group. He is admitted as an attorney in both Germany and New York and has more than

thirty years of experience as litigation and international arbitration counsel with a particular emphasis on M&A, investment protection, infrastructure, IP and energy related disputes. He also regularly serves as arbitrator in ad hoc as well as institutional arbitral proceedings. Siegfried is Honorary Professor at the University of Dusseldorf and regularly teaches and publishes on arbitration and commercial law subjects.

**Emmanuel Gaillard** founded and heads Sherman & Sterling's eighty-lawyer International Arbitration practice. He has advised and represented companies, States and State-owned entities in hundreds of international arbitrations. He also acts as arbitrator and expert witness. He is universally regarded as a leading authority and a star practitioner in the fields of commercial and investment treaty arbitration. Emmanuel Gaillard is also a Professor of Law at Sciences Po Law School and a Visiting Professor of Law at Yale Law School. He has written extensively on all aspects of arbitration law, co-authored a leading treatise in the field and authored the first published essay on the legal theory of international arbitration.

**Robert Gaitskell, Q.C.,** practises from Keating Chambers, specialising in technology, engineering and construction disputes, often of an international nature. He was called to the Bar in 1978, appointed Queen's Counsel in 1994 and sat as a Recorder (part-time judge) from 2000–2010. He is both a lawyer and a professional engineer. Robert predominately acts as an arbitrator, adjudicator, dispute board member and mediator. He has conducted over 100 arbitrations throughout the world and regularly lectures on the subject, including for the ICC, SIMC and CIArb. He writes extensively and lectures globally on legal/engineering subjects, including at CERN in Geneva and Xerox PARC in Silicon valley.

**Teresa Giovannini** is a founding partner of LALIVE specializing in international arbitration (including setting aside proceedings with the Swiss Supreme Court), as well as art law. She has acted – mainly as arbitrator – in more than 170 international arbitrations. Teresa Giovannini is the Swiss Member of the ICC Court of Arbitration and the ICC Commission on Arbitration and ADR since 1 July 2015 and she is part of several panels of arbitrators as well as of arbitration committees. Mrs Giovannini is also a frequent speaker on international arbitration and the author of various publications in the field.

**Professor Dr. Daniel Girsberger** is a founding member of the Faculty of Law of the University of Lucerne and a tenured professor for Swiss and International Private, Business and Procedural, as well as Comparative Law. Before accepting the Lucerne assignment, he taught at the University of Zurich Law School and as visiting professor at various universities worldwide. He is, moreover, the author of numerous publications focusing primarily on international business law and arbitration. Daniel Girsberger is also of counsel at Wenger & Vieli Ltd., a major Zurich business law firm. In the course of his profession, he has acted as chairman, arbitrator and counsel in various domestic and international arbitration cases.

Philipp Habegger is the principal of Habegger Arbitration in Zurich, Switzerland. He has acted in more than 170 commercial arbitrations under a variety of arbitration rules and applicable laws. He has been involved in disputes arising out of joint ventures, mergers and acquisitions, international sales, agency and distribution, licensing, franchising, construction and engineering projects, across a wide range of industries. Philipp used to be president of the Arbitration Court of the Swiss Chambers' Arbitration Institution, court member of the ICC International Court of Arbitration, and vice chair of the IBA Arbitration Committee. He teaches international arbitration at the University of Zurich.

**Professor Dr. Kaj Hobér** is Professor of International Investment and Trade Law at Uppsala University (Sweden). He is Chairman of the Board of the SCC Institute in Stockholm, as well as an associate member of Three Verulam Buildings, Gray's Inn, London.

**Günther J. Horvath** is partner and leads the International Arbitration Group in the Vienna office of Freshfields Bruckhaus Deringer LLP. His experience comprises around 150 high-profile cases as counsel and arbitrator under the Rules of ICC, VIAC, SCC, Swiss Rules and in ad-hoc arbitrations. His practise specialises in international commercial arbitration with a primary focus on energy, joint venture matters, corporate disputes and industrial engineering. Günther holds law degrees from the University of Graz and New York University. He speaks German, English and some Italian.

**Professor Dr. Hans van Houtte** is President of the Iran-United States Claims Tribunal and an independent arbitrator. He was a professor of law at the KU Leuven (Belgium) where he taught international public law, international private law, international business law and still teaches arbitration. He sits frequently in commercial and investment arbitrations. He has i.a. been President of the Eritrea-Ethiopia Claims Commission, Judge of the Claims Tribunal for Dormant Accounts and member of the United Nations Claims Commission and the Commission for Real Property Claims in Bosnia

**Benjamin Hughes** is an independent arbitrator with Fountain Court Chambers in London and The Arbitration Chambers in Singapore, and Associate Professor of Law at Seoul National University Law School. Prior to launching his practice as an independent arbitrator in 2013, Ben practiced as international arbitration counsel with major US and Korean law firms. Ben has been appointed as arbitrator in over sixty international arbitrations with a total value in despite exceeding USD 1 billion. Chambers & Partners has recognized Ben as one of the "Most in Demand Arbitrators" in the Asia-Pacific Region.

**Michael Hwang S.C.** currently practices as an international arbitrator and mediator based in Singapore. He also serves as the non-resident Chief Justice of the Dubai International Financial Centre Courts. He has two law degrees from Oxford University, to which he gained admission by winning an open scholarship examination. In 2014 he was conferred an Honorary LLD degree by the University of Sydney. His past and present appointments include: (a) Judicial Commissioner of the Supreme Court of

Singapore; (b) Senior Counsel of the Supreme Court of Singapore; (c) Singapore's non-resident Ambassador to Switzerland and Argentina; (d) President of the Law Society of Singapore; (e) Adjunct Professor, National University of Singapore; (f) Commissioner of the United Nations Compensation Commission; and Vice Chair of ICC International Court of Arbitration.

**Florence Jaeger**, is currently a Visiting Scholar and Ph.D. candidate at Columbia Law School in New York. Florence received her Bachelor's and Master's degrees in Law from the University of Basel.

**Professor Doug Jones** is a leading independent international commercial and investor/state arbitrator. He is an arbitration member at Arbitration Place, a door tenant at Atkin Chambers in London, and has chambers in Sydney, Australia. The arbitrations in which he has been involved include infrastructure, energy, commodities, intellectual property, commercial and joint venture, and investor-state disputes spanning over thirty jurisdictions. Prior to his full-time arbitration practice, Doug had forty years' experience as an international transactional and disputes projects lawyer. He is an Officer of the Order of Australia, and one of only four Companions of the Chartered Institute of Arbitrators.

Neil Kaplan CBE QC SBS, has been a full-time practicing arbitrator since 1995. He has been involved in several hundred arbitrations as arbitrator. Called to the Bar of England in 1965, Mr. Kaplan has practiced as a barrister, Principal Crown Counsel at the Hong Kong Attorney General's Chambers, and served as a Judge of the Supreme Court of Hong Kong in charge of the Arbitration List. He was Chair of HKIAC for thirteen years and President of the Chartered Institute of Arbitrators in 1999/2000. Since 2017 he has been the President of the Court of the Mauritius Chamber of Commerce and Industry Arbitration and Mediation Centre.

Jennifer Kirby is an internationally recognized arbitration expert, who acts as counsel and sits as arbitrator in a wide variety of arbitration matters. Jennifer served as both Counsel and Deputy Secretary General of the ICC International Court of Arbitration before leaving to join a multinational firm as a partner in their arbitration group. In 2010, Jennifer founded her own boutique arbitration practice, Kirby, in Paris. Jennifer has been recognized by *Chambers Global* as "a true expert in ICC-related disputes" and by *The Who's Who of International Arbitration* as a "very sharp" global player in the field.

**Professor Dr. Richard Kreindler** is a Partner of the law firm of Cleary Gottlieb Steen & Hamilton LLP and has specialized in international arbitration and litigation matters since 1985. He is a US national, was educated in the US and Germany, is admitted to the Bar in New York and Paris, and is also a professor of law in Germany. He has acted as counsel, arbitrator, expert and mediator in several hundred disputes under the major arbitral rules and regimes, with a focus on post-M&A, construction & infrastructure, energy and intellectual property.

**Professor Dr. Stefan Kröll** is an independent arbitrator in Cologne and an honorary professor at Bucerius Law School in Hamburg. He is one of the directors of the Willem C. Vis Arbitration Moot Court and Germany's national correspondent to UNCITRAL for arbitration. Stefan has acted as arbitrator or emergency arbitrator in over seventy cases with private and state parties and is regularly listed as one of the leading arbitrators in Germany. Stefan has published widely in the field of international commercial arbitration and commercial law.

**Lynnette Lee**, graduated with an LL.B. from Monash University and was an intern with Michael Hwang Chambers LLC.

**Dr. Werner Melis** is an independent international arbitrator. He was the former President of the Vienna International Arbitration Centre and is now Honorary President. He was also the former Vice-president of the International Council for Commercial Arbitation and of the London Court of International Arbitration as well as other leading arbitral institutions. He has been an arbitrator in more than 150 international arbitrations world-wide. Dr. Melis has been a member of the Austrian delegation in the negotiations of the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules and the UNCITRAL Model Law on International Commercial Arbitration.

**Dr. Michael Moser** Michael Moser is an international arbitrator with Twenty Essex Street Chambers, with offices in Hong Kong, Singapore and London. He is Honorary Past Chairman of the Hong Kong International Arbitration Centre, current board member of the Singapore International Arbitration Centre and the Vienna International Arbitration Centre, and past member of the LCIA Court and the SCC Stockholm Chamber of Commerce Arbitration Institute. He has sat as arbitrator in more than 200 cases around the globe.

**Alexis Mourre** is President of the ICC International Court of Arbitration and past chair of the IBA arbitration committee. He has participated as counsel or arbitrator in more than 230 arbitration proceedings under most international arbitration rules and since 1 May 2015 has established his independent arbitrator practice. He is the author of several books and many articles on international arbitration and private international law. He is fluent in French, English, Spanish and Italian and has good knowledge of Portuguese.

**Professor William W. Park** is a Professor of Law at Boston University where he teaches courses in tax and financial law. After studies at Yale and Columbia, Park practiced in Paris until returning home to Boston. Park is General Editor of Arbitration International and former President of the London Court of International Arbitration. He served on the Claims Resolution Tribunal for Dormant Swiss Accounts and the International Commission on Holocaust Insurance Claims. The United States appointed Park to the ICSID Panel of Arbitrators. His books include Arbitration of International Business Disputes, International Forum Selection, ICC Arbitration (with Craig &

Paulsson), International Commercial Arbitration (with Reisman, Craig & Paulsson) and Income Tax Treaty Arbitration (with Tillinghast).

**Dr. Tom Christopher Pröstler, LL.M. (Sydney)** is a registered foreign lawyer with CMS Hong Kong and a visiting lecturer at Humboldt-Universität zu Berlin. His legal practice focuses on representing clients and acting as tribunal secretary in international arbitration proceedings under all major arbitration rules, with a special focus on disputes between western and Asian parties. Dr Pröstler studied law at Humboldt-Universität, Université de Genève and University of Sydney and process management at Ruhr-Universität-Bochum. He obtained his doctorate on a comparative law subject from Humboldt-Universität. Prior to joining CMS Hong Kong, he worked at CMS's Munich office and was a fellow at Humboldt-Universität.

**Dr. Axel Reeg** is the founding partner of REEG RECHTSANWAELTE, a German niche law firm active in cross-border dispute resolution. Axel holds a Ph.D. in law and is admitted to the Bars in Germany and Spain. He lectures on International Arbitration at the University of Heidelberg. Axel has extensive experience in cross-border dispute resolution, both as an arbitrator, as counsel in international arbitration and before state courts. Axel is, *inter alia*, a member of the Board of Trustees of the Chartered Institute of Arbitrators.

**Professor Dr. Klaus Sachs** is a partner in the law firm of CMS Hasche Sigle. After attending schools in Paris, Bonn and Brussels, Mr Sachs graduated from Heidelberg University in 1973. He obtained a doctor juris degree in 1975 and was admitted to the bar in 1976. Klaus Sachs has over twenty-five years of experience as party's counsel, co-arbitrator, sole arbitrator and chairman in both ad hoc and institutional arbitration proceedings. He has also acted as chair or co-arbitrator in so far more than fifteen investment treaty arbitrations under the ICSID Rules or the UNCITRAL Arbitration Rules. He is honorary professor for international arbitration law at the Munich University.

**Professor Dr. Ulrich G. Schroeter** is a Professor of Private Law and Comparative Law at the University of Basel (Switzerland). Prior to starting his position in Basel, he was a Professor at the University of Mannheim (Germany) where he was the Chair for Private Law, International Corporate and Financial Markets Law, European Business Law. Ulrich was educated at the Albert-Ludwigs-University Freiburg (Germany) and the University of Lausanne (Switzerland). He received a *Doctor iuris* from the Freie Universität Berlin. Ulrich works and publishes in the areas of contract law, international trade law, arbitration, treaty law, commercial law, financial markets regulation and European Union law. He regularly speaks at conferences worldwide.

**Professor Dr. Ingeborg Schwenzer** is the Dean of the Swiss International Law School (SiLS), Professor emerita of Private Law at the University of Basel (Switzerland) and Chair of the CISG Advisory Council. She has also been an adjunct professor at City University of Hong Kong and Griffith University in Brisbane (Australia). She has

published numerous books and over 200 articles in the fields of the law of obligations, commercial arbitration as well as family law. She is the editor and main contributor of the world's leading Commentary on the Convention on the International Sale of Goods and its German, Spanish, Portuguese and Turkish counterparts. Ingeborg also regularly acts as arbitrator, counsel and legal expert in international disputes.

**Matthew Secomb** is a partner in White & Case's International Arbitration Group in Singapore. He specializes in international commercial arbitration, with a focus on energy-related and construction disputes. He has been involved in arbitrations under most of the major arbitral rules, as well as in *ad hoc* arbitrations. In addition to his counsel work, Matthew acts regularly as arbitrator. Before moving to Singapore in 2015, he was based in White & Case's Paris office for nearly ten years. Prior to joining White & Case in 2006, Matthew was counsel to the ICC International Court of Arbitration.

Alexander Shchavelev, LL.M. (UNSW, Sydney) is an associate in the Düsseldorf office of Orrick, Herrington & Sutcliffe LLP and member of the firm's International Arbitration group. His practice focuses on domestic and international arbitration and litigation, with a particular emphasis on M&A, energy and construction related disputes. Another focus are Russia related cross-border transactions and disputes. Alexander also regularly acts as administrative secretary of arbitral tribunals. He holds a PhD in Law from the University of Freiburg and a Master of Laws degree from the University of New South Wales and regularly publishes on arbitration and commercial law subjects.

**Jingzhou Tao** is the Managing Partner responsible for developing the Asia Practice of Dechert LLP. He has advised many Fortune 500 companies on international mergers and acquisitions, arbitration and corporate matters involving China for more than thirty years. Mr. Tao has represented major American and European and Japanese companies in hundreds of transactions in China involving joint ventures, tax planning, strategic alliances and intellectual property protection. He also has significant experience in international arbitration proceedings both in China and before the major international arbitration institutions.

Marc D. Veit is a Partner at LALIVE and specializes in international arbitration and litigation. He has acted as counsel and arbitrator in a large number of international arbitrations, both ad hoc (including UNCITRAL) and under institutional rules (ICC, Swiss rules, HKIAC, SIAC, SCC, IATA) involving the substantive and/or procedural laws of Switzerland, Germany, Austria, France, England, China, Turkey, Sweden, Singapore, Hong Kong, Georgia, Ukraine, Korea and Albania. He has been ranked for many years by Chambers Global as a leading individual in Arbitration and Litigation in Switzerland, and by Legal 500 as a recommended practitioner in Dispute Resolution in Switzerland.

Jeffrey Waincymer has over thirty-two years' experience as a legal practitioner in all aspects of international arbitration, international trade and investment, customers and commercial law. He has acted as arbitrator and expert witness in international arbitration proceedings. Jeffrey has published extensively on international arbitration and litigation and was formerly a Professor of Law at Monash University and Deakin University in Australia.

**Professor Janet Walker (JD, DPhil, FCIArb)** is a Professor of Law (past associate dean) at Osgoode Hall Law School, a member of the Ontario Bar, and licensed legal consultant of the New York State Bar. She authors Canada's main text on private international law and is general editor of works on comparative procedure and group actions. For more than fifteen years she has served as arbitrator, co-arbitrator and chair under various institutional rules. Janet is based in Toronto at Arbitration Place and in London at Outer Temple Chambers. She has a good working knowledge of Spanish and French.

Jane Willems is an Associate Professor of Law at Tsinghua Law School, Associate Director of the International Arbitration and Dispute Settlement LLM (IADS). She teaches international investment law, private international law and international commercial arbitration. Her Ph.D. thesis focused on Sino-foreign joint ventures contract disputes before international arbitrators. She has participated in numerous international commercial and investment arbitrations and other forms of ADR. She has served as an arbitrator and commercial arbitrations involving the ICC, HKIAC, CIETAC, BAC and UNCITRAL Rules. Jane Willems is a member of the California and the Paris (France) Bar.

Stephan Wilske Dr. iur., Maître en Droit (Aix-Marseille III), LL.M. (The University of Chicago; Casper Platt Award), Rechtsanwalt (Germany) and Attorney-at-Law (New York), admission to various U.S. federal courts, including the U.S. Supreme Court, FCIArb (Chartered Institute of Arbitrators); partner at Gleiss Lutz, Stuttgart; lecturer at the Universities of Heidelberg and Jena. Stephan is a member of the American Law Institute (ALI) and the SIAC Users' Council. He is also an Advisory Committee Member of the Swiss Arbitration Academy, Senior Committee Member of the Contemporary Asia Arbitration Journal and International Correspondent (Germany) of the Revista Română de Arbitraj.

# Summary of Contents

Editors	V
Contributors	vii
Foreword	xxxvii
Preface	xxxix
CHAPTER 1 Taming the Twin Dragons of International Arbitration: Cost and Delay Gerald Aksen	1
CHAPTER 2 One Shot Players and Arbitrator Selection: A Fair Shot or a Shot in the Dark? Chiann Bao	9
CHAPTER 3 Third-Party Funding and the International Arbitrator Louise Barrington	15
Chapter 4 The Arbitrator Dr. Martin Regli: Pierre Karrer's <i>Alter Ego Klaus Peter Berger</i>	25
CHAPTER 5 The Role of National Courts at the Threshold of Arbitration George A. Bermann	39

### Summary of Contents

Chapter 6 Pierre Karrer David J. Branson	51
CHAPTER 7 Is Efficiency an Arbitrator's Duty or Simply a Character Trait? Nadia Darwazeh	57
CHAPTER 8 The Role of Party-Appointed Arbitrators Siegfried H. Elsing & Alexander Shchavelev	65
CHAPTER 9 Concurrent Proceedings in Investment Arbitration Emmanuel Gaillard	79
Chapter 10 The Role of the Arbitrator in Energy Disputes Robert Gaitskell Q.C. CEng.	93
CHAPTER 11 Annulled International Arbitral Awards and Remand: Can/ Should the Same Arbitral Tribunal Take the Case Anew? A Short Analysis from a Swiss Perspective Teresa Giovannini	103
CHAPTER 12 Foreign Mandatory Norms in Swiss Arbitration Proceedings: An Approach Worth Copying? Daniel Girsberger	113
CHAPTER 13 The Arbitrator's Duty of Efficiency: A Call for Increased Utilization of Arbitral Powers Philipp Habegger	123
CHAPTER 14 Latin and International Arbitration Kaj Hobér	137
CHAPTER 15 The Angelic Arbitrator Versus The Rogue Arbitrator: What Should an Arbitrator Strive to Be?  Günther J. Horvath	143

CHAPTER 16	
Assessment of Future Damages in Arbitration  Hans van Houtte	153
Chapter 17 The Problem of Undisclosed Assistance to Arbitral Tribunals Benjamin Hughes	161
Chapter 18 Standard of Proof for Challenge Against Arbitrators: Giving Them the Benefit of the Doubt Michael Hwang SC & Lynnette Lee	169
CHAPTER 19 The Use of Experts in International Arbitration Neil Kaplan CBE QC SBS	187
CHAPTER 20 How Far Should an Arbitrator Go to Get It Right? Jennifer Kirby	193
CHAPTER 21 Sanctioning of Party Conduct Through Costs: A Reconsideration of Scope, Timing and Content of Costs Awards Richard Kreindler & Mariel Dimsey	201
CHAPTER 22 Promoting Settlements in Arbitration: The Role of the Arbitrator Stefan Kröll	209
Chapter 23 The Role of Individuals in International Arbitration Werner Melis	225
CHAPTER 24 The Pre-hearing Checklist Protocol: A Tool for Organizing Efficient Arbitration Hearings Michael Moser	229
CHAPTER 25 About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration Alexis Mourre	239

### Summary of Contents

CHAPTER 26 Arbitration and Fine Dining: Two Faces of Efficiency William W. Park	251
CHAPTER 27 Should an International Arbitral Tribunal Engage in Settlement Facilitation? Axel Reeg	269
CHAPTER 28 Time Limits in International Arbitral Proceedings Klaus Sachs & Tom Christopher Pröstler	279
CHAPTER 29 Mandatory Private Treaty Application? On the Alleged Duty of Arbitrators to Apply International Conventions Ulrich G. Schroeter	295
Chapter 30 The CISG in International Arbitration Ingeborg Schwenzer & Florence Jaeger	311
CHAPTER 31 Multi-party, Multi-contract Rules and the Arbitrators' Role in Finding Consent Matthew Secomb	327
CHAPTER 32 The Emergency Arbitrator Patricia Shaughnessy	339
CHAPTER 33 Deliberations of Arbitrators Jingzhou Tao	349
CHAPTER 34 The Importance of Languages in International Arbitration and How They Impact Parties' Due Process Rights Sherlin Tung	359
CHAPTER 35 Proving Legality Instead of Corruption Marc D. Veit	373

CHAPTER 36 An Arbitrator, a Gorilla and an Elephant Walk into a Room  Jeffrey Waincymer	383
CHAPTER 37 Procedural Order No. 1: From Swiss Watch to Arbitrators' Toolkit Janet Walker & Doug Jones, AO	393
CHAPTER 38 The Arbitrator's Jurisdiction at Risk: The Case of Hybrid and Asymmetrical Arbitration Agreements  Jane Willems	403
CHAPTER 39 Work Ethics of the International Arbitrator, or: The Distinction Between Rendering a Service to the Parties and Being the Parties' Slave Stephan Wilske	417

Editors		V
Contrib	utors	vii
Forewo	rd	xxxvii
Preface		xxxix
CHAPTER Taming <i>Gerald 1</i>	the Twin Dragons of International Arbitration: Cost and Delay	1
	ot Players and Arbitrator Selection: A Fair Shot or a	
Shot in Chiann	the Dark? Bao	9
§2.01	The "One Shot Players" of Asia	10
§2.02	The Responsibility of Appointing an Arbitrator	11
§2.03	The Problem as Faced by the "One Shot Player"	12
§2.04	Where Do We Go from Here?	13
CHAPTER		
	arty Funding and the International Arbitrator Barrington	15
§3.01	What Is Third-Party Funding?	15
§3.02	Why All the Fuss?	15
§3.03	Who Are the Funders?	16

§3.04			hird-Party Funding for Arbitration?	17
§3.05			erns May Arise from Third-Party Funder Involvement	1.0
§3.06			ation Case? TPF Be Disclosed to the Opposing Party and the	18
\$3.00	Tribun		The Disclosed to the Opposing Fairly and the	20
§3.07			Questions Around Third-Party Funding	22
§3.08	Conclu	_	, ,	23
C	4			
CHAPTER The Arb	_	Dr M	Iartin Regli: Pierre Karrer's <i>Alter Ego</i>	
Klaus Pe			iartii Regii. Ficire Rairei 3 Maei 1280	25
		0		
§4.01	Introdi			25
§4.02			r's Role in the Multimedia Project: The Arbitrator	26
§4.03		-	Himself Pierre Karrer's Adaptation of the Idea of Interactive	26
94.03			rieffe Karrer's Adaptation of the idea of interactive and Training in Arbitration	27
§4.04			ms and Their Solutions by Dr. Regli and Pierre Karrer	28
31.01			tive Procedural Planning	28
			athological Arbitration Clause	32
§4.05	Conclu		Ç	38
CHAPTER	5			
	-	tiona	l Courts at the Threshold of Arbitration	
George 1				39
CE 01	T 1			20
§5.01 §5.02	Introdu		rounds Might an Apparent Arbitration Agreement	39
93.02			Inforcement?	40
§5.03			to the Threshold Role of National Courts	41
30.00			rehensive Judicial Involvement at the Threshold	41
		-	nds-Off" Role for Courts at the Threshold	42
	[C] I	Intern	nediate Positions on the Threshold Judicial Role	43
	[	[1]	Default Rule and Party Autonomy	43
	[	[2]	Heightening the Burden of Proof for Resisting	
			Arbitration	44
	[		Immediate Court Review of Arbitral Rulings on	
	,		Jurisdiction Cl. II	45
	l		Distinguishing Among Challenges to the Arbitration	
ST 04	Co===1		Agreement	46
§5.04	Conclu	ision		48

Снарте Pierre David		51
	er 7 ciency an Arbitrator's Duty or Simply a Character Trait? Darwazeh	57
§7.01 §7.02 §7.03	Do Arbitrators Have a Duty of Efficiency in Arbitration? What Does it Take for an Arbitrator to Be Efficient? What Are the Sanctions if an Arbitrator Breaches the Duty of Efficiency?	58 60 62
	er 8 ole of Party-Appointed Arbitrators ed H. Elsing & Alexander Shchavelev	65
§8.01 §8.02	Introduction Some Notes on General Questions [A] The Right to Choose an Arbitrator [B] On Independence and Impartiality	65 66 68
§8.03	Party-Appointed Arbitrators in UNCITRAL Model Law and Institutional Rules	69
§8.04	Party-Appointed Arbitrator in the Course of Arbitration  [A] Selection and Appointment  [B] Disclosure  [C] Selection of the Chair  [D] Pre-hearing Phase  [E] Hearing Phase  [F] Award Making	70 70 71 72 73 74
§8.05	Conclusion	77
	rrent Proceedings in Investment Arbitration nuel Gaillard	79
§9.01	The Challenges Arising from Concurrent Proceedings  [A] The Origins of the Problem  [B] Illustrations  [C] Analysis of the Difficulty	80 80 83 85
§9.02	The Potential Solutions [A] De lege lata [B] De lege ferenda	87 87 90

Снарты The Ro	R 10 le of the Arbitrator in Energy Disputes	
	Gaitskell Q.C. CEng.	93
§10.01	Introduction	93
§10.02	Types of Energy Disputes	94
§10.03	Outset of the Arbitration	95
§10.04	Conditions Precedent to Arbitration	95
§10.05	Procedural Steps	96
§10.06	Pleadings or Memorials	96
§10.07	Experts and Their Reports	97
§10.08	'Hot-Tubbing' of Experts	97
§10.09	Experts' Meetings and Reports	98
§10.10	The Hearing Bundle	99
§10.11	The Pre-hearing Submissions	99
§10.12	'Chess-Clock' Usage of Time	100
§10.13	Witnesses	100
§10.14	Post-hearing	101
§10.15	The Draft Award	101
§10.16	Conclusion	101
Снарте	R 11	
Annulle	ed International Arbitral Awards and Remand: Can/Should the	
Same A	rbitral Tribunal Take the Case Anew? A Short Analysis from	
a Swiss	Perspective	
Teresa	Giovannini	103
Снарты		
	Mandatory Norms in Swiss Arbitration Proceedings: An	
	ch Worth Copying?	
Daniel	Girsberger	113
§12.01	Introduction	113
§12.02	Mandatory Norms in State Court Litigation vis-à-vis Arbitration	114
	[A] State Court Litigation	114
	[B] Arbitration	115
	[1] Swiss FSC	116
	[2] 'Swiss' Arbitral Awards Addressing the Issue	118
§12.03	Is There a Common Denominator?	120
§12.04	Is the Swiss Approach a Recommendable Model?	121

CHAPTER The Arb	13 pitrator's Duty of Efficiency: A Call for Increased Utilization	
	ral Powers	
	Habegger	123
§13.01	Introduction	123
§13.02 §13.03	Legal Basis for Arbitrator's Duties and Rights Concerning Efficiency Party Autonomy Versus Arbitrator's Discretion in Determining	124
	Efficient Procedures  [A] Arbitral Tribunal's Objections to Parties' Procedural	126
	Agreements  [B] Institutional Rules Giving Priority to Party Autonomy in Matters of Procedure	126 127
	[C] Institutional Rules Limiting Party Autonomy on Matters of Procedure	128
§13.04	Mandatory Provisions and Arbitrators' Discretion in Determining Efficient Procedures	129
§13.05	Arbitrators' Exercise of Power and Discretion: A Shift in Approach in Case Management	130
	[A] Application of IBA Rules and Other 'Soft Law'	131
	[B] Time to Prepare a Party's Case	131
	[C] Bifurcation of Issues	131
	[D] Document Production	132
	[E] Witness Evidence and Hearings	132
	[F] Written Submissions	133
	[G] Post-hearing Briefs	134
§13.06	Conclusion	135
CHAPTER	14 ad International Arbitration	
Kaj Hob		137
	Exordium	137
	Legis actio	138
5	Ius civile et Ius commercii	139
0		140
§14.05	Conclusio	141
CHAPTER The Ang	15 gelic Arbitrator Versus The Rogue Arbitrator: What Should	
	trator Strive to Be?  J. Horvath	143
§15.01	Introduction	143
§15.02	The Angelic Arbitrator: The Ideal	144

§15.03 §15.04	The Rogue Arbitrator: The Train Wreck The Enlightened Arbitrator: What an Arbitrator Should Strive	146
	to Achieve	148
§15.05	Conclusion	151
	16 nent of Future Damages in Arbitration on Houtte	153
marts vu	at Houte	133
§16.01	Conceptual Framework	154
	[A] Future Lucrum Cessans and Damnum Emergens	154
	[B] Time Span of Future Damages	154
	[C] Forecasting and Probability	155
\$17.00	[D] Different Levels of Certainty	155
§16.02	Procedural Aspects  [A] "Mind the Can"	156
	[A] "Mind the Gap"	156
	[B] How to Bridge the Gap?	157 158
	<ul><li>[C] The Manageable Excel Sheet</li><li>[D] The Future Shrinks</li></ul>	158
	[E] Recurrent or Continues Future Damages	158
	[L] Recurrent of Continues Lutture Dumages	130
CHAPTER	17	
The Pro	blem of Undisclosed Assistance to Arbitral Tribunals	
Benjam	in Hughes	161
817.01	Introduction	161
§17.01		163
317.02	[A] Confidentiality	163
	[B] Independence and Impartiality	164
	[C] Role in the Arbitration	165
	[D] Remuneration	167
§17.03	The Solution?	168
	d of Proof for Challenge Against Arbitrators: Giving Them	
	efit of the Doubt	
Michael	Hwang SC & Lynnette Lee	169
§18.01	Introduction	169
§18.02	The Standard of Proof for Challenging Arbitrators	171
	[A] Standard of Proof Spectrum for Challenging Arbitrators	171
	[1] Academic Commentaries	171
	[2] Arbitral Rules	173
	[3] National Arbitration Laws	173
	[4] Standard of Proof Spectrum	175

§18.03			Standard of Proof for the 'Justifiable Doubts' Test	1.77
			IBA Guidelines	177
			Intentions of the Original Working Group for the	177
			nition of 'Justifiable Doubts'	177
		[1]	The Interpretation of 'Likelihood'	177
		[2]	Best International Practice	177
			ral Standard 2(c): The Explanation of 'Justifiable Doubts'	178
		[1]	The 2004 and 2014 Versions of General Standard 2(c)	179
		[2] [3]	Born's Critique  Porn's Alternatives A Higher Threshold?	179 179
		[3] [4]	Born's Alternative: A Higher Threshold? Origins of General Standard 2(c)	180
			•	
		[5]	The Litmus Test of Independence	180
\$10.04		[6]	Application of General Standard 2(c)	181
§18.04			Requirements under the IBA Guidelines ral Standard 3: Disclosure Requirements	182 182
		Gene [1]	Disclosure Requirements under General Standards	102
		[1]	3(a) and 3(c) of the 2004 IBA Guidelines	182
		[2]	Born's Critique: Excessive Disclosure Requirements	183
		[2] [3]	Universal Acceptance of the IBA Guidelines	183
			imstances to Disclose under the IBA Guidelines	184
		(1)	The Orange List 2004 IBA Guidelines	184
		[2]	Born's Critique	184
		[3]	The Concept of Subjective Relevance	184
		[4]	Comparison with ICC Guidance Note on Disclosure	104
		[+]	Requirements	185
§18.05	Conclu	ıcion	_	186
910.03	Conci	181011		100
Снартег	19			
			in International Arbitration	
Neil Kap	olan CE	BE QC	CSBS	187
§19.01	Tribur	nal oi	r Party-Appointed Expert?	187
§19.02			Testimony Without Leave of the Tribunal	189
§19.03	Instru	ction	S	190
§19.04	Report	ts		190
§19.05	Early (	Open	ing and Expert Presentation	190
§19.06	Post-H	learir	ng	192
CHAPTER	20			
		ld an	Arbitrator Go to Get it Right?	
Jennifer			0	193

	ning (	of Party Conduct Through Costs: A Reconsideration of g and Content of Costs Awards			
_		ndler & Mariel Dimsey	201		
\$21.01 \$21.02 \$21.03 \$21.04	Scope of Cost-Relevant Conduct Timing of Costs Sanctions Form and Content of Costs Sanctions Conclusion				
CHAPTER Promoti Stefan F	ng Se	ettlements in Arbitration: The Role of the Arbitrator	209		
,					
§22.01		oduction	209		
§22.02 §22.03		rview of the Different Approaches in Practice nection with Other Developments in International Arbitration	210		
322.03		edure	214		
§22.04		Position Taken by Arbitration Laws and Rules on Settlement			
	Faci	litations	215		
§22.05	Deta	iled Evaluation of the Different Measures Suggested	217		
	[A]	Information About Preliminary Views on the Issues in			
	r=1	Dispute in the Arbitration and the Evidence Needed	217		
	[B]	Preliminary Non-binding Findings on Law or Fact on Key	220		
	[C]	Issues in the Arbitration	220		
	[C]	Suggested Terms of Settlement as a Basis for Further Negotiation	222		
	[D]	Chair Settlement Meetings Attended by Representatives	222		
		of the Parties at Which Possible Terms of Settlement May Be			
		Negotiated	223		
§22.06	Con	clusion	223		
Снартек	23				
The Rol	e of I	ndividuals in International Arbitration			
Werner	Melis		225		
Снартег	24				
The Pre Arbitrat		ing Checklist Protocol: A Tool for Organizing Efficient learings			
Michael	Mose	27	229		
§24.01	Intro	oduction	229		
§24.02	Pre-l	nearing Planning: Key Points for Consideration	230		
	[A]	Dates and Venue	230		
	[R]	Attendees	230		

	[C] Hear	ring Schedule	230
		hearing Items	231
	[E] Orde	er of Play, Witnesses and Sequestration	231
		rpretation	231
	[G] Post	-hearing Submissions and the Award	232
§24.03		earing Checklist Protocol	232
§24.04	Conclusion	n	236
Снартег	25		
	Procedural S Future of A	Soft Law, the IBA Guidelines on Party Representation	
Alexis I		Holifation	239
Снартея	. 26		
		ne Dining: Two Faces of Efficiency	
William	ı W. Park		251
§26.01		s' Legitimate Expectations	251
	[A] Riva		251
626.02		Aspirations	253
§26.02	_	ating Alternatives	254
		ciency from Two Perspectives	254
		s and Benefits	255
		The Last Bad Experience	255
	[2]	Hard Choices	257
		[a] Contract Drafting	257
		<ul><li>[b] A Laundry List of Dilemmas</li><li>[c] Institutional Rules</li></ul>	258
\$26.02	The Enfor		259
§26.03		cement Stage Law of Arbitration	260 260
		Arbitral Seat: Conflict in Action	260
	[1]	New Theories and Due Process	261
	[1]	[a] Caribbean Niquel	261
		[b] De Sutter v. Madagascar	262
	[2]	Cost Allocation and Contract Terms	263
§26.04			264
-		ise and Common Sense	267
Снартег	27		
Should Facilita		ional Arbitral Tribunal Engage in Settlement	
Axel Re			269
§27.01		ent Facilitation by Arbitrators Viable?: The Common	
	Law and t	he Civil Law Perspectives	270

§27.02	Is Sett Desira	lement Facilitation by International Arbitration Tribunals	272		
§27.03 §27.04	Are H	Are Hybrid Dispute Resolution Models Truly an Alternative? 2 Pre-conditions for Settlement Facilitation by International Arbitration			
§27.04	Tribui	nals	275 277		
Снартег	28				
		International Arbitral Proceedings			
		Tom Christopher Pröstler	279		
§28.01	Establ	ishing Time Limits	280		
		Tribunal Determination	280		
		Parties' Agreement	281		
	r - 1	Terms of Reference	283		
		Arbitral Institutions and Rules	283		
		Arbitration Laws	285		
§28.02		g the 'Right' Time Limit	286		
		Overly Long Time Limits	286		
		Overly Short Time Limits	288		
620.02		The 'Right' Time Limits	288		
§28.03		quences of Breaching Time Limits	288		
		Sanctions Against Parties	288		
		[1] Extensions for Non-dilatory Parties	289		
		[2] Exclusion of Submissions	289		
		[3] Adverse Cost Decisions	289		
		Sanctions Against Arbitrators	290		
		[1] Loss of Jurisdiction	290		
		[2] Replacement of Arbitrators	291		
		[3] Written Report by Arbitrators [4] Reduction of Tribunals' Fees	291		
\$20.04			291		
§28.04	Concl	usion	293		
CHAPTER	29				
		vate Treaty Application? On the Alleged Duty of Apply International Conventions			
Ulrich C			295		
§29.01	Introd	uction	295		
		A Duty of Arbitrators to Apply International Conventions?  Treaty Law and Arbitration Practice: Differences in General	296		
§29.02		Approach of Arbitrators to Apply International Conventions Resulting	297		
849.04	-	he Conventions Themselves?	298		
		Wording of International Conventions	298		

	[B]	<ul> <li>[1] Substantive Law or Conflict-of-Laws Conventions</li> <li>[2] Arbitration Conventions</li> <li>Addressees of the Obligation to Apply International Conventions</li> </ul>	
		Under Treaty Law [1] International Uniform Private Law Conventions in	301
		General	301
		[2] In Particular: Conventions on the Carriage of Goods	302
		[3] In particular: European Union Treaties	303
	[C]	Conclusion and a General Suggestion	304
§29.03		Lex Arbitri as Source of an Arbitrator's Duty to Apply	
		national Conventions?	304
§29.04		national Conventions as Part of the Lex Causae	306
§29.05	-	of State Courts to Apply International Conventions when	205
		ewing Arbitral Awards?	307
	[A]	Perspective of Arbitration Law	307
520.06	[B]	Compatibility with Treaty Law	307
§29.06	Conc	clusion	308
Снартев	30		
The CIS	G in I	International Arbitration	
Ingebor	g Schu	venzer & Florence Jaeger	311
§30.01	Intro	duction	311
§30.02		as Substantive Law	313
300.02	[A]	Preliminary Remarks	313
	[B]	Choice of Law by the Parties	314
	[C]	Applicable Law in Absence of a Choice of Law Clause	316
§30.03		as the Law Applicable to the Arbitration Clause	317
0	[A]	General Remarks Regarding the Applicable Law to the	
	. ,	Arbitration Clause	317
	[B]	General Applicability of the CISG to Arbitration Agreements	320
	[C]	Formal Validity	320
	[D]	Substantive Validity	322
	[E]	Interpretation	323
	[F]	Remedies for a Breach of the Arbitration Agreement	324
§30.04	Conc	clusions	324
Cxxxpmpp	21		
CHAPTER Multi-n		Multi-contract Rules and the Arbitrators' Role in Finding	
Consen	-	commune made and the inditions from the first finding	
Matthei		omb	327
C21 01	N (1)	i manta / Malti aantan at Aukitantian, What Desiran Desira	
§31.01		i-party/Multi-contract Arbitration: What Business People About Versus What Arbitration Rule Drafters Care About	328
	Carc	ADOUT ACTORS AND IT DITERTION WHICH DIGHTERS CALC ADOUT	J40

§31.02	How the Parties and Contracts Subject to an Arbitration Are	
	Defined Procedurally	329
	<ul><li>[A] The Bad Old Days Before Multi-party, Multi-contract Provisions</li><li>[B] The Brave New World of Multi-contract, Multi-party Provisions</li></ul>	329
	[B] The Brave New World of Multi-contract, Multi-party Provisions [1] The 'Institution Decides' Approach	330 331
	[2] The 'Arbitrators Decide' Approach	333
	[3] The Hybrid Approach	334
§31.03	Once the Parties and Contracts Subject to the Arbitration Are	334
331.03	Defined, What Happens to Jurisdictional Objections?	334
	[A] Consent's Binary Nature, But with Lots of Combinations and	001
	Permutations	334
	[B] Arbitrators' Decisions in Multi-party, Multi-contract Situations	335
§31.04	Why Does This All Matter? Arbitrators' Dual Role for Multi-party,	
	Multi-contract Arbitration	336
§31.05	The Wildcard: National Laws on Consolidation	337
§31.06	Conclusion	338
CHAPTER	· <del></del>	
	ergency Arbitrator	220
Ραιτισια	Shaughnessy	339
§32.01	Introduction	339
§32.02	Background to Emergency Arbitration	340
§32.03	The Source of the Powers and Duties of an Emergency Arbitrator	341
§32.04	The Developing Practice of Emergency Arbitration	343
§32.05	The Duties and Decision-Making of the Emergency Arbitrator	345
§32.06	Conclusion	347
Crrappin	22	
CHAPTER	ations of Arbitrators	
Jingzho		349
511621101	. 1	01)
§33.01	Introduction	349
§33.02	Issues Relating to Deliberations of Arbitrators	350
	[A] Arbitrators' Duty to Deliberate	350
	[B] Different Types of Deliberations	351
	[C] The Purpose of Deliberations	352
	[D] The Form of Deliberations	352
	[E] The Timing of Deliberations	353
§33.03	The Role of the Chairman in the Process of Deliberations	355
	[A] To Be Responsible for Organizing the Deliberations	355
	[B] To Be Responsible for Managing Potential Clashes Among	2=-
	Arbitrators	356
622.04	[C] To Be Responsible for Drafting the Final Award Afterwards	357
§33.04	Confidentiality of Arbitrators' Deliberations	357

§33.05	Thump-Up Rules in Deliberation Process	358
They In	portance of Languages in International Arbitration and How apact Parties' Due Process Rights	
Sherlin	Tung	359
§34.01	Introduction	359
§34.02	Languages in International Business Transactions	360
	[A] Negotiations Between the Parties	361
	[B] Performance of an Agreement	362
	[C] After the Dispute Arises	363
§34.03	Due Process in International Arbitration	364
§34.04	Languages and Their Impact on Parties' Due Process Rights [A] Procedural Fairness, Equal Treatment and the Right to	368
	Be Heard	369
	[B] CEEG (Shanghai) Solar Science & Technology Co., Ltd.	
	Versus Lumos LLC	371
§34.05	Conclusion	372
CHAPTER		
_	Legality Instead of Corruption	
Marc D.	Veit	373
835.01	Introduction	373
	Burden and Standard of Proof	374
§35.02	The Arbitral Tribunal's Right and Duty to Raise Corruption	57 1
300.00	Issues sua Sponte	377
§35.04	The Legality Test: The Flipside of the Medal or How Tribunals	511
300.01	Can Deal with 'Red Flags' Absent Clear Allegations of Corruption	379
	our z eur mair neu rago risoent escur rinegutions er correption	0.,
CHAPTER	36	
An Arbi	trator, a Gorilla and an Elephant Walk into a Room	
Jeffrey V	Naincymer	383
§36.01	Introduction	383
	Conclusion	391
930.02	Conclusion	391
Снартек	37	
Procedu	ıral Order No. 1: From Swiss Watch to Arbitrators' Toolkit	
Janet W	Talker & Doug Jones, AO	393
§37.01	Introduction	393
§37.01 §37.02	Settling the Procedure Before the Arbitration Begins	393
§37.02 §37.03	Settling the Procedure at the Commencement of the Arbitration	394
§37.03 §37.04	Recent Innovations in the Arbitrators' 'Toolkit'	396
551.01	1. Committee of the control of the c	570

§37.05		est Left Until Later in the Arbitration	397			
		ne Extent of Disclosure and Disputes Concerning	205			
		isclosure: The '@#\$%&' Redfern Schedule	397			
		ne Factual Evidence Actually Needed to Decide the Issues in	200			
		ispute	398			
		spert Evidence: Nature, Extent and Manner of	200			
		evelopment	398			
		ne Detail of the Evidentiary Hearing Yritten Openings and the 'Education' of the Tribunal	399 400			
\$27.06	[E] W	1 0	400			
§37.06	Conclusi	1011	401			
Снартев	38					
The Arb	itrator's .	Jurisdiction at Risk: The Case of Hybrid and				
		rbitration Agreements				
Jane W			403			
§38.01	Introduc		403			
§38.02		oitrator's Jurisdiction and Hybrid Arbitration Agreements	404			
		ne Arbitrator's Jurisdiction and the Parties' Choice of an				
		stitution to Administer Proceedings under Arbitration Rules				
		omulgated by Another Arbitration Institution	405			
		ne Arbitrator's Jurisdiction and the Parties' Choice of an				
		stitution to Administer the Arbitration under Ad-hoc				
		rbitration Rules	407			
§38.03		oitrator's Jurisdiction and Asymmetrical Arbitration				
	Agreeme		410			
		ptional Arbitration Agreements	410			
		ne Enforceability of Asymmetrical Clauses Providing for	410			
		General Option of Forum	412			
		ne Enforceability of Asymmetrical Clauses Providing for an	412			
	EX	sception to the General Forum	413			
Снартег	39					
		he International Arbitrator, or: The Distinction Between				
		vice to the Parties and Being the Parties' Slave				
Stephan		0	417			
r						
§39.01		w Focus on the Significance of the "Decision-Makers"	418			
§39.02	Often Ne	Often Neglected Work Ethics of Arbitrators: The So-Called Secondary				
	Virtues		419			
		iligence, Transparency and Predictability	420			
		me- and Cost-Consciousness	420			
		onesty	421			
§39.03	_	Is Enough: Neither the Prima Donna nor the Parties' Slave	422			
\$39.04	Conclusi	ion	424			

### Foreword

It is an honor for us to join in this celebration of Pierre Karrer's 75th birthday. Pierre has been a friend and a respected colleague whom we have both had the good fortune to know throughout our professional careers. We have had the pleasure of working with Pierre in many capacities: as a committee member colleague working on the IBA Rules of Evidence and other reforms, as co-arbitrator, as an arbitrator hearing our cases, as an officer of various arbitration institutions, and as a fellow aficionado of classical music, among others.

Pierre's is undoubtedly one of the great names in international arbitration. He and his work have influenced practitioners around the world. His contributions to the IBA Rules of Evidence were substantial; his training on both sides of the Atlantic and his global experience enabled him to propose solutions that bridged the common law/civil law divide. As the first Vice Chair of the Arbitration Institute of the Stockholm Chamber of Commerce after it internationalized its Board, he helped devise and implement procedures that offer substantial Board input into every major decision that the Institute needs to make in each case, including in particular the selection of arbitrators.

Pierre is as organized and dedicated an arbitrator as one could hope for – indeed it would be no exaggeration to say that these attributes have become the stuff of legend, sufficient to intimidate anyone ill-advised enough even to think about turning up to a hearing unprepared. He has an extensive box of tools, literally and figuratively, to carry out his trade. In each case, he applies his experience to work with the parties to determine the procedures best suited to that particular arbitration. His presence and demeanor exude efficiency, as do his solutions, but he wears his abilities lightly, so that proceedings before him are always managed with fairness and with a humanity that is readily appreciated. As the hearing progresses, his deft touch is even more keenly felt. Because Pierre is so well prepared in every case, he is able to guide the parties through the case effectively.

The range and quality of articles in this Liber Amicorum, and the diversity and excellence of its contributors, are a testament as much to the esteem and affection in which Pierre is held as to his influence upon, and to his own broad interests in improving, the practice of arbitration. At a time when arbitration is under ever greater

scrutiny and subject to ever more searching and sometimes hostile enquiry, his work is an example of how good the process can be when it is in the hands of a master. This volume will be one more substantial contribution resulting from Pierre's career, but more to the point, we hope that he will enjoy it both for its content and as a mark of the appreciation of his professional colleagues and friends for all that he has achieved. We, for our part, offer our warmest congratulations to Pierre and we wish him the happiest of birthdays.

John Beechev\* and David W. Rivkin\*\*

\* John Beechey CBE is among the best known arbitrators in the world. He has served as chairman, party-appointed arbitrator, or sole arbitrator on international arbitral tribunals in both 'ad hoc' (including UNCITRAL) and institutional arbitrations under the Rules of, *inter alia*, the European Development Fund (EDF), International Chamber of Commerce (ICC), International Centre for Dispute Resolution/ American Arbitration Association (ICDR/AAA), International Center for the Settlement of Investment Disputes (ICSID), London Court of International Arbitration (LCIA), Permanent Court of Arbitration (PCA), Singapore International Center for the Settlement of Investment Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA) (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA) (PCA), Singapore International Center for the Settlement Court of Arbitration (PCA) (

tional Arbitration Centre (SIAC) and the Stockholm Chamber. He is a past President of the

ment of arbitral awards and arbitration agreements.

International Court of Arbitration of the ICC (2009-2015).

<sup>\*\*</sup> David W. Rivkin is Co-Chair of Debevoise & Plimpton's International Dispute Resolution Group and The Immediate Past President of the International Bar Association (IBA). A litigation partner in the firm's New York and London offices, Mr. Rivkin has broad experience in the areas of international litigation and arbitration. Mr. Rivkin is consistently ranked as one of the top international dispute resolution practitioners in the world. He has handled international arbitrations throughout the world and before virtually every major arbitration institution. Mr. Rivkin also represents companies in transnational litigation in the US, including the enforce-

## Preface

Dr. Pierre A. Karrer stands out as an exceptionally accomplished international arbitrator, practitioner and expert. The authors who have contributed to this book – all of whom are also prominent in the field of international arbitration – have come to know and respect Dr. Karrer from sitting with him on tribunals, appearing before him as counsel, and/or working with him on projects such as the IBA Rules on the Taking of Evidence. We the editors had the fortune of getting to know Dr. Karrer through his role as a teacher and mentor. It is within this role that he has enthusiastically helped foster the interest, knowledge, skills and networks of generations of young lawyers. We are therefore pleased and delighted to honor Dr. Karrer's remarkable contributions to developing international arbitration and to enhancing the professionalism and collaboration of the global arbitration community.

When putting together this project, we sought to find a theme that would focus on an important feature of Dr. Karrer's philosophical and practical approach to arbitration After some brainstorming, there was no doubt in our minds that the theme of the book celebrating Dr. Karrer's career should focus on the powers and duties of an arbitrator.

Dr. Karrer exemplifies the characteristics of a "maestro" arbitrator who has built and earned his reputation with talent, skill, creativity, integrity and congeniality. His reputation for his good judgment in an expansive array of cases reflects his wide range of knowledge and interests as well as his openness to new ideas and diverse cultures. Dr. Karrer believes in the importance of the arbitrator conducting the proceedings with attention to detail, careful preparation, a firm hand and an open-mind. He believes in the powers of the arbitrator to ensure a fair and efficient conduct of an arbitration and he takes the duties and responsibilities of the arbitrator seriously. It is well known that "an arbitration is only as good as the arbitrator," and all of the contributors to this book know that when Dr. Karrer is the arbitrator, the arbitration will be expertly conducted.

Attracting prominent contributors to this book was an easy task as Dr. Karrer enjoys professional and collegial friendships across the globe. We tried to bring together a diverse group of his colleagues in this book. Many have enjoyed long careers over many years of interacting with Dr. Karrer, while others more recently had the fortune of getting to know him when they were young practitioners and benefited from

his willing helping-hand to bring new talent into the arbitration community. Regrettably, we could not include all of the potential contributors who would naturally be a welcomed part of this book.

We hope that the readers of this book will gain insights into the role of the arbitrator and continue the discussions of the issues addressed in these chapters. Arbitrators continue to develop during their careers and arbitration theory and practice evolves over the years. It is only through the sharing of experience, knowledge and ideas that we can guide the developments and evolution to better achieve the promise of arbitration to promote international trade and relations through resolving disputes in a fair, efficient and reliable manner. Dr. Karrer loves to share his knowledge and experience with students and young practitioners in a variety of settings: at universities, through the Willem C. Vis Arbitration Moot, through his writings, at conferences and seminars, and social events. We are delighted to offer this book to readers to carry-on his tradition of sharing experience and knowledge in the hopes of inspiring discussion and thought, just as Dr. Karrer has inspired us.

We would like to express our appreciation of working with Vincent Verschoor and Eleanor Taylor of Wolters Kluwer, as well as their team. They were immediately on board with the idea of publishing a Liber Amicorum for Dr. Karrer and have offered continuous encouragement and support.

Without the dedication and hard work of the team at Wolters Kluwer and the outstanding contributors, this book would not be the success that it is in honoring Dr. Karrer's career.

Patricia Shaughnessy & Sherlin Tung April 1, 2017

#### CHAPTER 30

## The CISG in International Arbitration

Ingeborg Schwenzer & Florence Jaeger

#### §30.01 INTRODUCTION

At first, it might be surprising what the CISG¹ and international arbitration have in common. While the CISG is considered substantive law, arbitration is qualified as procedural law. However, both have greatly facilitated international trade during the last twenty to thirty years by harmonising and unifying the applicable law.² Predictability as one of the most important factors for parties in international trade has been considerably increased.

Today, the CISG is applicable in eighty-five States, nine of the ten most influential trade nations are Member States.<sup>3</sup> Thus, it potentially covers more than 80% of global trade.<sup>4</sup> This international success is further underlined by the fact that during the last twenty years most of the national and international reform or legislative projects used the CISG as a starting point.<sup>5</sup> To name a few recent developments; the reform of the

<sup>1.</sup> The United Convention on Contracts for the International Sale of Goods (1980) (CISG).

<sup>2.</sup> Cf. Jeffrey Waincymer, The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure, 582, 583, 584 (C. Andersen & Schroeter, Sharing International Commercial Law across National Boundaries, Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, London: Wildy, Simmonds & Hill, 2008). For further shared characteristics Morten Fogt, The Interaction and Distinction Between the Sales And Arbitration Regimes – the CISG and Agreements or Binding Practice to Arbitrate, 26 Am. Rev. Int. Arb. 365, 385 et seq. (2015).

See for the current number of contracting states, http://www.uncitral.org/uncitral/en/uncitral\_texts/sale\_goods/1980CISG\_status.html (accessed 11 May 2016).

<sup>4.</sup> Nils Schmidt-Ahrendts, CISG and Arbitration, Belgrade L. Rev. 3, 211, 220 (2011).

<sup>5.</sup> Cf. the reform of the German law of obligations; the Dutch Wetboek; the sales law of the Slavic countries and of the OHADA States; the former socialist States as well as the subsequent States of the former Soviet Union, Yugoslavia and the Czechoslovakia. The CISG has also strongly influenced the contract law of Japan and South Korea, but even more so the new Chinese contract law; one exception is Turkey. A similar tendency can be made out with international rules: the

Spanish Commercial Code, the Argentinian and the Hungarian as well as the Korean and Japanese Civil Code. If one was to resort to the term of *lex mercatoria*,<sup>6</sup> the CISG would undoubtedly constitute the core of its contractual rules.<sup>7</sup>

A comparable story of worldwide success is the development of international arbitration. The New York Convention (NYC) is applicable in 156 countries and the UNCITRAL Model Law was implemented in seventy-two countries encompassing more than 100 jurisdictions. In the last twenty years the number of arbitration proceedings has tripled. Today, it can be well assumed that 60% of all international contracts contain an arbitration clause, whereas the likelihood increases even more with a rising in contract volume. Consequently, in practice significant international disputes are no longer litigated before state courts. Remarkably, while traditional arbitral institutions in Western countries experience a certain stagnation of the number of arbitral

UNIDROIT Principles for International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL). For further evidence, *see* Ingeborg Schwenzer, *Schlechtriem* & *Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, Art. 35 para. 4 (6th ed., Oxford: Oxford University Press, 2013); Ingeborg Schwenzer & Pascal Hachem, *The CISG – A Story of Worldwide Success*, 119, 123 et seq. (Kleinemann, CISG Part II Conference, Stockholm: Iustus Forlag, 2009).

<sup>6.</sup> Reflecting the critical views Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria*, 32, 33 (The Hague: Kluwer Law International 1999) and regards *lex mercatoria* in general; *see also* Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, paras 3.167 et seq. (6th ed., Oxford: Oxford University Press, 2015).

<sup>7.</sup> Pilar Perales Viscasillas & David Ramos Muñoz, CISG & Arbitration, 1366, 1359 (Büchler & Müller-Chen, Private Law – national – global – comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag, Berne: Stämpfli, 2011); Gustav Flecke-Giammarco & Alexander Grimm, CISG and Arbitration Agreements: A Janus-faced Practice and How to Cope with It, 25 J Arb. Stud. 33, 47 (2015). Mainly the lex mercatoria is seen in the PICC und PECL, see Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, Global Sales and Contract Law, para. 3.73 (Oxford: Oxford University Press 2012); Blackaby, Partasides, Redfern & Hunter, supra n. 6, at paras 3.167 et seq., particularly at paras 3.183 et seq.; PICC und PECL draw their basis strongly from the CISG, see Ingeborg Schwenzer, Uniform Sales Law – Brazil Joining the CISG Family, 21, 22 (Schwenzer, Pereira & Tripodi, A CISG e o Brasil, São Paulo: Marcial Pons, 2015).

<sup>8.</sup> Ingeborg Schwenzer & Claudio Marti Whitebread, *Legal Answers to Globalization*, 1, 2 et seq. (Schwenzer, Atamer & Butler, Current Issues in the CISG and Arbitration, The Hague: Eleven International Publishing, 2014).

<sup>9.</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), for the current status, *see* http://www.uncitral.org/uncitral/en/uncitral\_texts/arbitration/NYConvention\_status.html (accessed 11 May 2016).

<sup>10.</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments of 2006, for the current status, *see* http://www.uncitral.org/uncitral/en/uncitral\_texts/arbitration/1985Model\_arbitration\_status.html (accessed 11 May 2016).

<sup>11.</sup> Stefan Vogenauer, *Civil Justice Systems in Europe*, 2008, Questions 49.1 and 51.1, https://www 3.law.ox.ac.uk/themes/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf (accessed 11 May 2016); Ingeborg Schwenzer & Christopher Kee, *International Sales Law – The Actual Practice*, 29 Penn St. Int'L. Rev. 425, 446, 447 (2011); Schwenzer & Marti Whitebread, *supra* n. 8, at 1, 2.

<sup>12.</sup> As a result, different States try to make their national litigation more attractive for international disputes by establishing specialised courts, cf. particularly Singapore International Commercial Court; cf. for Germany Landgericht Mannheim (Regional Court), proceedings in English at the Chamber of Commerce.

proceedings, it is increasing immensely in Asia<sup>13</sup> and new arbitration institutions are founded particularly in Latin America, Africa and the Arabic States.

In arbitral practice the CISG is often applied.<sup>14</sup> This is closely related to the international composition of the arbitral tribunal which possesses comprehensive practical comparative legal experience and is therefore accustomed to bridge the differences arising out of different legal traditions.<sup>15</sup> In that regard, the CISG serves as a very successful compromise between the continental European and Anglo-American legal backgrounds.<sup>16</sup>

Numerous scholarly writings discuss the application of the CISG by arbitral tribunals. In addition to theoretical questions such as the application and interpretation of the CISG by arbitral tribunals, there are also a number of writings shedding light on the practical perspective to illustrate how often the CISG is applied in arbitration. The analysis showed that approximately 25% of all published CISG cases were rendered by arbitral tribunals. <sup>17</sup> Bearing in mind how little arbitral awards are published in general, it can be assumed that a majority of proceedings dealing with the CISG take place before arbitral tribunals and not national courts.

From the wide range of interesting issues, the following two questions are being discussed: (1) When is the CISG applied in arbitral proceedings? (2) Can the CISG be applied to the arbitration clause?

#### §30.02 CISG AS SUBSTANTIVE LAW

#### [A] Preliminary Remarks

According to Article 1(1) CISG the CISG applies if the parties have their seat in two different contracting states or the applicable rules of private international law lead to the application of the law of a Contracting State. The CISG thereby determines its sphere of application autonomously. Due to obligations arising out of international law this is binding for national courts. Arbitral tribunals, however, as a private dispute resolution instance chosen by the parties, are not bound by these international law

<sup>13.</sup> Cf. the statistics by the China International Economic and Trade Arbitration Commission (CIETAC) http://cietac.org/index.php?m=Page&a=index&id=40&l=en (accessed 11 May 2016); cf. also statistics by the Hong Kong International Arbitration Centre (HKIAC), http://22 0.241.190.1/en/hkiac/statistics (accessed 11 May 2016).

<sup>14.</sup> *See* on this Stefan Kröll, *Arbitration and the CISG*, 59, 61, 62 (Schwenzer, Atamer & Butler, Current Issues in the CISG and Arbitration, The Hague: Eleven International Publishing, 2014), who could even make out a pro-CISG attitude by the arbitrators based on a case study – in 57% of the analysed cases the CISG was chosen by the arbitral tribunal. Similarly Loukas Mistelis, *CISG and Arbitration*, 373, 388 (Janssen & Olaf, CISG Methodology, Munich: Sellier 2009).

<sup>15.</sup> Likewise Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 220 (2011); Kröll, supra n. 14, at 59, 69.

<sup>16.</sup> Schwenzer, supra n. 7, at 21, 36 f.

<sup>17.</sup> Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 213 (2011); Kröll, supra n. 14, at 59, 61.

<sup>18.</sup> Burghard Piltz, *Internationales Kaufrecht*, § 2 para. 6 (2nd ed., Munich: Beck 2008); Kröll, *supra* n. 14, at 59, 62 et seq.; Alexis Mourre, *Application of the Vienna International Sales Convention in Arbitration*, ICC ICArb. Bull. 17, 43 (2006).

obligations. <sup>19</sup> As there is no *lex fori* for arbitral tribunals comparable with the one for national courts, they are not requested to abide by the private international law rules. <sup>20</sup> It is rather the law at the seat of arbitration according to which the arbitral tribunal has to determine the applicable substantive law. <sup>21</sup> Subsidiarily, the arbitral rules chosen by the parties are to be applied. <sup>22</sup>

Recent developments in international arbitration show a remarkable congruence. Primarily, the arbitral tribunal decides the dispute according to the law chosen by the parties.<sup>23</sup> Today, such a choice of law is considered to be a direct choice of a substantive law of the selected state excluding its rules of international private law.<sup>24</sup> In absence of such a choice of law some of the national arbitration statutes still refer the arbitral tribunal to the rules of international private law.<sup>25</sup> According to a more modern view, the arbitral tribunal shall directly apply the law which is most closely connected to the dispute.<sup>26</sup> This approach is also mirrored by the most important arbitration rules.<sup>27</sup> In general, it is internationally recognised that in addition to the law of a state, rules of law, i.e., soft law, may be applied.<sup>28</sup>

#### [B] Choice of Law by the Parties

Nowadays the overwhelming majority of jurisdictions acknowledges the possibility of the parties to choose the applicable law at least for arbitral proceedings.<sup>29</sup> The Hague

<sup>19.</sup> Pierre Mayer, *L'application par l'arbitre des conventions internationales de droit privé*, 275, 287 (Loussouarn, L'internationalisation du droit, Paris: Dalloz 1994); also Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 214 (2011).

<sup>20.</sup> Kröll, *supra* n. 14, at 59, 64; cf. also Mourre, ICC ICArb. Bull. 17, 43, 46 (2006), especially at 44 regarding the parties' choice of law, which bases on party autonomy and thereby excludes the provision of conflict law in Art. 1(1)(b) CISG.

<sup>21.</sup> Kröll, *supra* n. 14, at 59, 64; Blackaby, Partasides, Redfern & Hunter, *supra* n. 6, at paras 3.213 et seq.; Gary Born, *International Commercial Arbitration*, 525 et seq. (2nd ed., Alphen aan der Rijn: Kluwer, 2014) with further references.

<sup>22.</sup> Blackaby, Partasides, Redfern & Hunter, *supra* n. 6, at paras 3.50 et seq.; cf. the concrete example of § 23 DIS-Arbitration Rules 98; Art. 17(1) ICC Arbitration Rules; Art. 22.3 LCIA Rules; Art. 28(1) AAA Rules; Art. 35(1) HKIAC Rules; Art. 24(1) SCC Rules; Art. 24(2) Vienna Rules und Art. 33 Swiss Rules; *see* also Art. 35 UNCITRAL Arbitration Rules.

<sup>23.</sup> Germany: § 1051(1) s. 1 CCP; Switzerland: Art. 187(1) PILS; United Kingdom: English Arbitration Act 1996, s. 46(1)(a).

<sup>24.</sup> See § 1051(1) s. 2 German CCP; English Arbitration Act 1996, s. 46(2).

<sup>25.</sup> English Arbitration Act 1996, s. 46(3); see also in Art. 28(2) UNCITRAL Model Law.

<sup>26.</sup> Germany: § 1051(1) CCP; Switzerland: Art. 187(1) PILS.

<sup>27.</sup> Article 33(1) Swiss Rules; §§ 23.1, 23.2 DIS-Arbitration Rules 98; Art. 21(1) ICC Arbitration Rules, which do not focus on the *closest connection* but on the law which the arbitral tribunal determines to be the most *appropriate* law.

<sup>28.</sup> English Arbitration Act 1996, s. 46 (1)(b); § 1051 German CCP includes explicitly *rules of law*; Joachim Münch, *Münchener Kommentar zur Zivilprozessordnung*, § 1051 para. 14 (Krüger et al., 4th ed., Munich: Beck, 2013); explicitly in the Introduction I.18 und Art. 3 The Hague Principles on Choice of Law in International Commercial Contracts; however, arbitration clauses are excluded from their scope pursuant to Art. 1(3)(b); further *Genevève Saumier*, 40 Brook. J. Int'l L. 1, 18 et seq. (2014); Frank Vischer, Lucius Huber & David Oser, *Internationales Vertragsrecht*, paras 114 et seq (2nd ed., Berne: Stämpfli, 2000).

<sup>29.</sup> See Gary Born, International Arbitration and Forum Selection Agreements, 167, 168 (4th edn, Alphen aan der Rijn: Kluwer, 2013).

Principles on Choice of Law in International Commercial Contracts first adopted in 2015 affirm this principle and will attribute even greater importance to it in the future. In practice, in more than 70% of all international contracts parties embrace this possibility to conclude a choice of law clause.<sup>30</sup>

In general, the parties simply choose the law of a particular state without further specifications, for example clauses like 'This contract is governed by Swiss law'. In such a case it is questionable whether the parties have exclusively chosen the Swiss Code of Obligations as non-harmonised Swiss law or also the CISG, since Switzerland is a contracting state of the CISG.

National courts have repeatedly discussed the question, whether the choice of the law of a contracting state constitutes an opting-out of the CISG according to Article 6 CISG. There is agreement that the choice of the law of a contracting state by itself cannot be interpreted as an exclusion of the CISG.<sup>31</sup> Rather, further specifications are required, for example, 'the law of the State X excluding the CISG', 'the Swiss Code of Obligations' or 'application of Articles 184 et seq. of the Swiss Code of Obligations'.<sup>32</sup>

However, this case law cannot be directly applied to Article 6 CISG in arbitral proceedings. It derives from the national courts' obligation by international law to apply the CISG in case the preconditions of Article 1(1) CISG are met. A national court has to decide in a second step, if there is a valid opting-out according to Article 6 CISG at hand. Since the arbitral tribunal – as already mentioned – is not bound by Article 1(1) CISG, it is not requested to assess opting-out of the CISG, but to establish its application.<sup>33</sup> This is achieved by interpretation of the parties' choice of law clause. It remains questionable, whether this interpretation is conducted in accordance with the non-harmonised domestic law or Article 8 CISG.<sup>34</sup> Despite existing differences between domestic principles of interpretation and Article 8 CISG, the result of interpreting choice of law clauses in international settings might hardly ever lead to diverging results.<sup>35</sup> After all, it is decisive what reasonable parties intended by agreeing on a

<sup>30.</sup> Vogenauer, *supra* n. 11, Questions 15 et seq., https://www3.law.ox.ac.uk/themes/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf (accessed 11 May 2016). Cf. further Schwenzer, Hachem & Kee, *supra* n. 7, at paras 5.21 et seq.

<sup>31.</sup> CISG Advisory Council, Opinion No. 16, Rapporteur Spagnolo, *Exclusion of the CISG under Article 6*, n. 4.2; Waincymer, *supra* n. 2, at 582, 595.

<sup>32.</sup> See also Born, supra n. 29, at 167; Mourre, ICC ICArb. Bull. 17 (2006), 43, 44, 45.

<sup>33.</sup> Schwenzer & Hachem, Schlechtriem & Schwenzer Commentary on the Convention on the International Sale of Goods (CISG), Art. 6 para. 13 (Schwenzer, 4th ed., 2016).

<sup>34.</sup> In favour of an application of Art. 8 CISG, *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, *Sabate S.A.*, 9th Cir., 5 May 2003, CISG-online 767; OLG Stuttgart, 15 May 2006, CISG-online 1414; OLG Düsseldorf, 30 Jan. 2004, CISG-online 821; CISG Advisory Council, Opinion No. 16, *supra* n. 31, n. 3.6 et seq.; Schmidt-Kessel, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Art. 8 para. 5. Critical Waincymer, *supra* n. 2, at 582, 586, 587.

<sup>35.</sup> With a comparison of §§ 133, 157 German CC also the BGH, VIII ZR 125/14, 25 Mar. 2015, CISG-online 2588, n. II.2.a).

specific clause.  $^{36}$  For this evaluation, the principles developed under Article 6 CISG can be applied by analogy.  $^{37}$ 

When parties choose the law of a Contracting State, it has to be emphasised that the CISG is an integral part of this law and is, furthermore, the law that particularly applies to international contracts. Moreover, as mentioned above, the CISG presents modern regulations tailored to international legal transactions. By contrast, most of the domestic legal systems are not only outdated, but also exclusively focusing on domestic matters. Further, their provisions – contrary to the CISG – do not always balance the interests of both parties. Finally, for reasonable parties it makes sense to choose a national law even when they are not opting-out of the CISG. As it is well known, the CISG does not govern all questions related to a sales contract. Accordingly, these questions are governed by the subsidiarily applicable law.

By means of a choice of law clause parties can also agree on the CISG to govern disputes not ordinarily covered by the CISG (opting-in). <sup>42</sup> Under these circumstances it is not considered as national law; however, as demonstrated above, it is for the arbitral tribunals to decide on the application of rules of law in addition to the national law chosen by the parties. In that case the CISG contains rules of law. <sup>43</sup> Opting into the CISG is advisable especially for framework contracts, in which the performance of services is outweighing the sales obligations of the parties and hence would not be covered by the CISG according to Article 3(2) CISG.

#### [C] Applicable Law in Absence of a Choice of Law Clause

As demonstrated above, different approaches are still present in different national arbitration statutes.<sup>44</sup> If the arbitral tribunal needs to follow the conflict of law rules in order to determine the applicable law,<sup>45</sup> it is decisive whether they refer to the law of a contracting state. In this case, the CISG can be applied without any difficulty.

If the applicable national arbitration statute refers the arbitral tribunal to determine the applicable substantive law according to the closest connection test or the most

<sup>36.</sup> For a comparative approach, *see* Schwenzer, Hachem & Kee, *supra* n. 7, at paras 26.10 et seq.: it becomes evident that in fact a multitude of jurisdictions already apply the standard of *a reasonable person in the shoes of the recipient* to the interpretation, moreover there is a tendency in the same direction in a few Civil law jurisdictions, *see* particularly para. 26.12.

<sup>37.</sup> Cf. for the general principles Schwenzer & Hachem, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Art. 6 paras 12 et seq.; CISG Advisory Council, Opinion No. 16, *supra* n. 31, at n. 3.1 et seq.

<sup>38.</sup> Piltz, *supra* n. 18, at § 2 para. 6; cf. Franco Ferrari, *Kommentar zum Einheitlichen UN-Kaufrecht*, Art. 6 para. 7 (Schwenzer, 6th ed., Munich: Beck, 2013) with further references.

<sup>39.</sup> Waincymer, supra n. 2, at 282, 283, 284.

<sup>40.</sup> Waincymer, supra n. 2, 282, 284, 285.

<sup>41.</sup> See also Waincymer, supra n. 2, at 282, 298.

<sup>42.</sup> Mourre, ICC ICArb. Bull. 17, 43, 46 (2006).

<sup>43.</sup> Mourre, ICC ICArb. Bull. 17, 43, 46 (2006).

<sup>44.</sup> Article 17(3) ICC Arbitration Rules; Art. 28 UNCITRAL Model Law; Art. 33 UNCITRAL Arbitration Rules.

<sup>45.</sup> English Arbitration Act 1996, s. 4(5) and Art. 28(2) UNCITRAL Model Law.

suitable law, <sup>46</sup> this will frequently lead to the application of the CISG. <sup>47</sup> Primarily, this will be the case when both parties have their places of business in contracting states. <sup>48</sup> The CISG was further applied to contracts between parties from non-contracting states, when arbitral tribunals found that the CISG represents international trade <sup>49</sup> or is part of the *lex mercatoria*. <sup>50</sup> Bearing in mind that – as shown above – the CISG served as a blue print for most modern law revisions, <sup>51</sup> this reasoning seems to be justified.

#### §30.03 CISG AS THE LAW APPLICABLE TO THE ARBITRATION CLAUSE

# [A] General Remarks Regarding the Applicable Law to the Arbitration Clause

Only very few national arbitration legislation contain an explicit regulation regarding which law governs the arbitration clause.<sup>52</sup> There is consensus that the law explicitly chosen by the parties is decisive.<sup>53</sup> Moreover, in absence of a choice of law some national arbitration statutes revert back entirely to the law of the seat of arbitration;<sup>54</sup> on the basis of the validation approach others either declare the *lex causae* or the law at the seat of arbitration to be applicable.<sup>55</sup>

Also in scholarly writings there is consensus about the parties' possibility to choose the applicable law. <sup>56</sup> The revised arbitration rules of the Hong Kong International Arbitration Centre (HKIAC) even include such a choice of law in their model clause. <sup>57</sup> Nevertheless, parties make use of this possibility very rarely, <sup>58</sup> even though – as shown above – the choice of the substantive law for the main contract is common

<sup>46.</sup> Born, supra n. 21, at 517, 518.

<sup>47.</sup> Also international conventions may be considered, such as Art. 4 Rome I Regulation.

<sup>48.</sup> Differentiating Kröll, *supra* n. 14, at 59, 64; also in case law represented, ICC case 8962 (1997); ICC case 7331 (1994); ICC case 7531 (1994); ICC case 7844 (1994), cited in: Mourre, ICC ICArb. Bull. 17, 43, 47 (2006).

<sup>49.</sup> Cf. Mourre, ICC ICArb. Bull. 17, 43, 49 (2006) with further references., also with reference to ICC case 8501 (1996) in fn. 34.

<sup>50.</sup> Similarly Mourre, ICC ICArb. Bull. 17, 43, 49, 50 (2006), who notes that arbitrators attribute a great importance to the great number of contracting states, critical towards the application of the CISG as *lex mercatoria*; ICC case 6281 (1989), cited in: Arnaldez, Derains & Hascher, *Collection of ICC Arbitral Awards* 1991–1995, 409 (Paris: Kluwer, 1997): *universal* impact of the CISG.

<sup>51.</sup> See supra n. 5.

<sup>52.</sup> As for example Switzerland: Art. 178(2) PILS as a conflict of law rule with an *alternative character*; *see* in absence of a choice of law in Austria: § 35(2) PILA, where the law of the party performing the characteristic performance is decisive; cf. Dietmar Czernich, *Das auf die Schiedsvereinbarung anwendbare Recht*, SchiedsVZ 181, 185 (2015).

<sup>53.</sup> Czernich, SchiedsVZ 181, 183 (2015) (Austria: § 35(1) PILA); Tamil Nadu Electricity Board v. St-CMS Electric Co. Pvt. Ltd. [2007] EWHC 1713 (Comm); Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd. [2008] EWHC 426 (TCC).

<sup>54.</sup> Turkish International Arbitration Act, Art. 4; Swedish Arbitration Act 1999, s. 48.

<sup>55.</sup> As for example Art. 178(2) Swiss PILS.

<sup>56.</sup> Born, supra n. 21, at 472 et seq., 478 with further references.

<sup>57.</sup> As an option the following wording is suggested: 'The law of this arbitration clause shall be  $\dots$ '.

<sup>58.</sup> Klaus Peter Berger, *Re-Examining the Arbitration Agreement*, 301, 302 (van den Berg, International Arbitration 2006: Back to Basics?, ICCA Congress Series Vol. 13, Alphen aan der Rijn: Kluwer, 2007).

practice. Only in exceptional cases its interpretation will show that the parties' also intended to apply the choice of law to the arbitration clause in the contract.

Highly disputed is the question, which law applies to the arbitration clause in absence of any choice of law by the parties regarding the arbitration agreement. One author is of the opinion that he can make out up to nine different theories in international practice. <sup>59</sup> Even though this number seems fairly high, at least three main approaches can be clearly distinguished.

The majority of scholars in arbitration primarily advocate the application of the law of the seat of arbitration.<sup>60</sup> This reasoning relies on the *doctrine of separability*.<sup>61</sup> Accordingly, the validity of the arbitration agreement and the main contract are to be assessed on an independent basis; the invalidity of the main contract generally does not affect the validity of the arbitration agreement.<sup>62</sup> Equally, notwithstanding an avoidance of the main contract the arbitration agreement is upheld.<sup>63</sup> Today, this *doctrine of separability* is widely accepted in international arbitration.<sup>64</sup> The CISG, too, acknowledges the *doctrine of separability*, as it explicitly states in Article 81(1) CISG that the avoidance of a contract does not affect the dispute resolution clause.<sup>65</sup>

In case law, however, there are many examples that the law applicable to the main contract has also been applied to the arbitration agreement without a detailed reasoning. <sup>66</sup> English courts traditionally tended to reach this conclusion if the parties made an explicit choice of law for the main contract. <sup>67</sup> The *doctrine of separability* shall

<sup>59.</sup> Marc Blessing, The Law Applicable to the Arbitration Agreement, 168, 169, 170 (van den Berg, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series Vol. 9, The Hague: Kluwer, 1999).

<sup>60.</sup> Berger, supra n. 58, at 301, 320 with further references.

<sup>61.</sup> Born, 26 SacLJ 814, 818 (2014); Czernich, SchiedsVZ 181, 182 (2015): so called *Trennungsprinzip* in Austria; so called *Autonomiegrundsatz* in Germany and in Switzerland, Münch, *Münchener Kommentar zur ZPO* (2013), § 1040 paras 8 et seq. for Germany; Dieter Gränicher, *Basler Kommentar zum Internationalen Privatrecht*, Art. 178 paras 89 et seq. (Honsell et al., 3rd ed., Basel: Helbing Lichtenhahn, 2013) for Switzerland.

<sup>62.</sup> Gränicher, *Basler Kommentar IPRG* (2013), Art. 178 para. 90 f.; for Austrian law Czernich, SchiedsVZ 2015, 181, 182 with further references; Lawrence Collins et al., *Dicey, Morris and Collins on Conflict of Laws* vol 2, para. 16-008 (15th ed., London: Sweet & Maxwell 2012).

<sup>63.</sup> Cf. Gränicher, Basler Kommentar IPRG (2013), Art. 178 paras 84, 85.

<sup>64.</sup> See § 1040(1) German CCP; Art. 178(3) Swiss PILS; English Arbitration Act 1996, s. 7; Art. 16(1) First Schedule Singapore International Arbitration Act (CAP. 143A, rev 2002); Art. 16(1) UNCITRAL Model Law; as regards wide recognition Gränicher, Basler Kommentar IPRG (2013), Art. 178 para. 89. As an independent agreement also laid down in Art. II NYC.

<sup>65.</sup> Janet Walker, Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement, 25 J. L. & Comm. 153, 163 (2005–2006); see the decision by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 13 Jun. 2000, CISG-online 1083, n. 3.1.

<sup>66.</sup> Motorola Credit Corp. v. Uzan, 2d Cir, 22 Oct. 2004, 388 F.3d 39, 51; accordingly FR 8 Singapore Pty. Ltd. v. Albacore Maritime Inc., SD NY, 13 Oct. 2010, 754 F.Supp.2d 628, 636; Sphere Drake Ins Ltd. v. Clarendon Nat'l Ins. Co., 2d Cir, 28 Aug. 2001, 263 F.3d 26, 32, fn. 3; cf. with a detailed overview on international case law, Born, supra n. 21, at 580 et seq.

<sup>67.</sup> Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm), n. 21; Karl Leibinger, Franz Leibinger v. Stryker Trauma GmbH [2005] 690 (Comm), 8; Sonatrach Petroleum Corp. (BVI) v. Ferrell International Ltd., 2001 WL 1476318, para. 32; Sumitomo Heavy Industries v. Oil and Natural Gas Commission [1994] 1 Lloyd's Rep. 45; Channel Group v. Balfour Beatty Ltd. [1993] Adj.L.R. 01/21, n. 67 (House of Lords); regarding the incentive for a clear rule, see Born, supra n. 21, at 590. Different, however, in a recent case C v. D [2007] EWCA Civ 1282, n. 22

only lead to the application of the law of the seat of arbitration in case the arbitration agreement was void under the *lex causae*. 68

Notwithstanding which of these two views prevails, it has to be distinguished closely between the procedural and the contractual dimension of an arbitration agreement. The *lex causae* approach is in only suitable for the contractual dimension of the arbitration agreement, while the procedural dimension of an arbitration agreement has to be determined according to the law of the seat of arbitration pursuant to Article V(1)(a) NYC. On the other hand, the approach that favours the law of the seat of arbitration, fails to break it down into the (procedural) arbitration statute and the possible application of the contract law at the seat of arbitration regarding the contractual dimension of the arbitration agreement.<sup>69</sup>

This distinction, which is inevitable, becomes apparent especially in Swiss law. While Article 178(1) of the Swiss Law on Private International Law Statute (PILS) $^{70}$  contains a substantive provision for the arbitration agreement, Article 178(2) PILS $^{71}$  only provides a conflict of laws provision for all further questions of validity of the arbitration agreement. Hence, for all those questions a substantive contract law needs to be determined. Most other national arbitration statutes, such as § 1031 German Civil Procedural Law, only contain form requirements, without specifying the law applicable to other questions of validity. Provisions regarding the law applicable to the interpretation of the arbitration agreement as well as the remedies for a breach of the arbitration agreement are – as far as can be seen – not contained in any arbitration statute.

All the difficulties just described are circumvented by the so called *a-national approach* by French courts, but also partly promoted in literature.<sup>72</sup> According to this approach no particular national law is applicable – except the mandatory (French)

et seq.; *Shashoua v. Sharma* [2009] EWHC 957 (Comm), n. 29 et seq., where it was stated that the law applicable to the arbitration clause only rarely differs from the law at the seat of arbitration. *See* also Collins et al., *supra* n. 64, at paras 16-017, 16-018.

<sup>68.</sup> See for the leading case Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ 638. Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. VSC Steel Company Ltd. [2013] EWHC 4071 (Comm), n. 99 et seq.; XL Insurance Ltd. v. Owens Corning [2001] 1 All E.R., 530. On the inconsistent case law in the United Kingdom, see Sabrina Pearson, Sulamérica v. Enesa, The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement, 29 Arb. Int'l 115, 124, 125 (2013), rightly titled as the 'hidden pro-validation approach'. See further Born, supra n. 21, at 575.

<sup>69.</sup> Similarly Kröll, supra n. 14, at 59, 82, 83.

<sup>70.</sup> Article 178(1) Swiss PILS: 'The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.'

<sup>71.</sup> Article 178(2) Swiss PILS: 'Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law'.

<sup>72.</sup> Cass (1re Ch. civ.), *Municipalité de Khoms El Mergeb v. société Dalico*, 20 Dec. 1993, 1993 Rev. Arb. 116, 117; Cass (1re Ch. civ.), *Renault v. société V 2000 (Jaguar France)*, 21 May 1997, 1997 Rev. Arb. 537. Cf. Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, paras 435 et seq., 525 et seq. (The Hague: Kluwer, 1999).

provisions. Rather, the arbitration agreement shall be assessed on the basis of the parties' intent as well as general principles and trade usages in international trade.<sup>73</sup> Although this approach is very appealing due to the fact that it avoids all difficult questions of conflict of laws references,<sup>74</sup> it is nonetheless mostly dismissed as an unnecessary exaggeration of transnational thinking.<sup>75</sup> Furthermore, it does not correspond to the hypothetical parties' intent anymore.<sup>76</sup>

Against this background the question will be discussed in the following, whether and to which aspects of the arbitration agreement the CISG can be applied.

#### [B] General Applicability of the CISG to Arbitration Agreements

Some authors are of the opinion that the CISG is generally not applicable to arbitration agreements.<sup>77</sup> Beside the *doctrine of separability* it is mainly argued that arbitration agreements fall outside the scope of the CISG due to their procedural nature lacking the sales contract characteristics.<sup>78</sup> As elaborated above, one must distinguish between the procedural and the contractual components of an arbitration agreements. With regard to the contractual dimension the question is whether harmonised or non-harmonised law applies. Article 19(3) (dispute resolution clauses as material alteration of the offer) and Article 81(1) CISG (continuation of the arbitration clause in spite of the avoidance of the main contract) clearly state that dispute resolution clauses are not excluded from the CISG's application.<sup>79</sup> The wording by itself suggests that the CISG puts the arbitration agreement a par with other contractual provisions.<sup>80</sup>

#### [C] Formal Validity

Most national arbitration statutes still submit arbitration agreements to a form requirement. Only very few states abolished the form requirements for the arbitration

<sup>73.</sup> For an overview, see Berger, supra n. 58, at 301, 380 et seg.

<sup>74.</sup> Berger, supra n. 58, at 301, 310.

<sup>75.</sup> Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, 197, 202 (van den Berg, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series Vol. 9, The Hague: Kluwer, 1999); Berger, *supra* n. 58, at 301, 310. Detailed in Fogt, 26 Am. Rev. Int. Arb. 365, 369 et seq. (2015), with further convincing arguments why this approach has to be dismissed.

<sup>76.</sup> Bernardini, supra n. 75, at 197, 202.

<sup>77.</sup> See for further references Kröll, supra n. 14, at 59, 82 et seq.

<sup>78.</sup> Stefan Kröll, *Selected Problems Concerning the CISG's Scope of Application*, 25 J. L & Comm. 39, 45, 46 (2005) with further references; idem, *supra* n. 14, at 59, 81 f.; BGer, 4C.100/2000, 11 Jul. 2000, CISG-online 627, n. 3.

<sup>79.</sup> Perales Viscasillas & Ramos Muñoz, *supra* n. 8, at 1366, 1355; Walker, 25 J. L. & Comm. 153, 163 (2005–2006); Robert Koch, *The CISG as the Law Applicable to Arbitration Agreement*?, 267, 280, 281 (B. Andersen & Schroeter, Sharing International Commercial Law across National Boundaries, Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, London: Wildy, Simmonds & Hill, 2008); Schroeter, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Intro. to Arts 14–24 paras 16 et seq.

<sup>80.</sup> Similarly Perales Viscasillas & Ramos Muñoz, supra n. 7, at 1355, 1366.

agreement, namely France,<sup>81</sup> Sweden,<sup>82</sup> New Zealand<sup>83</sup> and some Canadian provinces.<sup>84</sup> Also the NYC still contains a form requirement in Article II(1) and (2).

By contrast, according to its Article 11 the CISG is based on the freedom of form principle. Consequently, some authors argue that the freedom of form principle contained in the CISG prevails over any form requirement for arbitration agreements. <sup>85</sup> This view is, however, not compelling. <sup>86</sup>

The form requirements aim particularly at the procedural dimension that is generally governed in all those national arbitration statutes that have not yet implemented the freedom of form principle.<sup>87</sup>

Also by interpretation of the CISG the same result is reached. The application of Article 11 CISG to arbitration agreements was never intended. The freedom of form principle has been disputed since the beginning of the initiatives to harmonise sales law. So Objections were mainly raised by former socialist states and countries which have an indirect form requirement tied to the value of the transaction in their national law. For the form requirements of an arbitration agreement have never been part of the discussions about the freedom of form.

The possibility to make a reservation according to Article 96 CISG in order to exclude the freedom of form principle further affirms this reasoning. This reservation was mainly made by States that (originally) intended to control their international sales contracts. <sup>91</sup> If the intention had been to submit arbitration agreements to the freedom of form principle of Article 11 CISG most of the contracting states would have been obliged to make such a reservation. <sup>92</sup>

Further, the argument that the CISG prevails as *lex specialis* over national arbitration statutes<sup>93</sup> does not hold up. Rather the contrary is the case. Also from the wording in Article 90 CISG it derives that the CISG does not prevail over the NYC.

<sup>81.</sup> Article 1507 CCP.

<sup>82.</sup> The Sweden arbitration statute (1999) waives any sort of form requirements for arbitration agreements.

<sup>83.</sup> New Zealand Arbitration Act 1996, Sch. 1, s. 7(1).

<sup>84.</sup> Alberta: Alberta Arbitration Act 1991, Art. 5(1); Ontario: Ontario Arbitration Act 1991, Art. 5(3).

<sup>85.</sup> Walker, 25 J. L. & Comm. 153, 163 (2005–2006); Perales Viscasillas & Ramos Muñoz, supra n. 7, at 1355, 1366; Anne-Kathrin Schluchter, Die Gültigkeit von Kaufverträgen unter dem UN-Kaufrecht, 91 (Baden-Baden: Nomos, 1996).

<sup>86.</sup> Of the same opinion Piltz, *supra* n. 18, at § 3 para. 119; Kröll, *supra* n. 14, at 59, 83; Koch, *supra* n. 79, at 267, 276 et seq.

<sup>87.</sup> Cf. the UNCITRAL Model Law, which offers two options for Art. 7 that consciously reflects both alternatives.

<sup>88.</sup> Ernst Rabel, Der Entwurf eines einheitlichen Kaufgesetzes, RabelsZ 9, 1, 55, 56 (1935).

<sup>89.</sup> Hans Dölle & Gert Reinhart, *Kommentar zum Einheitlichen Kaufrecht*, Art. 15 paras 14 et seq. (Dölle, Munich: Beck, 1976); such provisions are present for example in the USA: § 2-201(1) UCC; France: Art. 1341 CC. Cf. also Schwenzer, Hachem & Kee, *supra* n. 7, at paras 22.09 et seq.

<sup>90.</sup> Cf. Schwenzer & Tebel, *The Word Is Not Enough – Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG*, ASA Bull. 4, 740, 748 (2013), *see* fn. 51 with further details on the different positions taken by the delegates throughout the drafting of the CISG.

<sup>91.</sup> The contracting states, which have originally made an Art. 96 CISG reservation: Argentina, Armenia, Chile, China (withdrawn), Estonia (withdrawn), Latvia (withdrawn), Lithuania (withdrawn), Paraguay, Russian Federation, Ukraine, Hungary and Republic of Belarus.

<sup>92.</sup> See Piltz, supra n. 18, at § 2 para. 130.

<sup>93.</sup> Perales Viscasillas & Ramos Muñoz, supra n. 7, at 1355, 1370.

Finally, the same conclusion is reached considering the *most favourable law approach* of Article VII(I) NYC. This provision is dealing with the relation of the NYC to other provisions specifically with regard to recognition and enforcement, however, not with regard to provisions of sales contracts or any other general contractual provisions.<sup>94</sup>

Due to all these reasons it can be assumed that mandatory form requirements of the *lex arbitri* have to be always applied. <sup>95</sup> Whether the CISG is the substantive contract law at the seat of the arbitral tribunal or the *lex causae*, is – like any other applicable contract law – irrelevant.

#### [D] Substantive Validity

Contrary to the formal validity which depends regularly on the applicable national arbitration statute, the CISG can be applied to questions of substantive validity, when dealing with questions of contract formation (Articles 14 et seq. CISG). <sup>96</sup> As already pointed out, for this discussion only the contractual dimension of the arbitration clause is of importance.

The application of the CISG is unproblematic, if the law governing the main contract is applied. A great number of courts have chosen this approach, without even discussing other viable options. <sup>97</sup> The overwhelming majority of scholars agree on this view. <sup>98</sup> The application of the CISG might not appear as evident if the law of the seat of arbitration is considered to be decisive for the contractual dimension of the arbitration clause. Here the question arises whether to apply the non-harmonised

<sup>94.</sup> Cf. Ulrich Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen*, § 14 para. 45 (Munich: Sellier, 2005); Thomas Rauscher, *Zuständigkeitsfragen zwischen CISG und Brüssel I*, 933, 950 (Lorenz et al., Festschrift für Andreas Heldrich zum 70. Geburtstag, Munich: Beck, 2005).

<sup>95.</sup> For a detailed overview, *see* Schwenzer & Tebel, ASA Bull. 4, 740, 749 (2013); also Fogt, 26 Am. Rev. Int. Arb. 365, 396 et seq. (2015).

<sup>96.</sup> Filanto S.p.A. v. Chilewich Int'l Corp., SD NY, 14 Apr. 1992, CISG-online 45, 789 F.Supp. 1229; LG Hamburg, 19 Jun. 1997, CISG-online 283; Tribunal Supremo (Spain), 17 Feb. 1998, CISG-online 1333; Tribunal Supremo (Spain), 17 Feb. 1998, CISG-online 1335; Koch, supra n. 79, at 267, 282.

<sup>97.</sup> Rechtbank Arnhem, 17 Jan. 2007, CISG-online 1476; Filanto S.p.A. v. Chilewich International Corp., SD NY, 14 Apr. 1992, CISG-online 45; see for case law on choice of forum clauses: Cass (1re Ch. civ.), 16 Jul. 1998, CISG-online 344; CA Paris, 13 Dec. 1995, CISG-online 312; Solea LLC v. Hershey Canada Inc., D. Del., 9 May 2008, CISG-online 1769; Chateau des Charmes Wines Ltd. v. Sabate USA Inc., Sabate S.A., 9th Cir., 5 May 2003, CISG-online 767; Gerechtshof 's-Hertogenbosch, 19 Nov. 1996, CISG-online 323, n. 4.4. et seq.; OLG Oldenburg, 20 Dec. 2007, CISG-online 1644; OLG Köln, 24 May 2006, CISG-online 1232; OLG Braunschweig, 28 Oct. 1999, CISG-online 510; LG Landshut, 12 Jun. 2008, CISG-online 1703, n. 31 et seq.; LG Giessen, 17 Dec. 2002, CISG-online 766 (obiter); cf. also Chateau Des Charmes Wines Ltd. v. Sabate, USA Inc. et al., Superior Court of Justice Ontario, 28 Oct. 2005, CISG-online 1139, n. 13; left open by OLG Düsseldorf, 30 Jan. 2004, CISG-online 821.

<sup>98.</sup> Application of the CISG to dispute resolution clauses: Magnus, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener Kaufrecht (CISG), 2005, Vorbem. zu Arts 14 et seq. para. 8; Schwenzer & Hachem, Schlechtriem & Schwenzer Commentary on the CISG (2016), Art. 4 para. 11; Schroeter, Schlechtriem & Schwenzer Commentary on the CISG (2016), Intro. to Arts 14–24 paras 18, 19; the same applies to choice of forum clauses: Schroeter, supra n. 94, at § 15 para. 24; dissenting Kröll, 25 J. L & Comm. 39, 44, 45 (2005); presumably also Rauscher, supra n. 94, at 933, 949 f.

contract law or – if the seat of arbitration is located in a contracting state – the CISG. Supporters of the application of non-harmonised law point out the similarity to arbitration agreements that are concluded independently from a contract. For those always the non-harmonised law and never the CISG would apply. The German Federal Supreme Court has taken a similar stance in a dictum in a recent case in which it decided upon a choice of forum clause pursuant to Article 23 Brussels Regulation.

At least for arbitral tribunals this argument is not convincing. As demonstrated above, arbitral tribunals do not apply the substantive law based on any obligation by international law if all preconditions are met, but rather in absence of a parties' choice of law they apply the law with the closest connection. This rule is not only valid for the selection between different national laws but also applies accordingly for the decision between the non-harmonised and harmonised law of one and the same jurisdiction to be applied to the arbitration agreement. An international dispute, which is governed by the CISG, will regularly be more closely connected to harmonised contract law, which thus is the preferable law.

Even when following the French approach, according to which arbitration agreements are not governed by national but by a-national law, the CISG presents itself as the most viable option of a transnational contract regulation.

#### [E] Interpretation

Substantive validity and interpretation of an agreement are closely interrelated. The question of what the parties agreed upon cannot be separated from the question whether the parties reached an agreement at all. This is generally the case but especially with regard to the facts that can be taken into account to interpret the parties' conduct. Many Anglo-American legal systems for example apply the *parol evidence rule*<sup>101</sup> according to which oral ancillary agreements cannot serve to interpret the written contract. The CISG, on the contrary, in Article 8(3) CISG explicitly provides for a basis to consider the parties' negotiations, customs, established practices between themselves and subsequent conduct of the parties. The Anglo-American *parol evidence rule* is thus excluded under the CISG. Applying contradicting substantive contract formation provisions and principles of interpretation would lead inevitably to frictions.

<sup>99.</sup> Kröll, 25 J. L & Comm. 39, 45 (2005).

<sup>100.</sup> BGH, VIII ZR 125/14, 25 Mar. 2015, CISG-online 2588, n. 23.

<sup>101.</sup> For example., USA: § 2-202 UCC; Singapore: Evidence Act 1997, s. 101; India: Evidence Act 1997, s. 99. Only as rebuttable presumption in England and Wales, cf. Schwenzer, Hachem & Kee, *supra* n. 7, at para. 26.47.

<sup>102.</sup> CISG Advisory Council, Opinion No. 3, Rapporteur Hyland, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, n. 1.2.3; Schwenzer, Hachem & Kee, *supra* n. 7, at paras 26.45 et seq.

<sup>103.</sup> With a detailed overview on case law and scholarly writings, Schmidt-Kessel, *Schlechtriem & Schwenzer Commentary on the CISG* (2016), Art. 8 para. 33, in fn. 183. On the reasons why the *parol evidence rule* was not incorporated in the CISG, *see* CISG Advisory Council, Opinion No. 3, *supra* n. 102, at n. 2.4. with further references: complexity, unknown to most legal systems and in general strongly criticised.

As a result, the CISG tends to always provide the more suitable provisions tailored to international trade than most of the national laws. 104

The situation may be different if the applicable national arbitration statute entails specific interpretation rules only and exclusively for arbitration agreements. <sup>105</sup> Such provisions prevail, like form requirements as discussed above, over general contract provisions as *leges speciales*. <sup>106</sup>

#### [F] Remedies for a Breach of the Arbitration Agreement

Lastly, the question of possible remedies upon a breach of the arbitration agreement is discussed. Can a party claim damages if the other party calls on a national court in violation of the arbitration agreement? Does this possibly result in the right to avoid the whole contract? Again, national arbitration statutes leave these questions open.

Arbitration agreements as well as choice of forum clauses are not merely procedural agreements, but also create contractual obligations. <sup>107</sup> The violation of those contractual obligations in turn may trigger contractual remedies. Accordingly, a solution has to be sought in national contract laws. Once more the choice is to be made between the law of the seat of arbitration and the law applicable to the main contract. An arbitral tribunal has recently upheld a claim for damages due to a breach of the arbitration agreement based on the Swiss Code of Obligations. <sup>108</sup> The Swiss Federal Tribunal affirmed this decision. <sup>109</sup>

Again, the starting point should be the reasonable expectations of the parties. It would be met with confusion if a breach of obligations arising out of the main contract faced different remedies than a breach of the arbitration agreement. As a result one should strive for a congruence in regard to the main contract, be it to apply the *lex causae* or at least when applying the law at the seat of the arbitration when making the choice between the non-harmonised domestic and the harmonised contract law.

#### §30.04 CONCLUSIONS

Internationally, both the CISG and arbitration are a story of worldwide success. Hardly any other legal framework promotes the international trade as effectively as these two

<sup>104.</sup> Cf. Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 220 (2011).

<sup>105.</sup> Such as the *liberal construction principle according to the ordinary understanding of business- men* as it is known in English law, *see* on this Collins et al., *supra* n. 64, at para. 16-016.

<sup>106.</sup> Premium Nafta Products Ltd. (20th) Defendant et al. v. Fili Shipping Company Ltd. et al. [2007] EWCA Civ 20, n. 17 f.

<sup>107.</sup> Cf. also Tan, 47 Va. J. Int'l Law 545, 602 (2006-2007).

<sup>108.</sup> Simon Gabriel, *Arbitration in Switzerland: The Practitioner's Guide*, 1473, 1475 (Arroyo, Alphen aan der Rijn: Kluwer 2013): awarding of damages on the basis of Art. 97 Swiss CO.

<sup>109.</sup> BGer, 4A\_444/2009, decision of 11 Feb. 2010.

<sup>110.</sup> Affirmed by Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 219 (2011), who agrees on the application of Art. 74 CISG in case of a breach of the arbitration agreement.

<sup>111.</sup> For an application of the CISG: Schmidt-Ahrendts, Belgrade L. Rev. 3, 211, 219 (2011). Dissenting Koch, *supra* n. 79, at 267, 285; Perales Viscasillas & Ramos Muñoz, *supra* n. 7, at 1355, 1346.

international instruments. This increases legal predictability and simultaneously reduces transaction costs.

Arbitrators apply the CISG on a regular basis as substantive law to the international sales contracts. Although the arbitral tribunals are not obliged to apply the CISG on the basis of international law, the CISG is applied due to the parties' choice-of-law or alternatively as suitable law with the closest connection to the dispute.

Further, the CISG plays an important role as the applicable law to the arbitration agreement. Regarding the formal validity arbitration agreements are governed by the applicable law of the seat of arbitration; the freedom of form principle of the CISG is thus not applicable. However, the CISG can be applied to all questions of the substantive validity of an arbitration agreement, its interpretation, as well as the remedies available upon a breach of the agreement.