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Horacio A. Grigera Naón

Choice-of-law Problems in International Commercial Arbitration

J. C. B. Mohr (Paul Siebeck) Tübingen

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To Nora, César and Juan José

Foreword

The preparation of this book covered a lengthy period and was made possible only through the help, patience and understanding of various people and institutions. Professor Margarita Argúas, who guided my first steps in the field of private international law, was a source of enthusiasm and was able to read some early drafts on aspects of the topic. Professor Henri Batiffol made possible an early stage of the research, at that time conducted at the Peace Palace Library at The Hague. Professor Dr. Hein Kötz and Dr. Jürgen Samtleben opened the doors of the Max-Planck-Institut in Hamburg to me. Professor Arthur T. von Mehren in many ways made possible my stay at Harvard Law School where a substantial number of refreshing ideas and vital information was absorbed. Professor Donald T. Trautman supervised my S.J.D. paper at Harvard Law School, on which the present text is based, and was invariably a source of sound advice and valuable criticism. To exchange ideas with Professors Trautman and von Mehren, who also read my S.J.D. paper, was always an inspiring exercise. It goes without saying, of course, that the responsibility for all ideas and errors expressed here is wholly mine and that my opinions often differ from those of some of the persons who read, supervised and facilitated my research and writing in this field.

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The writing of this book was substantially completed before taking up my present position as an attorney with the International Finance Corporation, Washington D.C. In any case, the views expressed here are my personal ones and are not necessarily those of the International Finance Corporation.

Washington D.C., October 1991

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I. Introduction

1. Purposes of the Study

It is the purpose of this study to analyze diverse aspects of international commercial arbitration so as to determine to what extent arbitral tribunals are willing to perform the independent role ascribed to them by *lex mercatoria* theoreticians, namely, the creation of an autonomous, anational and all-prevailing international commercial law. In addition, the following aspects will be explored:

(α) the attitude of States, evidenced by their legislation, court decisions and international treaties, towards a supranational, commercial and economic law developed independently through the increasingly uncontrolled adjudicative activity of arbitral tribunals; and

(β) the degree to which States will be willing to reduce, or even wholly deny, their supervisory powers over *lex mercatoria* by directly or indirectly removing certain controls on international commercial arbitration.

The major part of this work concerns, therefore, private international law problems touching the law applicable by international commercial arbitrators to the substance of disputes before them. However, in so far as *lex mercatoria* advocates contend that this law encompasses rules touching other matters standing outside the realm of traditional substantive commercial law (such as the capacity to enter into an arbitral agreement, the *Kompetenz-Kompetenz* powers of arbitrators, or the autonomy of the arbitral clause from the underlying transaction), choice-of-law questions arising from these matters will also fall within the purview of this study.

The central ideas inspiring the present work are:

(i) in the process of choosing the law applicable to the substance of a dispute, international commercial arbitrators do not and should not ignore the existence of national legal systems connected with the controversy or the policies underlying the choice of law and its attendant substantive rules and general principles of law; and

(ii) States are deemed to share the view that fluid and swift economic and commercial relations among nations redound to the benefit of all members of the international community. The achievement of such a shared policy in connection with certain issues often involves two prerequisites. On the one hand, it may be necessary to stretch the application of internal national rules to international transactions. On the other hand, explicit or implicit agreement may be needed on a general international minimum of mandatory rules governing international commercial and economic transactions, or, at least, agreement on a choice-of-law methodology which allows gradual elaboration of substantive rules and principles tracing out general, international, and compulsory limits on the powers of parties and arbitrators to shape the legal framework governing international trade and economic intercourse.

As a first step in this inquiry, it seems necessary to address certain introductory notions about the concept, history and scope of arbitration. Arguments concerning the nature, the function and the local, foreign, national or international character of arbitration are neither alien to the role arbitration is supposed to play in the field of international trade and

economic relations, nor to the notions of fairness and justice that international arbitrators are supposed to advance; these arguments therefore deserve attention. More precisely, the purpose of this study is to determine the choice-of-law methodology best adapted to the function, scope and meaning of international commercial arbitration in the international arena. For this reason, an evaluation of such aspects has a direct bearing both on the degree of autonomy from national legal orders possessed by international arbitrators and, as a result, on the choice-of-law methodology, identified as arbitral *lex fori*, and the room that should be left by such a methodology for the application of national laws. In successive sections, this introduction will consider: (1) a general definition of arbitration; (2) the meaning of arbitration for the purposes of the present work; (3) the juristic categorisation of arbitration; (4) an evaluation of the general function and role of arbitration; (5) the place of the *lex mercatoria* in establishing the content of arbitral justice; and (6) a suggested ideal role for international commercial arbitration in international economic and commercial transactions.

Arbitration has been defined as a private adjudicative institution under which the solution of disputes is removed from State courts and is left to be decided by individuals specifically invested by the parties with powers for that purpose.[1] It has been also referred to as "the settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision"[2]. It has been depicted as a "tribute to the freedom of contract". According to this view, arbitration is "the performance of a contract: the arbitral agreement"[3].

2. "Arbitration" in the Present Work

Defining the scope of arbitration for present purposes is closely related to distinguishing arbitration from other similar institutions and to identifying the different roles that can be played by arbitrators as, for example, under Italian law. After considering these two aspects in turn (*infra* I 2 a and b), the notion of international commercial arbitration which this study encompasses will be described (*infra* I 2 c).

a) Distinguishing Arbitration from Other Institutions

Arbitration can be compared with, and distinguished from, (1) compromise and settlement; (2) expertise and (3) conciliation.

(1) Compromise and Settlement

Compromise and settlement are, or contribute to, an agreement that normally puts an end to an already existing dispute, whereas arbitration finds its source in an agreement

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1 J. ROBERT (1955) 7f.; J. ROBERT (1967) 9. According to the Spanish Law of arbitration, it is an "institution" in which one or more persons resolve an existing dispute at the request of others, who undertake in advance to abide by the decision of the former. According to R. DAVID (1968/69) 12, arbitration is a "technique", whereby a question interesting two or more persons is resolved by one or more persons (arbitrators) who, in turn, derive their powers from an agreement between the interested persons. According to F. RUSSELL/A. WALTON (1979) 1, arbitration is essentially characterized by the arbitral agreement, through which "some dispute is referred by the parties for settlement to a tribunal of their own choosing, instead of to a court". As pointed out by A. FETTWEIS/J. ARETS (1961), the parties to arbitration can be physical or juridical persons, states, state instrumentalities or entities wholly controlled by the state.

2 J. LEW (1978) 11, quoting from the Shorter Oxford Dictionary.

that, instead of directly deciding a controversy, sets up a proceeding for reaching that end[4]. Compromise and settlement, then, do not end a dispute adjudicatively, and we will later observe the importance of this difference from arbitral adjudication[5]. Compromise and settlement are not governed by the idea that the parties appoint a third person with adjudicative powers, which is essential to the notion of arbitration. On the other hand, compromise and settlement normally bring about a reciprocal waiver of rights by the parties, while arbitral adjudication can lead to the full recognition, or denial, of the rights invoked by any of the parties[6].

It can be concluded, then, that an arbitral agreement differs from other agreements because it is specifically aimed at investing private individuals with adjudicative powers[7]. Compromise and settlement imply, on the contrary, a relinquishment of the right to resort to adjudication for deciding a controverted issue[8]. If an arbitral agreement carries any implication of a compromise, it does so only as regards the way in which the controversy is to be solved, but not directly as regards the substantive rights and obligations of the parties[9].

(2) Expertise

Expertise differs from arbitration because the former aims only at rendering a piece of advice or opinion to the parties or to a court[10], whereas the arbitral decision is normally binding on the parties[11]. Both can be used for deciding factual questions, but an arbitral adjudication will normally imply the application of some sort of legal framework in the decision-making process. This is not present in the mere reference to expertise, which is exclusively grounded on a certain type of specialized, technical or scientific knowledge[12]. We shall learn from the following analysis of Italian and other legal systems (*infra* I 2 b and c), however, that even decisions by third parties on matters of fact can imply, if the parties so wish, the solution of a controversy with adjudicative effects, more characteristic of arbitration than of expertise.

(3) Conciliation

Unlike arbitration, conciliation does not culminate in a binding decision, because it is merely a mechanism whose purpose is to advise the parties on the possible ways of reaching a reciprocally acceptable solution to a specific dispute separating them. This distinction is particularly evident in Eastern Asia (China, Korea, Japan) where acceptance by the disputing parties of the proposal of a third party will suffice for an understanding that a conciliation has been reached[13].

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3 J. MIRANDA (1916) 51.
4 J. RUBELLIN-DEVICHI (1965) 14.
5 J. ROBERT (1983) 8-10.
6 J. ROBERT (1983) 9.
7 J. ROBERT (1967) 13.
8 R. VECCHIONE (1971) 33.
9 R. VECCHIONE (1971) 34.
10 J. RUBELLIN-DEVICHI (1965) 14.
11 J. ROBERT (1967) 16.
12 P. FOUCHARD (1965) 2.
13 R. DAVID (1968/69) 13f.

b) Notions of Arbitration in Italian Law

Special consideration needs to be given to the notions of arbitration existing under Italian law - notions also present, to some degree, in the other legal systems: *arbitrato rituale*, *arbitrato irrituale*, *arbitrato libero* and *arbitraggio*. The aim of studying these categories here is to illustrate the different functions, not all of them necessarily adjudicative, that underlie the idea of arbitration, so as to identify which of them is pertinent to this study, and thus to establish its precise scope.

(1) *Arbitrato Rituale*

Originally, under Italian law, *arbitrato rituale*[14] was strictly governed by imperative legal provisions. Arbitrators were equated with public officials, who, instead of making a binding arbitral award, just issued a mere opinion, *a lodo*, which became a true adjudicative decision only after the *decreto di esecurieta* of the *pretore*, that is to say, after a decree of approval by the public authority[15].

Foreigners were not allowed to become arbitrators under the rules of *arbitrato rituale* and the arbitration had to be performed in Italy if it concerned a controversy that could have been decided by Italian courts. Moreover, if the award was not registered by the pretore within five days of its issuance (with parallel payment of a substantial governmental tax), it automatically became null and void[16].

Under the Italian Law on Civil Procedure (1983), modifying the Italian Code of Civil Procedure, Title VIII, Book IV, the regulation of *arbitrato rituale* in Italy underwent a radical change that somewhat diminished the gap between this institution and the *arbitrato irrituale* or *libero*. Under art. 812 of the new text, arbitrators can be either Italian or foreign citizens; according to new art. 823, para. 6, the arbitral award can be also rendered outside of Italy. Registration of the award before the pretore is required only in order to make it enforceable within Italy (art. 825) and to allow for the means of either setting aside the award or having it revoked under the Code of Civil Procedure arts. 829, 395 and 831. Nevertheless, the award acquires automatic binding force on the parties as from the moment it was rendered, irrespective of the fact of its having been filed by the *pretura*[17].

(2) *Arbitrato irrituale* or *libero*

The *arbitrato irrituale* or *libero*, as a reaction against the traditional conception of *arbitrato rituale* underlying the earlier version of the Italian Code of Civil Procedure, shared, and still shares, with the *arbitrato rituale* the characteristic that the parties can authorize the arbitrators to decide the dispute either *strictum iuris* (through strict application of legal rules) or *ex aequo et bono* (in other words, as *amiable compositeurs* who base their decision on general equitable principles of fairness and justice rather than on the textual letter of the law[18]).

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[14] R. DAVID (1968/69) 102.

[15] R. DAVID (1968/69) 119. In a recent decision in *Cariboni* (1989), the *Corte di Cassazione* points out that the obvious "rapprochement" between *arbitrato irrituale* and *arbitrato rituale* after the reform does not imply that they do not remain distinct and different institutions.

[16] R. DAVID (1968/69) 120.

[17] A. LUGO (1983) 450-452; A. GIARDINA (1983a); C. PUNZI (1984).

[18] R. DAVID (1968/69) 122.

The authority of arbitrators *irrituali* is based on an agreement made by the parties according to which any controversy is to be decided by a third party. Implicit in this is the understanding that the ensuing decision will not be enforceable by recourse to the *imperium* of the *pretore* but only through the introduction of an ordinary legal action before a State court aimed at obtaining recognition of the validity, content, interpretation or effect (as the case may be) of the award and, indirectly, of the arbitral agreement itself. The arbitral award is then equated with a contract concluded by the arbitrators and binding on the parties. Therefore, the *arbitrato libero* award is not a procedural act finding its source in the exercise of jurisdictional powers and, for that reason, directly enforceable by the courts; if any of the parties does not voluntarily enforce an *arbitrato libero* award, the other party will have to introduce an ordinary legal suit in order to obtain the recognition of its validity and binding nature, just as when the existence or validity of a contract is denied by one of the contractors. Indeed, compulsory effects stem not from the arbitral award, but from the court's judgment dismissing attacks on the validity, binding nature or effects of the contractual obligations imposed through the *arbitrato libero* award[19].

For this reason, it is generally accepted that *arbitrato irrituale* really falls within the sphere of private contracting, where arbitrators are actually agents of the parties in drawing up a new contractual relationship binding on them. Unlike *arbitrato rituale*, the arbitral agreement does not displace the jurisdiction of State courts in favour of arbitral jurisdiction since *arbitrato libero* does not have the same procedural effects as to enforcement of the award nor the same means available for attacking it.

However, since the reform of 1983, the latter element is the last relevant difference still remaining between *arbitrato rituale* and *arbitrato libero* or *irrituale*. The other important distinction - that the *arbitrato libero* award became binding on the parties, at least as a contractual obligation, from the moment at which the award was rendered, whereas the *arbitrato rituale* award had no binding effect before being registered at the *pretura* - disappeared with new art. 825[20]. According to this new provision, all arbitral awards,

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[19] R. DAVID (1968/69) 124.

[20] On the situation in Italy before the reform, see G. SCHIZZEROTTO (1967) 5, 8, 16-18; R. VECCHIONE (1971) 82, 169.

In Germany, a distinction is made between the *Schiedsgutachten* and the *Schiedsspruch*. The former can be used for verifying the existence of a factual situation or of an element of a legal relationship, for determining the substance of a contract or of an obligation when there is no agreement between the parties, and for completing the formation of an existing but incomplete legal relationship (as it is the case with art. 317 of the German CC, under which a third party establishes the price in a sales contract or other contract): W. HABSCHEID (1967) 107. Prevailing German case law and doctrine contend that these modalities only concern questions regarding the substantive private law of obligations that are removed from the sphere of procedural law and from art. 1025 of the CCProc, from which it should be inferred that the third party is not an arbitrator: P. SCHLOSSER (1975) 16f.; O. GLOSSNER (1979). Moreover, if the third party merely decides a factual question - even if legal consequences are to be derived therefrom - his decision cannot be considered an arbitral award and is deprived of compulsory enforcement by courts (*Zwangsvollstreckung*): E. RIEZLER (1949) 601.

Nevertheless, it is also maintained that there is no essential difference between a third party acting as arbitrator (*Schiedsrichter*) and a *Schiedsgutachter*; to establish whether arbitration took place, one needs to look at the powers conferred on the third party, especially with respect to the effective constitution of *res iudicata* and the enforceability attributed by the parties to the third party's decision: W. HABSCHEID (1967) 108, 112.

This is similar to the British criteria for determining when "certification" or "valuation" becomes arbitration. "Valuation" exists when the parties entrust a third party with the task of filling in a gap concerning the "quantum" of an obligation to be performed. If the intervention of the third party (valuer)

rituale or *irrituale*, are binding on the parties from the moment they are made[21]. Moreover, the new text of this article has removed the old limitation requiring that the award be lodged with the *pretura* within five days of its having been rendered, extending this deadline to one year, but then only for the enforcement of awards in Italy. This means that awards shall be enforceable in Italy only if filed with the *pretore* within that time limit, but there is no deadline for their execution outside Italy[22]. It also means that there is no possibility of setting aside the award or of having it revoked if it has not been registered at the *pretura* before the expiration of that time limit. There still remains, however, the problem of whether a third party acting as *arbitro libero* is really an arbitrator in the sense that he or she is performing an adjudicative function. If, by making a new contract for them the *arbitro libero* is actually a substitute for the parties, he or she becomes their agent empowered to decide their controversy in their stead; in addition, the decision is reached not by the application of rules of law or even of equitable principles but by transforming a potential or actual juridical dispute into an economic controversy, to be solved through a compromise between the aspirations or interests of the parties, reached after a contractual negotiation carried out by agents (the arbitrators)[23]. At this stage, the distinction between *arbitrato libero* and compromise and settlement is difficult to perceive: the *arbitrato libero* award is a sort of a compromise and settlement contract reached by agents in the name of the original parties. As regards *arbitrato libero* and *arbitrato rituale*, however, the distinction is clear; the latter is the only institution that can truly be equated as to many of its effects and procedure with a court adjudication[24].

(3) *Arbitraggio*

Arbitrato libero and *arbitrato rituale* are, in turn, to be distinguished from simple *arbitraggio*. The two types of arbitration already described imply a complete and fully existing legal relationship from which a controversy arises; *arbitraggio*, on the contrary, presupposes the presence of an incomplete transaction, one of whose missing elements is

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involves no more than simply the attempt to use his expertise and skills to influence the opinion of the parties on a given issue, the operation cannot be deemed an arbitration. However, if a controversy exists between the parties on account of such a gap, the valuer then adopts a procedure similar to court proceedings, in which he listens to the parties' arguments and consider evidence submitted to him. In such cases, there is no doubt that the valuation has become an arbitration. Even so, if the valuer has to decide a factual question for preventing a future dispute - rather than solving a present dispute on how to fill in the existing gap - this will not be considered an arbitation: F. RUSSELL/A. WALTON (1979) 56-59.

"Certification" involves the intervention of a third party for the determination of whether a specific contractual obligation has been properly fulfilled. To that end, the intervening third party has to issue a certificate. As in the case of valuation, the intention of the parties will be paramount for assessing whether arbitration has occurred": *Id.* 62.

21 A. GIARDINA (1983a) 458f.; C. PUNZI (1984) 1764.

22 A. GIARDINA (1983a) 458f.

23 J. CHILLON MEDINA/J. MERINO MERCHAN (1978) 50; H. GRIGERA NAON (1980a) 119f.; G. SCHIZZEROTTO (1967) 24. It has been recently argued, however, that arbitrators do not act as agents of the parties in the course of *arbitrato irrituale* since they do not perform "juristic acts" on behalf of the parties with automatic binding effects on the latter. Such arbitrators simply issue an "opinion" addressed to the parties as a mere factual circumstance deprived of imperative force *per se* without the acceptance of the parties expressed before or after the opinion was given. It is nevertheless recognized that this is a "contractual arbitration" not governed by procedural law but by the law of obligations. Therefore, the arbitrator's "opinion" may be attacked on the same grounds as in contract: incapacity, error, fraud, duress, mistake: A. KASSIS (1987) 87, 92-95, 352-355.

24 R. VECCHIONE (1971) 91; J. CHILLON MEDINA/J. MERINO MERCHAN (1978) 49f. In the performance of its functions, the "arbitrator" is nothing but a *Bevollmächtiger* (agent): P. SCHLOSSER (1975) 22. *Contra*: A. KASSIS (1987) 88-91.

to be completed by the person or persons designated by the parties[25]. As in the case of the *arbitrato irrituale*, the third party does not perform any adjudicative function: he or she is merely an agent of the parties for perfecting an otherwise limping transaction[26].

However, *arbitrum boni viri arbitraggio* is to be distinguished from *arbitrum merum arbitraggio*. In the first case, the decision of the third party is to be made within the limits of equitable principles or even specific legal and technical norms. For this reason, such a decision can be attacked (through an ordinary legal action before a State court), if it runs counter principles of fairness and justice that the parties presumably expected[27]. On the contrary, an *arbitrum merum* is deemed to be completely free to reach any decision, as the parties have relinquished in advance - on account of their confidence in the qualities of their appointee - any control over his or her actions, except for the extraordinary case of bad faith in making the decision[28].

(4) *Perizia Contrattuale*

Perizia contrattuale under Italian law is analogous to expertise under other legal systems; actually, it is essentially a technical activity carried out by the *perito* (expert) leading to a decision on a factual question. However, its true function varies with the way in which the parties make it operate, to the extent that it overlaps with other institutions. For instance, instead of requiring that the *perito* simply issue a non-binding opinion on a question of fact, the parties can ask him to consider either a pre-existing controversy on a factual question related to their transaction, or some element of it that is incomplete because a factual circumstance has not yet been made precise. In the first case, it is up to the parties to give to the person called upon to decide this question the power either (α) to make a decision the result of which is the incorporation of the elements of fact so determined as a part of the contractual agreement but without the effect of a true jurisdictional act (*arbitrato irrituale* or *libero*), or (β) to act as a true adjudicator whose decision on a matter of fact is not only automatically binding as a true award but is also susceptible to all means of attack available under Italian law against awards registered with the *pretura* (*arbitrato rituale*)[29]. It is obvious then that *perizia* is not an autonomous institution under Italian law and can be subsumed under different arbitral categories according to the will of the parties.

The complex landscape offered by Italian law is also true of other legal systems. For instance, in Argentina, an institution similar to *perizia contrattuale* is contemplated in the National Code of Civil and Commercial Procedure and is analogous in its regulation and effects to *amiable composition*. In other words, decisions by *peritos* acting as such, as a result of a legal provision or of the parties' choice, on matters of fact, will be binding as an award, and these can be set aside by the same means as are available for decisions rendered by *amiable compositeurs*[30].

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25 R. VECCHIONE (1971) 103.

26 G. SCHIZZEROTTO (1967) 1.

27 G. SCHIZZEROTTO (1967) 56.

28 G. SCHIZZEROTTO (1967) 57, 59, 75; L. MARANI (1984) 1735.

29 R. VECCHIONE (1971) 106f. For the distinction between arbitration and expertise, see generally J. CHILLON MEDINA/J. MERINO MERCHAN (1978) 51, 57; J. ROBERT (1983) 10; H. VAN HOUTTE (1976) 141.

30 H. GRIGERA NAON/J. SAMTLEBEN (1983) 721-723.

It should be observed that the UNCITRAL Model Law on International Commercial Arbitration does not include a definition of arbitration, and though it has been said that it should encompass "free arbitrations" such as the German *Schiedsgutachten*, the Dutch *bindend advies* and the Italian *arbitrato irrituale* (all "determining questions of fact rather than law" and leading to decisions "merely binding like a contract provision"), the truth is that "such limitations should not be [and are not] expressed in the Model Law"[31].

This variety of notions is certainly an obstacle to the international recognition of arbitral awards and to a unified notion of what arbitration is or implies. It is clear, for instance, that Italy has always considered that an *arbitrato libero* award qualifies as an award under the New York Convention (1958) on recognition and enforcement of foreign arbitral awards, a view not shared so far by other jurisdictions, such as German courts[32].

c) The Notion of International Commercial Arbitration for Purposes of the Present Work

For the purposes of this work, a broad conception of arbitration is adopted, without, however, ignoring that in practice each forum will characterize *ex lege fori*, at least in the absence of an international convention, according to its own understanding of arbitration. In this book, arbitration will include every controversy of a factual, legal or mixed nature that is submitted to the binding decision of third parties, provided that the decision be of an adjudicative and not of a contractual nature, and therefore, one fully equivalent to a jurisdictional act which State courts may control, revoke or set aside according to procedural, and not substantive, law. Institutions such as the Italian *arbitrato libero* will be thus excluded from the purview of this work, though modalities of *arbitraggio*, expertise and *perizia contrattuale* can be considered to be arbitration within this conception if, according to the will of the parties or to specific legal regulation, they satisfy the above-mentioned requirements[33]. The jurisdictional characteristics of arbitration are, therefore, to be emphasized. From the stand-point of choice-of-law methodology, this means that arbitrators and judges must carry out adjudicative functions embodying certain minimum standard of substantial justice. To that extent, the arbitral choice-of-law process is also expected to take into account all the general and particular ("public" and "private") interests related to the dispute.

Certainly, this notion of arbitration includes both ad hoc and institutional arbitration. Normally, an arbitration is ad hoc when the parties and/or the arbitrators themselves determine all aspects relating to the establishment and procedure of the arbitral process. Institutional arbitration, on the other hand, involves the reference, voluntary or compulsory, to a legal framework provided by an institution that specializes in international or local trade problems, a framework which includes general arbitral rules applicable to arbitrations submitted to it[34].

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31 I. SZASZ (1984) 39f.

32 A. GIARDINA (1983a) 460; *Colella* (1982); G. TOSATO (1987).

33 This is, for instance, the situation in Austria: "In Österreich stellt man bei der Abgrenzung des Schiedsgutachtvertrages vom Schiedsvertrag wesentlich darauf ab, ob die zur Entscheidung berufene Person eine Subsumtion unter Rechtsnormen vorzunehmen hat": P. SCHLOSSER (1975) 20; See generally R. DAVID (1967) 58f.

34 M. DOMKE (1968) 10. See generally J. LEW (1978) 19-34.

Institutional arbitration often implies the presence in the arbitral process of a permanent organ which, though not directly participating in the decision of the controversy, fulfils certain functions at the bureaucratic or administrative level such as collaborating whenever necessary in the establishment of the arbitral tribunal and the arbitral proceedings, designating arbitrators or an umpire, fixing the place of arbitration, and so on. In short, such an institution lends its support to avoid any paralysis of the arbitral proceedings. For these reasons, the arbitral institution not only offers the parties the advantages of its arbitral rules, facilities and administrative services, but also reserves to itself certain powers in its arbitral rules. Thus, an arbitration shall be considered "institutional" when the parties have agreed beforehand to submit themselves to arbitral rules the application of which has been guaranteed by the institution by which they were made. In this sense, then, an arbitration will be ad hoc not only when it has been directly organized by the parties for the resolution of specific disputes or contractual relationships, but also when the contract itself refers to institutionally created rules without falling under the powers of the pertinent institution for the enforcement of such rules[35]. The distinction between ad hoc and institutional arbitration is certainly important from a choice-of-law perspective: opting for institutional arbitration can have a direct consequence regarding the norms applicable to the arbitral procedure and, insofar as institutional rules contain choice-of-law provisions addressed to the arbitrators, on the designation of the applicable law to any aspect of the dispute.

This notion of arbitration certainly encompasses both arbitration governed by the strict rule of law (arbitration *strictum iuris*), and arbitration under which the proceedings and arbitral powers are not bound by strict legal norms (arbitration *ex aequo et bono* or *amiable composition*). However, it should be borne in mind that, in general terms, the distinction between arbitration *strictum iuris* and *amiable composition* is not universally admitted[36], and has more to do with substantive than merely formal aspects. For example, in strictly procedural matters, the distinction is nearly non-existent because, but for essential due process principles equally mandatory in both types of arbitration, the parties enjoy wide powers to fashion the procedural rules according to their own will and needs. As regards the power to decide the content of the dispute, however, the difference is substantial. The arbitrator *strictum iuris* is bound both by the imperative substantive rules and by the supplementary substantive law not contracted-out by the parties; the *amiable compositeur* decides according to general principles of equity and fairness but is nevertheless required, in most legal systems, to apply mandatory (public policy) rules of law[37].

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35 I. NESTOR (1972) 265f.

36 This is the case in Socialist countries. See NATIONAL REPORTS (1976) 4-119 (Poland may be a possible exception [72]). In Britain, *amiable composition* has traditionally been excluded, and even now its utilization is doubtful. However, the 1979 Act diminished the control of the British courts over arbitration, particularly when exclusion clauses have been inserted with regard to international commercial arbitration; as a result, the possibility of freely resorting to *amiable composition* seems to be open: M. MUSTILL/S. BOYD (1982) 606.

37 It is sometimes contended that in the course of *ex aequo et bono* arbitration, the parties and the arbitrators enjoy ample freedom over both the procedural and substantive rules to be observed. In rendering the award, arbitrators would not be bound by substantive law: L. PRIETRO-CASTRO (1954) 711, 724f. Nevertheless, *amiable compositeurs* are not entitled to set aside the application of basic legal norms or public-policy norms: R. VECCHIONE (1971) 568, 570f.

It cannot be accepted, then, that *amiable compositeurs* make their decisions independent of all legal frameworks[38]. Although they are released from the strict application of specific legal rules, they cannot adjudicate *contra legem*. As has been clearly stated, *amiable composition* should not be understood to be

> "an arbitration completely freed from all pre-established rules as some authors believe.... The amiable compositeur is also bound to respect at least the fundamental principles of procedural law and as to substantive rules it has to abide by public policy provisions and prohibitive rules. Amiable compositeurs are never conciliators. They perform an adjudicative function because they decide disputes according to rules or principles which can be generally and equally applied to all persons placed in the same situation"[39].

As a result, it must be concluded that *amiable compositeurs* must still resort to a choice-of-law methodology in order to determine (α) the law applicable to establishing the scope of their functions and (β) the law applicable to determining the public policy norms the application or consideration of which they cannot avoid.

As the present study concerns international commercial arbitration, "international" and "commercial" need also be defined. It seems vital to distinguish from the outset between international arbitration in the broader sense of public international law and international arbitration for the purpose of this study. The former encompasses the solution of disputes between sovereign States through adjudicators selected by them on the basis of respect for the rule of law; controversies arising between international organizations or between the latter and sovereign States are included within that as well[40]. Moreover, from the standpoint of its effect, a public international law arbitration between States cannot, in the absence of a treaty, be compulsorily enforced by way of exequatur before a national court[41].

Nevertheless, all international relations between States or international organizations do not necessarily fall within the sphere of public international law. The mere fact that the parties concerned may be the subjects of public international law does not make it inconceivable that they might also conclude transactions as private entities fully governed by private law principles. Sometimes, as found out by arbitrator René Cassin when deciding the *Cargaisons Déroutées* case[42], it may be possible that though the agreement between the States falls within the sphere of public international law, the substance of the rights and obligations of the parties is derived from principles rooted in national laws. Such was also the opinion of the *Permanent Court of International Justice* in its decisions in 1929 in the Serbian and Brazilian Loan cases: any contract "*not being a contract*

On the other hand, there is no essential incompatibility between equitable principles and substantive law, and sometimes it is difficult - even impossible - to distinguish one from the other: "[L]a solution la plus conforme à la justice et à l'équité, c'est le plus souvent, celle qui est conforme au droit", R. DAVID (1974) 317. In the same sense: G. SCHIZZEROTTO (1967) 18f.; P. CALAMANDREI (1962) 205-207; L. SIMONT (1974/75) 136. Therefore, the fact that *amiable composition* has been chosen by the parties does not prevent the arbitrators from applying rules of law. See the position of the Argentine courts and arbitrators, in: *Shulman; Fernandez Garciá*. See also S. FASSI (1979) 501.

38 E. MEZGER (1967) 185, also contends that *amiable compositeurs* must give reasons for their awards and respect public-policy norms, and he excludes the possibility of *amiable composition* "*in vacuo*". L. SIMONT (1974/75) 139.

39 I. NESTOR (1972) 271.

40 B. GOLDMAN/J. DEHAUSSY (1968) 110.

41 F. MANN (1973a) 258f.