PREFACE

This Teacher’s Manual concentrates on the Questions and Comments interspersed throughout the 6th edition of the coursebook. We hope that the discussion we offer in this volume will clarify what we had in mind in selecting certain cases and materials for study and in asking the questions we pose about those cases and materials.

The coursebook takes a distinctively transnational approach to international commercial arbitration. The materials are drawn from many of the leading national jurisdictions throughout the world and include international conventions, national statutes, judicial decisions, arbitral awards, and institutional rules. We have consciously avoided emphasizing the law of any one national system. That approach seemed to us in keeping with the distinctly international (some would prefer “a-national” or transnational) character of the subject and with the growing uniformity one can observe in this field throughout the world—at least concerning the essential core concepts. That uniformity is largely attributable to the central importance of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—which at last count in November, 2015 included 156 parties—and to the harmonizing influence of the UNCITRAL Model Law.

For ease of reference we have included at the top of each page of this teacher’s manual the relevant subsection of the coursebook to which the manual discussion relates.

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# Table of Contents

## Chapter I

### Introduction

1.1. Approaches to Dispute Resolution
   1.1.a. Note
   1.1.b. Arbitration: Characteristics
   1.1.c. Arbitration and Litigation
   1.1.e. Mediation, Conciliation and Multi-Tier Clauses
   1.1.f. Institutional and Ad hoc Arbitration
   1.1.g. Fast-Track Arbitration

1.2. On the Evolution of the Standing of Arbitration Within the Legal System
   1.2.a. Note
   1.2.b Historical Developments in Selected Jurisdictions

1.3. The Sources of Relevant Norms and Possible Conflicts Between Various Sources
   1.3.a. Note – The Sources
   1.3.b. Conflicts Between Various Sources
      1.3.b.i. Party Stipulation Versus Institutional Rules
      1.3.b.ii. Party Stipulation Versus State Norms
      1.3.b. iii. Institution Versus Institution

## Chapter II

### On the Authority of Arbitration Tribunals

II.1. The Arbitration Agreement as the Cornerstone of the Arbitration Process
   II.1.a. Note
   II.1.b. The Arbitration Agreement – Forms and Content
II.1.c. Enforcing Arbitration Agreements: An Overview and the Problem of Pathological Clauses 46

II.1.d. The Law Applicable to the Arbitration Agreement 51

II.1.e. Compelling the Reluctant Party to Arbitrate: An Overview on the Ways of Enforcing an Arbitration Agreement 54

II.1.e.i. Note 54

II.1.e.ii. Parallel Proceedings and Their Avoidance 55

II.1.e.iii. Waiver of the Right to Compel Arbitration 59

II.1.f. Kompetenz-Kompetenz and Separability 61

II.1.f.i. Kompetenz-Kompetenz of the Arbitrator 61


II.1.f.iii. Negative Effect of Kompetenz-Kompetenz: Jurisdictions Without Clear Statutory Guidance 67

II.1.f.iv. Negative Effect of Kompetenz-Kompetenz in U.S. Law 71

II.1.f.v. Separability Revisited and the Void Ab Initio Doctrine 73

Joc Oil and Harbour Assurance 73

II.1.g. The Form of the Arbitration Agreement 76

II.1.g.i. “An Agreement in Writing” 76

II.1.g.ii. Can a Battle of Forms Yield an Arbitration Agreement? 79

II.1.g.iii. Jurisdiction By Virtue of Tacit or Post-Agreement Submission or Estoppel 80

II.1.h. Liberalizing the Writing Requirement through National Legislation 83

UNCITRAL Model Law, as amended, 2006 83

II.1.i. Inclusion of the Arbitration Agreement by Reference 86

II.1.j. Scope of the Arbitration Clause—Settlements and Renewals 88

II.1.k. Non-Signatory Parties 91

Dallah Real Estate 97
Review Problem (Sale of lumber) 99

A. Before a Court 99

B. Before Arbitrators 100

II.1.l. Split Arbitration Clauses 101

II.1.m. Ad Hoc Arbitration in China 103

II.1.n. Changed Circumstances 104

II.2. Limits on Arbitrability 107

II.2.a. Note 107

II.2.b. Statutory Definitions of Arbitrability and Their Interpretation 107

II.2.c. Arbitrability Tested in Court Practice 112

II.2.c.i. Arbitrability of Antitrust Claims 113

Baxter International 115

SNF v. Cytec 116

X (S.p.A.) v. Y (S.r.l.) 117

II.2.c.ii. Arbitrability of Cargo Damage (COGSA) Claims 118

II.2.d. Law Applicable to Arbitrability 120

CHAPTER III 123

THE ARBITRATORS 123

III.1. The Arbitrators - Qualifications, Rights and Responsibilities 124

III.1.a. Note 124

III.1.b. Oaths as Safeguards of Impartiality 124

III.1.c. Getting Closer to More Modern Considerations and Devices (Neutrality, Independence, Disclosure) 125

III.1.d. The Relevance or Irrelevance of Group Affiliation 130

III.1.e. How to Get (or Not to Get) the Right Arbitrator? 133

Testing Professional and Linguistic Skills 137

III.1.f. Codes of Ethics 139

III.1.f.i. An Example of Reliance on IBA Guidelines in Court Practice 146
III.1.g. Rights and Responsibilities of the Arbitrators  147
   III.1.g.i. The Issue of Fees  150
   III.1.g.ii. Conduct and Misconduct of Arbitrators Regarding Fees  156
III.1.h. Rights and Responsibilities of the Arbitral Institution  159
III.1.i. Can the Arbitrators Abandon Their Function?  162
   III.1.i.i. Truncated Tribunals  162
   III.1.i.ii. How Safe Are Institutional Rules Which Allow Decision-Making by Truncated Tribunals?  168

III.2. Appointment and Appointing Authorities  170
III.2.a. Introduction – Options in Appointment of Arbitrators  170
III.2.b. Appointment by Courts  170
   III.2.b.i. Note on Appointment by Courts  172
   III.2.b.ii. Selected Legislative Provisions on Appointment by Courts  172
   III.2.b.iii. Appointment by Courts in Order to Prevent Denial of Justice  172
III.2.c. Appointing Authorities Chosen by the Parties  176
   III.2.c.i. The Nature of the Decision of the Appointing Authority  176
   III.2.c.ii. An Appointing Authority Not Relied Upon  180
   III.2.c.iii. An Appointing Authority That Ceased to Exist  182
III.2.d. The Role of Lists of Arbitrators in the Appointment Process  185
III.2.e. Multi-Party Arbitration and Selection of Arbitrators  186

III.3. Challenges  188
III.3.a. Introduction  188
III.3.b. Challenges – How Conclusive is the Challenge before the Arbitral Institution?  191
   III.3.b.i Challenges in Institutional Practice  191
   III.3.b.ii. How Conclusive Is the Challenge Before the Arbitral Institution?  192
      The Syrian Refineries Case  192
III.3.c. Challenge of Arbitrators in the Context of Challenging the Award  194
   III.3.c.i. The Issue of Disclosure  194
The Applied Industrial Materials Case
The AT&T Case

III.3.c.ii. Some Further Issues Pertaining to Disclosure
Further Testing of the Range of Disclosure

III.3.d. Can an Arbitrator Challenge a Co-Arbitrator?

III.3.e. Can an Attorney (Rather Than the Arbitrator) Be Challenged On the Ground of Links Between the Attorney and the Arbitrator

CHAPTER IV

FOCAL POINTS IN THE ARBITRATION PROCESS

IV.1. Selected Elements of Procedure Before Arbitration Tribunals

IV.1.a. Note

IV.1.b. The Scope and the Relative Importance of the Lex Arbitri

Note on the Seat’s Arbitration Law as the Presumptive Lex Arbitri

IV.1.c. Organizing Arbitral Proceedings

IV.1.d. Party Discretion, Discretion of the Arbitrators and Due Process

IV.1.e. What Belongs to Arbitration Proceedings?

IV.1.f. Terms of Reference

IV.1.g. Records and Minutes of the Hearing

IV.1.h. Presentation of the Case

IV.1.h.i. Problems with Discovery and Other Forms of Court Assistance in Taking Evidence

A case that led to the conclusion that an international arbitral tribunal is not a “foreign or international tribunal” under § 1782.

IV.1.h.ii. Experts

IV.1.h.iii. Language Issues

IV.1.i. Action or Inaction in Connection With the Presentation of the Case That Amounts to Waiver

IV.1.j. "Taking the Parties by Surprise”
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>IV.1.k. Confidentiality and Privacy</td>
<td>255</td>
</tr>
<tr>
<td>IV.1.k.i. Confidentiality of the Arbitration Proceedings and of the Award</td>
<td>255</td>
</tr>
<tr>
<td>On Breach of Confidentiality by the Arbitrators</td>
<td>264</td>
</tr>
<tr>
<td>IV.1.k.ii. Confidentiality of the Court Decision Dealing With a Claim for Set Aside (?)</td>
<td>266</td>
</tr>
<tr>
<td>IV.1.l. Time Limits for Accomplishing the Mission of the Arbitrators</td>
<td>269</td>
</tr>
<tr>
<td>IV.2. Choice of Law Issues Before the Arbitrators</td>
<td>274</td>
</tr>
<tr>
<td>IV.2.a. Note</td>
<td>274</td>
</tr>
<tr>
<td>IV.2.b. Applicable Substantive Law -- The Prevailing Concept: Party Choice or Choice by the Arbitrators</td>
<td>274</td>
</tr>
<tr>
<td>IV.2.c. Interpreting Choice of Law Clauses and the Role of the Lex Arbitri</td>
<td>276</td>
</tr>
<tr>
<td>What Creates Departure from a Choice of Law Clause?</td>
<td>279</td>
</tr>
<tr>
<td>IV.2.d. The Role of Lex Mercatoria</td>
<td>280</td>
</tr>
<tr>
<td>IV.2.e. Applicable Law in the Absence of Party Choice</td>
<td>283</td>
</tr>
<tr>
<td>IV.2.f. The Problem of Mandatory Law</td>
<td>285</td>
</tr>
<tr>
<td>Principal (Italy) v. Distributor (Belgium) – Final ICC Award No. 6379</td>
<td>285</td>
</tr>
<tr>
<td>George Bermann, Yves Derains and Ole Lando Excerpts</td>
<td>288</td>
</tr>
<tr>
<td>IV.3. The Award</td>
<td>293</td>
</tr>
<tr>
<td>IV.3.a. Form and Content of the Award</td>
<td>293</td>
</tr>
<tr>
<td>IV.3.a.i. Statutory and Institutional Rules</td>
<td>293</td>
</tr>
<tr>
<td>IV.3.a.ii. The Issue of Statement of Reasons</td>
<td>297</td>
</tr>
<tr>
<td>IV.3.a.iii. An Award Written by Someone Else</td>
<td>299</td>
</tr>
<tr>
<td>IV.3.b. Interventions After the Award is Written</td>
<td>300</td>
</tr>
<tr>
<td>IV.3.b.i. Institutional Security</td>
<td>300</td>
</tr>
<tr>
<td>IV.3.b.ii. Correction, Interpretation, and Additional Award</td>
<td>301</td>
</tr>
<tr>
<td>IV.3.c. Deposit, Authentication, Certification</td>
<td>307</td>
</tr>
</tbody>
</table>
CHAPTER V

THE EFFECTS AND LIMITS OF AWARDS RENDERED IN INTERNATIONAL COMMERCIAL ARBITRATION

V.1.a. Note

V.1.b. Confirmation, Leave to Enforce

V.1.c. Confirmation and Conversion

V.1.d. Concurrent and Consecutive Proceedings

V.1.e. Concurrent Proceedings

V.1.f. Effects of a Partial Award

V.2. Judicial Control Over the Award: Setting Aside

V.2.a. Note - Judicial Control in the Country Where the Award Is Considered to be Domestic

V.2.b. Domestic and Foreign Awards

Questions and Comments on the Two Indian Decisions in Light of the New 1996 Indian Arbitration and Conciliation Act

V.2.c. Public Policy, Fraud, and Evident Partiality as Grounds for Setting Aside

X (SPA) v. Y (SRL)

V.2.d. Standard of Review

V.2.d.i. Judicial Deference or Lack Thereof – to Arbitrator Discretion

BG Group v. Argentina

V.2.d.ii. Can the Parties Provide For Heightened Judicial Scrutiny of Arbitral Awards?

V.2.e. Due Process in Setting Aside as an Issue of Human Rights

V.2.f. Penalizing a Party For a Frivolous Challenge to an Award

V.3. Judicial Control over the Award: Recognition and Enforcement

V.3.a. Awards Subject to the New York Convention

V.3.a.i. An Award Rendered in the State Where Recognition or Enforcement is Sought

V.3.a.ii. Binding Awards and Awards Producing only “Obligatory Effects”

V.3.a.iii. Partial Awards
V.3.b. Grounds Under the Convention for Refusing Recognition and Enforcement - An Introductory Case 357

V.3.c. Procedural Grounds Under the Convention for Refusing Recognition and Enforcement 359

V.3.c.i. Burden of Proof 359

SA X (Belgium) v. Mr. Y (Spain) 359

Clothing Manufacturer (Ukraine) v. Textiles Manufacturer (Germany) 360

V.3.c.ii. Validity of the Agreement and Standard of Review 362

V.3.c.iii. Notice of Appointment of the Arbitrator and Waivability 364

V.3.c.iv. Scope of the Parties’ Submission to Arbitration 365

V.3.c.v. Improper Composition of Arbitral Authority or Improper Arbitral Procedure 367

Compagnie des Bauxites de Guinee v. Hammermills, Inc 367

V.3.c.vi. An Award Set Aside in “the Country in Which, or Under the Law of Which, That Award Was Made” 369


V.3.c.vi.(b) The “Article VII” Approach to V(1)(e)—French and U.S. Practice Relevance of the Enforcing State’s National Arbitration Law (France) 370

Pabalk Ticaret v. Norsolor 370

Relevance of the Enforcing State’s National Arbitration Law (United States) 372

Chromalloy Aeroservices v. The Arab Republic of Egypt 372

Note: Other U.S. Authority Undercutting Chromalloy 377

Baker Marine (NIG.) Ltd. v. Chevron (NIG.) Ltd. 377

The ALI's Restatement of the Law Third - The US Law of International Commercial Arbitration 378

V.3.c.vi.(c) The “Public Policy Discretionary” Approach to V(1)(e)—U.S. and Dutch Practice 380

TermoRio S.A. v. Electranta S.P 380

Note - Two Decisions (U.S. and Dutch) Exercising Public Policy Discretion to Enforce an Anulled Award 383
V.3.c.vii. Limits of Deference - The Hilmarton Triangle and the Problem of Conflicting Awards 387
V.3.c.viii. Parallel Set-Aside Proceedings and Anti-Suit Injunctions 392
V.3.d. Review of the Merits under the Convention 395
V.3.d.i. Review of the Merits Under Article V(1) Standards 395
Pabalk Ticaret v. Norsolor 397
V.3.d.ii. Review of the Merits for Manifest Disregard of the Law 397
Brandeis Intsel Limited v. Calabrian Chemicals Corp. 397
V.3.d.iii. Review of the Merits Under Article V(2(b) - the Public Policy Standard 398
Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd. 398
V.3.e. Estoppel 400
CHAPTER I

INTRODUCTION

Chapter I aims to set the scene, and to introduce the subject from three perspectives: conceptual, historical, and normative. In the first subchapter we offer a survey of possible concepts of dispute resolution. The second subchapter examines the evolution of arbitration within legal systems. The third subchapter seeks to explain the structure and interrelation of various rules that govern the process of international commercial arbitration today.

What’s new in the 6th Edition: There are several changes in Chapter I. In the first subchapter, the existing material has been rearranged and new material has been added to reflect developments in the use of arbitration and of various other dispute settlement mechanisms. The subchapter now starts, after the amended introductory “Note” (section a), with an overview of the characteristics of arbitration (section b). We rely in part on existing definitions (American Almond Products v. Consolidated Pecan Sales) but have added a new case from England (Kruppa v. Benedetti & Ors) dealing, on the basis of a badly drafted dispute resolution clause, with the relationship between arbitration and court proceedings. The following section on Arbitration and Litigation (section c. – previously section e.) has remained largely unchanged with the exception of the transference of the definition in American Almond Products into the preceding section on characteristics of arbitration. Section d. on “Expert Determination, Adjudication and Contract Adaptation” then deals with the various other forms of decision-oriented third party involvement in dispute resolution. It contains in part updated materials from the previous sections on Technical Expertise (e.) (New ICC Rules on Experts 2015) and on Adaptation of Contracts (d.). These are supplemented by a new introductory note and a new Swiss case dealing with the mechanism of Dispute Adjudication Boards, which play an important role in international construction disputes. Moreover, we have added in the Questions and Comments section a case reference to a U.S. contract adaptation case (Gas Natural Aprovisionamientos, SDG, S.A. v. Atlantic LNG Company of Trinidad and Tobago). This case – together with the revised questions – intends to show that today, in particular in the energy sector, contract adaptation is often a task entrusted to arbitrators and not to other experts as in the Frydman v. Cosmair case. After the decision-oriented dispute resolution mechanisms, we introduce the consent-oriented forms and the modern combinations in section e on “Mediation, Conciliation and Multi-tier Clauses”. Section e. contains primarily the materials that were previously in section b. on “Arbitration and Mediation”, supplemented by some new materials and questions focusing primarily on multi-tier clauses. The two following sections on different types of arbitration, “Institutional and Ad Hoc Arbitration” (section f.) and “Fast-Track Arbitration” (section g.) remain largely unchanged.
The second subchapter has been shortened considerably, and parts of the discussion have been summarized in a short introductory note. We have kept those materials that not only provide important historical background information but where the developments may be important for a current understanding of arbitration.

In the third subchapter on “The Source of Relevant Norms and Possible Conflicts between Various Sources”, the changes are minor. We have inserted some questions after the introductory note and elsewhere based on case law from Libya and Hong Kong, edited other questions, and added a case from the Singapore Court of Appeal dealing with conflicts between arbitral institutions (Insigma Technology v. Alstom Technology).

I.1. Approaches to Dispute Resolution

The purpose of this subchapter is to offer a survey of various possible strategies of dispute resolution and to introduce a discussion of the relative merits of these approaches. This discussion is expected to lead toward a better understanding of the position of arbitration among various options and should highlight the distinctive traits of the arbitration process.

I.1.a. Note

I.1.b. Arbitration: Characteristics

Subsection b. introduces the characteristic features of arbitration which distinguish it from other methods of dispute resolution, in particular from the other decision-oriented ones. The discussion and the cases selected intend to show the consequences associated with resorting to arbitration and being imprecise in drafting a dispute resolution clause.

Questions 1 and 2. The definitions in the Note and the two excerpts from Learned Hand and Lord Mustill address the major characteristics and features of arbitration that make it a distinctive and successful method of dispute resolution in practice. The discussion should address in particular:

- the role of party autonomy for the selection of arbitration as the method for dispute resolution as well as for structuring the proceedings both in relation to procedure as well as in relation to the standards applicable for the merits;
- the binding nature of the decision and the absence of appeal proceedings;
- the replacement of the state courts

Students should understand that given the role of party autonomy no two arbitrations would necessarily be alike in practice should the parties make use of their party autonomy. In particular, the “informalities” mentioned by Learned Hand may—or may not any longer—be a typical feature of arbitration but that in the end, this depends on how the parties exercise their autonomy in structuring
the arbitration. The discussion could extend to what such possible “informalities” could be and why parties may be interested in informality, i.e. why commercial entities in practice may be more interested in a “quick and dirty” solution of their disputes rather than engaging in a lengthy dispute resolution process leading to “correct” results.

In that respect certain limits resulting from the juridical nature of arbitration should be mentioned. A binding non-appealable decision by an arbitrator is only acceptable if certain minimum requirements as to fair procedure are observed. In particular, the parties’ right to be heard must be respected and the parties must be treated equally.

**Questions 3.** The focus of this question is on the award as a binding decision not open to any appeal, and which is enforceable like a court judgment. Students may be referred to the relevant provisions in the arbitration laws contained in the documents supplement, such as Articles 34 et seq. of the UNCITRAL Model Law, or as far as enforcement is concerned, Articles III, V of the NYC. While the laws normally do not contain an express provision stating that the award has res iudicata effects, such effects are normally accorded to it given the function of the award. Students should understand that the enforceability and res iudicata effect are crucial elements for the success of arbitration in practice. Without these effects parties would probably not, or at least less frequently, agree to submit their disputes to arbitration.

**Questions 4 and 5.** These questions focus on the point that arbitration provides dispute resolution *in lieu of the state courts*. Section 9 is the statutory embodiment of that feature, regulating, as it does, the effects of the arbitration agreement on the jurisdiction of the state courts. Pursuant to section 9 (4) courts are required to “grant a stay unless satisfied the arbitration agreement is null and void,” if a party invokes the arbitration agreement. Consequently, as long as a party relies upon the arbitration agreement, courts cannot hear the case.

That raises the question whether an agreement can constitute an arbitration agreement if it is not clear that the courts are definitively excluded from deciding the case. The dispute resolution clause in *Kruppa v. Benedetti & Ors* is not unequivocal in this regard. It merely provides that the parties “endeavor” to solve the dispute by arbitration and foresees exclusive jurisdiction of the English courts, for the case in which the parties fail to resolve the dispute by arbitration. The court had to interpret what the parties meant by such an ambiguous clause, i.e. whether the parties wanted to exclude the courts from having jurisdiction.

In practice, clauses that lack the necessary clarity as to whether the parties wanted to exclude the state courts from deciding are a special subgroup of what are often referred to as “pathological arbitration agreements”. While for most other types of pathological agreements courts have generally taken a very
arbitration friendly approach, questions as to the existence of an intention to exclude the state courts are often solved in favor of court proceedings. What the parties actually intended with the clause remains uncertain. The interpretation adopted by the court seems at best as plausible as the interpretation rejected by it, i.e. that the parties intended to have a two stage dispute resolution process. That parties, who lack the sophistication to draft a proper dispute resolution clause, had in mind several different forms of arbitration, from which they were expected to choose, as was assumed by the court, seems far-fetched. If one were to understand the reference to “Swiss arbitration” as a provision for arbitration in Switzerland, all the various issues upon which there was no direct agreement by the parties—e.g. the number and identity of arbitrators—would have been regulated by the provisions of the Swiss Arbitration Law, which is contained in the Document Supplement.

The second part of question 5 addresses the difficult relationship between two characteristic features of arbitration, i.e. its foundation in party autonomy, on the one hand, and the exclusion of state courts, on the other. Can the parties, making use of their autonomy, agree on arbitration and nevertheless not exclude the state courts? Or would such an agreement no longer be classified as an arbitration agreement? The court obviously followed the second interpretation, which seems to be the view that prevails internationally. It is, however, worth noting that this need not necessarily be the case. For example, the arbitration law of El Salvador explicitly allows for the review of arbitral awards by the courts.

The question of the relationship between party autonomy and characteristics of arbitration will come up again when we deal in Chapter 5 with a possible extension of the grounds for setting aside an award, i.e. whether the parties can agree on a true review of the award by the state courts. As that problem is discussed in the context of Chapter 5, it is sufficient here to flag the potential conflict.

**Question 6.** Pursuant to the High Court, it is impossible to agree on arbitration and court proceedings as parts of the same two stage dispute resolution process. It is a characteristic feature of arbitration that it generally excludes proceedings in front of the state courts, as is evidenced by provisions such as Section 9 of the English Arbitration Act or Article II (3) NYC.

Such exclusion, however, is not unlimited. It can be deduced from Article 9 Model Law that the replacement of the state courts (by arbitration) only applies to the main action on the merits. By contrast, an arbitration agreement does not exclude the courts’ jurisdiction for interim relief. Effective interim relief may often not be available in arbitral proceedings, in particular when the tribunal has yet to be appointed. Consequently, Article 9 Model Law clarifies that an arbitration agreement does not exclude the courts’ jurisdiction for interim relief. As a consequence, conflicts between arbitration clauses and exclusive forum selection clauses contained in the same contract are often solved by interpreting the forum
selection clause as regulating which court has jurisdiction for the following two situations: (1) court ordered interim relief; (2) if the parties agree not to go to arbitration. In some jurisdictions such as Germany (Section 1062) the national arbitration law entitles the parties to regulate which local courts should exercise the supportive or supervisory functions provided for in the arbitration law. In these jurisdictions the forum selection could also be interpreted as performing such function.

Moreover, the exclusion of the courts does not extend to special supportive and supervisory powers foreseen in the arbitration law, such as court assistance in appointing the tribunal or court review of the award in proceedings seeking award annulment.

I.1.c. Arbitration and Litigation

The debate over the relative advantages and disadvantages of arbitration and litigation respectively, will probably never subside. It is today widely agreed that at least in international disputes, arbitration has a number of advantages over litigation.

Questions 1 and 2 go somewhat beyond the context of comparison between arbitration and litigation. They invite discussions of some basic approaches to the judicial (and arbitration) process. An opportunity is also offered to the instructor to take an excursion into a comparison of the merits of adversarial and inquisitorial proceedings. Information on the differences between American and Continental European civil procedure is helpful, but not indispensable. An interesting discussion will probably ensue if you simply ask what arguments can be advanced in favor of neutrality (an expert witness appointed by the court who must not have contact with the parties except for the purpose of gathering information for his expert testimony) and balance (allowing a party to present evidence from an expert it trusts—but allowing the same to the other party as well).

Another introductory question is whether the procedural rules and ethics prevailing today foster a search for truth, or whether they reflect a different ideal (victory in a battle with equal arms).

Arbitration is closer to the Continental European model. It is true, of course, that the arbitration process can freely be modeled by the parties, but what is dominant is a less adversarial procedure. One of the main reasons for this is that the arbitration process tends to be simple—and it is not easy to simplify the adversarial process without losing some indispensable guarantees.

The basis of Question 3 is the excerpt from the Commercial Law and Practice Course Handbook. J. Carter offers a list of pros and cons. Under item “G”, he also offers a list of considerations which may tilt the decision toward
arbitration or litigation. Since we are at the beginning of the course, students might not have sufficient knowledge for a more thorough comparison, but the questions raised will help to introduce them to thinking about arbitration. It is important to add that—unlike in other domains of law—in the field of international trade, arbitration is the mainstream form of dispute settlement rather than litigation.

**Question 4** explains the findings of Bühring-Uhle. It shows that experts tend to believe that neutrality is the main advantage of international commercial arbitration. This is a characteristic that courts cannot match.

A possible answer to **Question 5** is that once antagonistic positions are taken, parties often tend to take every opportunity to oppose the moves of the other party. Likewise, the competence of the court addressed by one party is often contested by the other party, either on the ground of an arbitration agreement, or on other grounds, if there is no arbitration agreement in sight. The clause in *Kruppa v. Benedetti & Ors* is a good example. These disputes about who is going to decide the matter on the merits are prompted by the fact that the parties often do not pay sufficient attention to drafting their dispute resolution clause. As a consequence, a considerable number of dispute resolution clauses are “pathological” in so far as they may give rise to different interpretations, as will be evidenced by numerous examples in the following chapter.

**Question 6** raises the issue whether the advantages of arbitration are only pertinent in an international setting. It is pretty clear that arbitration has scored much more success in the international arena. Part of the reason for this is that neutrality is much more critical in an international context, and litigation before a court of another country involves a host of logistic difficulties. It has to be added that arbitration between traders of the same country is not a rarity either; it covers a fair share of the disputes. In addition to arbitration’s being in numerous jurisdictions speedier, less formal and at one-level (no appeal), there is the fact that crowded court dockets have become a chronic condition, which can also explain the relative success of arbitration—and the more benevolent attitude of courts. Furthermore, the enhanced confidentiality of arbitration can play a role also in a purely national setting.

**Question 7**. In the large majority of cases, it is difficult to agree with the proposition that arbitration procedures can only be impartial in a “suitable third country outside the customer’s country”. The place of arbitration has a limited impact on the arbitral procedure itself (which is shaped primarily by party agreement and institutional rules)—and even less impact on the profile of the decision-makers. As far as the decision-makers are concerned, they are normally chosen by the parties themselves (or, in case of the third arbitrator, by the two co-arbitrators). Courts of the country of the place of arbitration will only gain a role in appointment if the parties (or the arbitrators) fail to make an appointment themselves. Even in such situations, appointments made by courts may be
avoided if the parties agree on some appointing authority. (Furthermore, even if there is a fear that national courts may appoint biased arbitrators, this fear has not really been substantiated in contemporary practice.) It is true that annulment of the award may be sought before courts of the place of arbitration, but grounds for annulment have become limited worldwide. However, it is in particular the possibility of local bias that explains Siemens’ perspective. One has to take into account that Siemens is very often engaged in large scale infrastructure projects infused with political tensions and involving customers resident in countries not noted for independence of the judiciary. Thus, there may be considerable pressure on the courts but also on arbitral institutions to delay and obstruct proceedings or to set aside awards on the basis of a very broad, or one-sided, interpretation of the existing grounds. Such outcomes are less likely if the arbitration is located in an independent third country.

One should not take lightly the remark in the Siemens Dispute Resolution Circular: “As with national court procedures, arbitration procedures are often lengthy and expensive.” This is one of many signals showing that contemporary arbitration practice is losing some initial advantages (like speed and simplicity). “Users” are probably best positioned to observe this. Attorneys have different incentives. They are interested in a quick result, but they also have some interest in a higher number of billing hours (based on lengthy submissions, more hearings, and more procedural manoeuvres). The remuneration of the arbitrators is often less dependent on the number of procedural steps, number of experts and witnesses, and size of submissions. In the majority of cases, in particular in institutional arbitration under the rules of the major international institutions, it depends primarily (although not exclusively) on the amount claimed. A prominent exception is the LCIA where arbitrators are remunerated on the basis of the time spent. The fact also remains that from a user’s point of view, arbitration appears to be still a clearly preferred alternative to litigation.


**Question 1.** This subsection deals with different forms of the use of experts in dispute resolution in various areas and how they are to be distinguished from arbitration. The materials try to cover examples from the whole range of the spectrum starting with mere recommendations under the 2015 ICC Rules for the Administration of Expert Proceedings, moving to the temporarily binding decision of Adjudication Boards in the construction industry, and extending to binding determinations on prices or contract adaptations by experts or arbitrators.

As explained in the Note—as well as in the scheme of the DIS-Rules in the note for the next subsection—the various forms differ in relation to their binding force and their enforceability. It is important for the students to understand the different forms of bindingness and the resulting consequences for enforcement,
in case the parties do not comply voluntarily with the decision of the expert. A good method to visualize these two different concepts is to present the various forms in a graph where the x-axis presents the binding nature of the decision while the y-axis presents enforceability.

The 2015 ICC Rules for the Administration of Expert Proceedings differ from the other forms of expert determination in so far as, in the absence of an agreement to the contrary, the findings of an expert acting under the rules are non-binding. They can then be used by the parties as a basis for their future negotiations in order to reach an amicable settlement. This form of expert determination makes sense if and when the dispute hinges on a quality or technical issue. (Is the quality of the goods in conformity with the applicable standards? Is the percentage of cotton in the shirts delivered really 80%, or is it only 55%? What does the performance of a provider of technical services exactly include? etc.) The expert will take a position, and might make recommendations regarding performance of the contract, and the parties should draw the necessary conclusions for their dispute.

In the construction industry a comparable function, i.e. the issuance of a mere recommendation, is performed by Dispute Review Boards for which the ICC and numerous other institutions provide separate rules. By contrast, the Dispute Adjudication Board provided for in the FIDIC Red Book mentioned in the decision of the Swiss Supreme Court renders a decision which is at least temporarily/provisionally binding for the parties and must be complied with until the decision has been set aside or amended by an arbitral tribunal or a court following a notice of dissatisfaction and resulting proceedings. Thus, the DAB decision does not constitute a final award but is binding and enforceable like any other contractual obligation even if a party sends a notice of dissatisfaction, until it is set aside. In jurisdictions with special laws for adjudication boards, the relevant rules often provide for special facilitated enforcement regimes and oblige a party to comply with the decision even if the party is dissatisfied with it and has initiated proceedings to have it set aside. In the context of the FIDIC Red Book, the Singapore Court of Appeal has succinctly summarized the approach in its decision in PT Perusahaan Gas Negara (Persero) v. CRW Joint Operation (Indonesia), [2015] SGCA 30, as the principle of “pay now, argue later”. According to the Court of Appeal, the decision of the DAB is binding and enforceable like a contractual provision but not necessarily final. Finality depends on the absence of a notice of dissatisfaction within the time limit provided for.

The main purposes of the specific FIDIC regime and the various national adjudication regimes is generally to prevent delays in payment to the contractors. The obligation to comply with the decision arises the moment it is rendered and does not depend on whether a party has issued a notice of dissatisfaction. It is common, however, that the decision may later be attacked before an arbitral tribunal or in the state courts—at least where the challenging party has issued a notice of dissatisfaction. The decision loses its binding effect if the challenge is
successful or the arbitral tribunal decides differently. If one wanted to compare
the DAB decision to a first instance court decision, there are a number of
differences. Unlike a judgment, it does not constitute a directly enforceable title.
Concerning its enforceability, it is closer to a contractual provision and has to be
enforced by an action on the merits. The main difference, as compared to a
contract, is, however, that whenever a party fails to comply with the DAB decision
while the contract is still being performed and, thus, makes enforcement
necessary, defenses are not readily available. The non-performing party may at
this stage challenge the DAB procedure, but not the substance of the DAB
decision. The non-performing party may challenge the substance of the DAB
decision in proceedings to revise that decision, but only after making payment.

The distinction between the bindingness of the decision and its
enforcement is also relevant in distinguishing other forms of expert determination
from arbitration in the area of contract adaptation. By regulating the parties’
future relationship, contract adaptation and gap filling involve tasks that go
beyond the ordinary activity in dispute resolution, i.e. the determination of the
parties’ existing legal rights. Today, both arbitration and expert determination are
used for contract adaptation, and it is often not clear which of the two forms of
dispute resolution the parties have chosen. What is clear is that binding contract
adaptation, whether done by arbitration or expert determination, primarily adds
(or clarifies) a term in the contract. If arbitration has been chosen the question
arises whether the different function fulfilled by the arbitrator, i.e. providing new
contractual terms regulating the parties’ future relationship, also has a bearing on
the legal nature and effects of the decision (if it is rendered by an arbitrator
instead of an expert). That issue, on which the editors have different views, is
discussed in questions 7 et seq.

**Question 2 and 3.** Both questions concerning the ICC Rules for the
Administration of Expert Proceedings relate to the legal nature of the expert’s
finding. The first question assumes that the parties have an honest disagreement
over the issue as to whether the quality of the goods delivered met the
contractual requirements. The parties choose to rely on the ICC Expertise
Procedure to find out who is right (in a non-binding procedure) regarding the
quality of the goods. After scrutinizing the matter, the ICC appointed expert
comes up with the following finding: "The quality of the goods delivered was in
conformity with the specifications set out in the Contract." This might (and often
will) resolve the dispute. The attitude of the buyer is often the following: "I do not
believe this is the right quality, but if the expert says it is right, I will pay." But the
question is what happens if the party affected refuses to accept the expert’s
opinion. It is clear that the findings of the expert regarding quality cannot replace
an award obliging the buyer to pay. The findings of the expert are not binding for
the parties. Consequently, the seller still has to prove the conformity of the goods
if he wants to bring a claim for payment of the purchase price. The findings of the
expert can be used as evidence to prove the conformity (Article 8 (3) of the
Rules). They do not, however, prevent the buyer from contesting the conformity, given that the buyer is not bound by the findings.

A further ramification of this problem arises when the parties use the option of Article 8(2) of the Rules, and agree that the findings (or recommendations) of the expert shall be binding. Again, even if the parties agree that the finding of the expert shall be binding, this does not mean that such a finding represents an enforceable award. What does it represent then? First of all, it may bring clarification that could end the dispute. If the parties (or one of the parties) are unwilling to follow the findings of the expert, this finding may be used in subsequent proceedings. Article 8(3) of the Rules for Expertise clarifies that the expert’s report will be admissible in judicial or arbitral proceedings between the same parties. The fact remains, however, that under these circumstances a new proceeding has to be conducted. The finding of the expert may not eliminate the need for a new lawsuit, but in this lawsuit (litigation or arbitration) the parties will be treated as having stipulated to the binding force of the expert’s findings. (Various procedural settings offer various procedural means that could prevent reinvestigation of the binding conclusions of the expert.)

Question 4. Construction projects are particularly prone to disputes because there are numerous participants who must be coordinated, soil and weather conditions may present surprises, and orders may be subject to continual change. At the same time, there is a need for speedy dispute resolution to prevent disputes from delaying or even jeopardizing completion of the entire project. Furthermore, contractors are often dependent on timely payment to avoid cash flow problems. These considerations should be taken into account when devising a dispute resolution mechanism.

In principle, the mechanism provided for by clause 20 of an FIDIC contract is designed to meet these special needs. It should lead to a decision within 84 days after initiation of the process, and it binds the parties until it is reviewed either by agreement or by an arbitral award. During continuation of the construction project all parties involved must comply with their obligations arising under the construction contract as interpreted in the first stage procedure. Clause 20 provides for a multi-tier dispute resolution process in which the first stage provides for an interim solution that may later be replaced by a final solution ordered by an arbitral tribunal.

A permanent Dispute Adjudication Board (DAB) has the advantage that once a problem arises it can be decided immediately. The decision making body is already in existence, and its members are familiar with the project. The main disadvantage is cost since the board members have to be paid whether their services are needed or not. Consequently, permanent review boards are primarily suitable for large scale projects.
The project forming the object of the Swiss decision may either not have been sufficiently large or the likelihood of dispute may have been too low to justify a permanent DAB. Moreover, the project may not have been time-sensitive and may not have involved the coordination of numerous contractors.

**Question 5.** The DAB decision is binding upon the parties and should be complied with until the decision has been overturned either by a settlement or an arbitral award.

Notwithstanding, the bindingness of the decision, its enforcement - if a party does not comply voluntarily with the decision but raises objections to it - remains a problem in practice. It is clear that the decision cannot be enforced under the provisions pertaining to arbitral awards, since it does not constitute an award. In particular, if a party has given a notice of dissatisfaction, the DAB decision may not yet be final but open to being overturned in arbitration or court proceedings on the merits. Some jurisdictions, such as, e.g., the UK or Malaysia, have special provisions for the enforcement of binding (but not yet final) decisions by adjudicators which provisions may be applicable to the DAB decision. Otherwise the decision has to be enforced like any other contractual right subject to arbitration—that is, through arbitration proceedings. The nature of those proceedings is not completely clear. In principle, an arbitral tribunal can adjudicate the issue de novo if one of the parties objects to the decision of the DAB. Whether that is also the case, where the primary issue is the enforcement of a DAB decision that has not been complied with during the continuation of the construction project, is open for discussion. On one hand, one could argue that the issue in these proceedings is merely the non-compliance with a provisionally (or temporarily) binding decision that should be respected. On the other hand, from the perspective of procedural economy, it would seem odd to have an arbitral tribunal enforce a binding (but not yet final) DAB decision and then review the merits of that already enforced DAB decision in a second set of proceedings.

The issue has given rise to conflicting positions in the Singaporean decision of PT Perusahaan Gas Negara (Persero) v. CRW Joint Operation (Indonesia), [2015] SGCA 30. In a dispute arising from a contract for the construction of a pipeline, the DAB rendered a decision concerning variation claims, i.e. whether certain work was still covered by the original contract or constituted additional work asked for by the employer. The DAB ordered the employer, PGN, to pay an additional US$ 17m to CRW, the contractor for additional work. Though the contract contained a special provision requiring compliance with the decision of the DAB, PGN did not pay the DAB-ordered amount. The issue of non-compliance with the DAB decision was referred to an arbitral tribunal (a DAB compliance dispute), and PGN argued that the tribunal could not compel it to comply with the DAB decision before it had also heard the merits of the dispute (main dispute) put to the DAB. The tribunal disagreed and rendered a final award for the sums decided upon in the DAB decision (2009 Award). It left it open to PGN to commence arbitration to deal with the main dispute. The award was set
aside by the Singapore Court of Appeal, which considered that the tribunal should not have granted a final award for the sums ordered by the DAB without also hearing and deciding the merits of the main dispute. It held that while it would have been possible to issue an interim or partial award for compliance with the DAB decision, the main dispute should have been decided in the same arbitration. The contractor initiated a second set of arbitration proceedings asking this time for an interim award in the DAB-compliance dispute followed by a final award for the same sum or a sum assessed by the tribunal dealing with the main dispute, should it decide to review and revise the DAB decision. In the enforcement action on the interim award, the majority of the Court of Appeal declared the interim award enforceable and effectively overruled the reasoning underlying the set aside of the first award. It held in essence that a party is entitled to have the DAB decision enforced by an interim award even before the main dispute is decided. The Court of Appeal, in effect, enforced the rationale underlying the DAB procedure of “pay now, argue later”.

**Question 6.** DABs are normally selected for the resolution of disputes in an ongoing project where it is necessary to have existing disputes resolved quickly to ensure the completion of the project. Consequently, there are strict time limits for the appointment of and decision by the DAB. The suggestion is to appoint a permanent DAB that is familiar with the project from its beginning and can act immediately.

In the case before the Swiss Supreme Court, the parties had opted for an ad hoc DAB and had not provided for any time limits for the constitution of the DAB, which was only about to be constituted after a year’s delay. Furthermore, the DAB procedure had only been initiated after the project had been terminated. As a consequence, the main reasons leading to the development of the DAB procedure and justifying its existence were not present. In principle, the situation was more akin to one where disputes are normally solved by arbitration.

The only conceivable reason for providing for the DAB procedure in such a situation is that the Parties may have wanted a neutral and less formal evaluation by a construction expert and not necessarily a lawyer. Thereafter a dissatisfied party might still have applied for arbitration.

**Question 7.** In principle, drafting and adapting contracts is the task of the parties. It is, however, recognized that they may entrust third parties with that task. That is what happened in *Frydman v. Cosmair* where the price for the shares in the company was to be determined by a third party acting in accordance with Article 1592 of the French Civil Code. The French Court made clear that a third party fixing the price pursuant to Article 1592 of the French Civil Code is not an arbitrator. In fixing the price the third party performs a kind of creative task that is different from the traditional scope of tasks assigned to an arbitrator. The normal role of an arbitrator is to decide a dispute between the parties about existing rights and remedies. By contrast, price fixing and contract
adaptation have the effects of a contractual stipulation that primarily regulates the future relationship between the parties.

The French decision is correct in stating that the third person acting under Article 1592 Civil Code was not an arbitrator and that the third person’s decision did not constitute an award. Any broader reading of the quote, i.e. that the task of “price fixing” as such cannot be entrusted to an arbitrator, would today no longer be correct in numerous jurisdictions. As shown by Article 1020 of the Dutch 2014 Arbitration Act (Book IV of the Code of Civil Procedure) or the American decision below in *Gas Natural Aprovisionamientos, SDG, S.A. v. Atlantic LNG Company of Trinidad and Tobago*, arbitrators can be entrusted with such creative tasks. The distinction between the two methods for fulfilling such creative tasks can be crucial for a number of issues such as review or enforcement, as is discussed in the following questions. Unlike the award of an arbitrator the decision of an expert acting pursuant to Article 1592 of the French Civil Code does not constitute an enforceable title but is merely a contractual provision. This conclusion is consistent with the fact that Article 1592 is part of the French Civil Code and not the French Code of Civil Procedure, where the rules for “real” arbitration can be found and awards are regulated. Consequently, there may be ways to revise the expert’s decision in case it is obviously wrong. The limitations on merits review that exist for awards do not apply for the expert’s decision.

In general, price fixation in itself does not directly yield an enforceable command to pay. If the duty of the third party is to establish the value of the Paravision shares, such a determination (combined with a contractual duty to buy) will yield a very strong cause of action upon which to sue for the purchase price, but not more and not less than that.

**Question 8.** Article 1020 of the Dutch 2014 Arbitration Act clearly states that gap filling and contract adaptation are tasks that may also be performed by arbitrators. The provision evidences the broadening of the scope of application of arbitration over the years. The classification of the task as arbitration means at the same time that – at least pursuant to the Dutch understanding – the result of such arbitration is a binding and enforceable award. Irrespective of whether one agrees with that qualification or not students should realize that the content of such an award differs considerably from that of “normal” arbitral awards, as do the underlying tasks performed by the arbitrators.

To make the students aware of the different types of tasks and the problems associated with awards adapting contracts, one could ask them what the content of an award would be if the parties in *Frydman v. Cosmair* had decided to have the price determined by arbitration under the Dutch Arbitration Act. Equally, it can be discussed how a party can enforce the award if the other party does not comply with the award and does not pay the price determined by the arbitrator? A further difference between price determination by an expert pursuant to Article 1592 of the French Civil Code, on one hand, and that by an
arbitrator pursuant to Article 1020 of the Dutch Arbitration Act, on the other hand, is the res iudicata effect the decision may have when the price arises as an incidental question within another dispute.

Another question that may arise is whether arbitrators can adapt (modify) a contract on the ground of the usual mandate entrusted to them, i.e., on the ground of a mandate to settle the dispute? Some of these questioned are answered in the American decision in *Gas Natural Aprovisionamientos, SDG, S.A. v. Atlantic LNG Company of Trinidad and Tobago* decided by the United States District Court, Southern District of New York, 16 September 2008, 08 Civ. 1109 (DLC) and discussed below in question 11.

**Question 9.** A party not satisfied with the decision of an expert acting pursuant to Section 317 BGB, i.e. a “Schiedsgutachter” in the German legal terminology, could apply to a state court to have it decide whether the decision is evidently inequitable. That would entail a limited review of the merits of the decision. The possible review in the context of Section 319 BGB consequently goes much further than the review possible concerning an award. The review can in principle take place as a separate action for a declaration that the price fixed by the expert is evidently inequitable followed by a new determination of the price by the court. It could also take place incidentally in an action by the seller to enforce the price fixed, in response to which the other party could defend itself by alleging the evident inequity of the price fixed by the Schiedsgutachter.

If the price is fixed by an arbitrator, or some other contractual provision is adapted, the question arises whether this decision has the legal characteristics of an award or of a contractual stipulation. The authors are divided on this point. Two of the authors agree that Dutch law permits adaptation of contracts by the arbitrators (and such an entitlement may also follow from party agreement), but, in their opinion, the question remains, whether the result is an award. In the opinion of these two authors, the specific nature of contract adaptation is not compatible with the nature of an award. If the arbitrators adapt the contract and set, say, a new Clause 18 stating a new place of delivery, this should be just a valid new contractual stipulation. If it were an award, it would have to go through confirmation (in countries where confirmation is needed, such as in the U.S.), it could be challenged in set aside proceedings in the country where it was rendered – and it would have to go through recognition proceedings in other countries under the New York Convention. The purpose of contract adaptation is to create a viable contractual provision (replacing one which e.g. became unviable, or which was unclear, or which became impossible). Yet – if treated as an award –we could have a contractual provision which is valid e.g. in the country of the Seller (if the “award” was rendered in the country of the Seller), but not valid yet in the country of the Buyer, or in the country of the place of delivery, until it is recognized under the NYC (if it gets recognized). Furthermore, a contractual stipulation (even if determined by an arbitrator) cannot have a full res iudicata effect, because by its nature, it should remain subject to change in case
of changed circumstances. Therefore, it appears that the task of contract adaptation could not be efficiently performed in the form of an award, and contract adaptation by the arbitrators should simply result in a contractual stipulation.

One of the authors would consider the determination of the price by an arbitrator – if the parties opted for arbitration – as constituting an award with res iudicata effect in addition to being a contractual provision to which the Parties have agreed in advance. The determination would therefore have contractual as well as procedural effects. One such procedural effect, the res iudicata effect, would distinguish it from the decision of a “Schiedsgutachter” or expert pursuant to Section 317 BGB (or Article 1592 French Code Civil). Another such procedural effect would concern the possible recourse against the decision. Due to the classification of the decision as an award, the remedies against it would be regulated by the German Arbitration law, which is in this respect a largely verbatim adoption of the UNCITRAL Model Law. Consequently, in line with Article 34 of the Model Law the merits of an award may only be reviewed as to its compatibility with public policy but not for evident inequity or obvious incorrectness.

That would not mean, however, that the price determined in an award would be fixed for eternity. The res iudicata effect of the award would only apply as long as there were no major change of the circumstances. Furthermore, in case of an adaptation clause the determination would only be made for the time until the next review date, since the arbitrator would only have been authorized to decide for that period.

Concerning the possible effects of the award and the need to have any particular effect recognized, one would have to distinguish between the various effects. The procedural effects of the award, in particular, its res iudicata nature, might have to be recognized. By contrast the award would have, from its rendering, a binding contractual effect for the parties.

**Question 10.** Looking at the consequences of both types of third party intervention and taking the view of one of the co-authors, arbitration has the effect that a party may no longer resort to the state courts in the matter and may be faced with an enforceable award against it. The consequences of expert determination by contrast are much more limited. Furthermore, while arbitrators may now adapt contracts for the parties, it is a task that goes beyond what would traditionally be performed by arbitrators. Consequently, arbitration should only be assumed if the dispute resolution clause leaves no doubts in this regard.

**Question 11.** The traditional task of an arbitrator is to determine existing rights and remedies of the parties and render an award on the basis of these findings, dealing primarily with events in the past. In the context of a price adaptation clause the arbitrator performs several different tasks. First, the
tribunal has to determine whether the triggering event occurred and a party has the right to ask for an adaptation of the price. Second, in case such a right is found to exist, the arbitrator has to determine the price for the future. That comes close to contract drafting, a task that is normally performed by the parties themselves. Third, on the basis of the price so determined the arbitrator has then to decide whether a certain amount was due in the past. While this last task is in principle traditional dispute resolution, the difference is that the crucial element for that task is the new price formula, a provision that has been created by the arbitrator.

Given that the tribunal is regulating the parties' future relationship it may require more input from the parties than it would normally be the case if it were merely to determine existing rights. Economic considerations may play a greater role than purely legal considerations. Furthermore, the tribunal should discuss its suggested adaptation with the parties if it deviates from those suggested by the parties. Otherwise it might infringe the right to be heard by rendering a “surprise decision”. That was one of the issues in the above American case where the losing party objected to the dual pricing scheme imposed that allegedly had not been pleaded by either party.

Given the different views as to what forms part of the res judicata effect of the award, it seems advisable that all three tasks performed by the arbitrator be reflected in the operative part of the award. The latter should consequently contain the following three elements:

1) a declaration that the triggering event occurred and the party in question is entitled to an adaptation,
2) a declaration of what the new price is, and
3) an order for payment of the sums outstanding on the basis of the new price since the time when the triggering event occurred.

The above discussed difference concerning the legal nature of the tribunal's determination of the new price will naturally also have a bearing on cases like GNA v. Atlantic LNG. If the determination of the new price is not an award but may be reviewed as to its correctness any successful review results in the fact that the payment order as the third part of the award was based on an incorrect assumption. To what extent that affects the finality of the payment order, which is without doubt a proper award, is an open question.

**Question 12.** Long term contracts often contain price adaptation and renegotiation clauses that entitle a party periodically, or upon the occurrence of a particular triggering event, to ask for an adaptation of the contract, in particular of the price. If no agreement can be reached by the parties on the new price within the period provided for, the parties may resort to a third party to determine the price. In general, the price adaptation effected by that third party is then to take effect retroactively from the date the triggering event occurred or from the particular date agreed upon in the contract. Consequently, the higher price
should have already been paid for some time before the determination by the third party. If the price adaption is done by arbitration, the tribunal may not only fix the price for the future but may at the same time render an enforceable award for the amount outstanding from the effective date of the newly fixed price. The decision in *Gas Natural Aprovisionamientos, SDG, S.A. v. Atlantic LNG Company of Trinidad and Tobago* is a good example of such a case. Moreover, the determination of the price has res judicata effect if it plays a role as an incidental question within the context of another action. An instructor might want to form a hypothetical case to make this latter point clear to the students.

I.1.e. Mediation, Conciliation and Multi-Tier Clauses

Subsection I.1.e. covers examples of other more consent-oriented techniques of dispute resolution that play a role in the domain of international trade. Like arbitration they constitute an alternative to state court proceedings and are therefore often referred to as methods of “alternative dispute resolution”. While all these procedures are indeed alternative procedures when compared with settlement of disputes by courts, there are crucial differences between arbitration on the one hand, and various techniques of mediation on the other. Mediation and conciliation are procedures in which a third party appears, yet the role of this third party boils down essentially to facilitation of a compromise rather than decision-making.

These differences in approach have led in practice to an increasing use of so called multi-tier clauses, often also referred to as escalation clauses. In such clauses, the parties try to combine the benefits of the different methods within one dispute resolution process, which may be multi-staged. If no solution can be reached in a particular stage, the dispute is escalated to the next stage. In particular, companies with considerable experience in dispute resolution use such clauses to ensure finding the most appropriate mechanism for the resolution of their disputes. As the chapter can only give an overview over a few of the more frequently used mechanisms in practice, students could be asked whether they know of any other methods and what their characteristic features are.

**Question 1.** The question asks the student to identify the main differences between arbitration on one hand and other forms of dispute settlement—not all of which are explained in detail in the materials—on the other hand. The crucial difference lies, of course, in the role of the third party. In the case of mediation, conciliation or a similar consent oriented method, the decision remains in the hands of the parties; they have not abandoned their right to veto any proposed solution. Third parties only assist the parties to the dispute in their attempt to reach a compromise. Arbitration means, however, that the parties have delegated to a third party the right to render binding decisions which no longer need the consent of the parties. Furthermore, the resulting arbitral decision constitutes a directly enforceable title. That is what differentiates arbitration from
the various forms of expert determination, where the expert renders a decision that may be binding (in the sense that a contract provision is binding), but which lacks the quality of an enforceable award.

Speaking of differences, students will often ask what are the precise differences between conciliation, mediation, and other forms of assistance in reaching a negotiated settlement. This is a difficult question to answer because these patterns have not crystallized; the terms are often used interchangeably. The most commonly used terms are mediation and conciliation; but again, a scrutiny of rules on mediation compared with rules on conciliation does not yield stable distinctive features. In sum, the general concept is that of compromise assisted by third parties; various rules use various names and contain different details, but there is no adequate foothold for a reliable typology—a circumstance recognized by the UNCITRAL Model Law on Conciliation.

**Question 2** concentrates on the goal of mediation and asks how a mediator should go about reaching that goal? What does a mediator actually do? (This question applies equally to conciliation and similar techniques.)

Put in most simple terms, the goal is to help the parties reach a negotiated settlement. The question is how to do this. Our suggestion is to start the discussion by describing an actual (or hypothetical dispute), to highlight the contested issues, and to stress that the parties have a vested interest in continuing business relations—an interest that a speedy compromise would serve well. After this, one could ask the students what they would exactly do as a mediator (conciliator). It is advisable to press students to face details (conference with both parties or separate conferences, ask for or discourage written submissions, time frame, allow or disallow attorneys, etc.), and to explain why one would prefer one course of action over another. The discussion might rely on options offered by the WIPO or Vienna rules, but students should be free to come up with their own ideas. As a matter of fact, individual students should be asked directly what they would exactly do if chosen, let us say, next week to be a mediator.

**Question 3** reminds us that arbitrators may (and often do) play the role of a mediator in a formal or informal way. If, for example, it appears during the oral hearing that the difference between the parties has been significantly narrowed, it is not out of line for an arbitrator to bring this to the attention of the parties, and to suggest to them that they take a break with the purpose of hammering out a settlement. This may or may not be called mediation. The important question is whether an arbitrator can (or even should) use the same methods a mediator uses? (He probably should not. Unless explicitly authorized in writing by the parties, an arbitrator should particularly refrain from suggesting specific compromises. Also, parties may not want to be as open, and may want to keep a different distance from a person who has a mandate to settle a dispute, as compared to one who does not.) With the ordinary caveat for any generalization,
it can be said that arbitrators coming from a civil law background, in particular from a Germanic jurisdiction, usually take a much more active role in the search for a compromise than those from the common law world. Thus, it may be interesting in an international class to ask the students in considering specific examples (caucusing, settlement proposals, early evaluation of the case, or certain aspects of it) whether in their view an arbitrator should engage in such activity or not.

A mediator might decide to disclose to the parties a proposed compromise as a way of telling them what the mediator thinks is equitable under the circumstances. This might help in shaping and encouraging a settlement. At the same time, if the suggested compromise is not accepted, the mediator’s position will be somewhat weakened. Still, he/she could, in principle, continue to mediate.

If, on the other hand, an arbitrator were to reveal to the parties a tentative preliminary position on the issues and this were not accepted as a compromise, the arbitrator would probably lose the level of confidence needed to continue as an impartial arbitrator. Also, the arbitrator is not in a good position to get candid party proposals, because the parties may not want to reveal any willingness to compromise to an arbitrator who has the power to impose a solution in a binding award. Arbitrators might seize opportunities to guide parties toward a compromise, but they should probably not go beyond offering procedural opportunities.

**Question 4.** The WIPO distinction between facilitative mediation and evaluative mediation can be linked to the discussion in Question 3. Arbitrators might take actions that come close to facilitative mediation, but should refrain from evaluative mediation, unless explicitly requested and authorized by the parties. Both approaches clearly have their relative merits. The choice is, first of all, up to the parties. Disputants may or may not want the mediator to come up with proposed (even if non-binding) solutions.

One could ask students to explain whether the Vienna Rules provide for facilitative, or for evaluative mediation. (The 2006 Vienna Conciliation Rules—see Article 3—have opted for an evaluative approach.)

**Question 5.** Conciliation and mediation typically involve separate discussions. The mediator (conciliator) would often communicate first with one party, and then he/she would listen to the other party. A hearing with the participation of all actors concerned may be the next step. The 1980 UNCITRAL Model Rules on Conciliation make it clear that the conciliator “[m]ay meet or communicate with the parties together or with each of them separately” (Article 9 (1)). During separate communications the parties are likely to act more sincerely, and the conciliator will thus have a better picture, and a better chance to find a compromise. Separate communications may also entail some dangers: the procedure is less transparent, it is more difficult to observe and implement.
procedural guarantees. The significance of these shortcomings is modest, however, considering that the conciliator has no decision-making power. Commenting on the Model Law on International Commercial Conciliation of 2002, Mr. Sekolec, Secretary General of the UNCITRAL, states: “Since the role of the conciliator is only to facilitate dialogue between the parties and not to make a decision, there is no need for procedural guarantees of the type that exist in arbitration, such as the prohibition of meetings by the conciliator with only one party or an unconditional duty on the conciliator to disclose to a party all information received from the other party.” (J. SEKOLEC, Introduction to the UNCITRAL Model Law on International Commercial Conciliation, 27 Yearbook Commercial Arbitration, 2002, 398, at p. 399.)

**Question 6.** Just as with unilateral communication between a party and the conciliator, the expectation of confidentiality may encourage a party to show all its cards, revealing options that may be eventually accepted as a compromise. A party may have an interest to accept as a compromise something what is less than what the other party owes it. There may be various reasons for such a solution (maintenance of business relations, avoiding costs of litigation, or the endeavor to get compensation without delay rather than at the end of protracted litigation). Of course, such a compromise solution is only acceptable if it replaces litigation. Parties would be most reluctant to reveal where they would be willing to compromise, if such statements could be used in arbitration or litigation were conciliation to be unsuccessful.

It may be advisable to read together with the students Article 10 of the Model Law which focuses on the possibility (or impossibility) of reliance on facts and statements revealed during conciliation, as evidence in further proceedings. Students may observe that Article 10 deals essentially with views and proposals, rather than with documents (such as an invoice). It is also important to note that Article 10 is addressed to “arbitration tribunals, courts or other competent governmental authorities” and imposes on them an obligation not to order disclosure of information contemplated in Article 10. Attention may also be directed to the fact that subsection 5 of Article 10 makes it clear that only evidence mentioned in subsection 1 of Article 10 is shielded by confidentiality. Otherwise, evidence that is admissible in arbitral proceedings does not become inadmissible as a consequence of it having been used in conciliation.

**Question 7** focuses on a combination between arbitration and conciliation. The logic behind the Vienna procedure is the following: if the parties reach a settlement with the assistance of the conciliator, this settlement might be procedurally upgraded and be given the form of an award. (A settlement between the parties is only a good basis for a lawsuit, but an award can be directly enforced. The difference becomes important if the settlement is not honored.) The “upgrading” of the party settlement into an award does not presuppose any adversary proceedings. It is rather a form of authentication. It is therefore expedient for the conciliator to assume immediately the role of an arbitrator who
will simply record the settlement in the form of an award. (Provided that a valid arbitration clause exists—in addition to the submission to conciliation—and provided that the parties so request.) If the conciliation is unsuccessful, the parties might still continue with binding arbitration—but in this case the conciliator (whose submitted proposal for an amicable settlement was not accepted) must not continue as arbitrator. It is also important to note that declarations made by the parties during the conciliation proceedings will not bind them in case they turn to arbitration. This rule tends to foster more cooperative attitudes during conciliation.

It may be discussed with the students whether the settlement turned into an award should be considered to constitute a proper award for enforcement purposes under the New York Convention. Unlike ordinary awards and awards on agreed terms that result from settlements concluded after arbitration proceedings have been initiated, the “award” rendered under the Vienna rules is considered in some countries to be a mere authentication of a settlement concluded even before arbitration proceedings were initiated. Whether that is sufficient for such an award to be considered a genuine award governed by the New York Convention may be the subject matter of a discussion.

**Question 8.** The key difference is in the character of the “product”. What Article 7 of the LCIA Rules yields is a settlement, not an award. This is perfectly adequate if the parties honor their settlement. If one party does not honor it, the other party is in a strong position in a prospective lawsuit. Nevertheless, he/she does not have an enforceable decision. Giving a party a strong claim is about as far as mediation (or conciliation) can go. Article 4 of the Vienna Rules goes one step further—but this can only be done if one combines mediation (conciliation) with arbitration.

**Question 9.** It makes sense to try first to settle a dispute with less confrontational methods—and to “escalate” the confrontation if this does not yield an acceptable solution. This means in practice, that a resort to arbitration is conditioned on there having been an (unsuccessful) attempt to negotiate or to mediate.

There are two potential dangers tied to this approach. One is the time element. Successful mediation is typically faster than arbitration. Unsuccessful mediation, however, amounts to a postponement of the dispute’s resolution. Recalcitrant debtors may thus use the obligation to resort to mediation to delay a determination of their payment obligation.

The second risk is the uncertainty as to the extent of the negotiation or mediation obligation associated with numerous clauses found in practice. Often, it is unclear when a party is allowed to abandon the path of “amicable settlement between the parties” (that is, mediation) so as to be able to initiate arbitration. (We shall focus on this problem directly in Chapter V.2.d.i, in connection with the
Várady, Barceló & Kröll

I.1.e.

Vekoma v. Maran case.) Both problems may be eliminated—or at least alleviated—by adequate drafting. For example, if the escalation clause says that “any party may resort to arbitration from the 60th day after mediation was initiated”, the situation is much clearer than if the clause says “any party may resort to arbitration after all efforts to reach a negotiated settlement with the assistance of mediators have been exhausted”. The model clauses of numerous institutions now contain such a time limit, as does the extensive negotiation clause provided as an example in the subsection.

Students may be asked to provide their own example of a multi-tier clause involving first an obligation to negotiate and then to mediate—one that would address these problems. In discussing the length of the negotiation and mediation obligations, they should be made aware that a short time frame may always be extended if both parties have the impression that there is the chance of success, while shortening a longer time-frame is often not possible.

A separate problem associated with negotiation or mediation obligations is their validity. In some jurisdictions, such as England e.g., unspecific negotiation and even mediation clauses may be void for uncertainty or may constitute non-binding agreements to agree. The treatment of the excerpted multi-tier clause from the Datamant-Lufthansa contract provides an excellent example of the various issues that may arise in connection with such clauses. The arbitral tribunal considered the clause to be void for uncertainty (another well known example for such treatment is the Sulamérica decision of the English Court of Appeal excerpted in Chapter II). The Singapore High Court considered it valid but assumed that the parties—though not following exactly the various steps foreseen—had complied with the objective of the clause by negotiating for some time. The Court of Appeal, by contrast, equally considering the clause to be valid, required compliance with all foreseen steps and therefore held that the tribunal should not have admitted the claim. If an instructor wishes to discuss the issue of compliance with the various steps of a multitier clause in some detail, the Singaporean case provides good starting points for the discussion.

The same applies for the Swiss Supreme Court decision dealing with the DAB—concerning whether there are other circumstances in which arbitration proceedings may be initiated even though a preceding step has not been complied with.

**Question 10.** Multi-tier dispute resolution clauses are primarily used by larger corporations that have considerable experience in dispute resolution and are aware of the various methods and their benefits. By contrast, Small and Medium Size Undertakings (SMU) regularly lack the necessary experience for such clauses.

Parties may not see the benefit of including a negotiation or mediation clause if they assume that even without such an obligation they will do their best
to settle a dispute amicably. While that may be true for negotiations, parties may be reluctant to offer to mediate a dispute—unless required to do so—because such an offer may be perceived as a sign of weakness, i.e. a signal that a party is not convinced about its legal position or the merits of the claim raised. That psychological obstacle can be removed by including a contractual obligation to try mediation first.

The main concern with including in a dispute resolution clause an explicit obligation to negotiate or mediate is that it may prolong the dispute and may be abused to delay any payment due. As already indicated in connection with question 9, these concerns can at least be mitigated by proper drafting, the details of which could be discussed with the students.

**Question 11.** Negotiations at the working level, i.e. between the persons involved in the performance of the contract, are often difficult because the event leading to the dispute may have destroyed the relationship between the persons involved and have resulted in considerable frustration or disappointment. Discussions may often be more about who is to blame for the disputes than about methods of solving it. At the same time it may be much more difficult for a person directly associated with a dispute to give in, as that could always be interpreted as the acknowledgement of responsibility for at least a part of the problem. That can be avoided if the dispute is escalated up the ladder to the first level of management. Members of the board of management may not only have greater powers to make concessions but may also be more willing to do so to resolve the dispute. They have often a broader view of the overall interest of a company and can justify concessions by overarching business considerations.

**Questions 12 and 13.** The negotiation obligations as such were very specific and thus could easily be enforced. The problem in the case was that the parties had negotiated for some time without, however, complying with the various steps explicitly foreseen in the dispute resolution clause.

The decision of the High Court raises the more general question, which should be discussed with the students, whether in such a situation clauses have to be observed to the letter or whether it is sufficient if their “object is met”, as was the view of the High Court. It could be argued that, given the parties’ behaviour, it would be inconsistent with good faith to require the parties to comply to the letter with the detailed steps in the dispute resolution agreement and that through their conduct the parties had amended or abandoned the specific negotiation requirements. On the other hand, the parties had deliberately agreed on such very detailed rules and probably had good reasons for doing so—but then they did not comply with their agreement.
I.1.f. Institutional and Ad hoc Arbitration

There is a continued rivalry between institutional and ad hoc arbitration. The Aksen article identifies the issues; the comment tends to add some clarifications. The question asked is when (under which circumstances) rather than whether one prefers institutional or ad hoc arbitration, but students will typically first embark on a general discussion of the relative merits of the two. Ad hoc is preferable when the parties want to entrust the arbitrators with special tasks, or when parties are ready to assume a greater role in the shaping of the procedural rules. Ad hoc might also appear to be a convenient solution when the parties get deadlocked in choosing between institutions. Ad hoc might also be cheaper—but with institutional arbitration the costs are predictable. One also has to keep in mind that the potential cost advantage of ad hoc arbitration is often lost if one of the parties fails to comply with its appointment obligation. In such case, the other party cannot rely on appointment by an institution but has to turn to the state courts for appointment.

Institutional arbitration is the preferred option when the parties are not sufficiently qualified to draft a dispute settling mechanism—or do not want to waste their time in doing so (the UNCITRAL Rules—which the parties may choose for ad hoc arbitration—have narrowed the difference arising from this consideration). An institutional setting might also provide more safety and predictability.

I.1.g. Fast-Track Arbitration

Questions 1-3. Fast-track arbitration is a response to a basic need which is speed. As arbitration becomes a regular, mainstream method of settling international trade disputes, it often cannot guarantee the desired quickness, and hence, new variations are being explored.

M. Philippe’s article raises again the question whether a distinct, specially designed procedure is necessary, or whether speed could also be achieved through the use of party stipulations within the framework of general rules and by a more expedient administration of the case. In all probability, this will remain an open question for some time.

In the opinion of M. Philippe (special counsel to the ICC International Court of Arbitration), “neither the Rules, the Court, nor its secretariat have been an impediment to fast-track arbitration”. The role of the institution chosen may be important. The institution is typically entitled to extend time-limits. Various policy approaches to possible extensions certainly have an impact on speed. Also, it is a fact that the ICC Court and Secretariat have a more pronounced role than most other arbitral institutions. Awards have to be submitted to the ICC Court for approval. The Secretariat will scrutinize the award and the Court will consider the award (and the opinion of the Secretariat) at one (usually the next) of its (usually
monthly) sessions. This is certainly conducive to more uniformity and helps in maintaining high standards - but it is not conducive to speed. The question remains whether distinct regulation of fast-track proceedings is helpful and necessary.

An interesting variation of the possible options was adopted in the 2011 Rules of the Court of Arbitration at the Hungarian Chamber of Commerce and Industry. No special fast-track regulation was adopted, but the shaping of a more expedited proceeding was not entirely left to the parties either. Article 45 of the Hungarian Rules is entitled “sub-rules of expedited proceedings”. These “sub-rules” provide for some features of expedited arbitration (such as shorter time-limits, a presumption in favor of a sole arbitrator, an oral hearing only if specially requested, etc). These features will apply whenever the parties opt for expedited proceedings. The sub-rules apply within the framework of the general rules.

It is clear that nowadays arbitration is not as simple and speedy as it was heralded to be 40-50 years ago. This is probably the key factor that prompted the emergence of fast-track arbitration. Why did arbitration become more cumbersome and less speedy? In the opinion of Lord Mustill the disappearance of expert-arbitrators was a key factor. When disputes about timber were arbitrated by people who knew about timber, things went more smoothly. As lawyers played more of a role in arbitration, the proceedings became more complicated and less speedy. There is another possible explanation. Arbitration was quick and easy as long as most of the cases submitted to arbitration were quick and easy. This is not the case anymore. Arbitration has become the dominant method of settling disputes and it includes all kinds of cases, including the most complicated ones which often involve very high sums of money. Cases with different levels of complexity yield different litigation strategies. In complicated cases with high stakes, parties are prompted to use all possible procedural devices. Under these circumstances lawyers play a more important role than experts in a particular branch of trade. (Of course lawyer-arbitrators may sometimes be the “cause of” instead of the “solution to” procedural complications.) Arguments can be made following both lines of analysis.

**Question 4.** The arguments stated in the Madrid debate are rather characteristic. Sympathies towards fast-track arbitration are fuelled by a growing dissatisfaction with delays and expenses incurred in the arbitration process. International commercial arbitration has become mainstream, the structure of cases submitted to arbitration has changed, the stakes have become higher, and this has prompted more procedural manoeuvres, more submissions, more cost, more time spent. Thus, in simple cases, fast-track is certainly an expedient solution.

Since the preparation of the claim is not subject to a time limit, short and stringent time limits may represent a disadvantage for the respondent. It is an open question whether it is advisable for parties to include a clause on fast-track
arbitration at the time of contracting, i.e., before knowing whether a dispute will emerge, and if one does, whether it will be a "minor" or "major" one. The dangers might outweigh the benefits. There are, of course, contracts that cannot possibly yield (or are most unlikely to yield) a "major" dispute with high stakes. Providing for expedited arbitration in such contracts is a relatively safe practice.

**Question 5** raises one of the key dilemmas of fast-track arbitration. Should the (short) time limits be firm or should the institution or the tribunal be given authority to modify them? The first solution would really guarantee speed, but at the same time it would endanger the whole process (assuming the sanction for a late award is invalidity). The Stockholm Rules use a combination of firm and flexible time limits, leaning toward flexibility. Article 7 of the 2010 Rules states that the Board may extend any time limit. Article 19 also sets time limits (e.g., ten working days for submitting documents), but these may be extended as well. Likewise, the time limit for rendering the award (which is—which is) three months after the case has been submitted to the arbitrator), can also be extended "upon reasoned request from the Arbitrator, or if otherwise deemed necessary". The drafters of the Rules clearly wanted to provide speedy proceedings, but stopped short of guaranteeing time limits. Pros and cons may be advanced—and this is what students are expected to do. The drafters of the Stockholm Rules probably opted for the lesser danger.

**Question 6.** The arguments of A. Magnusson remind us that even in fast-track arbitration, the parties must have sufficient opportunity to present their case. This also means that speed must correlate with the complexity of the case. If the claim is simple, it makes sense to expedite things and give the respondent only eight days for an answer. This may be perfectly in line with requirements of due process. In a really complicated case, one may have to allow two or three months in order to give to the respondent a meaningful opportunity to present its case.

There is, of course, no clear dividing line between “fast” and “too fast”. If an arbitrator is faced with a party arrangement that appears to deprive one party (or both) of a meaningful opportunity to present its case, the arbitrator should invite the parties to reconsider their arrangement. If they decline to do so, the arbitrator would be justified in resigning.

It is also important to bear in mind that fast-track does not mean that only the parties must move quickly; the arbitrators, too, must act with dispatch.

**Question 7** asks at what junctures of the arbitration process can one really save time. Fast-track arbitration can probably speed up all parts of the process, but not equally. The appointment stage (which may take quite some time) is not easy to engineer. One could set short time limits within which each party must nominate its arbitrator, but if a party fails to comply, the other party is forced to turn to an appointing authority. One option would be to omit party
appointment altogether, but this could deprive the parties of an opportunity they might consider to be a major advantage of arbitration. It is also difficult (and not advisable) to put the arbitrators under pressure to write their award within a short time limit. Some time might be gained, however, with regard to the proceedings in the narrower sense of the word: submission of written statements, and presentation of evidence.

I.2. On the Evolution of the Standing of Arbitration Within the Legal System

This Subchapter continues the introduction, shifting the perspective to that of history.

I.2.a. Note

I.2.b. Historical Developments in Selected Jurisdictions

Question 1. The Von Mehren text gives a survey of the development of the standing of arbitration within the legal system, tracing the problem up to present times. Patterns of development in England, France, Germany, the United States and other countries show a remarkable degree of synchronicity. This line of development may be explained by various factors, most of which are also touched upon in the other parts of this subchapter devoted to history. Students may take the information offered in the Von Mehren survey as a starting point to better understand the previous materials. It seems plain that the striving (and lobbying) of the community of traders aimed at having a mechanism tailored to their specific needs was a success. The arbitral mechanism became a success when it found a place within the legal system. Although arbitration started with the banner of an alternative to legal methods of settling disputes, it was fully accepted when it became one of the methods offered by the system of law. It contains considerable manoeuvring room within which directions are set by party autonomy, and it has strong supranational features. Both the “manoeuvring room” and the supranational features, however, are recognized by international agreements and national laws. The measure of independence of arbitration from municipal laws is considerable, but it is a negotiated independence, one that is recognized by legal systems. The junctures at which courts have contact with the arbitration process are few, but these remain consequential. At these junctures courts either offer assistance to, or exercise a limited control over, the arbitration process.

It is also important to emphasize that the interests of international trade were always the main driving force behind the acceptance of arbitration. As we have seen, national legislators—even at times when they had no sympathy for arbitration generally—allowed inroads in favor of arbitration in an international setting. The fact that the last decades have given rise to a spectacular growth in the size and relevance of international trade is another important factor
explaining the headway made by the process of international commercial arbitration.

**Question 2** takes us back to the question of the “jealousy” of courts. The reasons behind the change of perspective are mixed. An important factor is of course the development of arbitration. One does not need to reach for semi-rational justifications in order to explain why arbitration was less trusted one hundred or two hundred years ago, or even 50 years ago, before it gained its contemporary structure, before it was shaped, improved, and further elaborated by a wave of national legislation and international agreements. The fact that nowadays courts have typically more cases than they can handle is also part of the explanation. The “hypnotic power” of phrases, doctrines and trends might in some cases delay for some time a change that in retrospect seems compelling and logical.

**Question 3** is a follow up of the Kulukundis decision which offers a survey of the development of court attitudes (attitudes of English and American courts) toward the enforcement of an arbitration agreement. It is interesting to note that court vigilance was directed more toward the arbitration agreement proper than against the result of the arbitration process. Guards were doubled at the entrance so to speak. Reading the Kulukundis case yields a series of possible devices that could make the arbitration agreement executory in the absence of a simple duty of the courts to consider them as binding per se. You might want to discuss with the students the relative merits of penal bonds, or of an injunction enforced by contempt of court sanctions. Searching for an explanation behind the hostile stance, one might also ponder whether reasons are always necessarily rational. The way trends are started and continued is not always anchored in clear logic or interests. Judge Frank speaks of the “hypnotic power of the phrase oust the jurisdiction”, and adds: “Give a bad dogma a good name and its bite may become as bad as its bark.” In a single case it is pretty clear that a forceful rhetorical punch line might sway the decision maker. Could it also give rise to a trend in legal history?

It is very difficult to compel the recalcitrant party to arbitrate without a clear duty of the courts to refer the case to arbitration if the parties agreed to arbitrate. The parties could possibly agree upon liquidated damages payable if one party refuses to arbitrate. The bottom line is, however, that arbitration could never have developed without the recognition of the simple fact that arbitration agreements are binding.

**Questions 4 and 5** deal with the L’Alliance v. Prunier case, one of the characteristic articulations of the attitude toward arbitration around the middle of the 19th Century. The Cour de cassation puts a particular emphasis on the requirement "that the arbitrators be named at the time of the compromise”. The Court explains that it wants to protect parties who might enter into arbitration agreements without the necessary foresight. This was an important setback for
the *clause compromissoire*, i.e., an arbitration clause in a contract that is designed to cover possible future disputes and that typically did not name specific arbitrators.

The motive of the *Cour de cassation* was probably to protect parties in a weak bargaining position, such as an individual insured contracting with a mighty insurance company. Such concerns were, of course, much stronger at a time when the prevailing attitude toward arbitration was filled more with distrust than confidence. Such distrust might have been based to some extent on the “jealousy” of courts in guarding their jurisdiction, as some authors have put it; but most importantly, this distrust might also be explained by the fact that around the middle of the 19th century, arbitration was not yet clearly structured. Opting for arbitration was thought of as opting for something unknown, and possibly dangerous. The relationship between courts and arbitration proceedings was not fully regulated, and therefore the simplest and most efficient method of control appeared to be that of not allowing arbitration to proceed. There has been a fundamental change of attitude since this early period. Arbitration has proved capable of having (and observing) important procedural guarantees, and at the same time, the forms and limits of court control have been elaborated and elucidated. The change of attitude has also been facilitated by the more and more pressing problem of overcrowded court dockets, which leaves hardly any room for judges to be jealous of others who might assume part of the load.

The concerns of the *Cour de cassation* may be understandable; nevertheless, naming of arbitrators in advance barely addresses the problem and has never become an accepted practice. Arbitration clauses refer to disputes which may never come into being, and if and when they do, considerable time is likely to have elapsed. It is also uncertain, whether the possibly emerging dispute will be one concentrating on technical issues or, by contrast, the statute of limitations. It is very difficult to find persons who will agree to serve as an arbitrator as much as five or more years into the future. Availability changes, confidence changes, conflict of interest positions change. It is also difficult to foresee what kind of legal (or other) expertise will be needed when the dispute arises. Furthermore, if the names of the arbitrators are nailed down in the arbitration agreement, the unavailability of any of them might jeopardize the validity of the arbitration agreement. These are probably the main reasons why parties typically do not name arbitrators in an arbitration clause.

A certain recurrence of that attitude can still be found today in the hostility of the Chinese Arbitration law towards ad-hoc arbitration, i.e. requiring, as it does, that an arbitration institution be named in the arbitration agreement (see Chapter II.1.m.).

**Question 6.** Today, separate regimes for national and international cases are normally justified by the fact that the different cultural and legal background of foreign parties has to be taken into account in determining the applicable rules.
Foreign parties cannot be expected to abide by all the rules that have been developed in a particular jurisdiction on the basis of the perceptions prevailing in that country. Thus, international cases require more leeway for maneuvering. At the same time a state may have much less interest in regulating relationships that have no or little connection to its territory or citizens. French people, for example, are much more affected by a dispute between two French companies and its resolution than by one between an English and an American company that have merely selected France as the place of arbitration.

The facilitated enforcement regimes for domestic awards are based on a presumption that the arbitration has been conducted in accordance with the minimum requirements of a fair trial. The national arbitration law is known and considered to provide sufficient guarantees to ensure—with the help of the equally familiar state courts—such a procedure. Consequently, it is assumed that the award is based on fair proceedings and can therefore be enforced unless the debtor proves the opposite. The same trust is not accorded to arbitration proceedings in foreign countries, which proceedings always require an exequatur by the local court. The exequatur is normally granted, however, in the absence of any justified objections by the other party. At the same time it is recognized, that in the context of public policy, foreign awards only have to comply with the narrower concept of international public policy.

Consequently, the two approaches do not necessarily contradict each other. The automatic recognition of domestic awards is based on the fact that the legal framework for national arbitration is known and trusted. By contrast foreign arbitration law may provide greater leeway to arbitration and may not grant appropriate remedies against misconduct of an arbitration so that awards resulting from foreign arbitration cannot be enforced automatically. Instead they require special approval by the local courts—an exequatur.

**I.3. The Sources of Relevant Norms and Possible Conflicts Between Various Sources**

The Note introduces the issue of the rules applicable to arbitration. The question arises as to what norms really control the rather unique process of international commercial arbitration and what kind of hierarchy exists between various types of relevant norms. The survey shows a remarkably strong process of international harmonization that has very few counterparts in other domains of law. Still, the relationship between party autonomy and other sources of applicable rules remains a problem for both decision-makers and parties who are structuring the arbitration process.

**I.3.a. Note – The Sources**

**Question 1.** The question addresses the complex interplay between party autonomy and national arbitration law—the latter having the dual role of
guaranteeing the parties’ autonomy and at the same time limiting it. Defining the respective roles of party autonomy, on the one hand, and the state’s interest and right to regulate, on the other hand, is at the heart of the discussion about the concept of arbitration, summarized for example in Gaillard’s book on “Legal Theory of International Arbitration”.

The quote by the Libyan Supreme Court describes the dichotomy of the legal bases for arbitration very well. It follows the prevailing and more conventional view that emphasizes the second element, the will of the national legislator. Arbitration is based on an agreement by the parties, but that agreement is only enforced and enforceable because it is recognized by the national legislator, normally the one at the place of arbitration. The “internationalist view”— supported by Gaillard— assumes an autonomous arbitral legal order made up of rules accepted in the majority of jurisdictions—a legal order not emanating from or controlled by any one state that emphasizes the first element, i.e. the parties’ agreement.

**Question 2.** The question allows for a general discussion of the continuing importance of the place of arbitration in practice. Students should be made aware that due to increasing harmonization and the trend toward an arbitration friendly environment in the majority of jurisdictions, the place of arbitration has lost some of its importance over the years. Nevertheless, the persisting differences still make the selection of the place of arbitration one of the most important choices in any arbitration. The four points mentioned by the authors, i.e. pool of arbitrators, party choice of law, procedural law and enforceability of the award, provide good starting points to discuss with the students the role of the place of arbitration and how the choice may affect any of these issues. The prevailing view in international arbitration is that the arbitration law of the place of arbitration applies to arbitration conducted in that territory and that it has a dual function. On the one hand, it provides the fall back provisions for issues not regulated by the parties in their arbitration agreement or by the party-chosen arbitration rules, and regulates the support the local courts can give. On the other hand, it defines the scope of party autonomy, by, for example, regulating which disputes may be submitted to arbitration and imposing minimum requirements for the arbitration procedure from which the parties cannot derogate.

It should be obvious to the students that knowledge of the local arbitration law is a feature in the selection of arbitrators. At the same time students should be made aware that, due to increasing worldwide harmonization, the importance of that factor has been reduced.

In dealing with the other points it might be a good idea to draw the students’ attention to the Model Law—noting its scope of application— and to let them compare how the tribunal would be constituted in an ad hoc arbitration in a Model Law country (three arbitrators) and in the UK (one arbitrator). Both laws are contained in the Documents Supplement.
I.3.b. Conflicts Between Various Sources

I.3.b.i. Party Stipulation Versus Institutional Rules

The 1974 ICC Preliminary Award deals with one of those situations in which the parties accept institutional rules but add some provisions of their own that depart from the institutional rules. This is certainly possible, but such combinations have to be made with much foresight—and this is often lacking. Institutional rules build a system, and replacement of a segment of the system can yield inconsistencies and questions that are difficult to answer.

Questions 1 and 2 are based on a scrutiny of the 1955 ICC Rules, which differ from the present rules, but the problem pattern remains essentially the same. The ICC Rules (like practically all rules) contain a fallback provision for cases in which the primary appointment mechanism fails to yield results. The sole arbitrator will be nominated by the parties, and if they do not agree, the substitute (fallback) mechanism will be called upon, and the arbitrator will be nominated by the ICC Court of Arbitration. In our case, the parties replaced the substitute solution of the Rules with a fallback provision of their own. This party-designed substitute solution did not work, because the “Chairman” refused to make the appointment. The question is whether this situation resuscitates the institutional fallback mechanism. In principle, party stipulation cannot be overridden by institutional rules—but institutional rules also apply on the basis of party agreement. One may argue that the institutional fallback mechanism cannot spring back to life, because the parties did not want it; this is why they replaced it. One could also argue that Article 7(2) of the 1955 Rules provides for institutional appointment if an agreement between the parties “is failing”, and one might perceive the Chairman as an instrument of party agreement; if this instrument fails, we have a situation of “failing agreement between the parties”. This latter argument would sit better if the second paragraph of Article 7(2) would simply read “Failing agreement between the parties, the arbitrator shall be appointed by the Court”. The actual wording, however, makes it more difficult to stretch 7(2) to situations in which we have an indirect failure of party agreement, since the actual 7(2) focuses on a failure of direct communications between the parties. At any rate, there are arguments both for and against the position taken in the Preliminary Award.

If one were to find that the ICC Court cannot make the substitute appointment since this is exactly what the parties wanted to avoid, appointment could possibly still be sought from the local court.

Question 3. Ad hoc arbitration does not have an institutional safety net. We have an exception, though, if the parties adopt the UNCITRAL Model Rules designed precisely for ad hoc arbitration, because they do provide for a substitute appointing mechanism. If there is no institutional fallback solution, and
the appointing authority chosen by the parties refuses to make the appointment, the only practical alternative is to seek appointment from courts. (Seeking an order against the recalcitrant appointing authority is hardly a desirable solution, since the appointing authority should enjoy the confidence of the parties, and this is not likely to persist after a lawsuit arises between the parties and the designated appointing authority. Also, appointment is not a legal obligation unless the authority accepted this task in advance, or unless the appointing authority advertised such services. Even if the appointing authority were responsible for the failure to make the appointment, specific performance remains a most difficult remedy.)

**Question 4.** Article 46 of the 1999 Swedish Act simply states that the provisions of the Act apply if the arbitral proceedings take place in Sweden. The proceedings that yielded the 1974 Preliminary Award, did take place in Sweden. Article 15 deals with a number of situations in which substitute appointment may be made by a Swedish court, and the situation we are facing is clearly included. In the second sentence of Article 15 it is stated that the District Court shall also make appointment “Where an arbitrator shall be appointed by someone other than a party or arbitrators, but such is not done within 30 days of the date on which the party desiring the appointment of an arbitrator requested that the person responsible for the appointment make such appointment…” The formulation “someone other than a party or arbitrators” certainly includes the Chairman of the FIDIC.

**Question 5** takes us to the present (2012) ICC Rules. Article 11(6) makes it clear that party autonomy takes priority over institutional appointment—but the wording is not much different from the formulation of Article 7(1) of the 1955 Rules. Article 12(3) contains somewhat different wording from that of Article 7(2) of the 1955 Rules, but it is difficult to find in these drafting changes a foothold for different arguments. The dilemma is practically the same.

**Question 6** takes us to the issue of the appointment of a third arbitrator. Article 12(5) provides that a third arbitrator appointed by the parties is subject to confirmation by the Court in accordance with Article 13. The wording of our hypothetical party agreement (conferring appointing competence on the Chairman of the Ithaca Chamber of Commerce) does not envisage confirmation by the ICC Court. The ICC Court may have a vested interest in maintaining some control over the professional qualifications of arbitrators who act as ICC arbitrators. It seems, however, that Article 11(6) of the ICC Rules allows the parties to constitute an appointing mechanism that would bypass confirmation.

**Question 7** describes a complicated (or rather confusing) party agreement on appointment and the ensuing quandary. Students will identify three parallel appointing mechanisms within the same arbitration clause:
a) The parties, plus the President of the ICJ. (Here, two problems might arise. First, the President of the ICJ might not accept this task, a point worth mentioning to the students as a reminder for drafting arbitration clauses referring to third party appointers that are not arbitral institutions. Second, there is no fallback provision for the case in which the problem arises with the appointment of the second, rather than the third, arbitrator.)

b) Federal Tribunals of the Argentinian Republic (although it is unclear what the competencies of these courts exactly were).

c) The ICC Court of Arbitration as substitute appointing authority according to the ICC Rules.

It seems that the French courts were right. The party agreement may be a bad one, but it cannot simply be disregarded by arbitrators who owe their competence to the same agreement. In this case, no effort was made to follow the mechanism designed by the parties. Were the second arbitrator not nominated, appointment might have been sought from the Argentinian court. Were the third arbitrator not nominated, intervention of the Chairman of the ICJ could have been sought, and if he refused, the Argentinian court could have acted again. This is, of course, much more complicated than the fallback mechanism of the ICC, but party agreements cannot be disregarded for the sake of expediency.

**Question 8** addresses the question of what happens if the parties select institutional arbitration rules but want to deviate from provisions that the institution considers to be mandatory. If the institution refuses to act under the modified version of its rules, does that render the arbitration clause invalid, or can it then be considered to provide for ad hoc arbitration with application of the chosen institutional rules? If the latter is the case, what happens if the institution’s support is needed, as for example when the defendant does not participate in the arbitration at all and does not appoint its arbitrator? And what happens if in that case the claimant asks for appointment by the ICC, and the ICC acts as if there had been no modification to its rules and confirms all arbitrators and later also scrutinizes the award?

Students may be asked why institutions such as the ICC consider the rules on appointment of arbitrators (at least their final confirmation by the ICC after nomination by the parties or others) or on scrutiny of the draft award to be mandatory, while the majority of their other rules are subject to an agreement to the contrary by the parties. They should become aware that these are the only means the institution has to guarantee a certain quality of the process by refusing to appoint arbitrators who lack the necessary qualifications or independence and by scrutinizing the draft award—the latter being a process that the ICC considers a hallmark of ICC arbitration.
In the case at hand, the ICC, upon initiation of the proceedings, had notified the parties that it would not administer the arbitration unless the parties agreed to comply with the ICC Rules. The French Court to whom the Claimant had turned for appointment of Respondent’s arbitrator considered the clause to be valid and to provide for an ad hoc arbitration in Paris. It made the necessary appointments.

I.3.b.ii. Party Stipulation Versus State Norms

After an investigation of the relationship between party stipulation and institutional rules, we turn to another point of frequent contention: the relationship between party agreement and municipal law. Both the Haddad and the Termarea cases are structured along these lines. (Incidentally, you may note that the name of the Italian party is differently spelled in the English and Italian cases, respectively. We opted for “Termarea” on the assumption that the Italian court is more likely to get the name of the Italian party right.)

**Question 1.** It is difficult to support Judge Wright’s interpretation of Article V(1)(d) of the New York Convention. In Judge Wright’s opinion the composition of the arbitral tribunal may be upheld if it satisfies any of two alternative sources of rules: the agreement of the parties or the law of the *situs* of arbitration. The wording of the New York Convention does not support this understanding of the relationship between these two sources of regulation. According to Article V(1)(d), the law of the country where arbitration takes place only comes into consideration “failing such agreement” (an agreement between the parties). Thus, the composition of the arbitral tribunal cannot be contrary to party agreement. If it is, this cannot be remedied by acting in conformity with the *lex arbitri* (generally, the arbitration law of the *situs*).

According to the arbitration agreement, each party was to nominate an arbitrator, and the two alone were authorized to decide the case. A third arbitrator (actually an umpire) would only appear if the two arbitrators were unable to agree on an award. If needed, the umpire was to be appointed by the parties. The arbitration agreement did not provide for fallback provisions in case the second arbitrator or the umpire were not nominated.

**Questions 2 and 3.** The panel was not formed according to the agreement of the parties—thus, actually no panel was formed. In the absence of any substitute method that was set by the parties, Diakan relied on the option provided by English law and asked the arbitrator nominated by him (who was supposed to act as one of the two arbitrators) to serve as sole arbitrator. At this point, a debate might be initiated around possible interpretations of Article V(1)(d). The authors believe that V(1)(d) does not allow the *lex arbitri* to prevail over an agreement of the parties. It only applies “failing such agreement”. But this does not settle the issue. One might ask “failing agreement on what”? An agreement on substitute appointment was clearly failing. One could argue that
English law was actually not applied to override party autonomy, but to fill the gap created by the failure of the parties to provide for some surrogate mechanism to operate in the event that the respondent failed to appoint its arbitrator. This line of reasoning encounters one additional difficulty. There was no party agreement as to what one should do if respondent fails to nominate its arbitrator; but there was an agreement that the number of arbitrators was to be two (possibly three if an umpire were needed). If the second arbitrator were nominated by the local court, in accordance with the *lex arbitri*, one would have a clear case of substituting the solution offered by the *lex arbitri* exactly at the point where party agreement is silent, and without disturbing the structure designed by the parties. In the *Haddad* case, after the first arbitrator was nominated, the *lex arbitri* did not provide a second one following the pattern set by the parties, but changed the whole pattern allowing the arbitrator of the claimant to proceed as a sole arbitrator. These are some of the arguments that may be advanced in debating whether in *Haddad* the *lex arbitri* was applied contrary to or “failing” a party agreement.

**Question 4** focuses once again on the issue of the relationship between party agreement and the *lex arbitri*, but reversing the pattern. In this hypothetical case, the party agreement is not incomplete, it could be followed by the arbitrators—but it is contrary to the *lex arbitri*. We have stated that the *lex arbitri* cannot overrule party autonomy; but can party agreement override mandatory norms of the *lex arbitri*? Van den Berg speaks of a Scylla and Charybdis situation. The arbitrators should comply with both party agreement and the mandatory rules of the *lex arbitri*. If they fail to observe the *lex arbitri*, the award may be set aside. Setting aside in the country where the award was made allows (although does not mandate) refusal of recognition in other countries. In practice, this means that the arbitrators have three options if the parties’ agreement requires them to proceed in a way disallowed by the *lex arbitri*:

- they may seek new instructions from the parties;
- they may follow the instructions of the parties, and disregard the *lex arbitri*, which would result in a vulnerable award;
- they may disregard party instructions and follow the *lex arbitri*, which will again yield an even more vulnerable award.
- they may also refuse to arbitrate.

**Question 5.** If the facts stood as stated by the English Court, they would also have been in accordance with the provisions of Clause 24 of the Charter Party. (Actually, the part of Clause 24 which allows one party to nominate the arbitrator of the defaulting second party is not reproduced in the summary of facts of the English case, but it is reproduced within the “Facts” of the Italian case.) The solution according to which the moving party may nominate an
arbitrator instead of the second party (if the latter fails to do so within a specified time limit) is rather unusual. The question may be asked whether this is an advisable solution. The remedy is certainly a quick one, but it goes against one of the basic tenets of arbitration and that is neutrality. The question might also be raised whether this is consistent with ideas of due process (and whether some standards of equality and balance inherent in the principle of due process can be waived by mutual consent). One might also compare the *Termarea* solution for the nomination of a substitute arbitrator with a hypothetical arbitration agreement providing that two arbitrators out of three are to be nominated by one of the parties. The latter case appears to represent a stronger challenge to the principle of due process. Students should be invited to explain why.

**Question 6.** In the opinion of Judge Mocatta, the parties saw the third arbitrator as an umpire who only needed to step in if the two arbitrators could not agree. The question is whether this was what the parties intended, or whether they simply wanted three arbitrators. Students should scrutinize the wording of Clause 24. It speaks of arbitration “before a board of three persons”, but it also says that “the decision of any two of the three on any point or points shall be final”. (It appears that the latter provision relates more to voting than to the conduct of proceedings.)

**Question 7** compares the *Haddad* decision with the decision of the Italian court in *Termarea*. The context of the two decisions is very similar, but there is a key difference in the reasoning of the two courts. The *Haddad* court understood Article V(1)(d) as allowing the court to uphold the composition of the arbitral tribunal if it accorded with either the party agreement or with the *lex arbitri*. In *Termarea*, the Italian court held that consistency with the *lex arbitri* cannot help if the composition of the tribunal is inconsistent with the agreement of the parties.

**Questions 8 and 9.** A. Van den Berg is probably right in assuming that the law of the place of arbitration cannot (and should not) overrule party agreement. Arbitration should only proceed if the parties want it, and it should proceed the way they want it to. If they have confidence in a panel of five arbitrators, then a panel of five should proceed. In *Termarea*, the issue is whether the parties made it clear in their arbitration agreement that they wanted proceedings before a panel of three (rather than two, possibly with an added umpire if the two could not agree). The problem is that if Section 9 of the (old) English Arbitration Act gives a mandatory interpretation to arbitration agreements providing that each party will nominate an arbitrator and the two so nominated will appoint a third one, and this statutory interpretation differs from the understanding of the parties, then the two conflicting requirements create an impasse. There are no fully satisfactory solutions in this situation. The options are those which we outlined in connection with Question 4. Trying to avoid this conundrum is better than trying to solve it. If you provide for arbitration in France, you should know that France does not allow clauses with an even number of arbitrators; so you should either provide for an uneven number, or move the site.
from France to some other location where even numbers do not represent an impediment. Such tactics are greatly facilitated by the sweeping harmonization of rules and attitudes that has occurred during the last decades. Provisions that have been typical stumbling blocks are being removed. (An example is shown by the new 1996 Arbitration Act for England, Wales and Northern Ireland that abandoned the mandatory presumption in favor of an umpire instead of a third arbitrator in the Termarea setting.)

**Question 10** deals with one of the limits of party autonomy in arbitration. Notwithstanding the parties’ general freedom to regulate the arbitral proceedings as they wish, their agreement must comply with the minimum requirements of due process. That requirement is not only reflected in the rules regulating the proceedings, cited in the decision, but also in the rules for setting aside. Consequently, Article 34 (2) (a)(iv) of the UNCITRAL Model Law, which was applicable because of having been adopted in Hong Kong, provides that an award may be set aside if the “arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law, from which the parties cannot derogate”. Thus, the decision was clearly in line with the applicable law.

The situation differs from that in the previous Termarea example, where the agreement should have prevailed—in principle even over the provision of the applicable lex arbitri—, because in this case—by contrast with Termarea—the parties’ agreement was in conflict with a universally accepted principle of arbitration law.

In any event, the arbitrator is in an uncomfortable situation when faced with two opposing commands, one stemming from the applicable law, the other from an agreement by the parties who are the ultimate source of the arbitrator’s authority. Students should discuss the possible options available to the arbitrator, i.e. comply with the parties’ agreement, comply with the requirements of the law or resign.

**I.3.b. iii. Institution Versus Institution**

**Question 1.** The wording of the Budapest and of the Hamburg arbitration clauses is essentially similar, and so is the problem to which these clauses gave rise. One may note that under the Budapest clause the parties more clearly chose the Hungarian Court of Arbitration as the institution to administer the arbitration; while in the Hamburg clause this is only implicit. Another minor difference can be found in the wording of the reference to rules. The Hamburg clause states that arbitration will take place “according to” the Commodity Trade Association of the Hamburg Exchange Rules, while the Budapest clause provides that disputes will be settled “in accordance with” the ICC Rules. One might conceivably argue that the Budapest clause does not clearly exclude the application of some other rules (like the Budapest rules), as long as the
procedure is at the same time “in accordance with” the ICC Rules. Students might be invited to explain the relevance (or lack of relevance) of these minor differences in wording. It is not likely however, that these slight variations can explain the different outcomes. The viability of both clauses was a close call. The Budapest clause was upheld. The Hamburg clause produced more conflict. The lower German courts reached different results. In the end the German Supreme Court decided that the wording of the arbitration clause was fatally ambiguous and did not choose the Hamburg Friendly Arbitration institution with sufficient clarity.

**Question 2.** As Comment number 7 below explains, it is ill-advised to refer to one institution and to the rules of another institution within the same arbitration clause. However, once such a reference is made, it is probably a better approach to take account of both references, and to try to make them function together. If one simply disregards either the reference to the institution, or the reference to the rules (of another institution), there is practically no defense against the argument that “the arbitral procedure was not in accordance with the agreement of the parties”—which is one of the key grounds for set aside or for denial of recognition. (See New York Convention Article V(1)(d).) The endeavor to take account of both references does not yield a simple and straightforward solution either, because in some situations it could be quite difficult to divorce the rules from the institution, i.e. to distinguish arbitral procedure from the administration of this procedure by the institution. Still, the Budapest approach probably offers a better solution.

**Question 3.** Harmonization of rules is a factor that helps, because this makes it more likely that in most places, more or less the same things will be regulated by the rules, and more or less the same things will require institutional administration and decision making. Nevertheless, the problem of proceeding within the setting of an institution, while applying the rules of another institution, remains a redoubtable one. As far as the application of substantive law is concerned, Cavalieros is probably right. The arbitrators missed an opportunity here to demonstrate and to make it convincing that they were applying ICC Rules, while acting under the auspices of the Hungarian institution. The problem lies not with the conclusion that Hungarian substantive law should apply. This was a quite logical conclusion under the circumstances of the case, and many conflict rules would have led to the same result (considering in particular that the seller was from Hungary). What was more problematic was the reliance on Hungarian conflict rules. According to Article 14(2) of the Rules of the Budapest Court of Arbitration, the arbitrators should apply Hungarian conflict rules in the absence of party choice. (This provision was retained in the 2011 version of the Budapest Rules.) Thus, the arbitrators applied a conflict rule suggested by the Budapest Rules of Arbitration, rather than by the ICC Rules. Article 17 of the 1998 ICC Rules stated that in the absence of party choice “[t]he Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.” (The same solution has been adopted in Article 21 of the 2012 Rules.) It would have been
easy—and advisable—to refer to Article 17 of the ICC Rules, and to come up with the same result (applicability of Hungarian substantive law) since the ICC Rules allow a wide discretion—and since the outcome reached is certainly a reasonable one. An opportunity was missed to demonstrate the viability of the cohabitation approach by relying explicitly on ICC Rules.

The question still arises whether the Hungarian arbitrators acted in defiance of the basic arrangement (Budapest institution – ICC Rules). The arbitrators applied Hungarian conflict rules, but without referring to Article 14 of the Hungarian Rules. The ICC Rules say that the arbitrators shall apply “the rule of law which it determines to be appropriate”. Does this mean, that the arbitrators may do this indirectly by applying the conflict rules which they determine to be appropriate and which will lead them to the applicable substantive law? (If Article 17 may be interpreted this way, one could argue that the arbitrators acted in accordance with the ICC Rules.)

**Question 4.** Had the arbitration clause only stated “ICC Rules” without mentioning any institution, this would have represented a proper basis for addressing the ICC. However, an arrangement according to which disputes “[a]re to be settled by the Court of Arbitration of Budapest, Hungary, in accordance with the rules of the International Chamber of Commerce”, makes it rather clear that the competent institution is the Budapest institution (with the remaining question being whether the Budapest institution can or cannot effectively act “in accordance with ICC Rules”). Thus, the party wanting arbitration on the ground of the wording of the arbitration clause would probably have a better chance if it addresses the Budapest institution rather than the ICC.

**Question 5.** Arbitral institutions often have long names, and changes of names are not so rare. Quite often the parties do not get the name right. Sometimes this causes a real dilemma. The International Chamber of Commerce (ICC) International Court of Arbitration in Paris is probably the best known arbitral institution not only in Paris, but in the world. But it is not the only court of arbitration in Paris. A reference to the ICC Court of Arbitration (instead of the ICC International Court of Arbitration) is probably still quite unambiguous. But how about a reference to the Court of Arbitration at the Paris Chamber of Commerce? This is much more problematic, because there is a Paris Chamber of Commerce and there is a Paris Arbitration Chamber, which is active in international arbitration. If the given designation is at a similar distance from the precise names of alternative institutions, (and the parties do not cooperate in clarifying the imprecision) the question arises whether we have a valid arbitration clause.

The situation in Hungary is simpler because there is practically only one arbitral institution in Hungary dealing with international commercial disputes, and this is the Court of Arbitration at the Hungarian Chamber of Commerce and Industry. (Specialized institutions attached to stock exchanges were not among the reasonably plausible referents of the imprecise language in the Budapest
case.) In the Budapest case, the (incomplete) indications could have led to only one result. “Court of Arbitration in Budapest” would have been better than the “Court of Arbitration of Budapest”, because the Court of Arbitration is attached to the Hungarian Chamber of Commerce and Industry, rather than to any institution of the city of Budapest. Nevertheless, the reference was probably still acceptable since it could not have been interpreted as a reference to some other institution.

Questions 7 and 8 address the problems created by arbitration clauses that instruct one institution to administer an arbitration under the rules of another institution. Such clauses are often the result of the parties’ inability to agree on a particular institution leading to the—definitely not advisable—compromise found in the clause in the Insigma case. Unlike some of the other examples of clauses that refer to different institutions, the contract in the Insigma case was between two multinationals with some experience in dispute resolution.

In evaluating the solution found by SIAC and endorsed by the courts in Singapore, students should be asked what the alternatives would have been. If SIAC had refused to act—as the new ICC rules seem to have intended—the clause would have probably been inoperable, if not void. It is more than doubtful that the courts in Singapore would have been willing, or even able, to take up the tasks performed by the ICC under the ICC rules, in particular the scrutiny of final awards. Consequently, the parties would have been forced to litigate their dispute in front of the state courts, a solution that clearly contradicted the obvious will of the parties to resort to arbitration. Equally at odds with the parties’ agreement would have been a solution that would have interpreted the clause to provide for ad hoc arbitration in Singapore without any reliance on the ICC Rules, with the SIAC acting as appointing authority—or to provide for an ICC Arbitration administered by the ICC. The clause was included in a contract between two multinationals with some experience in international dispute resolution so that the references to both institutions cannot be lightly ignored, despite all the problems they create in practice.

In light of these problems, the clause included in the new ICC Rules should be primarily a salutary reminder to the parties that clauses such as the one used in the Insigma contract may create problems. The rule expresses the legitimate wish of the ICC to be the only institution to administer its rules to guarantee the reputation of such proceedings. The ICC cannot prevent the parties from agreeing otherwise, however, nor can it hinder any other institution selected by the parties from acting in lieu of the ICC and performing those tasks that under the ICC Rules would be performed by the ICC.
CHAPTER II
ON THE AUTHORITY OF ARBITRATION TRIBUNALS

What’s new in the 6th Edition: Chapter II has been partly restructured and supplemented by several subsections dealing with various aspects of the arbitration agreement in greater detail. These subsections rely in part on completely new materials, in part on rearranged materials.

The amended and enlarged introductory note gives a short overview of the issues covered. In subsection 1.b., we now deal with the forms and the content of the arbitration agreement adding a Supreme Court case from New Zealand. Subsection 1.c. gives an overview of the different modes of how to enforce an arbitration agreement and how to deal with pathological clauses. For the later issue we have included a new case for Singapore, HKL Group v. Rizq International Holdings. Subsection 1.d. addresses the law applicable to the arbitration agreement. The three excerpts used reflect the different approaches to the question that are used in practice. For the traditional choice of law approach, which probably prevails in practice in most jurisdictions, we have excerpted the decision of the English Court of Appeal in Sulamérica v. Enesa. It sets out the general test that led to the application of English law (the law of the place of arbitration) to the arbitration agreement, although the parties had submitted the contract containing the arbitration clause to Brazilian law. Subsection 1.e. deals with the various ways of compelling the reluctant party to arbitrate. After a short overview in a new note, we have supplemented the existing materials with a decision of the English Supreme Court granting an antisuit-injunction (Kamenogorsk Hydropower).

In subsection 1.f., we have restructured the part on Kompetenz-Kompetenz to make the different questions associated with the concept and term more apparent. The new note gives an overview of the various understandings of the topic. In addition to the description of the French and the American understandings of the concept of the negative effect of Kompetenz-Kompetenz, we have included excerpts from other jurisdictions which—like most Model Law jurisdictions—lack a clear statutory solution but merely contain provisions comparable to Article II NYC.

In subsection 1.i. on “Inclusion of Arbitration Agreement by Reference” we have added excerpts from the decision of the Singapore Court of Appeal in International Research Corp. v. Lufthansa.

II.1. The Arbitration Agreement as the Cornerstone of the Arbitration Process

II.1.a. Note

II.1.b. The Arbitration Agreement—Forms and Content

Question 1 addresses the different components of an arbitration agreement. As stated in the Note, an arbitration agreement could be limited to a mere referral of the dispute to arbitration. All other determinations as to the constitution of the arbitral tribunal or the conduct of the proceedings or, in the case at hand, setting aside proceedings are not necessary parts of the arbitration agreement in a narrow sense.
In some jurisdictions such regulations are therefore distinguished from the arbitration agreement proper and are referred to as “agreements on the arbitral procedure”. As the case referred to in Question 2 shows, the underlying distinction may have a bearing on which interpretation rules apply. Other decisions show that it may also be relevant for the question of the formal validity of the agreement, since the form requirement is still contained in most arbitration laws and the New York Convention only applies to the arbitration agreement but not to other agreements.

The Supreme Court in New Zealand, by contrast, rejected such a separation and considered the additional regulations to form part of the arbitration agreement. The court rightly stated that the doctrine of separability has no bearing on the question of how the invalidity of parts of the arbitration agreement affects the remainder. The doctrine only separates the arbitration agreement from the container contract. It is not concerned with separating different parts of the arbitration agreement from one another. Students should understand that the view adopted by the Supreme Court does not mean that the invalidity of a provision, which in the court’s view is an integral part of the arbitration agreement, necessarily leads to the invalidity of the whole arbitration agreement. The importance of the invalid provision for the remainder of the arbitration agreement as well as its importance for the parties always has to be taken into account. At the same time, the opposite view, supported by the respondent in the case, i.e. that such regulations do not form part of the arbitration agreement, does not necessarily lead to the conclusion that their invalidity would not affect the arbitration agreement. Unlike other provisions of the container contract, such regulations, even if conceptualized as not forming part of the core arbitration agreement narrowly defined, are so closely connected with the arbitration agreement that the doctrine of separability can only apply with a limited force. It is in the end, as with the approach adopted by the Supreme Court, an evaluation of what importance the parties themselves attached to the provision.

In the case itself, the Supreme Court—unlike the Court of Appeal—considered the clause concerning possible review to be of such importance for the parties’ submission to arbitration that its invalidity led to the invalidity of the whole arbitration agreement.

**Question 2.** The distinction drawn by the Swiss Supreme Court in the excerpt cited is based on the assumption that litigation before the state courts is the standard mode of dispute resolution and arbitration is the exception that has to be justified. Whether that is true for international cases is at least questionable. Unlike in national cases, for international disputes there is no court of general jurisdiction; but instead the courts of both parties have equally good or bad claims to jurisdiction.

Be that as it may, one could justify a stricter rule in determining whether the parties ever agreed on arbitration with the consideration that by submitting to arbitration a party waives its right to have its day in court—a right generally considered everywhere to be fundamental.

Once it has been established that the parties wanted arbitration there is every justification for an arbitration friendly interpretation of the remainder of the agreement leading to its validity. It has to be kept in mind that any other interpretation would defeat the parties’ most basic agreement to have their dispute determined by arbitration instead of the state courts. In the majority of cases, the mere fact that the
parties did not get the selection of the institution or the other issues right is a clear indication that they were not of considerable importance to the parties. Otherwise, they would have paid proper attention to them. Even if no sense can be given to a particular provision, the available alternatives are therefore either to disregard some minor point completely or to turn it into a major obstacle to the parties’ unequivocal will to have their disputes decided by arbitration instead of by the state courts.

**Question 3.** In principle, everything that goes beyond the mere referral of the dispute to arbitration can be classified as collateral. That includes choice of a particular institution, provisions on the number and appointment of arbitrators, choice of specific procedural rules, for example, for the taking evidence, provisions on the applicable law or regulating setting aside proceedings, and terms deciding which courts should have jurisdiction over various issues.

Given that modern arbitration laws, in particular those based on the UNCITRAL Model Law, contain fall back provisions for most of these questions, the minimum requirements for an arbitration agreement are very limited. In principle, it is sufficient that the agreement makes clear that the parties want their dispute to be decided by an arbitral tribunal instead of a state court and that it determines the place of arbitration, which in turn leads to the law supplying the missing rules. Some national laws even go so far as to provide support for the constitution of the arbitral tribunal when the place of arbitration has not yet been fixed, so as to allow the tribunal then to fix the place and thereby determine the lex arbitri.

Thus, the clause “Dispute Resolution: Arbitration New York” is sufficient to constitute a valid arbitration agreement. It provides for an ad hoc arbitration with the place of arbitration in New York. To further students’ understanding of what the effects of the clause would be, one could ask the additional question as to the composition of the tribunal in such a case.

**Question 4.** In light of the circumstances of the case, the decision of the Supreme Court seems to be more convincing. The agreement was concluded by lawyers who amended a very specific rule of New Zealand’s arbitration law. Unlike most other Model Law countries, New Zealand kept the old common law system of allowing an appeal on a question of law. The parties amended that provision by adding that questions of fact could also be appealed. For one of the parties it was obviously of great importance to have the opportunity to have a proper appeal against the award rendered.

Other additions that may be of considerable importance are all provisions that relate to the composition of the arbitral tribunal. The possibility to appoint one’s own arbitrator is generally considered to be one of the major advantages of arbitration. That applies in particular where the provisions contain detailed modifications of the general practice under the applicable rules, giving more autonomy to the parties. An example are provisions by which the parties explicitly allow for the appointment of former members of the board of directors who would otherwise not be eligible due to concerns as to their independence.

In evaluating how important a particular matter is, the drafting process and the attention given to the provision are normally good indicators. That applies in particular for the selection of a particular institution. Getting the name of the
institutions wrong is sometimes an indication that the selection of that particular
institution was not of major importance for a party. Otherwise, it would have gotten
the name right. For other additions to the arbitration agreement that may not apply
with equal force but the unclear provisions may be primarily due to the parties’ lack
of experience in drafting such clauses.

Furthermore, in determining the severability of certain additional regulations,
one should always look at the consequences associated which each solution, i.e. the
invalidity of the whole arbitration clause if the clause is considered to be crucial.

**Question 5.** The doctrine of separability is intended to separate the arbitration
clause as such from the container contract in which it is included. The present case,
however, only concerned separate parts of the arbitration clause. Hence, the
d doctrine was irrelevant.

The underlying rationale of the doctrine could only be applied if one were to
make a distinction between the arbitration agreement in a narrow sense, i.e the mere
referral of a dispute to arbitration, on the one hand, and the other procedural
provisions, on the other hand.

**II.1.c. Enforcing Arbitration Agreements: An Overview and the
Problem of Pathological Clauses**

**Question 1.** Five of Tennessee Imports’ arguments are listed on p. 136. All of
these, except the fourth, seem fairly frivolous. The fourth argument asserts that
the claim against Filippi sounds in tort for interference with the contract and as such
does not come within the scope of the arbitration agreement, because Filippi himself
was not a party to the arbitration agreement. In fact, as explained at the end of the
case, the court retained jurisdiction of the tort claim against Filippi for precisely this
reason: Filippi was not a party to the arbitration agreement.

The case, though primarily dealing with the question of whether Filippi was a
party to the arbitration agreement, can also be used, either here or in the context of
Question 4, for a broader discussion of how to deal with tort or other claims that are
closely related to the contract but are not classified as contractual. Are they covered
by the arbitration clause included in the contract?

**Question 2.** The sixth argument appears at p. 139 (bottom)-140 (top) where
Mr. Johnson, for Tennessee Imports, maintains that he was fraudulently induced to
enter the contract - that Prix, at the time of contract formation, knew that it would
take the action it eventually took and fraudulently concealed that intent from Mr.
Johnson, who, had he been properly informed, would not have entered the contract.
The court notes that this argument challenges the validity of the entire contract, not
just the arbitration clause, and as such is within the scope of the arbitration clause.
In other words, the court will not decide this issue, but will send it to the arbitral
tribunal for decision.

**Question 3.** The pattern just described in Question 2 is the essence of the
separability doctrine. A contract containing an arbitration clause is treated as two
contracts: 1) the large, basic transaction (“container contract”); and 2) the arbitration
clause, which is treated as a separate contract. Arguments challenging the validity
of the “container contract” – such as fraud in the inducement — are within the scope of the arbitration clause and must be sent to the arbitral tribunal for resolution. Only arguments specifically and directly challenging the validity of the arbitration clause itself are decided by the court (at Stage 1) — not arguments claiming the clause’s invalidity indirectly as a logical consequence of the claimed invalidity of the “container contract”. The underlying rationale is given in para. 43 of the Carr & Or case, i.e. to give the arbitrator "jurisdiction to determine the validity of the principal contract".

The court in Tennessee Imports is specifically following the separability doctrine in sending to the arbitral tribunal the fraud in the inducement claim (challenging the entire (“container”) contract), while deciding for itself in this opinion Tennessee Imports’ claim, for example, that the arbitration clause itself was adhesive and unconscionable (challenging directly and specifically the validity of the arbitration clause itself).

**Question 4.** Refer to Question 1 above. The claim against Mr. Filippi sounded in tort and was not within the scope of the arbitration clause. Mr. Filippi himself was not a party to the contract or the arbitration clause. If not already treated within the context of Question 1, one could discuss here with the students in a more general way the problems that may arise from a narrow interpretation of the scope of the arbitration agreement, i.e. i) one factual dispute litigated in two different fora, ii) what follows from that for drafting, and iii) whether the issue may be solved by drafting.

**Question 5.** Claims not sent to arbitration would be retained by the court for a judicial trial. Because the claims against Filippi were interrelated with the claims against Prix, however, the court stayed the action against Filippi until after the arbitration had run its course. In this way the court gave arbitration full effect and achieved consistency and some judicial economy. For example, if in the arbitration award Prix were found not to have breached the contract (and the award were recognized in the U.S.), then collateral estoppel (issue preclusion) principles would bar the court action against Filippi for inducing breach of the contract. The issue may be more complicated in jurisdictions where collateral estoppel or a comparable doctrine does not exist.

**Question 6.** Article 8 of the contract refers to "Arbitration Court of [the] Chamber of Commerce in Venice (Italy)." This is not the same as arbitration in Venice before the Arbitration Court of the International Chamber of Commerce. If the parties intended ICC arbitration, they did not express that intent in Article 8 - or, at least, they did not express it clearly. Counsel for Tennessee Imports might have argued that although there is a "Chamber of Commerce in Venice", it does not provide arbitration services and has no "Court of Arbitration". (Of course these propositions would have to be established as facts.) Even if research shows that there was a Court of Arbitration at the Chamber of Commerce in Venice, Prix's pleading still raises the question whether there was ever a meeting of minds. Since Prix says in its pleading that it accepted and understood the agreement to refer to ICC arbitration, Tennessee Imports could simply say that it never consented to ICC arbitration, either in writing or otherwise. Hence, counsel for Tennessee Imports could have argued that the arbitration clause was null and void because there was no genuine agreement to arbitrate - the parties wanted institutional arbitration, but they failed to agree on a specific, existing institution.

47
Throughout the book students will find examples of what is generally referred to as “pathological arbitration agreements”. Very often, as is evidenced by the *Tennessee Imports* case treated above, the parties merely refer to a non-existing institution. However, this is not the only “pathology”. The *HKL Group v. RIZQ International Holdings* case is one of the rare examples where the court does not merely deal with the particular clause in the case but also addresses the issue on a more general and systematic level. The decision and the guidelines contained in it may not be completely convincing in every respect. Nevertheless, they may allow the students to approach the various pathological clauses coming in subsequent parts of the book in a more systematic way, reflecting the prevailing understanding in international arbitration.

**Question 1.** The arbitration clause is in several respects pathological. First, it refers the case to a non-existing institution (Arbitration Committee in Singapore). Second, it declares the rules of a different institution (the ICC) to be applicable, even though the ICC has made clear in its newest rules that it does not want other institutions to administer its rules. At the same time, and this is the third pathology, the application of the chosen institutional rules, i.e. the ICC Rules, requires the intervention of the ICC-Secretariat and the ICC Court of International Arbitration. Given the special nature in particular of the ICC Court of International Arbitration and its role in scrutinizing draft awards, most other institutions will not have similar or even comparable bodies. In the *Insigma* decision discussed in Chapter I, the SIAC had therefore agreed to set up a body to take up the functions that under the ICC Rules would be performed by the ICC Court of International Arbitration. Consequently, the arbitration clause can only be operable if the institution cooperates and is willing to perform functions that go beyond its ordinary tasks. That is well reflected in the courts decision, which considered the clause to be workable only under the condition that “the parties are able to secure the agreement of an arbitral institution… to conduct a hybrid arbitration.”

It seems likely that the parties intended to agree on institutional arbitration. The court, following the Court of Appeal in *Insigma*, interpreted the parties’ agreement to refer to a “hybrid arbitration,” which means in principle an ad-hoc arbitration under the auspices of an institution with the ICC Rules being applicable.

The second example given shows that “pathologies” may also result from unequivocal clauses that contain, however, provisions that may not be in line with fundamental principle of arbitration. In the present case, the transfer of the unilateral right to appoint the arbitrator may conflict with the fundamental principle that the parties should have an equal influence on the composition of the arbitral tribunal. The problem cannot be resolved by interpretation, and, hence, it involves questions discussed above in the context of *Carr & Or*, i.e. whether the invalidity of a provision, i.e. the unilateral appointment right, leads to the invalidity of the whole clause.

**Question 2.** The ultimate purpose of an arbitration clause is to facilitate the resolution of disputes. In principle, that objective is frustrated when the clause itself becomes the object of a dispute. Consequently, one could adopt an even broader concept of a “pathological” clause than that given by the High Court in Singapore,
covering all clauses with wording that is not unequivocal and that requires extensive interpretation, in particular reliance on methods of supplementary interpretation such as the German “ergänzende Vertragsauslegung”. Thus, the role of interpretation in deciding whether a clause is pathological differs, depending on which concept one adopts. According to the definition of the High Court, a clause would only be classified as pathological if the rules of interpretation have not resulted in an unequivocal meaning. As a consequence, it seems doubtful whether under that definition of the concept the clause in the case could be classified as “pathological” at all. The inconsistency in the decision is apparent in para. 13, where interpretation obviously only occurs after the clause has been classified as pathological.

The decision clearly shows that the mere classification of a clause as defective or pathological in itself does not render the clause inoperative or incapable of being performed.

**Question 3.** Arbitration agreements in whatever form are contracts concluded between the parties. Consequently, the general rules for contract conclusion and contract validity apply, unless they are superseded by specific rules contained in the respective arbitration laws, which for example often impose special form requirements.

Thus, the first requirement is that the parties must have agreed to have their dispute resolved by arbitration. The agreement must also extend to the particular type of arbitration under consideration. In connection with pathological arbitration agreements, that may be an issue where both parties allege that they had different institutions in mind when agreeing on a mis-named, non-existing institution.

As *Tennessee Imports* shows, the arbitration agreement must also comply with the general rules as to the validity of agreements. Misrepresentations, coercion or mistakes may affect the validity of the arbitration agreement. It follows from the doctrine of separability that these vices of consent must apply to the arbitration agreement itself, and not solely to the larger contract within which an arbitration clause is situated. Invalidity of parts of the arbitration agreement may or may not affect the remainder. In this respect, the general rules on partial validity may apply.

Like any other contract, an arbitration agreement is also open to interpretation. The Swiss and the Singaporean decisions show that there may be special substantive rules of interpretation, which may differ depending on whether the general consent to arbitration is at issue or not. When consent to arbitration per se is not an issue, courts may go a long way, applying the principle of effective arbitration, to ensure the enforcement of the arbitration agreement.

**Question 4.** The decision of the Singaporean Court is peculiar in that it avoids a definite decision about the validity of the clause. It is obvious that at the time of the decision the clause’s inadequacies have not been removed either by rectification or by a creative interpretation that ensures its validity independent of further contingencies. Instead, the court stays its own jurisdiction under the condition that the SIAC will accept the task of conducting a hybrid arbitration, as it did in Insigma. Furthermore, it gives the parties the advice that the easiest solution would be to rectify the clause and agree on a proper SIAC or ICC clause. The Singaporean Court solution is very arbitration friendly, in that it tries to uphold the arbitration
agreement under all circumstances. It may be interesting to ask the students how they would act were they in the position of one of the parties—that is, whether it makes sense or not to agree on a proper clause or to wait for the reaction of SIAC.

**Question 5.** The clause is clearly pathological as it does not specify what happens if the witnesses are not all from Singapore. Irrespective of that, it can probably be made workable by interpretation. There are a number of possible solutions to the problem that should be discussed with the students. The best is probably to disregard the condition relating to the witnesses completely and to consider the clause to be one for SIAC arbitration. The implementation of the witness clause will always be difficult in practice. At the time of initiating the arbitration it will normally not yet be clear which witnesses will be nominated and called, in particular, by the respondent.

The pathology clearly refers to the fourth of Eisemann’s elements of an arbitration agreement.

**Question 6.** In practice, the majority of defects relate to the fourth element, i.e. the procedural regulations. As the above discussion shows, these elements can often be separated from the arbitration agreement proper and therefore do not lead to the invalidity of the arbitration clause.

By contrast, defects that affect one of the first two elements regularly have a more serious effect on the agreement. In some cases, they may simply cause the arbitration agreement to be unenforceable, as happened in *Kruppa v. Benedetti*. According to the Swiss Supreme Court, at least, such defects will trigger less favorable rules of interpretation.

The various criteria may be useful to show the different layers of regulation contained in an arbitration agreement and to clarify that defects may have different effects depending upon which element they relate to. There are, however, no direct legal consequences that are associated with the Eisemann classification.

**Question 7.** The classification and characterization of the various defects in practice helps to systemize them and to look for solutions that have been adopted in other cases. Often pathological clauses have the same origin—such as a contract model circulating in a particular industry—and can therefore be treated alike. Thus, for example the solution in *HKL Group* was definitively affected by the *Insigma* case. The classification may also be helpful in determining the generally applicable interpretative rules.

Irrespective of all guidance that may be offered by other cases, given that the solutions are usually found through interpreting the particular clause, ultimately the decision will always be dependent upon the circumstances of the specific case, i.e. the will of the parties in the case.

**Question 8.** The clause in *Carr & Or* contains one particularity that is only advisable when the arbitration agreement is concluded after the dispute has arisen: it refers the dispute to a particular arbitrator. Such a determination would be very impractical for clauses concluded long before the dispute has arisen. At this time, one is generally not yet sure what type of dispute will arise, whether the person
nominated is suitable for the particular type of dispute that may arise, and whether he or she will be available at the time the dispute arises. Moreover, if the named arbitrator is unavailable, that could render the clause inoperative. The situation is of course different in the case of a post dispute arbitration agreement. Students should be made aware that even in such cases the parties must ensure that the contemplated arbitrator is willing to accept the task.

Essential elements of an arbitration agreement are usually only the referral of the dispute to arbitration and either a selection of the institution under the rules of which the dispute will be decided or a determination of the place of arbitration in case of an ad-hoc arbitration. In institutional arbitration, the institution normally ensures that the tribunal will be constituted even if one party does not cooperate. And if no seat is chosen, the institution’s rules will normally authorise the tribunal to decide the place of arbitration. In ad-hoc arbitration, the selection of the place of arbitration may be necessary. In numerous jurisdictions, a court is only authorized to help in getting the tribunal appointed if the seat is in the country where the court is located.

II.1.d. The Law Applicable to the Arbitration Agreement

Question 1. Lord Mustill distinguishes the three different legal regimes that have to be kept separate in every arbitration: (i) the law governing the main contract, (ii) the law governing the arbitration agreement and (iii) the law governing the arbitration proceedings, i.e. the curial law (or lex arbitri). In practice, all these questions will often be governed by rules drawn from the same legal, as parties often submit their contract to the law where the arbitration is going to be held. However, in such a case the curial law (the lex arbitri) will come from the arbitration law of that country, whereas the rules governing the merits of the dispute will come from that country’s general contract law. The law governing the validity and interpretation of the arbitration agreement may come from the chosen country’s general contract law or arbitration law, or in part from both.

Lord Mustill correctly points out that there is a lower likelihood that the law governing the merits and the law governing the arbitration agreement are different than that the curial law is different. The arbitration clause—notwithstanding its legal separation—is generally perceived, at least by the parties, to be a part of the main contract. Consequently, parties would be surprised to hear that—without any express choice—this one clause of the contract is submitted to a different law than the remaining clauses. As the Sulamérica decision shows, however, that is not always the case.

Students should understand that the differentiation between the law governing the arbitration clause and the law governing the container contract is a consequence of the doctrine of separability. It may be discussed on a more general level whether the differentiation makes sense and is really required by the doctrine of separability or whether separability should have more limited effects. One could try to find statutory support for a more limited role for the doctrine from the description of separability in Article 16 Model Law, which ties it to challenges of the arbitrator’s jurisdiction. "For that purpose", i.e. the tribunal’s decision concerning its own jurisdiction, the arbitration clause “shall be treated as an agreement independent of
the other terms of the contract”. A strong argument against such a limitation of the doctrine can be found in the inconsistencies that would result from it.

The Note as well as the cited Article 178 Swiss PILA show that in practice more than just three different legal regimes may be relevant. Sometimes the form of the arbitration agreement is submitted to a separate regime that may even differ depending on where the case is decided. Form requirements are often regulated in substantive rules of private international law with the consequence that each court has to apply its own rule.

**Question 2.** The analysis of the Court of Appeal strikes a good balance between the doctrine of separability on the one hand and the parties’ perception of their contract on the other hand. By not extending the specific choice of law for the main contract automatically to the arbitration clause takes into account the legal separateness of the clause. Considering it, however, to contain regularly an implicit choice reflects that the parties normally do not distinguish between the various clauses.

At the same time the approach gives sufficient flexibility to react to extraordinary situation, as Sulamérica shows. According to the pleading Brazilian law would have rendered the arbitration agreement non-enforceable. As there was no explicit choice of law for the arbitration clause, the court could deny an implicit choice. In general, an implicit will of the parties to submit a clause to a particular law cannot be assumed if that will would render the clause non-enforceable.

In cases where the parties have opted for a place of arbitration in a jurisdiction different from the one the law of which was chosen to govern the main contract, there may be good reasons to question even the assumption that the choice for the main contract contains at the same time an implicit choice of the law governing the arbitration agreement. The arbitration agreement and the main contract have completely different purposes, and the former is performed primarily at the place of arbitration, the courts of which have jurisdiction to support and supervise the execution of the arbitration agreement. Consequently, it is generally more important to ensure that there are no conflicts between the law applicable to the arbitration agreement and the lex arbitri, than to ensure that it is in accordance with the law governing the main contract.

**Question 3** can be used to discuss with the students practical and tactical considerations that play a role in drafting and enforcing arbitration clauses. In the case at hand, the drafting of the contract was re-insurance driven, i.e. its terms had to be acceptable to the re-insurers. Consequently, while all the parties involved and the risk insured related to Brazil, the re-insurers insisted on an arbitration clause with London as the seat. By contrast, they seemed to have had no problems with submitting the contract itself to Brazilian law. Students may be asked what they consider to be the reason for these choices. This pattern is a clear indication that in practice, the question of who decides a dispute (a matter on which the lex arbitri at the seat can be decisive) is perceived to be more important than according to which law it is decided.

In practice, it happens regularly that the natural defendant, i.e. in the case at hand, the insurer, who has to pay money under the insurance contract, takes the
initiative to start proceedings in order to choose the venue. In the present case, the
discussion may already have shown that the insured did not want to rely on the
arbitration clause, which they considered to be invalid, but instead preferred to seize
the Brazilian courts, as they subsequently did. Thus, the only chance the insurer had
to settle the dispute through arbitration was to initiate arbitration itself in England.

Students should be made aware that such tactical considerations regularly
influence procedural choices.

**Question 4.** According to the traditional conflict of laws approach, the validity
of the arbitration clause is determined by the particular law chosen by the applicable
choice of law rule. According to the two other approaches, it is sufficient if (i) the
arbitration clause complies with any of a number of laws (Article 178 Swiss PILA) or
(ii) without regard to any national law, it can be established that by common consent
the parties have agreed to arbitrate.

**Question 5.** Article 178 (1) Swiss PILA regulates the form directly and does
not merely determine which law should govern the form requirements. It is thus a
substantive rule of private international law. The Swiss legislator wanted to determine
for itself the conditions that had to be fulfilled for an arbitration agreement to be valid
and for Swiss courts to refuse to exercise jurisdiction.

Article 178 (2) Swiss PILA by contrast determines merely which national law
should govern and in this respect is an ordinary choice-of-law provision. At the same
time since it only requires validity of the arbitration agreement on the basis of one of
several appropriately applicable laws, it contains a substantive element in favor of the
validity of the arbitration agreement.

The differences in approach shows that the Swiss legislator put more
emphasis on the form requirement than on the issue of substantive validity.

**Question 6.** The question refers back to the issues already discussed in the
first part of this chapter, i.e. what elements of an arbitration clause should be
considered part of the core agreement to arbitrate. While above, we were merely
looking at regulations affecting the arbitration procedure as such, the present case
concerns the dispute resolution proceedings provided for in advance of arbitration.
Given the close connection between the arbitration clause and the preceding dispute
resolution proceedings foreseen, it makes sense to treat such clauses jointly and to
submit them to the same law. That reflects commercial reality and the view of the
parties, who generally consider both clauses to form part of a single dispute
resolution process. The argument by the government, by contrast, seems to be very
formal.

Notwithstanding the fact that according to its wording Article 178 (2) Swiss
PILA only regulates the validity of the arbitration agreement, it should be extended to
govern also the rules of interpretation. In particular in dealing with a pathological
arbitration agreement, the validity of such a clause is so closely connected to its
interpretation that it would not make any sense to separate the issue of interpretation
from that of validity.
**Question 7.** It seems difficult to assume an implied choice of the parties in favor of the law of the place of arbitration when the latter has been determined by the institution. One could, however, argue that the parties, by not making a choice themselves, entrusted the institution with the choice on their behalf. Thus, it could be classified as an indirect implied choice.

By contrast, the question of which jurisdiction has the closest connection to the arbitration agreement—once the place of arbitration has been determined—is largely independent of who determined the place of arbitration. The importance of the close connection consideration stems from the fact that according to the prevailing view in international arbitration, the courts at the place of arbitration have jurisdiction to support and supervise the arbitral proceedings.

**Question 8.** The arbitration agreement is a contract like any other contract. Thus, in principle the interpretation rules for contracts should be applicable unless the content and the function of the arbitration agreement require special treatment. Some decisions create the impression that there is a special rule for the interpretation of arbitration agreements in favor of arbitration. That rule can, however, also be seen as a special emanation of the general rule that agreements should be interpreted in a way which renders them valid.

These general rules also require that the intention of the institution that created the particular arbitration rules in question should be considered. It has to be kept in mind, however, that in the end, it is always the will of the parties that has to be determined through interpretation. Thus, if both parties when agreeing on the arbitration rules of a particular institution jointly understood a given rule in a way different from the one held by the institution, the interpretation of the parties should prevail.

**Question 9.** The underlying rationale of the French approach, adopted by the courts since the landmark decision by the Cour de Cassation in Dalico (Municipalité de Khoms El Mergeb v. Société Dalico, December 20, 1993, Case no. 91-16828, Rev. arb. 1994, 116) is to free the arbitration agreement from any validity requirements of a particular national law. As long as the parties have agreed upon arbitration, that agreement should not be frustrated by any additional validity requirement existing in any national legal system. This at first sight very arbitration friendly approach is often presented as forming part of an international legal order for arbitration that is therefore no longer anchored in any national system, a kind of transnational principle. As Lord Collins rightly pointed out in the Dallah decision, the rule is not part of such an order, but rather is a substantive rule of French arbitration law. It may also be questioned whether the uncertainty associated with the reference to largely undetermined transnational principles does not deprive the approach of most of its perceived benefits.

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**II.1.e.i. Compelling the Reluctant Party to Arbitrate: An Overview on the Ways of Enforcing an Arbitration Agreement**

**II.1.e.i. Note**

**Question 1.** The listed provisions of the Model Law ensure that arbitration
proceedings may be conducted irrespective of whether the other party is cooperative or not. At the same time, they prevent a party from enforcing its rights outside of arbitration without the consent of its counterparty. Article 8 requires state courts to deny jurisdiction if the other party invokes a valid arbitration agreement.

To ensure the conduct of arbitral proceedings, the Model Law provides the relevant mechanisms for getting the tribunal appointed (Articles 10 and 11 ML) and explicitly allows the tribunal to conduct the arbitration without the participation of the other party, provided that the latter has been properly informed (Article 25 ML). Furthermore, in such cases the mere fact that awards have been rendered ex parte does not constitute a ground to resist enforcement (Articles 35 and 36 ML).

If the Respondent does not comply with its appointment or cooperation obligations, the Claimant may bring an action in the state courts to ensure the constitution of the tribunal (Article 10(2) ML [three arbitrators if nothing else is agreed]). That is possible for the appointment of the Respondent’s arbitrator as well as for the appointment of the president or chairman (Article 11(3), (4) ML).

Respondents that have not participated in the constitution of the arbitral tribunal or the arbitral proceedings, despite having been properly asked to do so, may not turn their lack of participation into a ground for setting aside. As long as there was sufficient time for the Respondent to make the appointment and to present its case the appointment by the court and the rendering of an award without any input from Respondent does not constitute an incorrectly composed tribunal nor violate the Respondent’s right to be heard. Article 25 ML explicitly empowers the tribunal to continue the proceedings without the participation of one of the parties.

In case of a three arbitrator tribunal, the Claimant must first appoint its arbitrator and may then have Respondent’s arbitrator and the chairman or president appointed by the state court, if the two co-arbitrators cannot agree on the chair. Article 11(4) ML explicitly deals with situations in which the appointment mechanism agreed upon fails and provides for appointment by the courts in such cases.

**II.1.e.ii. Parallel Proceedings and Their Avoidance**

**Question 1.** Two arguments, in particular, support the New York court’s decision to defer to the Venezuelan court. First, because the parties have chosen Venezuelan law for the validity and interpretation of the arbitration clause (or, at least, this is how the New York court reads the agreement), it makes sense to defer to a Venezuelan court for interpretation and application of Venezuelan law. Second, since the respondent companies appear to be Venezuelan and may well have all or most of their assets in Venezuela, any arbitral award would probably have to be enforced in Venezuela. A ground for refusing enforcement under the New York Convention (to which Venezuela is a party), however, is invalidity of the arbitration agreement under the law to which the parties subjected it. (Art. V(1)(a)) Here that would be Venezuelan law. Hence it would seem better to know at the outset whether Venezuelan courts would find the arbitration agreement valid under Venezuelan law. Otherwise an award against the Venezuelan parties would be unenforceable, and unless the losing parties voluntarily agreed to pay, arbitration
would have been a wasted effort.

(Note also that the Venezuelan parties assured the court that the Venezuelan court was required to decide the jurisdiction issues very quickly—within 5 working days of Pepsicola’s deadline for filing an answer.)

**Question 2.** If the Venezuelan court were to hold the arbitration agreement inoperative, the binding force of that holding in the U.S. would depend technically on the U.S. rules for recognition and enforcement of foreign judgments. This is a complex question, not fully within the scope of a course focusing on transnational arbitration law. At the same time, we believe students should be aware that foreign court judgments are not automatically enforced in other countries and that each country has its own body of law addressing this issue. There is no widely applicable international convention equivalent to the New York Convention setting out the conditions under which a national court must recognize foreign court judgments.

Note, however, if the arbitration agreement were ruled invalid by a Venezuelan court applying Venezuelan law, it is unlikely that any resulting arbitral award in the U.S. could be enforced in Venezuela.

**Question 3.** If the courts (either American or Venezuelan, or both) find the arbitration agreement valid, the arbitrators are still free to reach their own conclusion about the validity of the arbitral agreement (under the *Kompetenze- Kompetenz* principle discussed in subsection II.1.c.). Of course if they agree that the parties have chosen Venezuelan law to decide the validity of the arbitration agreement, presumably they would follow the Venezuelan courts’ interpretation of Venezuelan law on this point.

(Note: Were the arbitrators to find the arbitration agreement invalid, despite contrary decisions of both the Venezuelan and U.S. courts, Pepsico might be able to persuade a U.S. court to re-open the case because of frustration of the arbitration agreement.)

**Question 4.** Without the express choice of Venezuelan law, the first reason for deferring to Venezuelan courts mentioned above in Question 1 (to get a Venezuelan court’s interpretation of applicable Venezuelan law) would fall away—unless, of course, the U.S. court decided on the basis of other choice of law principles that Venezuelan law nevertheless applied to the validity question. The second reason (the need to enforce any resulting award in Venezuela) would lose some of its force, because if the parties did not choose Venezuelan law to govern the agreement, a Venezuelan court could not apply its own law to refuse recognition and enforcement under Article V(1)(a) of the New York Convention. Indeed, in the absence of party choice, V(1)(a) refers validity questions to “the law of the country where the award was made”. Since the arbitration was to be in New York City, Article V(1)(a) would seem to refer validity questions to U.S. law.

**Question 5.** This raises the controversial issue of the appropriateness of a court in one country enjoining the parties from instituting or continuing parallel judicial proceedings in another country. Many commentators, especially in civil law jurisdictions, consider such an injunction to be objectionable and to clash with the sovereign right of the courts of each country to decide for themselves upon the
proper exercise of their jurisdiction. Nevertheless, courts in the U.S. and other countries do occasionally issue such injunctions, especially when they believe that one of the parties is engaged in bad faith, vexatious litigation tactics. See generally, Emmanuel Gaillard, ed. Anti-Suit Injunctions in International Arbitration (2005); Daniel Tan, Anti-Suit Injunctions and the Vexing Problem of Comity, 45 Va. J. Int'l L. 2 (2004); Emmanuel Gaillard, Il est interdit d’interdire: Réflexion sur l’utilisation des anti-suit injunctions dans l’arbitrage commercial international, 2004 Revue de l’Arbitrage 47; John Phillips, A Proposed Solution to the Puzzle of Antisuit Injunctions, 69 U. Chi. L. Rev. 2007 (2002); Stephen Burbank, Jurisdictional Equilibration [Lis Pendens, Anti-Suit Injunctions, and Forum Non Conveniens], the Proposed Hague Convention, and Progress in National Law, in J. Barceló and K. Clermont, eds., A Global Law of Jurisdiction and Judgments: Lessons From The Hague (2002). Conceptually, such injunctions do not necessarily conflict with the principle that each tribunal is entitled to determine its own jurisdiction. The antisuit injunction is addressed to the parties and not to the courts so that there is at least no direct conflict.

In February 2009, the European Court of Justice ruled in *West Tankers* that the EU Brussels Regulation (on jurisdiction and judgments) disallows one EU member state (in *West Tankers*, the UK) to enjoin a proceeding in another EU member state (Italy), even though the Regulation excludes “arbitration” from its scope and even though the injunction was issued to enforce an arbitration clause. The ECJ decided that the Regulation’s exclusion of “arbitration” was inconsequential in this case, because the claim in the Italian court was not an arbitration claim (even though the respondent in the Italian proceeding argued that a valid arbitration agreement was controlling and hence asked the Italian court to dismiss the case and send the parties to arbitration.)

One of the co-authors has argued that allowing the anti-foreign-suit injunction in a case like *West Tankers* can be seen as pro-arbitration. See John Barceló, “Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements” in Arthur Rovine, ed., CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 107 (2008). Barceló’s argument favors an anti-suit-injunction where the parties choose a seat of arbitration in the same jurisdiction whose law they also choose to govern the validity of the arbitration agreement. These are the facts of *West Tankers*. He argues that in such a case, the parties should be understood to have agreed that any challenge to the validity of the arbitration agreement would be decided by the courts of the seat of arbitration (whose law would apply to the validity issue). Any jurisdiction willing to enforce such an agreement through an injunction remedy could be seen as acting in a pro-arbitration manner. Parties wanting strong enforcement of an arbitration agreement (including avoidance of parallel litigation costs), could find it attractive to place the arbitral seat in such a jurisdiction and to choose that jurisdiction’s law to govern validity of the arbitration agreement. The argument naturally presupposes that there is actually a binding arbitration agreement between the parties. As that is often contested by the party trying to resist arbitration, a court—before granting the injunction—normally has to determine the existence and validity of the arbitration agreement.

Barceló’s argument favors one exception to the pro-anti-suit-injunction position—that being where the party opposing arbitration relies on a rule of public policy in the non-seat jurisdiction for disallowing arbitration—such as a rule
designating the subject matter to be non-arbitrable. In West Tankers, there was no such public policy at stake. But had there been, the parties’ choice of the seat’s law to govern validity of the arbitration agreement could be seen as the parties’ deliberate attempt to avoid otherwise applicable mandatory law in the non-seat jurisdiction. An injunction that would interfere with the non-seat’s opportunity to enforce its public policy could be seen as especially offensive to comity between nations—a value generally strained to some degree by any anti-foreign-suit injunction, but especially so where public policy issues are at stake.

The ECJ refused to consider pro-arbitration policy arguments in favor of an anti-foreign-suit injunction in West Tankers. It ruled instead that the mutual trust principle at the core of the Brussels Regulation meant that in West Tankers, the British courts were required to defer to the Italian courts, so that the latter could decide on their own jurisdiction. Thus one might wonder whether parties wishing to ensure “strong” enforcement of an arbitration agreement will have an incentive to choose, say, a U.S. seat (and U.S. law to govern the validity of the arbitration agreement) instead of an EU seat.

Presumably, the ECJ’s West Tankers ruling would not prevent UK courts from enjoining a parallel proceeding in a non-EU jurisdiction. Thus, West Tanker’s negative effect on the attractiveness of the UK as a seat of arbitration could be limited. Moreover, pursuant to the recent decision of the ECJ in Gazprom v. Lietuvos Respublika (13 May 2015), the parties could ask the arbitral tribunal itself for such an injunction. Due to the exclusion of arbitration from the scope of application of the Brussels Regulation, the tribunal would not be bound by the principles underlying the Regulation, in particular not by the principle of mutual trust.

**Question 6.** The court is of the view that an arbitration agreement contains a dual promise: as a concomitant to the undertaking to submit disputes to arbitration, the arbitration agreement also contains an obligation not to bring the action in a state court. That latter promise forms, in the court’s view, the basis for the grant of the antisuit injunction.

Students should realize that this understanding of the arbitration agreement has a number of consequences in practice. First, given that the promise not to seek to resolve disputes in the state courts is a separate undertaking, the grant of an antisuit injunction is largely independent from the conduct of the arbitration proceedings. It is not necessary that the party applying for an antisuit injunction has already started an arbitration or is even intending to start arbitration proceedings.

Second, the breach of the undertaking may in itself form the basis for a damage claim, covering all costs that may be associated with the action before the state courts.

**Question 7.** In principle, every court in a Contracting state of the NYC is obliged to “refer the parties to arbitration” whenever its jurisdiction is challenged on the basis of a valid arbitration agreement. Thus, the court before which an action on the merits is pending or will be brought has to engage in the same analysis as the court granting the antisuit injunction, i.e. verify whether there is a valid arbitration agreement. In a perfect world, the outcome of the analysis of both courts would be the same, which would make antisuit injunctions largely superfluous.
In practice, that is, however, not the case. The action will often be brought in the home state of the party trying to avoid arbitration and in front of courts that may not be very arbitration friendly. Or the action on the merits may be pending before a court which is notoriously slow, so that the uncertainty as to the validity of the arbitration clause may continue for a considerable time and constitute an obstacle to the conduct of the arbitration. In such cases the antisuit-injunction may be the only effective way of protecting the jurisdiction of the arbitral tribunal.

The nearly identical program of examination involved in the antisuit injunction and the invocation of the arbitration agreement in the state courts is evident in the statement of the English Supreme Court in the Kamenogorsk Hydropower Plant decision in para. 2. The Court makes clear that the undertaking forming the basis of the antisuit injunction in the case would have led to a rejection of the court's jurisdiction had the case been brought in England.

**Question 8.** The prime example for that statement is where a fair and equally fast decision can be expected from the court before which the action on the merits is pending. Thus, if the case before the English Supreme Court had not concerned courts in Kazakhstan but, e.g., the courts in Switzerland, the decision by the Swiss Court on the issue of the validity of the arbitration agreement would probably have been as fast as an antisuit injunction and the fairness of the proceedings would have been assumed. Consequently, there would have been little need to ask for an antisuit-injunction before the English courts, and they in turn might not have granted it.

A second example can be where the dispute has already been pending for some time in the foreign court, the parties have already undertaken considerable expenses to discuss the issue and to hear relevant witnesses, and a decision can be expected in the not too distant future.

**II.1.e.iii. Waiver of the Right to Compel Arbitration**

**Questions 1 and 2.** The court's conclusion in Menorah is very easy to accept. Even if prejudice is required for the waiver concept to operate, prejudice is easy to find. INX resisted Menorah's original attempt to invoke arbitration because it had no resources to pay for arbitration. It then allowed a default judgment to go against it in Israel and only invoked the arbitration clause more than a year later when Menorah sought to enforce the Israeli judgment. Menorah was put to considerable expense and delay before INX sought to invoke arbitration; moreover INX had explicitly rejected arbitration when Menorah first sought to invoke the arbitration agreement.

Were Menorah to face some obstacle to enforcing the judgment and then seek to invoke the arbitration clause, the waiver issue would be a closer question. Even though INX had resisted arbitration, Menorah could still have insisted on its right to an arbitral proceeding. It opted instead for judicial resolution of the dispute. This could perhaps be seen as a waiver of arbitration. On the other hand, if prejudice is a prerequisite for waiver—a principle the authors are inclined to accept under US law—it is not easy to see how INX would have been prejudiced by Menorah's actions.
Question 3. The authors are inclined to agree with the outcome in Mustad v. Seawest and with the three-part test articulated in it. The key question is whether the claimant’s initial court action prejudiced the respondent. One can understand that the respondent’s counterclaim could have caused the claimant to prefer to switch to arbitration. As the court noted, the respondent could have avoided any prejudice to itself by filing the counterclaim earlier, so that the claimant would have understood the full nature of the controversy. Suppose, however, in the same factual setting the parties had litigated for a significant period over personal jurisdiction and other preliminary questions before the respondent was required to file an answer and counterclaim. In this situation the authors would be inclined to find prejudice and hence to rule that the arbitration option had been waived.

Question 4. The Menorah case cites and purports to follow the famous First Options decision of the U.S. Supreme Court. (As footnote [21] notes, First Options is taken up in the coursebook infra in subsection II.1.f.iv.) That case stands for two propositions. First, a court should presume that the parties did not intend to delegate to the arbitrators a first or final decision on the question of the scope of the arbitration agreement (termed “arbitrability” in First Options). That is, if the issue of scope arises before a court, the court should decide it and not send the question to the arbitrators. Second, in deciding the scope issue, the presumption is reversed; a court should assume all issues related to the central dispute are within the scope of the agreement unless it is very clear that the parties intended to exclude a particular issue.

The Menorah court seems to apply the first presumption but not the second. It says on page 126: “... [W]e do not interpret the silence of the agreement on this point to create a right of arbitration.” Under the second presumption, however, silence would not seem to be a reason to exclude exequatur from arbitration. But of course the Menorah court’s waiver argument makes careful resolution of this issue unnecessary.

We raise doubts in the question about the arbitrability of exequatur. Here “arbitrability” is a different concept from “arbitrability” as used in First Options. First Options’ use of “arbitrability” refers to the scope of the arbitration agreement. Our doubts go to the issue of whether the law will allow a particular issue (such as an antitrust question) to be resolved by arbitration—the issue of “non-arbitrability”. We take up that problem in section II.2 (Limits on Arbitrability) of this chapter.

What if an arbitration agreement specifically provided for arbitration of any exequatur issues that arose out of or related to a particular transaction. We refer the reader to section II.2 for a fuller consideration of the “non-arbitrability” issues such a provision would raise. Here it is perhaps worth saying that even if the issue were sent to arbitration, we assume any public policy ground a court might have had to refuse recognition and enforcement of the judgment (exequatur) would also apply to refuse recognition and enforcement of an award granting exequatur to the judgment.

What if an arbitration agreement specifically provided for arbitration of recognition and enforcement issues for an arbitral award? Perhaps New York Convention Article V(1) grounds for refusing recognition and enforcement—which are waivable—could be submitted to binding arbitration. Arbitration of Article V(2)
grounds—which are not waivable—would not, however, seem arbitrable. One of the authors would also reject arbitration of Article V(1) grounds. He acknowledges that a party can choose not to invoke a V(1) ground, but he would argue that “recognition and enforcement” is a concept tied to an authority outside the arbitration process. Hence, he would consider such issues non-arbitrable.

We hasten to add that neither proposition—arbitration of exequatur issues or of recognition and enforcement issues—seems at all practicable. Even after such an arbitral proceeding, the parties would still need a court order to enforce the final arbitral award.

**Question 5.** Howsam introduces the concept in U.S. law of “procedural arbitrability” issues that at Stage 1 are presumptively for an arbitrator, not a judge:

“Thus ‘procedural’ questions which grow out of the dispute and bear on its final disposition” are presumptively not for the judge, but for an arbitrator, to decide.*** So, too, the presumption is that the arbitrator should decide “allegations[] of waiver, delay, or a like defense to arbitrability ***” (emphasis added). See infra in the text at p. 141.

Although the language just quoted concerning waiver is *dictum*, it seems persuasive dictum entirely in line with the logic of the Howsam decision. Thus, were the Menorah fact pattern to arise today, under this Howsam approach, one might perhaps reason that a U.S. court should send the waiver question to an arbitral tribunal.

On the actual Menorah facts, however, it would not surprise us were a U.S. court to conclude that INX so obviously and manifestly waived its right to arbitration that it would serve no useful purpose (and would needlessly delay the proceedings further) to send the waiver issue to an arbitral tribunal.

**II.1.f. Kompetenz-Kompetenz and Separability**

**II.1.f.i. Kompetenz-Kompetenz of the Arbitrator**

**Questions 1 and 2.** Since an arbitrator’s authority stems from the agreement of the parties, naturally arbitrator Dupuy stresses the provision in the arbitration agreement expressly providing that the arbitrator “shall determine the applicability of [the arbitration clause].” But even without this express provision, in today’s world virtually every arbitrator would apply the “Kompetenz- Kompetenz” principle and decide the existence of his own jurisdiction. Even arbitrator Dupuy does not rest entirely on the express wording of the arbitration clause but bases his jurisdictional claim on broader theories of publicists, international case law, and necessity.

**Question 3.** The Texaco award is a preliminary award dealing with the arbitrator’s jurisdiction to hear the merits of the dispute. Libya apparently argued that its nationalization decree voided the Deeds of Concession and hence by logical deduction, the arbitration clause (Clause 28) contained in them. This argument raises the separability issue. By relying on the separability doctrine, Arbitrator Dupuy
concludes that even if the Libyan nationalization law voided the Deeds of Concession themselves, the nationalization law was not addressed to the arbitration provisions in Clause 28 that functioned as a separate contract. If that contract was separate and not addressed by the nationalization law, it survived that law and was still in effect. In paragraph 16 Arbitrator Dupuy refers to “several decisions of international case law” that acknowledge the principle of “the autonomy or the independence of the arbitration clause” - which is another way of describing the separability doctrine. He also grounds the doctrine in the language of Clause 28 itself. In paragraph 19 he notes that Clause 28 says: “If, at any time during or after the currency of this Concession any difference or dispute shall arise …” Thus the arbitration clause itself contemplated that it would survive and still function, even after the Concession provisions themselves were no longer in effect. Hence the language of Clause 28 itself treated the arbitration clause as a separate and independent contract.

**Question 4.** Presumably Libya argued that its nationalization law had put an end to the Deeds of Concession and to the arbitration clause within them. Hence Libya must have urged the ICJ President to refuse to appoint an arbitrator, because the arbitration agreement was invalid. This raised the issue for the ICJ President of the proper role of an appointing authority called upon by one of the parties to make an appointment. Should the appointing authority in such a situation simply make the appointment without considering the validity of the arbitration clause, or should the appointing authority first decide upon the validity of the clause before making the appointment? As the question notes we take up this issue more thoroughly infra in section III.2. Here it seems appropriate to call the students’ attention to this issue and to note the ICJ President’s resolution of it. The ICJ President relied on the Kompetenz-Kompetenz provisions of Clause 28 to conclude that the arbitrator, and not the appointing authority, should decide the validity of the arbitration agreement.


The section on negative Kompetenz-Kompetenz has been restructured to make the different concepts more transparent to students. We hope that, in combination with a rewritten Note, this will facilitate an understanding of the differences and the underlying ideas of each concept. As the majority of countries have no clear rule on negative Kompetenz-Kompetenz, we start with the French law, which has a clear rule and presents one end of the spectrum. To avoid giving a wrong impression, it should be made clear to the students that the French and the American approaches, even though presented in some detail—are not necessarily broadly followed approaches, but rather two different approaches to the negative Kompetenz-Kompetenz concept—one (the French) very pro-arbitration and driven by civil procedure code provisions, and the other (the American) less pro-arbitration and driven by common-law interpretive methodology with an emphasis on party intent.

**Questions 1 - 3.** The *Jules Verne* case shows not only the classic style of French *Cour de cassation* decisions, but also the different concepts that operate in France to reinforce the Kompetenz-Kompetenz principle and to give deference to an arbitration agreement. The issue seems to be one of “existence” of the arbitration
agreement—at least as between the disputing parties—though in French law the outcome is not affected by whether the issue is one of existence or validity. The ship owner appears to have sued the marine underwriter (insurance company) in the Paris Commercial Court for damage to the vessel. The underwriter seems to have sought a dismissal of the action by asserting the existence of an arbitration clause in something called “the contract of classification”. The Paris Court of Appeal rejected this argument by concluding that the ship owner was not a party to the “contract of classification” and hence that the disputing parties had not agreed to submit the dispute to arbitration. The Cour de cassation rules that in so holding, the Paris Court of Appeal erred. The Cour de cassation opens its brief decision with a reference to the Kompetenz-Kompetenz principle. After the second “Whereas” it states the derivative principle that only the “manifest nullity of the arbitration agreement” can defeat the Kompetenz-Kompetenz principle’s requirement that the dispute be submitted to the arbitrators for their decision on their own competence. The Paris Court of Appeal found the arbitration agreement to be “null” (non-existent as between the two disputing parties). What it needed to find to defeat arbitration was that the arbitration agreement was “manifestly null” (manifestly non-existent). The “manifestly null” concept implies that there must not have been any real room for dispute, or reasonable difference of opinion. Hence on remand, the new panel of Court of Appeal judges could still reach the same result, but they would have to support that result by explaining why the “contract of classification” (containing the arbitration agreement) was not only not binding on the shipowner but why this conclusion was so clear and indisputable as to be “manifest”. At the last revision of the French Arbitration Law in 2011, the legislator made clear that revised Article 1448 (cited in the Note), which captures the “manifest nullity” concept and which appears in the domestic arbitration provisions of the French civil procedure code (as was the case in the previous version of the code) also applies to international arbitration (a result reached in Jules Verne by judicial decision).

**Question 4.** Clearly the key point is the “manifestness” of the nullity.

**Questions 5 and 6.** The positive Kompetenz-Kompetenz principle is addressed to arbitrators. It confirms that arbitrators have competence to decide their own jurisdiction. If this were not so, arbitrators would be forced to stay the arbitration until the parties were able to litigate the jurisdiction issue in a competent court. Delay and obstruction of arbitration would be considerably facilitated.

The “negative” effect of Kompetenz-Kompetenz principle reflected in the Jules Verne case is addressed to courts. In France it instructs courts to refuse to exercise jurisdiction, even over threshold questions such as the existence and validity of the arbitration agreement. The French doctrine recognizes the power of the arbitrators themselves to decide these questions — that is, unless it is manifest either that there is no arbitration agreement binding on the parties or the putative agreement is invalid. In such cases it would be a waste of time and resources to send the parties to arbitration. Thus the “negative” effect of Kompetenz-Kompetenz principle (courts will not take jurisdiction) allows the “positive” Kompetenz-Kompetenz principle (arbitrators have the power to decide their own competence) to work. Or to put it differently, according to the French understanding, the “negative” effect is intended to protect the “positive” effect and follows directly from it.
The consequences of this understanding become particularly obvious if one compares the French approach with the American approach discussed later. The French approach is limited to stage 1. Once the arbitral tribunal has made a decision there is no more need in the French view to protect its Kompetenz-Kompetenz, which has been exercised. Quite to the contrary, the possibility to fully review the arbitrator’s decision as to his or her jurisdiction is seen as a justification to limit the review at stage 1. The French do not recognize any binding (or final) Kompetenz-Kompetenz. The American Approach by contrast with its reliance on contractual agreements would treat the courts power to rule on the tribunal’s jurisdiction at both stages the same way. It allows either for a full review at both stages or only a limited review at both stages.

(In teaching the French approach the authors have found it effective to point out to students that at first sight there is some logical tension between, on one hand, a court’s refusal at Stage 1 to give a full review of the existence, validity, and scope of the arbitration agreement—in deference to a first decision by the arbitrators—and, on the other hand, the court’s de novo review of arbitral jurisdiction on award enforcement at Stage 3, with no deference at all to the arbitrators’ prior decision. One can ask students whether this makes any sense. If in the end at Stage 3 the court will make a de novo decision on jurisdiction, why force the parties to incur the cost and delay involved in the arbitration process, only to have the court decide jurisdiction de novo at the end of that process—a decision which, if it goes against arbitral jurisdiction, would mean the time and expense devoted to the arbitration process was wasted? Why not just make the court decision at Stage 1? Gaillard in his commentary refers to this aspect of the French approach as a drawback because of the delay and increased cost it entails. At another point he refers to it as a problem of duplication of effort. See E. Gaillard & J. Savage, eds., Fouchard Gaillard Goldman On International Commercial Arbitration 408-413, papas.675-82 (1999).

At this point an instructor can introduce the importance of the procedural option the arbitrators have to issue a preliminary award on jurisdiction early in the proceedings—a point that Gaillard stresses. The availability of this procedural device goes a long way toward easing the apparent logical tension (or the drawback of delay and increased cost) inherent in the French approach. Once a preliminary award on jurisdiction is issued, it can then be challenged immediately in a court at the seat, so that a final de novo judicial decision on jurisdiction early in the process will be forthcoming and will thus avoid unnecessary cost and delay. Note also, that arbitrators confident that the challenge to their jurisdiction is without merit are free, under this approach, to go forward with arbitral proceedings even while their preliminary award on jurisdiction is being challenged in court—or even to proceed without a preliminary award on jurisdiction, reserving the jurisdiction question for discussion in the final award. On the other hand, arbitrators who are not so confident that their decision will be upheld have the option to render a preliminary award and to delay the arbitral proceedings until the court makes its decision. Thus the French approach represents a calculated balance between, on one hand, reducing options for what could otherwise constitute obstruction of a binding and valid arbitration agreement through extensive court litigation at Stage 1, and, on the other hand, not forcing parties to incur for long the cost and delay of arbitration if they have not genuinely agreed to arbitrate.
Students should understand that the French position on negative Kompetenz-Kompetenz is merely a rule of timing of the courts’ control of the existence of a valid arbitration agreement but does not question the power of the court to control it as such. One could even say that the availability of control at the post-award stage (Stage 3) is a necessary precondition to refrain from control at the pre-award stage (Stage 1).)

In debating the pros and cons of the different approaches to “negative” Kompetenz-Kompetenz, it is important to look at both situations, i.e. that in which the parties actually agreed on arbitration and that in which the parties did not actually agree on arbitration but where a Claimant nevertheless initiated arbitration because the lack of an arbitration agreement was not manifest. Students should understand the way in which the latter situation impinges to some degree upon a party’s right to have its day in court. Furthermore, they should be made aware of the difficult position a Claimant may be put in, who genuinely believes that there is no valid arbitration agreement but who is nevertheless referred to arbitration because the lack of an arbitration agreement is not manifest. In principle, he or she has to start arbitral proceedings arguing that the tribunal has no jurisdiction to hear the case in order to then be allowed to bring an action in court. That dilemma becomes apparent in Question 9.

**Question 8.** New York Convention Article V(1)(a) authorizes refusal to enforce an award if it is based on an invalid arbitration agreement. Hence at Stage 3 a national court is entitled to decide for itself whether the underlying arbitration agreement came into existence and is valid. That French courts make this decision de novo, does not seem to us to undercut completely the arbitrator-priority principle that operates at Stage 1. That principle prevents obstructionist tactics and at least gives an arbitrator who accepts jurisdiction an opportunity to explain in the award as persuasively as possible the basis on which he or she does so. Though de novo review means that a reviewing judge need not defer to that reasoning, at least such a judge is likely to be influenced by a persuasively written award. At the same time, it may explain why other jurisdictions prefer to have a full court review of the tribunal’s or court’s jurisdiction at stage 1— at least if the issue arises in front of the state courts first.

**Question 9.** This hypothetical is intended to show the dilemma that may arise from the doctrine of “negative” Kompetenz-Kompetenz for Claimants who genuinely believe that no arbitration agreement has been concluded and who want to enforce their claim in the state courts. Unless the arbitration agreement is manifestly void, the doctrine of “negative” Kompetenz-Kompetenz does not only prevent any action on the merits but equally any action to determine the validity of the arbitration agreement. Consequently, the Claimant only has the choice of starting arbitration proceedings. If the Claimant has the intention to have the merits heard in a state court, it has to apply to an arbitral tribunal for a declaration that there is no valid arbitration agreement between the parties. Presumably a Claimant seeking such a declaration could at the same time reserve its right to file a claim on the merits before the tribunal if the tribunal and the state courts at the seat decide that the arbitration agreement is valid. If the tribunal were to rule that it had good jurisdiction, that decision would have res judicata effect for the state courts at the seat unless it were set aside. Thus, a Claimant receiving an unfavourable jurisdiction award—in this context, one upholding the arbitral tribunal’s jurisdiction—
would have to try to set it aside in a state court at the seat. If that action failed, then the Claimant would have to return to the arbitral tribunal with a claim on the merits.

Were a Claimant to apply for a remedy directly on the merits without first seeking a declaratory award that the arbitration agreement was not enforceable, the Claimant would probably be interpreted as having submitted to arbitration and would therefore subsequently be unable to challenge the tribunal’s jurisdiction.

Students should understand that in light of this difficulty facing a Claimant seeking a remedy before a state court, some jurisdictions have struck a different balance on the underlying dilemma (between obstructionism and a right to a day in court) and have rejected the “negative” Kompetenz-Kompetenz concept altogether. They consider the threat of obstructionist tactics to be insufficient to justify preventing a party from having its day in court without delay.

**Question 10.** The logic of the French approach is as follows. Deference to arbitrators at Stage 1 prevents obstructionist tactics. Use of a preliminary award, however, allows Stage 3 court review of jurisdictional issues, some of which may have merit, while arbitrators confident of their jurisdiction are allowed to go forward with the arbitration without delay—even while a court reviews the preliminary award. Also the Model Law and the UNCITRAL Rules expressly mention the possibility of a preliminary decision on jurisdiction. Whether such a decision is rendered or not is left, however, to the discretion of the arbitrator.

It may be discussed with the students whether they as a Claimant in an arbitration would or should urge the tribunal to go on with the merits, even though the Claimant will at the same time challenge the preliminary award on jurisdiction before the state courts and how an arbitrator should react to such a request. In that context it should be pointed out to the students that in numerous jurisdictions, arbitrators would also not be prevented from continuing arbitration proceedings and rendering an award on the merits even while proceedings on the merits are pending before the state courts. There is no *lis alibi pendens* in favor of the state courts.

**Question 11.** Ambiguity about the status of a tribunal’s preliminary ruling on jurisdiction can be seen in the very first line of Article 16(3) where it is said that the tribunal “may rule on a * * * [challenge to its jurisdiction] either as a preliminary question or in an award on the merits. * * *” Note that the provision does not say: “either as a preliminary award (on jurisdiction) or in a final award on the merits.” One interpretation would be to treat a preliminary ruling on jurisdiction as a procedural order, for which Article 16(3) provides a unique form of judicial review. On the other hand a number of jurisdictions characterize a preliminary ruling on jurisdiction as a “preliminary award” or as an “interim award” that is subject to the ordinary set-aside procedure available for awards. This seems to be the case in France where one can see in the Paris Court of Appeal decision in the *Dallah* case [infra at II.1.k.] that the tribunal’s preliminary ruling on jurisdiction was treated by the French court as an award subject to the French set-aside procedure applicable to awards made in France in international cases (Article 1502(1) of the pre-2011 French Code of Civil Procedure. [The equivalent provision in the 2011 French procedural code is found in Article 1520.]

In the excerpts from Lord Mance’s opinion in the U.K. version of the *Dallah*
case that we have included below at II.1.k., we have omitted the language quoted here ["First, (in the absence of any agreement to submit the question of arbitrability itself to arbitration) I do not regard the New York Convention as concerned with preliminary awards on jurisdiction."] This could be read as meaning that Lord Mance does not consider the tribunal’s preliminary decision on jurisdiction (which he calls a “preliminary award”) as amounting to a “New York Convention award”—one that would be subject to recognition and enforcement under the New York Convention. The main thrust of Lord Mance’s analysis on this point seems, however, to have a different focus. He seems not so much concerned with whether a preliminary “award” on jurisdiction is a “real” award. He seems rather to be considering whether a British court must give any deference to an arbitral tribunal’s ruling on its own jurisdiction. Thus, he seems to be saying that deference would be due only if the parties had agreed that the arbitral tribunal should decide “arbitrability”. Recall that this is precisely the approach of the U.S. Supreme Court in First Options (infra at II.1.f.iv.). Since the parties had not so agreed, the British court was entitled to decide the jurisdiction point de novo.

As mentioned above in Question 8, French courts also follow a de novo standard of review when considering whether the arbitral tribunal had good jurisdiction.

Students should also understand that a decision denying jurisdiction is not a preliminary award but an award terminating the proceedings by rejecting the claims for lack of jurisdiction. Again the question arises whether a tribunal which lacks jurisdiction can render an award at all. Conceptually, the power to do so may in principle only derive from a statutory empowerment or equivalent recognized principles of the national or international arbitration law. In most cases the arbitration agreement—the normal source of power—is not available. It can well be argued that it follows from the doctrine of Kompetenz-Kompetenz that once arbitration proceedings have been initiated the arbitrator is at least empowered by statute—or by a principle of arbitration law established by case law, where no statutory power exists—to render an award denying its jurisdiction. In exceptional cases, if both parties join in presenting the jurisdiction question to the arbitrators for an initial (not necessarily final) decision on jurisdiction, then the tribunal’s power to make an initial decision derives from that joint action of the parties. Of course, the losing party can still try to set aside an adverse ruling.

(One co-author believes that even if the claimant alone brings a claim before arbitrators, that action itself—understood, at a minimum, as an agreement between the claimant and the arbitrators—can be seen as empowering the arbitrators to make an initial, non-final, decision on jurisdiction, including a decision that the arbitrators are without jurisdiction to hear the case.)

II.1.f.iii. Negative Effect of Kompetenz-Kompetenz: Jurisdictions Without Clear Statutory Guidance

**Question 1.** In all cases where the Parties have agreed on arbitration, the doctrine of Kompetenz-Kompetenz helps to ensure that the arbitral tribunal can fulfil the task assigned to it. In this respect the classification by the Court is correct. The doctrine of negative Kompetenz-Kompetenz ensures that the arbitrator gets a
chance to decide the issue and the decision is not pre-empted by a decision from the court.

Students should understand, however, that the doctrine also applies—and really matters—in cases where the parties have not validly concluded an arbitration agreement. In such cases, since the core arbitration agreement is invalid, the tribunal’s authority to decide preliminarily on jurisdiction must derive either from a statutory grant of power to the tribunal or an implicit agreement on the part of the parties presenting the issue to the tribunal to allow the tribunal to make a preliminary (but not final) decision on jurisdiction. (See the discussion above in connection with Question 11 in II.1.f.ii.)

(As reflected in the discussion above, one co-author believes that the tribunal’s authority to decide (without finality) against jurisdiction can be understood to derive from the action of both parties—or even only that of the claimant alone when the claimant acts without the cooperation of the respondent—in presenting the claim to the arbitrators for decision. He also believes that nothing of real consequence turns on how one explains the tribunal’s authority to decide (without finality) against jurisdiction.)

Question 3. The distinction between existence and scope of the arbitration agreement, on the one hand, and its enforceability and validity, on the other hand, can also be found in the context of stage 3. There, as will be discussed later in Chapter V, the distinction has been used in some jurisdictions to justify a differentiation in allocating the burden of proof, so that the party making an application for recognition and enforcement has to prove the existence of the arbitration agreement, whereas its non-validity constitutes a defence to be proven by the party resisting enforcement. It can be argued that once it is clear that the parties have in principle referred a particular dispute to arbitration (existence and scope) it should be primarily for the arbitrators to determine whether such an agreement is valid or enforceable.

The distinction is, however, by no means compelling, neither here at stage 1 nor at stage 3. For the crucial question of whether an arbitral tribunal has jurisdiction to decide a case it makes little difference whether the arbitration agreement has not come into existence, the dispute is beyond the scope of issues submitted to the tribunal, or the arbitration agreement is not valid. Consequently, courts in other jurisdictions have not made such a distinction at all (Germany) or have relied on different distinctions, i.e. whether the question concerns substantive or procedural arbitrability (US) or questions of law or of facts (Canada).

The High Court referred also to some English authorities that seem to have concluded that the question of existence (conclusion) of an agreement is covered by the term “null and void” (see para. 21). That is also the interpretation given to the notion in the context of Article II (3) NYC, which—unlike section 9 English Arbitration Act—only devotes one paragraph to the question of stay and therefore does not provide a formal basis for the distinction made by the High Court on the basis of the two paragraphs of section 9.

Question 4. The supposed facts do seem to take us closer to an “exceptional” case. Due to the fact that the arbitrator is already dealing with the issue, there is a possibility of a preliminary award on jurisdiction, which can then be reviewed. That
could justify a stay even without full scrutiny, since a decision by the arbitrator can be expected in the not too distant future.

Another example of an exceptional case could be where the decision on the existence of the arbitration agreement entails at the same time a decision on the merits of the case, which should be decided by the arbitrator. That may be the case when the sole issue is whether the contract including the arbitration clause has been concluded or not and the answer is solely dependent on whether a particular letter, containing the acceptance of the offer to conclude the container contract as well as the arbitration agreement, has been sent or received.

**Question 5.** The court gives part of the reason itself in para. 86 and para. 70 (quoted in the following question). The main rationale of the doctrine of negative Kompetenz-Kompetenz and the court’s presumption is to avoid obstructionist behaviour by a party trying to resist arbitration. To exclude such behaviour a court should in principle not interfere and take its own decision before the arbitral tribunal has had an opportunity to address the issue first.

The view of the court is also evidenced by the fact that it classifies the direct challenge to the court’s jurisdiction by the defendant in the court proceedings as an “indirect” challenge to the arbitrators’ jurisdiction by the claimant. That is a very arbitration friendly approach, which is based on the assumption that the claimant in the court case is not genuinely trying to bring its claims on the merits but intends to challenge the jurisdiction of the arbitral tribunal. In most cases where monetary claims are involved, the primary objective of a claimant is to get paid as fast as possible and at the time of initiating the court proceedings the claimant may even be unaware of the potential existence of an arbitration agreement. The claimant in the *Dell* case was seeking monetary damages against Dell for its failure to honor erroneously advertised low prices for its computers and hoped to take advantage of class action procedures available in litigation. Thus, the case did not seem to involve delaying tactics by a party trying to obstruct arbitration.

The distinction made by the court between questions of law, of facts and of a mixed nature and its underlying rationale may be feasible in largely domestic cases, such as the *Dell Computer* case. In international cases, where the courts may have to apply a foreign law to the merits as well as to the conclusion of the arbitration agreement, it is not very convincing. Judges usually lack the expertise which according to the Supreme Court justified making an exception for questions of law where the courts were allowed to enter into a full examination already at Stage 1.

**Question 6.** The wording of the New York Convention is at best neutral on the issue. Contrary to the view of some authors, it does not contain a qualification that the clause is “clearly” null and void. If at all, the absence of such a qualification would speak more in favor of a full review than what is suggested by these authors.

**Question 7.** The changes that have been made in principle exclude the doctrine of “negative” Kompetenz-Kompetenz. Dismissal of a case for lack of jurisdiction is only possible after full scrutiny of the arbitration agreement’s existence and validity. Furthermore, it makes little sense to establish a special procedure to have the existence and validity of an arbitration agreement determined by the state courts (§ 1032 (2) ZPO), if in an action on the merits the court could only engage in a
prima facie review. The German provisions show that the legislator has given priority to the principle of procedural economy, allowing for an early and final determination of the jurisdiction issue by the state courts. That may have been influenced by the perception that such a determination will be conducted in a speedy way and not lead to considerable delay in the conduct of the arbitration.

**Question 8.** The Swedish approach lies between the German approach and the English and Canadian approaches providing for a rather weak form of “negative” Kompetenz-Kompetenz. Unlike the German legislator, the Swedish legislator has not provided for an express procedure to determine the jurisdiction of the arbitral tribunal by the state courts. At the same time, the Swedish statute makes clear that a court is not prevented by the doctrine of Kompetenz-Kompetenz from examining its jurisdiction if one of the parties requests such a determination.

**Question 9.** The arguments in favor of a strong doctrine of “negative” Kompetenz-Kompetenz are summarized in para. 70 and 86 of the *Dell Computer* decision. Recalcitrant parties should be prevented from walking away from or delaying their freely entered obligation to arbitrate their disputes. Consequently, as long as there exists prima facie evidence of an arbitration agreement, courts should refer the jurisdiction dispute to the arbitral tribunal for a first determination. The underlying assumption is that in the majority of such cases it is the arbitral tribunal that finally has jurisdiction, so that it should be the arbitrators who take the first decision on the issue.

The arguments against a strong doctrine of “negative” Kompetenz-Kompetenz include the right to have access to the state courts for determining ones claims and procedural economy—an approach that the English High Court called “the Rule of Law” in para. 20 of the *Albon* decision. A claimant which initiates proceedings before the state courts should only be denied—even temporarily—its right to a day in court if it is established that the court has no jurisdiction due to an arbitration agreement. For this to be so, the court has to fully examine the existence and validity of the arbitration agreement. If the final decision as to the jurisdiction of the tribunal rests with the court, it may not be the most economical situation to first refer a case already pending in the state courts to arbitration for a preliminary, non-final decision on jurisdiction, after which a state court will engage in a full, de novo review of the arbitrators’ decision. Rejecting at Stage 1 a strong doctrine of “negative Kompetenz-Kompetenz” in favor of a full court hearing and decision on the question of the arbitral tribunal’s jurisdiction focuses more on protecting a party’s right to bring its claims in the state courts and on the cases in which, in the end, no valid arbitration agreement is found to exist.

Which approach to follow in a Model Law involves a weighing process and depends on numerous factors. These include, inter alia,:

- the speed with which courts decide the issue of jurisdiction if a party invokes an arbitration agreement to challenge their jurisdiction,
- the likelihood that a case pending before a court will prevent an arbitration from going forward, and
- the likelihood that in cases where a Claimant brings an action in the state courts despite the prima facie existence of an arbitration agreement, the arbitral tribunal will ultimately be found not to have good jurisdiction.
II.1.f.iv. Negative Effect of Kompetenz-Kompetenz in U.S. Law

Question 1. The precise issue before the Court is whether a reviewing court at Stage 3 should defer at all to the arbitral tribunal's prior decision that it had good jurisdiction (that an arbitration agreement binding the parties came into existence, that it was valid, and that the disputed issues were within the scope of the agreement). The First Options Court decides this question by asking what the parties most likely intended concerning who the decision-maker would be were issues of arbitrability (existence, validity, and scope of the arbitration clause) to arise. The Court concludes that the parties most likely would have intended that a court, and not arbitrators, would make the decision. Thus, the Court establishes the presumption (which could be rebutted by an express provision in the arbitration agreement) that arbitrability questions are to be decided by a court. This in effect means that at Stage 1 a court should retain and decide arbitrability questions and not send them to the arbitration tribunal for decision. Given this conclusion the Court consequently decides that at Stage 3 there is no reason for a reviewing court to defer to the prior arbitrators’ decision concerning arbitrability. Indirectly then, First Options settles how a court at Stage 1 should proceed. It should presume that arbitrability questions (existence, validity and scope of the arbitration agreement) are for the court to decide.

Question 2. It is hard to think of realistic situations in which the parties would consciously relegate to arbitrators the very question of whether they, the parties, had actually agreed in a valid way to arbitrate certain disputes. Perhaps this could about where the parties first enter into a broadly worded arbitration agreement covering disputes that might arise in connection with future contemplated agreements concerning a certain subject matter that they might or might not execute and that might or might not contain a valid arbitration clause.

The broad interpretation adopted by the Contec court has the potential to turn every provision granting a tribunal positive Kompetenz-Kompetenz into an agreement granting at the same time negative Kompetenz-Kompetenz (i.e., causing a court at Stage 1 to defer the jurisdiction question to the arbitrators) and—given that it operates also at Stage 3 according to First Options—binding Kompetenz-Kompetenz—in other words, the decision of the arbitral tribunal on its own jurisdiction would be final and not subject to de novo court review at Stage 3.

At Stage 1, the U.S. approach in institutional arbitration would come close to the French approach, with one possible exception: where the existence of the arbitration agreement is challenged. Where one party claims that it never entered into an arbitration agreement in the first place, that arbitration agreement cannot form the basis for a conferral on arbitrators of final decision-making powers concerning jurisdiction. In an exceptional case, however, there could conceivably be a separate framework agreement in which the parties agreed to confer such powers on arbitrators in connection with contemplated future agreements that might or might not come into existence and that might or might not contain an arbitration agreement. For a case with a fact pattern that could possibly be construed to fit this exceptional scenario see Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991).

The Contec court’s interpretation becomes problematic not so much at Stage

71
1, but because of its effects at Stage 3. It largely deprives the state courts of any possibility to review the jurisdiction of the arbitral tribunal. In this respect the Contec court’s approach goes much further than the French approach.

**Question 3.** The First Options Court’s use of the term “reverse presumption” to describe how scope questions are to be treated is potentially misleading. The basic presumption, under which at Stage 1 a court is to decide arbitrability issues (including the question of scope) remains in place. However, in deciding the scope question a U.S. court must employ a new presumption - that is, that all scope issues are to be resolved in favor of including them within the scope of the arbitration agreement - unless the agreement is unmistakably clear that a particular issue is to be excluded. This then has the practical effect of sending virtually all potentially arbitrable issues to the arbitrators - but for resolution on the merits (not for reconsideration of the scope question).

**Questions 4 and 5.** In general the negative-effect-of-Kompetenz-Kompetenz doctrine in U.S. law, as derived from First Options, does not yield much Stage 1 deference to arbitrators. All jurisdiction questions (existence, validity, and scope of the arbitration agreement) are to be decided by the court. Of course there is the “reverse presumption” on scope issues that, as a practical matter, sends issues to the arbitrators for resolution on the merits; and there is the Prima Paint separability doctrine under which a challenge to the container contract (but not directly to the arbitration clause itself) would be sent to the arbitrators. Under Howsam at Stage 1 another set of issues—a special subset of jurisdictional issues—will be for the arbitrators to resolve instead of the court. These are termed in Howsam “procedural arbitrability” issues—such questions as time limits for bringing a claim to arbitration or whether the right to arbitrate has been waived.

The Howsam Court does not try to explain its outcome in terms of the parties’ likely intent, but such an explanation would seem potentially at hand. Once we are clear that the parties have opted to arbitrate their basic dispute (a valid arbitration agreement is in existence), it seems reasonably likely that they would want fact-based issues, such as time limits for bringing a claim or possible waiver defenses, to be heard by the arbitrators—perhaps at the same time that merits-based issues are heard. This is surely a reasonably efficient way to proceed. Of course pro-arbitration policy also favors the Howsam outcome. Under Howsam procedure-based defenses cannot be used to delay or obstruct arbitration.

**Question 6.** See the discussion of this point supra in subsection II.1.e.iii. at Question 5.

**Question 7.** To protect arbitration from obstruction and delay U.S. law also contains elements of a “negative” effect of Kompetenz-Kompetenz policy. However, it employs different concepts that do not seem to privilege arbitration to the extent of the French law reflected in Jules Verne. Under the U.S. Supreme Court’s First Options decision, a Stage 1 challenge to the existence, validity or scope of an arbitration clause is for the court to decide—whether or not the outcome of the issue is manifest. In Jules Verne, the challenge is to the existence of the arbitration agreement, hence a U.S. court would retain jurisdiction to decide this fundamental issue. (See the discussion below of the Sandvik case in Question 9. under Joc Oil and Harbour Assurance.) From the U.S. point of view, unless there is an arbitration
agreement in existence, there is no justification for sending the parties to arbitration. On the other hand, if the dispute concerns the validity of an arbitration agreement that admittedly has come into existence, U.S. law requires the judge to scrutinize whether the challenge is to the container contract as a whole (in which case this issue would be sent to the arbitrators) or specifically to the arbitration clause (or separate arbitration agreement) itself—in which case the court would retain jurisdiction to decide whether the arbitration clause (or separate arbitration agreement) is valid. Of course Howsam adds the qualification that a “validity” issue that is procedural in nature (“procedural arbitraribility”) goes to the arbitrable tribunal instead of the judge. Where the Stage 1 issue concerns the scope of an existing and valid arbitration clause, First Options tells us that in principle a court must decide the issue. However, in making that decision, First Options tells U.S. judges that they must decide all doubtful scope issues in favor of including the issue within the scope of arbitration—an approach that clearly favors arbitration.

German courts would engage in a full review of whether a valid arbitration agreement is in existence between the parties and would only refer the parties to arbitration if that is the case. The same approach would probably be followed in an English court. It seems not very likely, given that the case is not pending before an arbitral tribunal, that an English court would make use of its residuary discretion to refer the issue to arbitration for determination.

The Canadian courts, by contrast, might refer the issue for determination to the arbitral tribunal, provided it is a mere question of fact.

II.1.f.v. Separability Revisited and the Void Ab Initio Doctrine

Joc Oil and Harbour Assurance

Question 1. The issue of course turns on an interpretation of Russian law, the 1935 Signature Decree. We do not really have enough information about the wording or purpose of that law to decide for ourselves whether the arbitrators’ interpretation is persuasive. It is important of course to see the distinction between applying the Signature Degree to the container contract and applying it to the arbitration clause. Treating the contract and the clause as different agreements is of course the essence of the separability doctrine. In principle it also seems perfectly conceivable that the Signature Decree could properly apply to the container contract without automatically applying as well to the arbitration clause. The two involve different subject matter and different risks. An enterprise could logically need more protection and review before entering into one (the container contract) than the other (the arbitration clause).

Question 2. Here again we see an important consequence of the separability doctrine. The invalidity of the container contract does not automatically imply the invalidity of the arbitration clause in that contract, because the latter is conceived of as a separate agreement governed by different validity considerations. As just noted in Question 1, the arbitrators found that although the Signature Decree invalidated the container contract, it did not invalidate the arbitration clause. Thus, the arbitrators retained authority to make an award on the basis of an unjust
enrichment theory even though there was no valid contract binding on the parties.

**Question 3.** In section II.1.g we will see that formal validity of the arbitration clause requires compliance with strict “agreement in writing” requirements (although UNCITRAL itself now favors a looser standard for the writing requirement—see infra subsection II.1.h.). The same rules do not apply to the container contract.

**Question 4.** If one considers that the separability doctrine concerns how to interpret an arbitration clause in a larger container contract, then the law governing the interpretation of the contract would seem to apply. Here the parties have expressly provided that “The USSR is regarded as the place of conclusion and fulfillment of the contract.” The implicit intent of this sentence must surely be to have Soviet law apply to the contract. Hence the party autonomy principle – now widely recognized in choice of law theory – would support the Bermuda judges’ decision to apply Soviet (Russian) law.

A second line of reasoning would also support this result. The parties chose Moscow as the place of arbitration, hence most authorities would conclude that Soviet arbitration law would provide the lex arbitri. If the separability issue is considered a matter for the lex arbitri, then again Soviet (Russian) law would apply.

On the burden of proof point, the first paragraph of New York Convention Art. V(1) is unambiguous in placing the burden of proof on the party challenging enforcement of the award (here Joc Oil):

> “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes …, proof that …” (emphasis added).

**Question 5.** In effect the Court of Appeal of Bermuda avoids the problem of distinguishing between a contract that is void *ab initio* and one that is nonexistent by concluding that the container contract was merely “voidable” (or ratifiable) and not void *ab initio*. See the court’s discussion in paragraphs 97-106.

**Questions 6 and 7.** The underlying dispute in the Harbour Assurance case arises out of reinsurance contracts containing an arbitration clause. The reinsurer, Harbour Assurance, brought an action in the U.K. for a declaration that it was not liable on various reinsurance contracts because the insurer, Kansa, was not authorized to carry on insurance business in the U.K. and therefore that the reinsurance contracts were illegal and void *ab initio*. Until this decision U.K. doctrine had applied a limited version of the separability concept. If the container contract were alleged to have been void *ab initio*, instead of merely voidable, then arbitrators were not authorized to decide the question; it had to be decided by a court. The logic was that a contract void *ab initio* was the same as a nonexistent contract. Thus, if the container contract never came into existence, so too, the arbitration clause never came into existence, and there was no basis for referring the parties to arbitration.

In this opinion the Court of Appeal overturned that doctrine, based as it was on pure logic, and declared that even a question of initial illegality or voidness *ab
initio could be decided by arbitrators as long as the scope of the arbitration clause indicated that the parties intended to submit questions of invalidity and illegality to the arbitrators. The Court of Appeal held that the arbitration clause in this case was broad enough and hence referred the parties to arbitration.

Although the Court of Appeal does not base its decision on policy considerations, the excerpt from Judge Schwebel seems to express the fundamental issue—the need to protect arbitration from obstruction by the simple claim of illegality or voidness ab initio of the container contract.

The opinion also distinguishes between a claim that the container contract is invalid—and hence that the arbitration clause is derivatively (or indirectly) invalid as well—and a claim directly focusing on the arbitration clause itself as invalid. If claims of indirect invalidity were not within the jurisdiction of the arbitrators, then the doors to possible obstruction of arbitration would be opened wider. Except for formal validity questions (the requirement of a writing), it is generally more difficult to raise a plausible argument directly attacking the arbitration clause as invalid. When such a direct claim can be raised, some jurisdictions (eg. the U.S.) require a court to retain jurisdiction and to decide the question. Judge Steyn in the lower court seems to have assumed that this would be U.K. law as well, and the Court of Appeal says nothing in its opinion to the contrary. This seems sound to the authors because it would be difficult to force parties to arbitrate the issue of whether their arbitration agreement is invalid. If the arbitration agreement is in fact invalid, the policy behind the invalidity rule must be to protect the parties from being forced to arbitrate.

In Harbour Assurance the reinsurer alleged that the container contracts (the contracts of reinsurance) were illegal (invalid) because Kansa was not authorized to carry on insurance business in the U.K. That ground of invalidity would not prevent Hansa from entering into a valid contract to arbitrate.

**Question 8.** The problem raised in this question concerns whether the agreement to arbitrate ever came into existence. This is different from a question of validity. If the container contract comes into existence but is invalid, the invalidity need not strike down the arbitration clause (conceived of as a separate agreement). If the ground of invalidity does not apply to the arbitration clause, then it is possible to recognize its existence and validity and to allocate to the arbitrators the question of the container contract’s validity. On the other hand if the container contract never came into existence, how could the arbitration clause come into existence? Moreover, if there is no arbitration agreement, it is difficult to understand how a court could refer the parties to arbitration. Thus, it seems that a court should decide the issue of the existence of the container contract—and hence of the arbitration agreement—before sending the parties to arbitration.

The analysis just given assumes that the phrase “[no] provision of this contract” is intended to include the arbitration clause as one of the “provisions” referred to. A different outcome would ensue if the court concluded that the language “this contract” refers only to the substantive provisions of the transaction between A and M, and not to the arbitration agreement treated as a separate agreement. In that case, the court would seem on sound ground to send the parties to arbitration.
**Question 9.** The *Sandvik* case discusses this situation thoroughly under U.S. law. The Court of Appeals for the Third Circuit notes the anomaly of a case in which the claimant wants to enforce the container contract, but to reject the arbitration clause contained in it, and the respondent wants the reverse, to reject the container contract (on the theory of never having become a party to it), but to enforce the arbitration clause contained in it. The respondent of course urges the separability doctrine to support its position. The Court of Appeals rejects the respondent’s argument, however, because there is a dispute concerning whether the container contract (and, *a fortiori* the arbitration clause within it) ever came into existence. Under U.S. law, questions of existence of the arbitration agreement must be resolved by a court before the court may send the parties to arbitration. The Court of Appeals notes that *Prima Paint* dealt with a different situation, one in which the container contract and its arbitration clause clearly came into existence, but in which the respondent challenged the validity of the container contract. In that situation, the separability doctrine operates, and the parties must litigate the validity of the container contract before the arbitrators.

It would seem that French courts would reach an opposite result on the *Sandvik* facts—assuming that it is not manifestly clear that the respondent is not a party to the container contract. The *Sandvik* case helps to demonstrate the difference between the French and U.S. approaches to the “negative” effect of *Kompetenz-Kompetenz* doctrine. Students can be asked to side with one approach or the other.

**II.1.g. The Form of the Arbitration Agreement**

**II.1.g.i. “An Agreement in Writing”**

**Question 1.** David’s observation is the standard answer to Kaplan’s quandary. At the same time, the tension continues in this area of arbitration law. Rigid requirements of a written agreement, while they help to ensure that the parties have taken the arbitration decision consciously and seriously, at the same time may appear in some cases to frustrate what is otherwise a fairly obvious agreement between the parties to arbitrate, though not “sufficiently” in writing. Hence the instinct to “keep the welsher in the agreement” may have to yield to the policy of certainty guaranteed by a writing. On the other hand, courts can be quite inventive when faced with harsh choices, as the cases in this subsection show.

**Question 2.** The authors believe that the Italian Supreme Court (Corte di Cassazione) is entirely correct to refuse to enforce the arbitration agreement, because it does not satisfy the “agreement in writing” requirement in Article II NYC. In *Robobar* there was a writing on one side but only conduct on the other. Today, in numerous jurisdictions a more lenient writing requirement applies. Under some of the more lenient standards, a court might conclude that there is a valid arbitration agreement on the *Robobar* facts. The *Mediterranean Shipping* decision is an example of how courts have tried to deal with the issue in more recent times.

**Question 3.** As footnote 2 in *Mediterranean Shipping* points out, applicability of the Swiss Private International Law Act requires that the seat of arbitration be in Switzerland. In *CNT v. MSC* the parties chose arbitration in London.
**Question 4.** The argument that Article 7(2) is an “interpretation”—instead of an amendment—of New York Convention Article II(2) is problematic but perhaps credible. Article II(2) defines “agreement in writing” to mean an agreement “signed by the parties or contained in an exchange of letters or telegrams”. Model Law Article 7(2) expands this definition to include: “an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.” As the excerpt from Holtzmann & Neuhaus points out, the claim-and-defense language was intended to cover the case in which the parties proceed to arbitration, although their original agreement was not sufficiently in writing to satisfy Article II(2).

When one moves from Model Law Article 7(2) to Article 178 of the Swiss Private International Law Act, the bounds of “interpretation” seem to the authors to be exceeded. Article 178 includes as constituting an “agreement in writing” an “agreement ... made in writing, by telegram, telex, or any other means of communication which permits it to be evidenced by a text.” No longer is an exchange of written instruments specifically required, and the closing clause seems to indicate that the main purpose is simply to have a written document that serves as evidence of the agreement, even if both parties do not sign that document and it does not originate through an exchange of documents between the parties. In other words, a written document sent by one party to the other could suffice. Those seem to be the facts of *Mediterranean Shipping.*

**Question 5.** The authors find the first argument listed – the shipper filled in the bill of lading – to be the most persuasive and the closest to the New York Convention Article II(2) requirements. This action by the shipper comes very close to the exchange of writings standard expressly included in Article II(2).

The consignee’s signing the bill of lading is perhaps next in order of persuasiveness. The problem, however, is that there is no finding that the consignee had authority to sign as an agent for Somatrans ZAE, the shipper and putative plaintiff in the action by the subrogated insurer.

**Question 6.** The authors think that the *Robobar* agreement is the farthest from satisfying the writing requirement. In *Robobar* there was a writing on one side and only conduct on the other. In *Mediterranean Shipping* there are at least two arguments – those traced immediately above in Question 5 – that something close to a writing occurred on the shipper’s side of the bargain.

**Questions 7 and 9.** Under the first paragraph of Article 22 of the 1978 UN Convention on the Carriage of Goods by Sea, the arbitration clause in *Mediterranean Shipping* would be valid. The bill of lading itself is in writing and the arbitration clause is a written part of that contract. Hence the arbitration clause would seem to constitute “an agreement evidenced in writing”. This, of course, goes beyond the New York Convention Article II(2) standard.

The possibility that the 1978 UN Convention will “rescue” some arbitration agreements contained in a clause of the bill of lading is expressly mentioned by Holtzman & Neuhaus. Question 9 points up a difficulty, however, with this reasoning,
a difficulty that arises whenever a country uses a test of “agreement in writing” that is more liberal than the New York Convention Article II(2) standard. For an award to be enforceable under the New York Convention, the moving party must satisfy the requirements of New York Convention Article IV. Thus that party must present: “The original agreement [to arbitrate] referred to in article II * * *” (New York Convention Article IV(1)(b)). But if the agreement, on the basis of which the parties were referred to arbitration, does not meet the writing standard of Article II, would that requirement of Article IV(1)(b) be met? The authors have serious doubts and hence believe that the award in such a case might not be enforceable under the New York Convention. This is especially so, if the respondent continues to contest the existence of an “agreement in writing” during the arbitration, so that the claimant could not argue that the statement of claim and defense constituted the “agreement in writing.”

The point just made could also be raised in another way. New York Convention Article V(1)(a) provides that an award can be refused recognition and enforcement if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; ...” The authors believe that only material invalidity should be controlled by the choice of law provisions just quoted. However, the opening phrase of Article V(1)(a) provides: “The parties to the agreement referred to in article II ...” Though this language does not expressly state that an award can be refused enforcement if the arbitration agreement does not meet the formality requirements of Article II(2), Albert Jan van den Berg notes that this was nevertheless the intent behind the addition of the just-quoted language. (Albert Jan van den Berg, The New York Convention of 1958, 285 (1981).) Thus, the authors believe that under Article V(1)(a) an award can be refused recognition and enforcement on the ground of the formal invalidity of the arbitration agreement if the agreement does not conform to the Article II(2) writing requirements.

The NYC, Article IV problems just discussed do not arise if the enforcement regime under the national law, whether based on the New York Convention or on completely separate national provisions, contains form requirements that are less stringent than those of the NYC, as is for example the case in Germany. The German Supreme Court, in the decision excerpted below at II.1.h., considers that at the enforcement stage, i.e. Stage 3, it is sufficient if the arbitration agreement upon which an award is based meets the less lenient form requirements of the German arbitration law (or the law applicable to the arbitration agreement—a point established in other German decisions, see S. Kröll in Böckstiegel, Kröll, & Nacimiento, eds. ARBITRATION IN GERMANY 465, § 1061,para. 68 (2d ed. 2015)).

**Question 8.** Of course the harshness of the “agreement in writing” requirement of New York Convention Article II(2) encourages courts to seek inventive interpretations, but we believe that the Sphere Drake court simply misread Article II(2). Although the placement of words in Article II(2) allows the reading given to it by the Fifth Circuit in Sphere Drake, that reading makes no sense. Why would the drafters impose stricter writing requirements on a separate, free-standing arbitration agreement than on one contained in a clause in another contract? If anything, one might have expected the reverse, because a clause in another contract is more easily overlooked than a separate, free-standing agreement. Under the Fifth Circuit’s interpretation even an oral agreement referring
to and incorporating a standard form contract containing an arbitration clause would apparently satisfy the writing requirement.

Moreover, the Fifth Circuit’s reading is actually ungrammatical. Because of the comma placed after “an arbitration agreement”, the next two modifiers (“signed by the parties or contained in an exchange of letters or telegrams”) must be read as modifying both of the two antecedents preceding the comma.

In Kahn Lucas Lancaster, Inc. v. Lark International Ltd, 186 F.3d 210 (2d Cir. 1999), the Second Circuit Court of Appeals rejected the Sphere Drake interpretation. The Second Circuit stressed the punctuation rule under which use of a comma to set off a qualifying phrase causes the qualifying phrase to apply to all the phrases preceding the comma not just the immediately preceding phrase. The Kahn Lucas court also compared the other official languages. In French and Spanish the word for “signed” (signés and firmados, respectively) is in the plural form, indicating that it modifies both (i) an arbitration clause in a contract and (ii) an arbitration agreement. In Chinese the modifier, “signed”, comes at the beginning of the series, making it difficult to limit it to the second item, “an arbitration agreement”. Curiously, the Russian language version uses the singular form of the modifier “signed” and comes after the series, suggesting that it modifies only “an arbitration agreement”. The Kahn Lucas court properly, we think, disregarded the non-conforming Russian version.

II.1.g.ii. Can a Battle of Forms Yield an Arbitration Agreement?

**Question 1.** The major defect in the Nokia case seems to be not so much the writing requirement as the absence of clear intent to enter an arbitration agreement. Nowhere does the clause in question even mention the word arbitration, and in its origin it was a choice of forum clause, not an arbitration agreement.

Had Leaseindustria forwarded Mazzer’s telex to Nokia, we do not believe the outcome would have changed. On those facts one could more easily have argued that there had been an exchange of writings, even though the telex was not signed. But Article II(2) does not require a signature in every case; an exchange of writings that completes the formation of the agreement would suffice. But in the hypothetical posed, we believe a court would still have insisted on a clearer intent to arbitrate.

**Question 2.** We believe the Fourth Circuit went too far in finding an enforceable arbitration agreement in the Podar Brothers case. Each party clearly expressed a willingness to arbitrate at a specified site, but not at any other site, and the sites did not agree. The court treats the agreement as one in which the parties agreed to arbitrate but without specifying a site. We believe the Fourth Circuit went too far, perhaps out of a desire to lighten crowded court dockets. To us it is difficult to distinguish Podar Brothers from Nokia; in neither is there a clear meeting of the minds about arbitration. Consider also that the place of arbitration has an important bearing on the applicable law. This is a further reason for concluding that the parties would not likely have treated agreement on the seat as of little importance to their willingness to submit disputes to arbitration.
II.1.g.iii. Jurisdiction By Virtue of Tacit or Post-Agreement Submission or Estoppel

Questions 1 and 2. The interpretation of the Model Law adopted by the Hong Kong court in the William Co. case is difficult to square with Article II(2) of the New York Convention; hence enforcing the award outside Hong Kong would be problematic. (See discussion of Questions 7 and 9 above under II.1.g. The Form of the Arbitration Agreement; II.1.g.i. “An Agreement in Writing”.) Note that Hong Kong has adopted the Model Law as its arbitration act and that the Hong Kong court applies its own law (the adopted Model Law) to decide whether to enforce the arbitration clause. Its interpretation of Model Law Article 7(2) is extraordinarily broad.

Whereas the “statement of claim and defense” language was included in Article 7(2) to cover the case in which the parties have actually completed the arbitration process before one of them relies for the first time on the formal invalidity of the arbitration agreement, it is expanded here to cover an exchange of correspondence between the parties’ counsel not filed either in arbitration or court proceedings. Moreover, in that correspondence the plaintiff’s counsel expressly challenges the validity of the arbitration clause, though on the ground of material, not formal, invalidity. The claim of plaintiff’s counsel is that arbitrators in China will apply Chinese law (as provided in the arbitration clause) and that that law would result in lessening the liability of the carrier below the minimum required in the Hague-Visby Rules—applicable in Hong Kong courts because it is mandatory law.

The Hong Kong court reasons that this exchange of correspondence can be squared with the requirements of Model Law Article 7(2) for two reasons. First, it constitutes an exchange of letters providing a record of the agreement. The difficulty with this reasoning, however, is that in Article 7(2)—as in New York Convention Article II(2)—the exchange of writings referred to means an exchange that forms an agreement. In William Co., however, the correspondence makes clear that the parties are not in agreement.

Second, the Hong Kong court relies on the statement of claim and defense language in the Model Law. Here the problem is not only that the statements of claim and defense were not found in pleadings before arbitrators as contemplated in the Model Law, but just as important, that the defendant did in fact contest the validity of the arbitration agreement, albeit on material invalidity grounds (inconsistency with the Hague-Visby Rules). One wonders how the Hong Kong court would have reacted to correspondence in which the defendant had actually raised the central formal validity issue, the absence of a sufficient writing. In that case, too, the correspondence would not have denied the existence of the arbitration agreement.

The authors believe the William Co. case goes beyond the bounds of New York Convention Article II(2). Thus, because of the provisions of Article IV(1), the winning party in this arbitration might have had difficulty enforcing the award in any jurisdiction other than Hong Kong under the New York Convention. They would have to rely on a more favorable national enforcement regime, where such exists.

Question 3. Although the issue arises in an unorthodox way in Sulanser, we believe that the “exchange of writings” theory is applicable to establish an
“agreement in writing”. The classic form of a written offer and a written acceptance is of course not followed here. But the defendant communicated to the Wuhan Admiralty Court that it believed the parties had agreed on arbitration, and that communication was certain to (and in fact did) reach the plaintiff. The plaintiff by initiating arbitration before CIETAC in a communication that was certain to (and in fact did) reach the defendant, communicated its acceptance of arbitration.

An estoppel theory would also seem to apply. Sulanser first relied on the arbitration agreement to resist Jiangxi’s action in the Wuhan Admiralty Court. That caused Jiangxi to drop the litigation and begin arbitration before CIETAC. Only after both parties had chosen arbitrators did Sulanser then object to the formal validity of the arbitration agreement because of inadequate writing. Jiangxi had suffered considerable delay and some cost in reliance on Sulanser’s representation that the parties had agreed on arbitration—the classic formula for estoppel.

The authors prefer the “exchange of writings” theory to estoppel, however, because of the potential difficulty with New York Convention Article IV under an estoppel theory. As already discussed, Article IV requires “[t]he original agreement referred to in article II or a duly certified copy thereof”. An estoppel theory does not yield any such agreement.

Though the “statement of claim and defense” theory of Model Law Article 7(2) could perhaps be stretched to fit the Sulanser case facts, it is also unorthodox. The statements of claim and defense would be those before the Wuhan Admiralty Court, and it would be the defense that alleged the existence of the arbitration agreement. Neither in the pleadings nor in other communications would there have been a denial of the existence of the arbitration agreement. Still, such a stretching of Article 7(2) makes conformity with New York Convention II(2) even more difficult to accept.

**Question 4.** We believe that under the facts stated, an arbitration agreement could be understood to have been implicitly or tacitly alleged, so that the requirement of Model Law 7(2) would be met. The even more difficult question is whether the requirements of New York Convention Article II are met. Though the argument is not without difficulty, we believe that even here a plausible case can be made that through the exchange of written pleadings before the arbitral tribunal the parties have implicitly agreed in writing to arbitration.

**Question 5.** We have discussed above in Question 3. the difficulty of finding the requirements of New York Convention Article II(2) to be met on the Sulanser facts. On this issue the Sulanser court raises a very interesting argument. It says that the definition of “agreement in writing” in New York Convention Article II “is not exclusive and is not a bar to the application of Art. 7(2), which does not exclude any arbitration agreement covered by Art. II of the New York Convention.” The Sulanser court does not elaborate further, but it is referring presumably to the English language version of the New York Convention, which says: “The term ‘agreement in writing’ shall include …” (emphasis added). This can be read as a non-exclusive statement. Interpreted in this way Article II(2) would obligate a party to recognize any arbitration agreement meeting the conditions set out in Article II(2) but would not prevent a party from also recognizing as an “agreement in writing” other agreements based on a less obvious writing element.
It is probably worth noting that the French language version of New York Convention of Article II(2), which is also an official version, carries a more exclusive connotation. It reads: “On entend par convention écrite ...”, which is best translated as: “An agreement in writing means ...” It is also interesting that the wording of Model Law Article 7(2) itself carries a more exclusive connotation: “An agreement is in writing if ...” Given the unhappiness in many quarters with the strictness of the writing requirement as stated in New York Convention Article II(2), the authors would not be surprised to find courts—at least those using English—interpreting the language as non-exclusive. Even UNCITRAL now recommends that Article II(2) of the New York Convention not be interpreted as exhaustive. See infra subsection II.1.h. (recommendation number 1).

**Question 6.** Focusing on the official languages, two (English and Russian) seem to be non-exclusive, and three (French, Spanish, and Chinese) appear to carry at least a connotation of exclusivity. The French and Spanish versions are given in the text. One of the authors has consulted a native Chinese speaker who says that the Chinese character used—which is not reproduced in the text—would translate as “means” or “shall mean”. There is apparently a different Chinese character for “includes”, but that character was not used in the Chinese version of Article II(2). The text in German—not an official language—accords more with the exclusivity connotation of the French, Spanish, and Chinese versions. This variability in the official and other languages makes it difficult to reach a firm conclusion, but the sampling just described seems to favor the “exclusivity” reading of Article II(2).

**Question 7.** Because the *Sulanser* case arises on enforcement of an award, our attention is drawn to the recognition and enforcement provisions of the New York Convention in Article V, in particular Art. V(1)(a). That provision subjects the validity of the arbitration clause to the law chosen by the parties. What does that mean? If the parties choose a law that is more demanding on the writing even than New York Convention Art. II(2), would V(1)(a) mean that the award cannot be enforced?

We believe that New York Convention Art. V(1)(a) should be understood to refer to “material validity” questions, not those of formal validity. As to the latter, Article II(2) is controlling. Indeed, Art. V(1)(a) itself expressly refers back to “the agreement referred to in Article II”. See generally Albert Jan van den Berg, The New York Arbitration Convention of 1958 284-287 (1981).

**Questions 9 and 10.** If the arbitration agreement is not in writing as defined by New York Convention Art. II(2), the provisions of the CAMCA and UNCITRAL Rules cannot in themselves waive that requirement. Other grounds of invalidity not timely raised under the CAMCA or UNCITRAL Rules could of course be found to have been waived by the parties’ choice of those rules, as long as the agreement was “an agreement in writing”. Applying the 30-day rule of the CAMCA Rules or the statement-of-defense rule of the UNCITRAL Rules to bar a late claim of insufficient writing could perhaps be based on principles of estoppel. For the ensuing award to be enforceable, however, presumably the enforcing state must be willing to accept these estoppel notions, because the New York Convention would not require it to do so.

Note that the New York Convention sets down the conditions under which a
party may refuse to enforce an arbitral award; it does not provide any circum-stances in which a party must refuse to enforce an award. Hence, an enforcing court willing to accept estoppel principles could enforce an award, even though there was no agreement in writing.

**Question 11.** The Vienna arbitrators appear to be taking a liberal approach to the interpretation of New York Convention Art. II(2), similar in effect to Model Law 7(2) (“exchange of letters ... which provide a record of the agreement”). This approach emphasizes the evidentiary value of having a written record of the agreement, acknowledged to exist in a writing emanating from both parties. The writing from both parties need not constitute the contract formation process itself. One can be more comfortable with this approach of course if the writing from the party in question says: “I expect our next contract to be drafted along the same lines as your order acknowledgment No. ...” because this makes reference to the contractual terms of the agreement, rather than merely to the quantity or price. Hence, it more clearly serves the purpose of the writing requirement—assuring that both parties fully understood and took seriously their agreement to settle disputes through arbitration.

**Question 12.** Neither the good faith nor the estoppel arguments seem to have support in Article II of the New York Convention or Article 7 of the Model Law. Thus, such arguments pose the risk that the award could be refused enforcement under the New York Convention. On the other hand, as we have already noted, the Convention does not require adhering countries to refuse to recognize or enforce awards, and good faith and estoppel concepts are found in all legal systems. Thus, we believe there is a good chance that an enforcing court would accept such arguments in a compelling case.

**II.1.h. Liberalizing the Writing Requirement through National Legislation**

**UNCITRAL Model Law, as amended, 2006**

**Question 1.** Option I retains the requirement that an arbitration agreement must be in writing but allows the requirement to be met if the content of the agreement is recorded in any form, including various forms of electronic communication described in subparagraph 4. Option II, on the other hand, completely eliminates any requirement that there be a record of the agreement either in printed or electronic form. Presumably under Option II a completely oral agreement to arbitrate would be valid, as long as the agreement meets the ordinary requirements for contract validity under the applicable law. One might argue in favor of Option II that arbitration is now so well established and understood that it is no longer necessary to have a sentinel at the door (the writing requirement) to warn the parties to be sure they know the consequences of what they are agreeing to when entering an arbitration agreement. At the same time, whether the parties did or did not submit their dispute to arbitration might become a more difficult and more time-consuming issue. Furthermore, the considerable number of defective dispute resolution clauses evidences that parties—in particular if not advised by lawyers (with experience in dispute resolution)—generally pay less attention to the dispute resolution provisions than to the substantive rules governing their future relationship. Students are likely to have different views concerning which option is preferable.
**Question 2.** Seeking to amend the Convention would of course have run the risk that other amendments would have been introduced. The final result would have been unpredictable, and without unanimous or near-unanimous acceptance of an amended Convention, the uniformity that has been achieved by the widespread adherence to the current version of the New York Convention would have been lost. Amending the Model Law did not carry the same risk of upsetting achieved uniformity, given that there is already variability among national arbitration statutes. The Model Law is only a recommended “model,” not a binding treaty. It has had an important harmonizing effect on national arbitration statutes the world over, but there still are significant variations in different national statutes.

**Question 3.** Interpretive paragraph 1 seeks to counter the view that New York Convention Article II(2) prevents enforcement of an arbitration agreement that does not meet the Article II(2) “in writing” form requirements at a minimum. Instead the first interpretive paragraph says the “circumstances described [in Article II(2)] are not exhaustive.” In other words a party is free to adopt less strict “in writing” form requirements—such as, for example, a requirement limited to there being a written document that evidences the agreement.

Interpretive paragraph 2 seeks a broader than literal interpretation of Article VII(1). By its terms Article VII(1) allows a party seeking recognition and enforcement of an award to avail itself of more favorable provisions—more favorable than the New York Convention provisions—of an enforcing country’s national law for enforcing the award in question. Presumably if the enforcing country’s national law on award recognition and enforcement allows recognition and enforcement of an award based on an arbitration agreement that meets its national “in writing” form requirements—even though they are less strict than those of New York Convention Article II(2)—Article VII(1) applies to require recognition and enforcement of the award. This would not be a strained interpretation of Article VII(1). But paragraph 2 goes further by urging an interpretation of Article VII(1) that would have its “more favorable right” principle apply to recognition of the validity of an arbitration agreement itself—even divorced from an award-enforcement context—for example where the issue in dispute is whether to recognize the validity of the arbitration agreement in order to justify sending the parties to arbitration.

**Question 4.** Note that Article 35 of the Chindonesian national law (identical to the UNCITRAL Model Law) is the equivalent of Article IV of the New York Convention. Whereas Article IV requires the party seeking enforcement to present “the original [arbitration] agreement referred to in Article II” (thereby incorporating the strict “in writing” requirements of Article II(2)), Article 35 of the Chindonesian national law requires instead presentation of “the original arbitration agreement referred to in article 7** * *.” (emphasis added) This of course means Article 7 of the Chindonesian national statute in which Chindonesia has adopted Option II of the 2006 amended version of Model Law Article 7. Since Option II accepts as valid even an oral agreement to arbitrate, the Chindonesian national law is more favorable to the claimant than is Article IV of the New York Convention. Thus, under New York Convention Article VII(1), Chindonesia is required to allow the claimant to avail itself of the Chindonesian national statute provision (Article 35) and to recognize and enforce the award.
Question. Because Section 1061 of the German Arbitration Act (ZPO) merely includes by reference all the provisions of the New York Convention on recognition and enforcement of foreign arbitral awards, Section 1061 ZPO, on its face, incorporates the provisions of New York Convention Article IV requiring presentation of the original arbitration agreement “referred to in Article II.” Under this interpretation, Section 1061 ZPO does not usher in, for foreign awards, a German enforcement regime that is more favorable to enforcement than Article II(2) of the New York Convention. It simply ushers in the New York Convention regime, itself (including Article IV and Article II(2)). Thus, the claimant would fail to meet the requirements of New York Convention Article IV (because the arbitration agreement that must be presented under Article IV would not meet the strict writing requirements of Article II, to which Article IV refers), and hence the award would not be enforced.

The Bundesgerichtshof considers such a result inconsistent with the “meaning and purpose” of Article VII(1). But is it? The Bundesgerichtshof says that a facial reading of Section 1061 ZPO along the lines just discussed would cause German law to enforce domestic awards (those made in Germany) more readily than foreign awards (made outside Germany), because for domestic awards the relaxed writing standards of Section 1031 ZPO would apply. But Article VII of the New York Convention is not based on a non-discrimination principle. It does not forbid an enforcing country to give less favorable treatment to a foreign award than it gives to a domestic award. Instead, Article VII requires an enforcing country to apply its national law on enforcing foreign awards—if such a national law exists and if it is more favorable to award enforcement (as compared to the result under the New York Convention). In other words, the New York Convention should never cause a foreign award to be refused enforcement where, without the New York Convention, the award would be enforced according to national law applicable to foreign awards.

The Bundesgerichtshof refers also to UNCITRAL’s 2006 second recommendation (see p. 193), calling for New York Convention countries to interpret Article VII of the Convention as applying also to the enforcement of an arbitration agreement if the national law is more favorable. As we noted above in Question 3 following the 2006 amendments to Model Law Article 7 (on the writing requirement), this calls for a truly strained interpretation of Article VII, making it applicable to the enforcement of arbitration agreements as well as awards, whereas the literal language of Article VII refers only to enforcement of awards. So in effect the Bundesgerichtshof is saying that when a German court—following Section 1061—turns to the New York Convention for enforcing a foreign award and confronts Article IV, calling for the claimant to present the award and the “agreement referred to in Article II”, Article VII should be interpreted as, in effect, amending Article IV to require the claimant to present the “agreement referred to in Article II, or one meeting the formality standards of domestic law if those standards are more favorable to enforcement of the agreement”.

The correct way of reading the Bundesgerichtshof’s decision is that the Court, without making it completely clear, bases its decision on a separate German
enforcement regime, which is in substance largely based on the New York Convention but contains deviations in relation to the formal requirements. Deviations are evident, for example, in Section 1064 ZPO, which contains special rules as to the documents that have to be submitted with an application to have a foreign award declared enforceable. Consequently, the Court is de facto saying that no matter what the literal language of Section 1061 ZPO says, German law calls for enforcement of a foreign award if the arbitration agreement meets the standards of validity that German law applies to awards made in Germany. Thus, the national German law does indeed provide a more favorable regime for enforcing foreign awards, and Article VII requires German courts to apply this more favorable national law when a German court is asked to enforce a foreign award.

II.1.i. Inclusion of the Arbitration Agreement by Reference

Question 1. The case falls within variant three. It concerns a two-contracts case, where one of the parties supposedly bound by the arbitration agreement contained in another contract is not a party to that other contract.

Question 2. The “strict rule” requires that the reference in the contract to the other document must contain a “clear and express reference” to the arbitration clause contained in that document. The obvious rationale (mentioned in the last paragraph of para. 19) is to warn the party who is not familiar with the document referred to that it contains not just substantive provisions but also an arbitration clause.

Question 3. The Court of Appeal in para. 23 stated that the strict rule in two-contract cases had different roots and was overextended when applied to other cases. In the not reported part of the judgment the Court found the roots of the strict rule in the House of Lords’ decision in Thomas v Portsea [1912] AC 1. That case dealt with the incorporation into a bill of lading of an arbitration clause in a charterparty to which the bill of lading referred. Due to the character of the bill of lading as a negotiable instrument, the need for legal certainty, the fact that the language of the arbitration clause was inapposite to claims under the bill of lading and the fact that the arbitration clause “would oust the jurisdiction of the court,” the House of Lords required an express reference to the arbitration clause. In a later decision by the Court of Appeal in Aughton Ltd v. MF Kent Services (1991) 31 Con LR 30, dealing with a sub-subcontract and forming the basis for the subsequent adoption of the rule in Singapore, the rule was extended to other cases. The leading judgment referring to the decision in Thomas v Portsea named as reasons for the strict rule that the arbitration agreement could preclude the parties from bringing a claim in the state courts, that the “written agreement” requirement was designed to ensure that a party is aware that it loses its right to go to the state court and does so consciously, and that the arbitration agreement was a separate contract from the container contract in which it was included so that a general reference to the latter was not sufficient.

The Court of Appeal correctly stated in para. 27 that all arguments relating to the ousting of the courts’ jurisdiction are outdated and no longer reflect the general attitude towards arbitration. Furthermore, in relation to the businessmen concluding the contracts, the courts also made clear that the doctrine of separability does not
influence a businessman’s view of the arbitration clause as part of the contract.

Hence, the Singapore Court of Appeal’s decision to treat the question of including arbitration clauses by reference as a mere matter of construction is convincing. Unlike in bill of lading cases, the present case involved no special considerations arising from the negotiability of the instrument, so that it is merely a question of establishing the parties’ consent to such clauses.

**Question 4.** In negotiations, the primary focus of the parties normally rests on the substantive rules regulating their relationship and not on how disputes between the parties resulting from such provisions are to be resolved. Thus, it cannot be excluded, a priori, that the quoted provision in the Supplemental Agreement focused primarily on IRC’s additional substantive obligations, the breach of which would lead to independent damage claims. Consequently, the Court of Appeal’s interpretation, while tenable, is not compelling. It could well be that the parties were in full agreement that disputes arising between IRC and Lufthansa concerning obligations arising primarily under the Cooperation Agreement and also for IRC under the Supplemental Agreements should be arbitrated.

Under the hypothetical wording mentioned, it would have been more difficult for the Court of Appeal to adopt a construction according to which the parties had not intended to refer also to the obligation to arbitrate disputes. Again the specific wording of the dispute resolution clause, excerpted in Chapter I.1.e., could lead to a different solution.

**Question 5.** The reference to disputes arising under the particular contract containing the arbitration agreement is a normal feature of dispute resolution clauses. In the authors’ view, it should not exclude the inclusion of such a clause into another contract to cover the disputes arising from this second contract. When the first contract was entered into, the parties naturally could only cover through the arbitration clause the disputes arising out of that contract. When the parties to the second contract opt for a reference to the first contract as a way of defining their obligations, they make all the provisions of this first contract part of their second contract even if the reference requires some minor adaptations (by way of interpretation).

**Question 6.** Article 22 (2) of the Hamburg Rules requires in the bill of lading a “special annotation providing that [the arbitration clause] shall be binding upon the holder”. A comparable requirement was also contained in the old version of Section 1031 (4) of the German Arbitration Act (ZPO), which is still mentioned in a footnote in the Documents Supplement.

Bills of lading have to be distinguished from other cases of inclusion by reference since they constitute negotiable instruments. Such instruments require a higher degree of certainty to maintain their unique function, a practical consideration that in other areas has also led to special treatment for bills of lading and other negotiable instruments.

**Question 7.** The fact that the arbitration clause referred to mentions the
names of the parties to the first contract should not be an obstacle to its inclusion into the second contract with different parties. In this respect the same considerations apply as those we found applicable for disputes arising from the first contract (see Question 5 above).

The detailed wording of the clause is more problematic. The various steps described in the clause involve personnel who may not exist under the new contract, or who may not make sense in the new context. In the present case, these difficulties do not appear to be insurmountable, but nevertheless support the result reached by the Court of Appeal.

II.1.j. Scope of the Arbitration Clause—Settlements and Renewals

Questions 1 and 2. The preferred and now standard language for a broad arbitration clause is: “any disputes arising out of or relating to this agreement”. The wording in MEI v. Ssangyong was narrower (“any disputes arising hereunder”), and the court accordingly held the parties to their agreement. The result was an unfortunate split process, with some issues (those clearly arising directly under the contract) going to arbitration and others reserved for judicial determination after the arbitration was completed. But the misfortune was caused by poor drafting of the arbitration clause and points up the importance of careful attention to the wording of the agreement to arbitrate.

Had the joint venture actually come into existence, it is anybody’s guess how a court would have reacted to the “or following the formation of joint venture” language. Presumably the court would have included only issues that related in some way to the agreements (including the joint venture agreement) between the parties.

Questions 3 and 4. If the dispute had involved the formal validity of the “Preliminary Agreement”, again we can see the importance of language giving a broad scope to the arbitration clause. Such a dispute clearly “relates to” the Preliminary Agreement, but it does not so clearly “arise under” that agreement.

The Fiona Trust approach calls for a broad construction even of the narrower “arising under” language. Under Fiona Trust a dispute concerning the validity of the “Preliminary Agreement” would also have been sent to arbitration. Indeed, under Fiona Trust the result in the Ssangyong case itself would probably have been different. In Fiona Trust, the House of Lords says that the “arising under” language should be given a broad construction to include “any dispute arising out of the relationship into which [the parties] have entered or purported to enter * * *.” Thus, under Fiona Trust even the claim for inducing breach of contract and the quantum meruit and conversion claims would presumably have been sent to arbitration.

The Fiona Trust approach accords well with the “reverse presumption” concept for scope issues articulated in First Options. Recall that under that concept the First Options court said that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”. Thus, First Options, like Fiona Trust, requires a broad construction of scope language in an arbitration agreement. A disputed issue that reasonably relates to issues plainly submitted to
arbitration, should also go to the arbitral tribunal, unless the parties have been explicit in excluding the issue. Under that understanding of First Options, the Ssangyong case should be decided differently were it to arise today in the U.S. All the claims in Ssangyong should have been sent to the arbitral tribunal. But as the Cape Flattery decision shows, not all courts follow that approach. In particular, in relation to closely associated tort claims, it cannot be excluded that courts will consider them to be outside the scope of the arbitration agreement.

Still, so as to avoid all doubts and disputes, parties should be advised to include a broad scope provision in their arbitration agreement. The standard phrase is “all disputes arising under or related to this agreement.” In the authors’ view the broad interpretation is generally favorable. In the absence of indications to the contrary, it can be assumed that parties want to have all their disputes treated in one set of proceedings before a single dispute resolution body to avoid conflicting decisions and additional expenses.

**Question 5.** The Zegna court reasons that the no contest clause bars jurisdiction only of claims seeking to set aside the entire agreement, not claims like the one before it aimed at only a part of the agreement. We believe the no contest clause should have been interpreted as going to the merits and not as potentially limiting the jurisdiction of the arbitrators. Of course this change in reasoning would not have affected the result in Zegna.

An arbitration clause can obviously be worded so as to exclude certain types of claims, but we would require rather clear wording to achieve that result. We would not give a general no contest clause that effect.

**Question 6.** This interpretation of the parties’ agreement suggests a way of sending the issue to the arbitrators without deciding the scope of the arbitrators’ jurisdiction. The scope of the arbitration agreement would be left to the arbitrators to decide. This would amount to saying that the parties deliberately delegated to the arbitrators (and intended to take away from courts) the fundamental decision concerning which issues were to be submitted to arbitration. In other words, to reason that a no-contest clause can have the effect of limiting the arbitrators’ jurisdiction and that the arbitrators should decide whether this clause did so, would be to say that the parties delegated to the arbitrators the issue of the scope of the arbitration agreement. In the First Options decision (included supra in subsection II.1.c.i.), the U.S. Supreme Court ruled that such an interpretation of an arbitration agreement is basically implausible and should be disfavored. The Court said that unless the arbitration agreement is very clear on the point, it should not be interpreted as reserving to the arbitrators the decision concerning which issues are to be arbitrated. The authors tend to agree with this approach. Under it, one would not interpret a no contest clause as delegating to the arbitrators the responsibility for deciding which issues are within their jurisdiction.

Of course this means only that when the issue of the scope of the arbitration agreement arises before a court, the court should generally decide the question for itself. If the issue arises instead before the arbitrators, the well-established Kompetenz-Kompetenz principle provides that the arbitrators are competent to decide their own jurisdiction. The First Options approach merely says that if the parties are before a court, the court should require very explicit language of
delegation to the arbitrators, before concluding that the parties intended to take away from courts the question of the scope of the arbitration agreement.

Having set out a presumption favoring court interpretation of the scope of an arbitration agreement, the First Options case went on to adopt a very pro-arbitration rule for deciding the scope of the agreement. Under this rule any issue should be found within the scope of the agreement if there is a reasonable (sometimes U.S. courts even say “colorable”) argument that the parties intended to include it. Taking this approach to the Zegna case, one would reach the same result as did the Zegna court, either on the court’s reasoning, or on the reasoning advanced above in connection with Question 5 – that is, that the no contest clause goes to the merits of the dispute and not to the jurisdiction of the arbitral tribunal.

Note that in interpreting the no-contest clause the Zegna court expressly follows the U.S. presumption in favor of giving broad scope to an arbitration agreement: “Furthermore, the no-contest clause . . . does not clearly and unambiguously exclude the underlying dispute from the scope of the arbitration clause . . . [hence the court included it]” (See p. 201 of the opinion).

**Question 7.** The language of the Zegna clause seems broader than that in MEI v Ssangyong. The key broadening phrase is “or arising herefrom”. The rest of the Zegna language quoted (“Should there be any dispute between the parties with respect to the interpretation of this Agreement and Stipulation or with respect to the rights, duties and obligations undertaken by the parties herein, ...”) seems included in the Ssangyong phrase: “Any disputes arising hereunder ...”. The phrase added in Zegna, “or arising herefrom”, seems to widen the scope, though not as clearly or as broadly as would the language recommended above in the discussion of questions 1.-4.: “or relating to this agreement”. With the help of the First Options presumption mentioned in the discussion of Question 6 (issues colorably within the scope of the arbitration agreement should be submitted to arbitration, the claims for quantum meruit and conversion but perhaps not the claim for inducing breach of the agency agreement with Trac (which is “related to” the agreement to form a joint venture but does not seem to “arise herefrom”).

**Question 8.** We tend to agree with the Hart reasoning. Perhaps the outcome would be different if the settlement agreement were clearly intended to substitute for and completely replace the original agreement. In Hart, by contrast, the settlement agreement seems to contemplate the continued existence of the original contracts. It says: “... according to the original contracts.” As long as the settlement agreement did not completely substitute for and displace the original agreements, we believe a dispute concerning the interpretation of the settlement agreement should go to arbitration. Such a dispute would still be “in connection with the S/C”, which is language that we read to be essentially the same as, for example, “all issues relating to the sales agreement”.

**Questions 9 - 13.** We find the Becker case difficult to accept and plausible only if one reads the words “and about” to mean “and relating to” and only if one gives heavy weight to the U.S. presumption in favor of including an issue within the scope of an arbitration agreement. If the parties had entered a written renewal of the contract without including an arbitration clause—that is, without including a new
arbitration clause and without incorporating the prior clause by reference— and the claim alleged a breach of this new agreement (see Question 13.), we do not believe even the U.S. presumption could justify referring the parties to arbitration. The claim would be "about" the new agreement, not the old one.

Also, if the original contract had omitted the words “and about” (see Question 12.), we do not see how even the U.S. presumption would be sufficient to bring the dispute within the scope of the arbitration clause. Without “and about”, we would be left with the words “all disputes arising out of this agreement”. The Third Circuit seems to think that that language would suffice (“... we find it difficult to understand how a dispute ... did not ‘arise out of’ or is not ‘about’ the 1974 Agreement”) (emphasis added). We have difficulty with that conclusion. The dispute would “arise out of” the subsequent oral contract, not the original contract. Without the language “and about”, we see no basis for including disputes that merely “relate to” the original agreement. Even reading the word “about” to mean “relating to” is no small step.

We have difficulty seeing how the Third Circuit can characterize the dispute as “concerning the termination and renewal clause” (see Question 11), because we would read the word “concerning” in this context to mean “arising out of”. A more plausible interpretation appears to be that the dispute “arises out of” the alleged oral agreement, not the termination and renewal clause of the Distribution Agreement.

Finally, it seems only tangentially, if at all, relevant to the Third Circuit’s interpretation that the alleged promise to renew took place before the termination of the Distribution Agreement (see Question 10). Given the timing of the renewal negotiations and the alleged oral renewal agreement, it is perhaps easier to claim that the dispute concerning the oral agreement is also “about” (in the sense of “relates to”) the Distribution Agreement because the oral agreement was intended to trigger the renewal clause of the Distribution Agreement. Of course had the alleged oral agreement arisen after the termination of the Distribution Agreement, one could still have said that the dispute over reviving and renewing the prior agreement was “about” or “related to” that prior agreement.

**Question 14.** The considerations mentioned in the statement all speak in favor of a broad interpretation of the arbitration agreement. The reference to the commercial background of the parties and the commercial purpose of the arbitration clause reduces the importance of the particular wording. As para. 40 makes clear, the wording can limit the scope only if the parties’ intent to do so is unmistakeable. It is to be assumed that the parties want to agree on a “quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction”, which means that they wanted arbitration, as long as the language of the clause does not exclude such an interpretation.

**II.1.k. Non-Signatory Parties**

**Question 1.** Common law theories do not necessarily apply in cases pertaining to international commercial arbitration. The options contemplated by common law theories are relevant, however, outside the realm of common law, even though different conceptual terminology may be used. But does each of these common law theories comport well with the writing requirement?
Incorporation by Reference is probably the easiest to apply consistent with the writing requirement. According to the last sentence of the UNCITRAL Model Law: "The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract." The same (or a similar provision) is typical for modern arbitration rules as well.

Assumption is more difficult. Article 7(2) of the Model Law equates with an agreement in writing the situation in which there is "an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another". This form of "assumption" clearly involves writing from both sides. Other forms of assumption may not.

Agency leads us back to the question whether the agreement between the principal and the agent has to be in writing (in addition to the agreement between the agent and the other party to the arbitration).

Veil Piercing/Alter Ego and Estoppel Here we find little direct support in the wording of either the Model Law, or in the New York Convention. The common law theory is not without parallel, however, in international arbitration practice. The "group of companies" theory, in particular, has arisen in ICC arbitration cases and may have much in common with common law alter ego and estoppel theories. In these theories there is often an adequate writing. The question is: who are the parties to the writing? The Peterson Farms case introduces the "group of companies" theory.

Question 2. The coursebook provides some examples, and more examples can be found in arbitration practice. For instance, ICC arbitrators have on several occasions established jurisdiction towards non-signatories of the arbitration agreement based on the "group-of-companies" theory. In one case (Case No. 6519) the arbitrators assumed jurisdiction towards a non-signatory who played an active role in the negotiations and who was directly affected by the contract. In this case the non-signatory member of the group of companies (Respondent) was to receive shares and other benefits resulting from the transaction between its parent and a third party (the Claimant in the arbitration case).

Inclusion of non-signatories may prevent manipulation and may frustrate maneuvers aimed at sacrificing an empty shell instead of assuming liabilities; it may also create uncertainty.

Questions 2 and 3. Separability seems a good starting point for analyzing the Peterson decision. Whether C&M Group is a party to the arbitration agreement is a jurisdiction (arbitrability) question. If it is not a party, then its claims for damages (for losses connected with the sale of "parent" chickens and ultimately of "broiler chicks") could not be decided by the arbitral tribunal, and that part of the award should be set aside. If the C&M Group is not a party to the sale contract itself, then there would be no contractual duty owing from Peterson to the C&M Group. This second issue is a merits based question. Note that this is one of those cases in which the jurisdiction question overlaps considerably with the central issue on the merits, and in which decision of the jurisdiction issue (at least when jurisdiction is denied) settles the
merits question—at least, before this decision-making body, the arbitral tribunal. Might one also say that a potential or likely outcome on the merits might also have an influence on the jurisdiction analysis. We are inclined to answer in the affirmative, as the discussion below will indicate.

Note that the U.K. Commercial Court seems to have given no deference to the arbitral tribunal’s decision on jurisdiction (arbitrability). In other words, it decided de novo. This is certainly what a U.S. court would have done under First Options and also what a French court would have done (de novo review of arbitrability at Stage 3).

The arbitral tribunal’s decision on the merits, which treated the C&M Group as a party to the sale contract (a contract different from the arbitration agreement), would not have been subject to de novo review. Perhaps that part of the award could have been set aside on the procedural ground that the tribunal did not follow the parties’ choice of law instructions found in the agreement—namely, Arkansas law. The set-aside grounds for a home award in the U.K. are found in Section 68 of the English Arbitration Act (see Documents Supplement), and largely track the grounds set out in the New York Convention for refusing recognition and enforcement of a foreign award (and those of the UNCITRAL Model Law for setting aside a home award). Thus, the relevant provision would have been Section 68(2)(c) of the English Act (“failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties”). But of course the Commercial Court never reached a review of the award itself.

The choice of law question is central to the outcome before the tribunal and before the Commercial Court. The tribunal seems to have relied heavily on “separability” to conclude that the choice of Arkansas law in clause Clause 19 applied to the sale contract, but not to the arbitration clause (Clause 17). Thus, the tribunal concluded in paragraph 86:

“In the absence of any choice of law made by the parties with regards to the arbitration agreement itself, this Tribunal will determine this question in accordance with the common intent of the parties.”

Applying a strong version of separability, the tribunal was unwilling to allow the choice of law clause for the sale contract to have any effect on the arbitration clause. It thus treated the arbitration agreement as one for which the parties had failed to choose a law.

That is in line with the Sulamérica decision of the Court of Appeal discussed in Chapter II.1.d. The latter came, however, to the conclusion that—in the absence of special circumstances—the choice of a particular law for the main contract normally contains at least an implicit choice of law for the arbitration agreement. The tribunal chose instead to apply “the common intent of the parties”. If we understand this to mean the common and subjective intent of the parties in forming their agreement to arbitrate, then this would surely be a core notion in all contract law systems. So the tribunal could be understood to be applying the choice of law rule under which a rule of decision is applicable if it is common to all potentially applicable legal systems.
Difficulty arises, however, once the tribunal moves in its award from the “common intent of the parties” as just defined, to the “group of companies doctrine”. Note that in the quote from the Dow Chemical award in Question 2, the tribunal in that case grounded the doctrine in what it said was the “mutual intention of the parties”. If the doctrine is given a narrow meaning, it would seem to overlap with contract principles found in all legal systems—such as principles of agency and the subjective intent of the parties in the formation of the arbitration agreement. In fact the Peterson tribunal expressly claims that C&M acted as the agent for the C&M Group. But it does not try to justify this assertion with a specific reference to any evidence, and the U.K. Commercial court expressly rejects the agency theory as unsupported by any evidence.

Taking into account the tribunal’s award as a whole, one gets the impression that the tribunal had in mind a concept of the “group of companies” doctrine that overlaps with or reflects notions in common law of estoppel and in civil law of good faith, abuse of right, and venire contra factum proprium. For example the tribunal stressed that Peterson knew and understood the integrated nature of the C&M business—that is, that it knew that most of the poultry would be re-sold within the C&M group for further breeding before the end-product chicks would be sold to unrelated third parties. Thus, it understood that the whole C&M Group would be relying on Peterson to supply merchantable poultry. This is the kind of situation in which notions of equitable estoppel or good faith might hold Peterson accountable for the damages to all C&M Group companies, and correspondingly could require Peterson to treat the broader C&M Group companies as parties to the arbitration agreement.

It is not clear, however, that the U.K. Commercial Court understood the group of companies doctrine in these terms. It may well have equated the doctrine with a breathtakingly wide concept that sometimes is articulated as lifting the corporate veil whenever a group of companies is involved, without any unique or particular justification. Some of the language in the ICC Case No. 5103 award—dealing with the merits of that case—seems to express this expansive doctrine:

“The security of international commercial relations requires that account should be taken of its economic reality and that all the companies of the group should be held liable for all and all for one for the debts of which they either directly or indirectly have profited at this occasion.”

Returning to the U.K. Commercial Court’s reasoning, the court rejected the tribunal’s choice of law approach. Without much explanation, the Commercial Court reads the choice of Arkansas law in Clause 17 as automatically applying to the arbitration agreement in Clause 19. This is certainly an acceptable line of reasoning when, as here, the parties do not expressly provide for a different choice of law in the arbitration clause itself, but the court’s open acknowledgement that the arbitration agreement operated as a separate agreement—not just another clause in the contract—would have been welcome.

At the same time, when it comes to issues of estoppel and related concepts, some commentators claim that normal choice of law principles are too arbitrary and unpredictable—arguably because of the large number of potentially applicable
connecting factors that arise in an international arbitral context. Thus such commentators favor the applicability of “international principles of estoppel and good faith”—which is one way of understanding the group of companies doctrine. (See Gary Born, Vol 1, INTERNATIONAL COMMERCIAL ARBITRATION at 1499 (2d ed. 2014) “More difficult choice-of-law considerations arise with regard to issues of alter ego status, apparent authority and estoppel. In each of these cases, the better approach in international matters is to apply international principles.”)

Given the explicit choice of Arkansas law for the merits of the dispute—and the close link between lifting the corporate veil on the merits and, consequently, on jurisdiction—the Commercial Court’s decision in favor of Arkansas law is certainly defensible. Nevertheless, the Commercial Court’s peremptory rejection of the group of companies doctrine may have been based on a misunderstanding of it. That it would have rejected the broad version of the doctrine—one articulated in the broad terms used in the ICC Case No. 5103 award—is understandable. But notions of estoppel and good faith are not foreign to Arkansas and English law, and in most applications of the group of companies doctrine, it corresponds rather well with those notions.

Of course the Commercial Court explicitly takes up estoppel as a possible justification for the award and summarily rejects it. But the analysis offered is cursory, not penetrating. There is no discussion, for example, of Peterson’s being aware of and benefitting from the integrated nature of the C&M business operation. Separate corporations were used, but Peterson knew that non-merchantable poultry would cause serious loss of profits for all the C&M Group companies, and that they all relied on C&M’s supply of merchantable poultry. Of course, these comments go to the merits of the dispute and not to jurisdiction. But there are many instances in arbitration law where a non-signatory who takes advantage of—or who knowingly and intentionally benefits from—the substantive provisions of an agreement is also required to honor the arbitration clause. For example, when an insurance company is subrogated to an insured’s claim against a third party, generally the insurer is also held to the arbitration clause in the contract between the third party and the insured.

Concerning the link (mentioned at the end of Question 3) between Dallah and the group of companies doctrine, note that the discussion in the U.K Supreme Court and in the Paris Court of Appeal in Dallah focuses on the “common intention of the parties”—the very concept that the Peterson tribunal claims to be applying, in lieu of a choice of law rule, and that leads it to the group of companies doctrine. And the thrust of the Paris Court of Appeal opinion—though based on the formal principle of the “common intent of the parties”—seems mostly to reflect notions of good faith (or common law equitable estoppel). Thus we can see a clear link in the case decisions between “common intent of the parties” and the group of companies doctrine on one hand, and the common law estoppel and civil law good faith doctrines, on the other.

One might want to raise with the students whether it would not have been possible for C&M to present the “parent losses” as its own damages that then would have been covered by the arbitration clause along with the “grandparent losses”. It is not clear why the other companies from the C&M group did not claim damages for the “defective” male “parent” birds from C&M, which would have resulted in direct damages for C&M that may have been recoverable from Peterson Farm (See also the discussion in Question 5 below, in which we explore further some of the
difficulties entailed in such an approach).

**Question 4.** The question is intended to stress the distinction discussed above in Questions 2 and 3 between jurisdiction (based on the parties to the arbitration agreement) and the merits (based on the parties to the underlying contract). As we will see in the *Dallah* cases, French courts apply a concept of transnational law to determine the parties to an international arbitration agreement. This is articulated as turning on the “common intent of the parties”—the very concept that the *Peterson* arbitral tribunal asserts it is applying. Thus, if the parties chose French law as applicable to the arbitration agreement, but Arkansas law as governing the sales contract, then a tribunal (or reviewing court) might well find the C& M Group to be a party to the arbitration agreement but not a party to the sale contract.

**Question 5.** If a court finds good arbitral jurisdiction and sends the parties to arbitration, but the arbitrators reach a different decision on jurisdiction and refuse to proceed, the parties are left in a difficult position. We have discussed similar patterns before in these materials. If the claimant were unable to have the award declining jurisdiction annulled, one solution would be for the claimant to seise a national court and argue that the valid and applicable arbitration agreement had been frustrated by the arbitrators’ refusal to take jurisdiction, thus the national court’s jurisdiction would be restored.

Note that in the *C&M* pattern, the C&M Group companies that formally purchased Peterson poultry from C&M, will have no incentive actually to recover damages from C&M for their losses, since they are all in the same business group. For that reason, all the group companies want to collect from Peterson.

One might wonder, however, whether C&M would have been well advised to bring an alternative claim against Peterson, one that would have asked for compensation from Peterson for the damages C&M would have been liable to pay to the other C&M companies because of the defective poultry. But of course if the C&M Group is not a party to the arbitration agreement, then the claims by C&M against Peterson and by C&M Group against C&M could not have been decided by the same decision-maker. Inconsistencies (and inefficiencies) stemming from having two different decision making processes is one reason, of course, why C&M wanted to include the C&M Group damages in the arbitration claim against Peterson.

An alternative might have been for C&M Group to sue C&M to establish liability and damages for the defective poultry first, and then for C&M to have begun arbitration against Peterson claiming for its own losses and for its liability to C&M Group for the Group’s losses. But again this would have involved delay and the inefficiency of two different dispute procedures. Moreover, for the C&M Group v. C&M litigation to be more than a sham, C&M would have had to defend in good faith, and would have been forced to develop arguments against liability that could have benefited Peterson in the anticipated subsequent case that C&M would subsequently be expected to bring against Peterson to recoup the damages actually paid, or for which it would be found liable to pay, to C&M Group.

More realistically, rather than litigate, C&M would have favored a settlement of C&M Group’s claim against it. Depending on the law applicable to the merits and
therefore the calculation of damages, a mere claim by the C&M Group companies or a claim and a payment made by C&M based on a settlement may have been sufficient to create a damage claim by C&M against Peterson in the arbitration. However, the amount and good faith nature of C&M Group’s claim, or the settlement, would have required verification—if contested—in C&M’s arbitration with Peterson.

Dallah Real Estate

Questions 1.- 4. Before the UK courts Dallah brought an action to recognize or enforce a foreign arbitral award. As the award was made in Paris, from the UK perspective it was a foreign award. Section 103 (2)(b) of the 1996 English Arbitration Act (implementing NY Convention Article V(1)(a)) provides in the case of a foreign award:

“(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
    * * *
(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.”

Again, because the award was made in Paris (and the parties had not chosen a law for the arbitration agreement), French arbitration law governed whether the arbitration agreement was valid. We learn in the opinion that French law follows a unique theory, under which an international arbitration agreement is considered to be governed by “transnational law” and not by the national law of any particular country. The principal tenet of that “transnational law” is that the existence and validity of an international arbitration agreement depends upon the “common intention of the parties”—something of a “term of art” in French law. We will return in a moment to what this concept seems to mean.

Given that under Section 103(2)(b) of the English Arbitration Act (Implementing NY Convention Article V(1)(a)) validity of the arbitration agreement would be determined by French law, Dallah presumably decided to rely on the French law doctrine of “common intent of the parties”, instead of the alter ego theory, which is not known in French law—at least not under that name. A leading scholar, frequent arbitrator, and emeritus professor from the University of Muenster, Otto Sandrock, points out in an article in a forthcoming issue of the American Review of International Arbitration (“The U.K. Supreme Court Misses the Point: Estoppel Applies Without Common Intention”) that the French doctrine of the “common intent of the parties” as applied in some contexts actually has a close affinity with U.S. alter ego and equitable estoppel theories. He also argues that in Dallah the UK Supreme Court failed to understand this, and thus applied the “common intent of the parties” doctrine as if it meant only the actual, subjective intent of the parties, either expressed or objectively derivable from the parties’ actions.

Recall that in the Peterson case the arbitral tribunal also decided to apply the “common intent of the parties” concept to the interpretation of the arbitration agreement—in that case because there was no specific choice of law in the arbitration agreement itself (although there was a choice of law clause in the sale agreement). The tribunal could have applied an appropriate choice of law rule that
would have guided it to some particular national law on contract formation. It opted instead to apply a general body of substantive transnational law. This seems to have been the rationale of the *Peterson* tribunal’s choice of the “common intent of the parities” concept, just as it seems to underlie the French courts’ novel theory that a special anational body of autonomous law must be applied to determine the validity of an international arbitration agreement. In both cases the motive appears to have been a pro-arbitration one—a desire to advance the cause of arbitration by reaching results consistent with commercial reality and good faith, rather than technical rules of contract formation in a particular national legal system.

Note that the UK court in *Peterson* takes a different approach. It applies national law—Arkansas law (assumed to be the same as UK law on the relevant issues)—because the parties expressly chose that law to govern their sale agreement. The *Peterson* court seems to slide easily from the choice of Arkansas law for the sale agreement to its application to the separable arbitration clause. Applying Arkansas law, it rejected the “group of companies theory”, that the tribunal had applied on the basis that it derived from the “common intent of the parties” and, as such, was a part of transnational law. Indeed, as we have already noted, the narrower understanding of the “group of companies” doctrine—which is arguably what the tribunal had in mind—overlaps considerably with equitable estoppel. Thus, “common intent of the parties” and “group of companies theory” (both more commonly used by civil law jurists) and “equitable estoppel” (more commonly used by common-law jurists) may mean roughly the same thing.

All three cases, *Peterson* and the two *Dallah* cases, arise at Stage 3—enforcing the award. And in each one the courts show no deference to the decision of the arbitral tribunal concerning its jurisdiction. This reflects the de novo approach to deciding arbitrability at Stage 3 that is followed in France and in the US—in the latter, where the parties have not expressly empowered the arbitral tribunal to decide arbitrability. At Stage 1 in these cases a French court would presumably have deferred to the arbitral tribunal, because it was not manifest in each case that the non-signatory party was not a party to the arbitration agreement. A US court (and presumably a UK court) would have decided the arbitrability issue itself at Stage 1.

**Questions 5 and 6.** One might approach the two *Dallah* decisions and their conflicting outcomes as reflecting two different assessments of the facts by the two courts (the UK Supreme Court and the Court of Appeal of Paris). The UK Court seems to conclude that in sending the January 19 letter (and signing it only as “Secretary”) asserting that Dallah had repudiated the contract, Mr. Lutfullah Mufti was acting as Secretary of the Trust (or at least thought he was, since at that date the Trust was no longer in existence). The Paris Court of Appeal, on the other hand, seems to conclude that Mr. Lutfullah Mufti sent the January 19 letter in his capacity as Secretary of the Ministry of Religious Affairs—especially since he used the Ministry’s letterhead stationery.

In Professor Sandrock’s view (see the discussion above under Questions 1-4), however, the conflicting outcomes are instead attributable to the UK Supreme Court’s misunderstanding of what the French law concept “common intent of the parties” really means. He believes the UK Supreme Court understood the “common intent of the parties” concept in a literal sense and thus searched for the subjective intent of the parties. In contrast, he argues, the Paris Court of Appeal decision shows
that French courts actually apply the doctrine in a broader sense to reach results that resemble closely those that would be reached in US law under the alter ego theory (the very theory Dallah urged before the arbitrators). The French court concludes that Mr. Lutfullah Mufti sent his January 19 letter as Secretary of the Ministry of Religious Affairs. It reasons that this action formed a pattern (in the light of related facts—for example, that two other Ministry officials with no formal connection to the Trust had intervened in this project on other occasions) demonstrating that the Pakistani Government, which had originally negotiated the deal, was all along the real party acting in place of the Trust and controlling the business project. The Trust was just a figurehead; its existence as a separate entity was not truly respected. Again, one can see in the French court reasoning elements of alter ego theory, equitable estoppel, and good faith (sometimes articulated as abus de droit [abuse of right] or venire contra factum proprium (no one may act in contradiction to his own previous conduct).

The UK trial court judge, Aikens J, actually acknowledges that the “common intent of the parties” doctrine requires that “good faith” be taken into account in assessing the facts and interpreting the parties’ conduct. From a good faith perspective, it is not difficult to side with the French court decision. The Pakistani government first negotiated all the terms of the arrangement, then created a Trust to be the formal party entering into the agreement, including the arbitration clause, and then by its own willful act of failing to continue the necessary proclamation allowed the Trust to go out of existence, thus depriving Dallah of a formal contractual party against whom it could arbitrate its dispute. This is hardly good faith behavior.

Question 7. The authors believe that the Southern Pacific Properties case, taken up below in section V.2.d.i., is distinguishable from Dallah, and that the Paris Court of Appeal did not act inconsistently in the two cases. In the Southern Pacific Properties case the government entity, EGOTH, was the legal entity that negotiated and signed the agreement envisioning the Pyramids project, which ultimately fell through. EGOTH was not a figurehead fronting for and controlled by the Government of Egypt, and there were no officials with overlapping authority in EGOTH and the Ministry of Tourism. The Egyptian Minister of Tourism merely added at the end of the contract his notation: “approved, agreed, and ratified”. Under Egyptian law the Minister was required to give administrative approval to projects of this kind. Thus, his actions were consistent with this role and were not part of a pattern of disregarding the separate legal structure of EGOTH. We do not believe that concepts of alter ego or equitable estoppel would have required a different result.

Review Problem (Sale of lumber)

A. Before a Court

These facts raise the issue of the negative consequence of the Kompetenz-Kompetenzz doctrine in French law. The parties in the action before the Paris TGI are two enterprises, Bois et Meubles and Lumber Mills of Budapest. Are they parties to an arbitration agreement under which they agreed to submit their sale dispute to arbitration? And more directly to the point, who should decide this issue, the Paris TGI or arbitrators?

Under French law, discussed in the Jules Verne case, supra subsec.
II.1.c.ii., and codified in Article 1448 of the French Code of Civil Procedure (as amended in 2011), a French court must defer to the arbitrators in two situations: (1) if an arbitral tribunal is already seized of the matter and (2) if the purported arbitration agreement is not “manifestly null”. On the facts given, no arbitration tribunal has been seized of the dispute, so analysis must focus on the second condition.

The authors believe that it is manifestly clear that no arbitration agreement came into existence between the two enterprises. The purported agreement does not even mention the enterprise, Lumber Mills of Budapest. Instead, it seems to be an “exclusive agency” agreement between Bois et Meubles, represented by Bucheron, on one side, and the individuals Kossuth and Szasz, on the other. Though the agreement mentions that Bucheron is acting for Bois et Meubles, it says nothing about Kossuth and Szasz acting for Lumber Mills. On its face, the agreement seems to have nothing to do with sales of timber by Lumber Mills to Bois et Meubles. It is true that “trade in timber” is listed as one of the “Fields of Activity” of the contract, but, as mentioned, the agreement says nothing about Lumber Mills of Budapest participating in that trade.

Were it at least reasonably debatable or controversial whether Lumber Mills of Budapest were a party to the agreement, we believe the result would be different. Under the French doctrine of the negative consequences of Kompetenz-Kompetenz it would no longer be manifest that no arbitration agreement came into existence, and thus the dispute would have to be sent to arbitrators for them to decide. We do not believe that the absence of the word “arbitration” and use of the language “the selected court, which operates next to the Chamber of Commerce in Budapest” is decisive or even particularly probative. The central problem for us is that on the face of the “framework” agreement, Lumber Mills of Budapest does not appear to be a party.

B. Before Arbitrators

On these facts there is no particular reason why the French doctrine of the negative consequences of Kompetenz-Kompetenz should come into play. That doctrine only determines in the first instance whether a court or the arbitrators are to decide the jurisdiction question. Here the French courts have decided (before the formation of the arbitral tribunal), and assuming that they have correctly applied French law, we can conclude that there is some difficulty in deciding whether an arbitration agreement binding on the parties has come into existence—in other words, a negative answer is not manifest. The tribunal should presumably allow each side to submit evidence and written and oral arguments on the question whether Lumber Mills was a party to the “framework” agreement. Because Bois et Meubles is refusing to participate, presumably the evidence and arguments will come only from Lumber Mills.

If the arbitrators conclude that Lumber Mills is a party, there would be the further issue of whether the framework agreement in fact provided for arbitration before the Hungarian Court of Arbitration attached to the Hungarian Chamber of Commerce. Again the parties could produce evidence and arguments on that point for the arbitrators to decide, and again, it would presumably be only Lumber Mills who would do so. On the interpretation of the language: “the selected court, which
operates next to the Chamber of Commerce in Budapest", it would not seem far-fetched for the arbitrators to conclude that the parties did, in fact, mean the Court of Arbitration attached to the Hungarian Chamber of Commerce.

II.1.I. Split Arbitration Clauses

Question 2. It is rather clear that the arbitration agreement was seriously defective. The agreement of the parties was afflicted by possible misunderstandings and oversights. One line of discussion would be to follow-up on Astra's argument that when the parties said “Chamber of Commerce in New York” they actually meant the ICC, which has an office in New York. Was this argument helpful? Was it just a sign of desperation? Or was it perhaps even counter-productive? The motivation for the argument was obviously to shift competence to an existing institution from one that did not exist. There was hardly any factual basis. However, for this proposed shift, one could even observe that Astra's contention has opened the gates for a counter-argument: Harwyn could have said that if Astra believed they agreed on ICC arbitration while Harwyn believed they agreed to submit their dispute to the Chamber of Commerce in New York, they never actually had a meeting of minds.

Most legal systems provide for court intervention (appointment by court) when party appointment does not work. Paragraph 5 of the U.S. Arbitration Act offers a thorough list of contingencies that might trigger court intervention, but all the situations contemplated thereunder are situations in which the problem emerges with respect to the appointment of an arbitrator. In our case the problem is with the arbitral institution. To extend Paragraph 5 to situations where the designation of an institution yields an impasse is certainly in the spirit of pro-arbitration policies. The parties obviously agreed to arbitrate. It is not much less obvious that their agreement was flawed. According to the New York Convention, a court of a Contracting State is supposed to refer a case to arbitration if an arbitration agreement exists and the court does not find that “the said agreement is null and void, inoperative or incapable of being performed”. The options would be to apply - by analogy - Paragraph 5 to situations in which the institution chosen (rather than the arbitrator) cannot perform its function - or to declare that under the given circumstances the arbitration agreement is inoperative or incapable of being performed.

Question 3. Split arbitration clauses that use as a criterion whether a party is claimant or respondent in the proceedings are often criticized for failure to give a clear-cut answer to the question of where counterclaims belong. If one follows the idea of balance (I must go to your place if I am the claimant, you must come to my place if you are the claimant), one might conclude that if Harwyn counterclaims, he will have to go to Belgrade. This solution is not in line, however, with another logic, that of procedural consistency and efficiency. If the claim and the counterclaim were adjudicated by different tribunals, conflicting conclusions might very well be reached in the very same fact-law pattern. In the countries of the CMEA (a now defunct economic integration agreement that included the Soviet Union and other East European socialist countries with the exception of Yugoslavia) split arbitration clauses represented the prevailing practice, and hence the counterclaim issue arose with quite some frequency. The 1988 Rules (General Conditions of Delivery) adopted a more precise wording stating that counterclaims will be handled by the
same court of arbitration that has jurisdiction over the claim. This is logical, but not obvious. If one cannot avoid a split arbitration clause, one should try to specify which tribunal is to entertain counterclaims.

**Question 4.** Students will probably notice that one of the problems with this arbitration clause lies in the assumption that competent courts in Heidelberg have some arbitration rules and may proceed in accordance with those rules. This false assumption was not relevant, however, given that the Heidelberg party was the claimant, and thus part b) (rather than part a) of the arbitration clause was put in issue.

The designation of the arbitral institution in part b) is adequate. This time, court and arbitration are not confounded. The problem lies in the language used; it is a problem of poor drafting. In all probability the parties wanted to use a party's position in the arbitral claim as the decisive criterion (If the Yugoslav party were suing, he would have to go to Heidelberg; if the German party were the Claimant, he would have to bring his claim to the Court of Arbitration in Belgrade.) But instead of distinguishing cases in which one or the other party (German lessor or Yugoslav lessee) is the Claimant, the arbitration clause distinguished between cases in which the lessor or the lessee was liable. We are back to the question of what latitude arbitrators and courts have to protect the apparent basic understanding of the parties to arbitrate even when the actual wording the parties used to express their understanding poses difficulties.

**Questions 5 - 7.** Clause 12 of the Contract was hardly meant to be an agreement to agree. There are no criteria stated, however, for selecting among the three institutions mentioned. The GDR arbitrators stated that this was an “optional clause”. But who had the option? The wording of the arbitration agreement itself offered no explicit guidance. The GDR arbitrators concluded that the option belonged to the Plaintiff. Students may be asked whether they see any support for this conclusion in the wording of the arbitration agreement. The authors do not see much support. Perhaps one could argue that if an agreement on one arbitral institution means in practice that Claimant may address this institution if a dispute emerges that cannot be settled amicably, then an agreement on three arbitral institutions means that Claimant may address any of these institutions when a dispute emerges that cannot be settled amicably.

Another finding of the GDR arbitrators is that since the New York Convention and the European Convention do not provide for “two-stage arbitration agreements”, Clause 12 is not a preliminary contract (an agreement to agree). Rather, it is a “single-stage”, complete arbitration clause. It is true that neither the New York Convention nor other pertinent international agreements envisage “two-stage” arbitration agreements. But does this mean that agreements to agree are disallowed? And even if agreements to agree were disallowed, how can an understanding that stops short of providing for a fully articulated solution be treated as a definitive agreement?

But one can also pursue another line of argument. Suppose the wording of the arbitration clause fails to designate the party who is entitled to choose among the three options. This might mean that Respondent can veto a choice exercised unilaterally by Claimant. Can Respondent veto all choices?
Another line of discussion might follow from the question of what you would advise Claimant to do to thwart endless obstruction by Respondent and to move definitively to arbitration. (Proposing that Respondent choose from among the three institutions could be one solution. If Respondent fails to answer, or refuses to make a choice, Claimant might be on firmer ground in selecting the institution himself.)

**Question 8.** The view of the Russian Court has been followed by courts in other jurisdictions, such as Bulgaria and France. In Bulgaria in a September 2, 2012 decision, the Supreme Court struck down a unilateral option clause in a loan agreement that gave the lender alone a choice between referring disputes to courts or arbitration. In France, in the *Rothschild* case, the Cour de Cassation held on September 26, 2012 that an agreement to refer all disputes to Luxemburg courts, but allowing one of the parties (a bank) the unilateral option to refer disputes to other courts, was ineffective, because it did not comply with the requirements of Article 23 of the Brussels I Regulation as to specificity.

That one party is given preferred treatment in such asymmetrical arbitration clauses is obvious, and if one adopts a strict position on equal treatment, the Russian court’s position seems initially to be convincing.

One has to keep in mind, however, that such clauses are often the result of lengthy discussions between the parties. Often the party having the choice under the clause had to give in on one or more other issues in return. In such cases insistence on a formal equality will affect the contractual equilibrium agreed between the parties to the detriment of one party.

There may be good reasons for one party to insist on the option of going to the state courts instead of arbitration. It may be an “easy” case (e.g. default on the repayment of a loan that was obviously granted) that can be dealt with more time and cost efficiently in the local courts at the defendant’s domicile where there would be no need for any additional action to have an award declared enforceable. Also a party may be interested in the publicity associated with a court case or in the creation of a binding precedent for comparable actions.

**II.1.m. Ad Hoc Arbitration in China**

**Question 1.** A historical explanation linked to China’s evolution from a planned economy without an independent judiciary to a more market oriented economy with greater respect for the rule of law may go a long way toward explaining China’s hostility to ad hoc arbitration. Arbitration institutions in China, like CIETAC, have evolved from an earlier period in which they were subject to extensive government control, to their modern status as relatively independent, non-governmental institutions. One explanation, then, for the unwillingness of PRC law to allow ad hoc arbitration is perhaps that it is a holdover from the earlier historical period in which the government exercised full control over all adjudicatory processes. For government oversight to be possible, arbitration must be under the supervision of an institution. Hence institutional arbitration was (and remains) required. As the discussion immediately below in Question 2 points out, the Supreme People’s Court has recognized relatively easy ways to contract around the
PRC law’s hostility to ad hoc arbitration, a point that reinforces the impression that the constraint is something of an anachronism. At the same time, it is still part of PRC law and can function as a serious pitfall for the uninformed and unwary.

**Question 2.** The decision of the Supreme People’s Court (the highest court in mainland China) makes clear that the validity of an arbitration clause will be governed by (1) the law the parties choose for that purpose, or (2) if the parties do not reach agreement on the applicable law, then by the law of the seat. If there is neither a chosen law nor a chosen seat, then the law of the forum will be applied. It is this last case that is before the Supreme People’s Court in the interpretive decision it forwards to the Higher People’s Court of Sichuan Province. In the decision the Court concludes that forum law, PRC law, applies and that—since the parties have not specified an arbitration institution to administer the arbitration—the arbitration agreement is invalid and the PRC first instance court retains jurisdiction to hear the case.

Thus, the general counsel should advise the CEO that there are two options for entering an ad hoc arbitration agreement that will be recognized and enforced as valid in a PRC court. The first option would be to choose expressly as the governing law on the validity of the arbitration agreement the arbitration law of a country that allows ad hoc arbitration. Essentially, this would seem to mean any law other than PRC law, since, so far as the authors have been able to determine, no other national arbitration law requires institutional arbitration. One should probably be careful to draft the arbitration clause as including the parties’ agreement on the governing law for the interpretation and validity of the arbitration agreement itself and not just for the underlying contract. As we have seen supra in the Peterson case, at II.1.g., decision makers—in Peterson it was the arbitral tribunal—will not always conclude that a choice of law provision drafted for the larger container contract applies, at the same time, as the governing law on the interpretation and validity of the “separable” arbitration agreement.

A second option is to leave the governing law of the arbitration agreement undetermined but to place the seat in a New York Convention country whose arbitration law allows ad hoc arbitration. Again this probably means any New York Convention jurisdiction—other than the PRC.

Given the availability of these alternatives for entering an ad hoc arbitration agreement that a PRC court will enforce as valid, one must wonder why the PRC arbitration law itself retains a ban on ad hoc arbitration. As we noted above in discussing Question 1, as a practical matter the provision seems to operate as a potential pitfall for the uninformed and unwary.

For a general discussion of these issues, see an article by Tietie (Frank) Zhang, “Enforceability of Ad Hoc Arbitration Agreements in China—China’s Incomplete Ad Hoc Arbitration System” to be published in Volume 46 of the Cornell International Law Journal.

**II.1.n. Changed Circumstances**

**Questions 1 and 2.** The effect of major changes in the territorial sovereignty and legal environment within which an arbitral institution is situated is
an issue that has gained very significant practical importance over the last decade. These are the years during which the breakup of the Soviet Union, of Yugoslavia, and of Czechoslovakia took place, and this is the period within which Hong Kong became part of the P.R. of China. A problem that had previously been articulated only in hypotheticals, became a matter of everyday life. Is an agreement submitting future disputes to the Court of Arbitration at the USSR Chamber of Commerce and Industry still valid after the USSR ceases to exist? (The Court of Arbitration continued to operate with the same staff and in the same building, but under a different name: International Commercial Court of Arbitration at the Russian Chamber of Commerce and Industry.)

In the case decided by the German court in Kassel the name of the institution actually did not change. It was—and remained—Foreign Trade Court of Arbitration at the Yugoslav Chamber of Commerce. In 1993, however, “Yugoslavia” was not the country it was when the Slovenian and German parties signed their arbitration agreement. Most importantly, Slovenia was no longer a part of Yugoslavia. Does this matter?

Let us complicate matters further. Chambers of commerce sometimes change their name. So do countries. After 1989, most “people’s republics” in Eastern Europe simply became republics. Sri Lanka and Myanmar are also new names of (relatively) old states. Should the name of an institution or of the country where it is situated matter?

One could reason that because arbitral institutions are not governmental entities, a change of sovereignty should not matter, and considerations of state succession are not pertinent. It matters, however, whether the changes have a relevant impact on the position of the parties and on their bargain. At the time the Slovenian and German parties agreed to arbitrate, Belgrade was “home ground” for the Slovenian party, because it was in its home country. This has changed. But is the change relevant? Is “home ground” a legitimate bargained-for advantage, the loss of which would upset the bargain? How about a detour of 100 kilometers (about 60 miles)?

If any and all changes of convenience or inconvenience constitute valid grounds for challenging the arbitration agreement, the stability of the arbitration process could be severely undermined.

In the Landgericht Kassel case the atmosphere of hostilities was also taken into account. It is possible that someone in a Belgrade hotel, guided by hostility, would have assigned an unpleasant room to the Slovenians. More serious inconveniences could also be imagined. This does not necessarily mean, however, that the Belgrade arbitrators, some of them excellent lawyers with Western education, would have treated the parties differently in 1992 as compared with 1988.

The burden of proof should be on the party who challenges the arbitration agreement.

Questions 3 and 4. There was a war between Serb and Croat forces. It lasted about 5 years, between 1991 and 1995. One could make a convincing case that during this period one could not expect a Croatian party to go to Belgrade. After
1994, the situation would be much less clear. The Croatian party would have to prove that some material circumstances had changed.

The authors are aware of an ICC case in which a U.S. party and a Yugoslav party agreed to settle their disputes by ICC arbitration. They designated Belgrade as the site of any proceedings. The case began in April 1999, when Belgrade was bombed by NATO. The U.S. party moved to change the site. No decision was made by mid-August. There had been no bombing after mid-June. The NATO campaign ended with a settlement on Kosovo. Is Belgrade a possible site today? (You can consider “today” as being either the summer of 2000 – when the issue arose - or whenever you read this.)

Outside of the context of war and hostilities, it is difficult to characterize as a critical change of circumstances a change of sovereignty (as a result of which the arbitral institution is no longer in the home country of one of the parties to the dispute). The rebus sic stantibus argument probably needs a stronger foothold.

**Question 5.** A different pool of potential arbitrators may represent a change that could justify the rebus sic stantibus argument. Of course, this is a sensitive matter. Institutions that have a list of arbitrators change the list from time to time. Changes may very well occur between the making of the arbitration agreement and the presentation of the dispute to the tribunal. In such a case, at the time of arbitration, the parties will have a list of persons that is different from the roster that existed at the time of the drafting of the arbitration clause. We believe that this falls short of justifying a challenge to the arbitration agreement. Students should also be reminded that most lists today are open lists - parties may nominate arbitrators not on the list if they wish.

What we have in the example case, however, is not a simple updating of the list, but the creeping disappearance of a category of arbitrators. The eliminated arbitrators would have been in typical cases the prime candidates for selection by parties from country X. As the list is neither closed nor is it mandatory to appoint a party-appointed arbitrator from the list, the selection of co-arbitrators would not have been particularly affected by this change. The problem is, however, that the presiding arbitrator can only be from the list. In that situation we are brought closer to a valid argument based on changed circumstances. Whether it is successful or not depends then to a certain extent on the previous practice of the institution. If it has already at the time of contract drafting been the practice of the institution that the chairman was not to be of the nationality of one of the parties, the disappearance of arbitrators from country X from the list has not changed very much. In such cases a rebus sic stantibus argument could not be advanced very persuasively.

**Question 6.** A change of the site of the institution is unlikely to satisfy the changed circumstances test. With regard to the ICC, this is quite obvious. Within the present setting, the location of hearings is not necessarily in Paris, but is “fixed by the Court unless agreed upon by the parties.” If the Court were to move to Amsterdam, this would not necessarily affect the choice of the site, let alone the basic bargain of the parties.

Other arbitral institutions typically proceed in the place where the institution is situated - but the rules usually allow the parties by agreement to choose a different
location for the proceedings. In the absence of a specific party agreement on the site of the proceedings, a change of site of the institution will yield an outcome not in accordance with party expectations, but this would normally not amount to a valid ground for challenging the arbitration agreement. Most arbitral institutions are tied to one country (usually linked to a national chamber of commerce), thus a change of the seat of the institution will be a change of site within the same country. It is conceivable that an international arbitral institution (like the ICC or the WIPO) could change its seat--and even locate in a different country - but this would not necessarily have an impact on the site of the arbitration proceedings. (Like the ICC Rules, the WIPO Rules have not established a presumption in favor of the seat of the institution. Instead, according to Article 39 of the WIPO Rules, the Geneva based Center will decide on the place of arbitration, unless otherwise agreed by the parties.)

**Question 7.** The two German decisions are probably not incompatible. The Hamm decision merely states that the arbitration agreement is not affected by change of sovereignty. In other words, it held that a change of sovereignty does not necessarily affect the identity of the institution. Is the Kassel decision based on the change of sovereignty argument? A careful reading of the arguments of the court seems to show that it gave more weight to changed circumstances. Another difference is that in the Kassel case, the problem emerged before arbitration; the court was invited to decide whether a stay of court proceedings in deference to arbitration was justified. In the Hamm case, arbitration (before the Belgrade Tribunal) had already taken place; the question was whether the award should be recognized. At this point - once the sovereignty argument is out of way - the changed circumstances argument becomes redundant. There is no longer a reason for contemplating problems that could affect the arbitration process because of changed circumstances; the question is reduced to the issue of whether due process principles were in fact observed.

**Question 8.** In the Hong Kong case, the change of sovereignty argument might only be convincing if one were to assume that under the given circumstances the incorporation of a specific territory under the sovereignty of another state results in a private arbitral institution becoming a state institution (which might be considered to be a radical change of the original bargain). But this is not an easy assumption to make. Within the PRC the state has a wide role, but this is still not a sufficient ground for concluding that the very nature of a Hong Kong arbitral institution must necessarily have changed once Hong Kong became part of China. The fifty-year special status Hong Kong is supposed to enjoy makes the argument even less persuasive.

**II.2. Limits on Arbitrability**

**II.2.a. Note**

**II.2.b. Statutory Definitions of Arbitrability and Their Interpretation**

**Question 1.** The question is designed to sensitize students to the choice of law issue, which the materials address more fully and directly in subsection II.2.d. The *Fincantieri* court in paragraph 13 applies Italian law. It does so because the issue concerns the competence of an Italian court to hear the case. The court
says that such questions must be decided by Italian law. Without elaborating, the
court says its result is consistent with the “principles” expressed in Articles II and V
of the New York Convention. Article V(2)(a) of the New York Convention—which
concerns enforcement of awards—expressly refers the question of arbitrability to the
law of the enforcing state. But the Fincantieri case arises on enforcement of the
arbitral agreement, not the award. Hence, Article V is not directly applicable.
Perhaps for that reason the Italian court speaks of the “principle” embodied in Article
V. Presumably the “principle” referred to is the principle of choosing the lex fori.

Article II of the New York Convention, dealing with enforcement of the
agreement, does not expressly provide a choice of law rule for the issue of
arbitrability or even for the broader issue of validity of the arbitration agreement.
Hence the Italian court’s reference to Article II of the New York Convention for
support is somewhat obscure. Of course Article II is addressed to the obligation of a
court seized with an action in a matter governed by an arbitration agreement to refer
the parties to arbitration – unless, among other reasons, the matter is non-
arbitrable. Hence one could perhaps see in this pattern the issue that the Finantieri
court saw – that is, the issue of the competence of an Italian court to entertain a
case. Hence one might see in Article II of the New York Convention an implicit
understanding that a contracting party’s courts would refer to forum law to decide
the competence of its courts to adjudicate a dispute.

There are other possibilities. (1) If the arbitrability issue were characterized as
procedural, a court might readily apply its own lex fori as the law applicable to all
procedural questions. This is perhaps one way of interpreting the approach actually
taken by the Finantieri court. (2) On the other hand a court could reason that
“arbitrability” is just one aspect of “validity” of the arbitration agreement. Hence, a
court could apply its general choice of law rules for deciding the validity of a contract,
including, perhaps, a role for the party autonomy principle.

Questions 2 and 5. The Finantieri court’s interpretation of Article 806 of the
Italian Code of Civil Procedure gives considerable scope to the non-arbitrability
doctrine. Under the Finantieri interpretation, it would seem that any dispute that
could plausibly involve a question of mandatory law should not be sent to arbitration.
This is because in any such dispute the arbitrators could—and the emphasis should
be on could—reach a result inconsistent with the proper application and interpretation
of the mandatory law. The Finantieri court seems to say that because of this
possibility, such cases fall within Article 806 and should not be sent to arbitration.
This is not an unreasonable interpretation of Article 806, but at the same time it is
not one that particularly favors arbitration.

As Question 5 notes, the Court of Appeal of Bologna in the Coveme case
gave a different interpretation to Article 806 in allowing arbitration of an antitrust
issue. The reasoning of the Coveme court, reproduced in the excerpt in question 5,
is not easy to follow. It helps in reading the Coveme excerpt to be familiar with the
Italian Supreme Court decision of May 19, 1989, which the Coveme court was
presumably applying.

The Italian Supreme Court decision of 19 May, 1989 (no. 2406) involved
scrutiny of an arbitral award. Epargne had agreed to sell its business to Quaker,
including know-how and an important trademark. In return, Quaker had agreed to pay royalties to Epargne. Under Italian mandatory law, it is forbidden to sell a trademark without also selling the firm (or branch of the firm) that makes the product to which the trademark attaches.

The agreement was not carried out, and the parties went to arbitration over the resulting dispute. Epargne asked for execution of the agreement and payment of royalties; Quaker sought to avoid performance under the agreement, but without challenging the agreement's original validity. The arbitrators, considering the validity of the agreement not in question, rendered an award in favor of Epargne and ordered the payment of royalties. Quaker sought to set aside the award on the ground that the arbitration agreement was invalid.

When the case reached the Italian Supreme Court, it ruled as follows. First, the arbitration clause would be invalid, if two conditions were met: (i) the container contract, in which it was found, actually transferred rights that the law prohibited to be transferred (diritti indisponibili) and (ii) any party settlement or arbitral award concerning the contract actually transferred a non-disposable right (diritto indisponibile). Second, the arbitration clause would be invalid if it expressly authorized the arbitrators to decide whether the container contract transferred a non-disposable right (diritto indisponibile) and hence was invalid. Because the award merely ordered the payment of royalties and because the arbitration clause was of a generic, non-specific nature, the court found the arbitration agreement valid. The court also noted that if arbitration proceeds under a valid, general arbitration clause and in that proceeding a party raises a claim of invalidity because a non-disposable right has been transferred, then the award will be annulled if the arbitrators do not apply the mandatory law correctly. In this case, however, the court found that neither party raised an invalidity claim before the arbitrators. Quaker raised the diritti indisponibili problem for the first time in the set aside proceedings. The award was therefore not set aside. (The court indicated, without deciding the point, that the Italian mandatory trademark law had probably not been violated.)

Reading Coveme and the 1989 Italian Supreme Court decision together suggests the following interpretation. These decisions appear to mean that as long as the arbitration clause is worded in general terms (e.g., “all disputes arising under or related to this contract shall be submitted to arbitration”), the clause itself would not dispose of mandatory rights (diritti indisponibili) and therefore would not be invalid. Hence whether the container contract was invalid by reason of mandatory law, would be a matter that the arbitrators could consider. A mistake by the arbitrators in applying mandatory law would result in an award that could not be enforced in Italy. This is an approach that is very similar to the second look doctrine of the Mitsubishi case, which we take up in the next subsection. Thus, it seems that the language of Article 806 is subject to a strict (Fincantieri) or more flexible (Coveme) interpretation. Students may be asked to state which approach they favor and why.

The Swiss statute is obviously much more pro-arbitration. Under it the Fincantieri case would presumably have been sent to arbitration, because the dispute involved monetary (“property”) claims. Of course the Swiss statute would not
preclude a *Coveme* (or “second look”) approach, under which an award that violated Swiss mandatory law would not be enforced in Switzerland.

**Question 3.** This question encourages the students to focus on what precise provisions and policies underlie the Italian mandatory law and whether that law would be violated by the mere rendering of an award – for example an award that validated an Iraqi counterclaim by using it to reduce the total value of the award in the Italian party’s favor. A close reading of the Italian legislation implementing the UN embargo raises questions about whether an arbitral award itself would actually violate this legislation, or only the actual enforcement of such an award.

*Decreto legge* 247 of August 23, 1990 seems to be limited to Italian citizens or permanent residents. Thus, if none of the arbitrators was either a citizen or permanent resident of Italy, the arbitrators themselves would not seem to be subject to the terms of the August 23 *decreto legge*. Similarly, *Decreto legge* 220 of August 6, 1990 could be read as applying only to actions within Italy or to actions anywhere undertaken by citizens or permanent residents of Italy. (See Article 1.3 of *decreto legge* 247 of August 23, which seems to interpret *decreto legge* 220 of August 6 as being limited to actions within Italy or actions anywhere committed by Italian citizens (and perhaps permanent residents)). The arbitration in *Fincantieri*, however, was to take place under the ICC arbitration rules. There is no mention of the place of arbitration, but if it were to take place in Paris, or any other location outside of Italy, it would not seem that the action of non-Italian arbitrators would come under the terms of the Italian statutes.

And even if the August 6 decree were not limited to actions within Italy or by Italian nationals or residents, would an arbitral award in and of itself constitute “an act of disposal” of Iraqi property or property claims? Arguably, “disposal” only occurs at the stage of enforcing the award.

Despite these interpretive difficulties and the contrary approach of the *Coveme* case in an antitrust matter, experience shows that many students tend to agree with the *Fincantieri* result. Perhaps the strong feelings evoked by the Iraqi invasion of Kuwait and by the U.N. call for an embargo of Iraq play a role. Perhaps these feelings also affected the *Fincantieri* judges; or were they simply applying the straightforward provisions of the embargo decrees and Article 806?

**Question 4.** This question continues to press the students to analyze exactly how the arbitral award itself (apart from its enforcement) could undercut the embargo policy. It would seem that under most circumstances an award of specific performance could only be enforced against Fincantieri in Italy; hence we can assume that Italian courts would not enforce such an award. Monetary damages in favor of Iraq also would seem to require enforcement in Italy, unless Fincantieri had assets in another country. If that other country also recognized and respected the U.N. embargo—which one can assume would be true of most countries—then again the courts of that country would presumably refuse to enforce the award. Only if Fincantieri had assets in a pro-Iraq country hostile to the UN embargo would there be any real risk that an award of damages in favor of Iraq could be enforced.

The question also asks the students to analyze the case of an award in favor
of Fincantieri, but reduced in amount because of the Iraqi set off claim. Fincantieri would not want to enforce such an award, because of its inadequacy. Would it have any other remedy? Presumably Fincantieri could return to court in Italy to seek a full remedy. It would then be Iraq that would seek to have the arbitral award recognized and hence as barring Fincantieri’s claim. But here again the Italian court could refuse to recognize the award on the ground of public policy.

The upshot of this analysis is that an award in violation of the U.N. embargo would have very little chance of enforcement. Is the slight risk that Fincantieri would have assets in a pro-Iraq country sufficient to justify the Fincantieri court’s outcome? Or is the outcome justified more by the clear content of the Italian embargo legislation and Article 806 of the Italian Code of Civil Procedure? Or is it dictated more by strong anti-Iraq sentiment? The authors tend to favor a Coveme or “second look” approach that at least gives arbitration a chance, because it seems that to a large extent (though perhaps not in every imaginable scenario) the policy of the mandatory law can be protected at the award enforcement stage. At the same time, many students and perhaps some teachers are likely to disagree and to favor the Fincantieri result.

**Questions 6 and 7.** As has just been stated the authors tend to favor a limited role for non-arbitrability and thus favor something like the Swiss approach or the “second look” doctrine of Coveme and Mitsubishi (taken up in the next subsection), though the “second look” approach is not without its difficulties. Again, opinions here are likely to differ.

**Question 8.** The authors have different views as to the position expressed by Brekoulakis. In favor of the distinction made by Brekoulakis it can be said that the various legal instruments, in particular the New York Convention, treat inarbitrability separately from validity in general. That is most obvious in Article V NYC, which does not only contain two separate defenses but also submits each to a different law. While the validity of the arbitration agreement in the context of Article V(1)(a) NYC is to be determined on the basis of the law to which the parties have submitted the agreement or—in the absence of such a choice—to the law of the place of arbitration, inarbitrability is to be governed by the law of the enforcement state pursuant to Article V(2)(a) NYC. As a consequence, a clear separation between both concepts facilitates the explanation of such differences and the legal treatment of situations as described in the hypotheticals. It is not necessary to resort to legal constructions which—though conceptually possible—deviate considerably from the understanding of the parties using arbitration in practice.

(On the other hand, in the view of one of the co-authors, to explain the separate treatment of invalidity in general under V(1)(a) and the particular kind of invalidity (inarbitrability) dealt with under V(2)(a), one need only note that, by contrast with V(1) grounds for non-enforcement, V(2) grounds deal with public policy concerns and allow a court to raise a V(2) ground sue sponte. V(1), on the other hand, deals with procedural (not public policy) issues and places the burden of pleading on the award debtor. This is what explains the different treatment between V(1) and V(2) grounds (choice of law and burden of proof) and not the need to distinguish between “invalidity”, on one hand, and “lack of jurisdiction”, on the other hand.)
Concerning the first hypothetical, the minority view would come to the conclusion that the termination dispute can be heard in the state courts as it is not arbitrable. Since the non-arbitrability does not affect the validity of the arbitration agreement the disputes concerning the outstanding commission would have to be referred to an arbitral tribunal as there is a valid arbitration agreement.

According to the majority view the non-arbitrability of the termination dispute would render the arbitration agreement invalid. That invalidity would definitively allow the state court to hear the termination dispute. Concerning the commission dispute three options are conceivable. The first, which is most in line with general contract law and the layman’s perception of invalidity, is that the invalidity affects the whole arbitration clause. As a consequence, the commission dispute could also be heard by the state courts. According to the second option, the single arbitration clause in the agency contract is to be understood as being composed of an unlimited number of separate arbitration agreements referring particular disputes to arbitration. Out of those the one referring to the termination dispute would be invalid, so that the one concerning the commission dispute would still be valid and the dispute would have to be referred to arbitration. This option would result in a kind of partial invalidity of the arbitration clause. The third option would yield the same result creating a kind of special partial invalidity without making the detour via the number of individual arbitration agreements contained in the single arbitration clause. Unlike the second option, which would resort to the traditional notion of partial invalidity of a separable part of a clause, i.e. the one arbitration agreement dealing with the termination dispute, the third option would create a new kind of partial invalidity for arbitration agreements.

Comparable differences exist concerning the second hypothetical. Pursuant to the minority view, the inarbitrability of the annulment claim has no influence on the validity of the arbitration agreement. Consequently, the claims concerning the license fee are covered by a valid arbitration agreement. According the majority view the inarbitrability of the annulment claim would affect the validity of the arbitration clause. Furthermore, its invalidity may have been declared by the first court when assuming jurisdiction with res iudicata or estoppel effects. Again, the same three options for the scope of the invalidity exist as for the first hypothetical. Either the invalidity covers the whole arbitration agreement with the effect that there would no longer be a valid arbitration agreement covering disputes under the licensing agreement. Or the invalidity only partially affects the particular annulment disputes, for one of the two reasons mentioned. In addition, also any res iudicata or estoppel effect would have to be limited to these disputes even if that is not directly evident from the judgment.

(The co-author who rejects the “lack of jurisdiction” theory would add, concerning the hypotheticals, that the partial invalidity theory, which he favors, would not lead automatically to the invalidity of the whole arbitration agreement in every case. In his view, the issue should be analyzed in the same way that any other “partial invalidity” issue is analyzed, concerning whether the invalid portion of the agreement is so central to the agreement that without it the whole agreement fails. This is not always the case, but can be, depending upon the issues in dispute. Thus, the inarbitrability of one of several claims arising from a particular commercial dispute, might or might not lead to the inapplicability of the arbitration agreement to other claims that would normally be arbitrable.)

112
II.2.c. Arbitrability Tested in Court Practice

II.2.c.i. Arbitrability of Antitrust Claims

**Question 1.** The potential threat to the public welfare underlying the exclusive distribution agreement between Mitsubishi Motors and Soler is that of higher prices for automobiles because of restraints on competition. The agreement provides that Mitsubishi Motors will sell only to Soler for resale within Puerto Rico. Thus, Soler will be the only authorized dealer in Puerto Rico for the sale of Mitsubishi cars. The exclusivity arrangement also means that Soler is not allowed to sell Mitsubishi cars outside of its exclusive area—to the U.S. mainland or to South America, for example—because Mitsubishi has given other dealers exclusive rights in these other areas. This does not necessarily mean, however, that the end result of the exclusive distribution agreements will be higher prices for Mitsubishi cars in Puerto Rico, the U.S. mainland, or South America. The Mitsubishi-Soler agreement has both anti-competitive and pro-competitive effects. As is generally thought to be the case with most exclusive distribution agreements, the pro-competitive effects could outweigh the anti-competitive effects.

The anti-competitive effects are those just described. Soler will have a monopoly in the retail market for Mitsubishi cars in Puerto Rico (and other dealers will have a monopoly in their respective exclusive areas). The absence of intra-brand competition in Mitsubishi cars in Puerto Rico (and in these other areas)—because there will be no other authorized dealers in Puerto Rico (and in these other areas)—will of course tend to push up the price of Mitsubishi cars. However, at the same time there could be vigorous inter-brand competition—that is, competition from dealers selling other cars (Fords, Chevrolets, Volkswagens, Hondas, Toyotas, etc.). The exclusivity feature of Soler's dealership should actually encourage more vigorous inter-brand competition. This is because exclusivity gives Soler (and the other exclusive dealers in the other exclusive areas) an incentive to invest heavily in developing the market for Mitsubishi cars through advertising, promotions, high-quality repair and servicing facilities, and an ample supply of spare parts. Were it not for exclusivity Soler would be reluctant to invest funds to develop a market for Mitsubishi that other dealers could profit from ("cream skimming") without having made a comparable investment. Thus, on balance the pro-competitive effects on inter-brand competition could outweigh the anti-competitive effects on intra-brand competition. The predominant tendency would depend in part upon what share of the automobile market Mitsubishi cars held. A small share would generally mean that the procompetitive effects on inter-brand competition would likely predominate.

These concepts would not seem beyond the capacity of ordinary arbitrators to grasp. Their application to complex fact situations could of course yield varying, sometimes faulty results. How important would it be for arbitrators to apply the law correctly?

**Question 2.** One answer to the concern over arbitrator misapplication of the antitrust law is that arbitrators would not be the sole enforcers of that law. In U.S. practice both the Justice Department and the Federal Trade Commission function as independent executive branch enforcers of the antitrust statutes. We believe that this tends to argue in favor of the Mitsubishi outcome. Even if arbitrators misapplied
the antitrust law and enforced an anticompetitive agreement, that would not prevent either the Justice Department or the FTC from taking action against the violators. Indeed, even private party claimants directly damaged by the anticompetitive agreement and not in contractual privity with Mitsubishi could bring treble damage actions against the offenders.

Of course, as Justice Stevens points out, the arbitrators could err in the other direction by striking down an agreement that was not violative of the antitrust laws. But such a result would have no precedential value and the second look doctrine could still come to the rescue. For example, if the arbitrators rejected Mitsubishi’s claim against Soler on the ground of a mistaken application of the antitrust law, presumably Mitsubishi could bring the claim again in a U.S. court and urge the court on the ground of public policy to refuse to recognize the award. (Note, however, that unless the district court retains jurisdiction when originally referring the parties to arbitration, a subsequent action by Mitsubishi could run into statute of limitations problems.)

The second look doctrine articulated by Justice Blackmun in *Mitsubishi* also helps to counter concern for misapplication of the antitrust laws in the other direction – arbitrator enforcement of an anticompetitive agreement. As long as the defendant has assets only in the United States, there is a fair chance that an enforcing court would reject the award. Of course, the “rub” here arises over the level of scrutiny an enforcing court will give to the award. The Court articulates the standard very ambiguously:

“While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”

Perhaps only an award that refused to apply the U.S. antitrust law—or one that applied it so ineptly or non-seriously as to amount to the same thing—would be refused enforcement.

**Question 3.** Mr. Werner’s argument is well taken. Arbitrators face considerable difficulty in justifying their application of mandatory law from a country other than one whose law the parties expressly chose to govern the dispute. One potentially persuasive ground for doing so, however, is if the award would be unenforceable otherwise. That point could have influenced the ICC prediction that the arbitrators would apply U.S. antitrust law. The issue of applying mandatory law is taken up in the materials in IV.2.f.

**Question 4.** Mr. Jarvin’s quote from the ICC brief calls attention to the ICC’s basic rule, found in Article 17 of the ‘98 ICC Rules: “The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute.” On the basis of this rule, one would expect that the ICC would want arbitrators to apply the law chosen by the parties. After all, the arbitrators’ authority derives from the parties’ agreement, and hence arbitrators should in principle follow the parties’ will. On the other hand, if the parties choose arbitration under the 2012 ICC Rules, Article 41 of those Rules is also applicable. It provides: “In all
matters not expressly provided for in the Rules, the Court and the arbitral tribunal
shall act in the spirit of the Rules and shall make every effort to make sure that
the award is enforceable at law” (emphasis added). Perhaps in a case with facts
like those in Mitsubishi Article 35 would give an Arbitral Tribunal some maneuvering
room to apply U.S. antitrust law.

**Question 5.** One can only speculate, but it seems plausible that Mitsubishi
agreed to the applicability of U.S. law on the antitrust claim in order to ensure
that the award would be enforceable in U.S. territory (including Puerto Rico). Had
Mitsubishi insisted on Swiss law, however, the authors believe the arbitrators should
have applied Swiss law, because the arbitration agreement so provides. It would
then have been up to Mitsubishi to find a jurisdiction in which any eventual award in
its favor could be enforced (or to find some other use for the award.)

**Question 6.** The precise issue in Eco Swiss is of course not the same as that
in Mitsubishi. In Eco Swiss the question is whether an EU Member State must
invoke public policy to refuse enforcement of an award inconsistent with EU
competition law. The ECJ answers that question in the affirmative. And although the
question technically arises in a set-aside proceeding in the Netherlands, the ECJ’s
opinion expressly extends its holding to recognition and enforcement proceedings
under the New York Convention. In Mitsubishi the issue is whether at the stage of
enforcing the agreement to arbitrate, not an award, the court should send the
antitrust issue to the arbitrators. The second-look doctrine of Mitsubishi seems to
contemplate that an award inconsistent with applicable U.S. antitrust law will not be
enforced.

One of the crucial questions not clearly addressed in Eco Swiss or Mitsubishi,
however, is what level of scrutiny an enforcing court should give to the arbitral
tribunal’s application of the relevant antitrust law. Should the enforcing court decide
the antitrust question de novo, give substantial deference to the arbitral tribunal’s
application of the law, or find a way station somewhere between these two end
points on the spectrum?

**Baxter International**

**Questions 1 - 3.** The Seventh Circuit opinion in Baxter seems to answer for
the U.S. the question posed immediately above (in the discussion of Question 6
following Mitsubishi) concerning the level of scrutiny an enforcing court should
give to an arbitral tribunal’s application of relevant antitrust law and it does so in
startlingly deferential terms. Judge Easterbrook says explicitly on page 280: “But the
initial question is whether Baxter is entitled to reargue an issue that was resolved by
the arbitral tribunal. We think not; a mistake of law is not a ground on which to set
aside an award.”

The authors tend to disagree with the opinion’s assertion quoted in Question
1 to the effect that anything less than full deference to the arbitrators would mean
that antitrust issues were not arbitrable. After all, the Mitsubishi Court itself plainly
contemplates a “Second Look” at an award applying U.S. antitrust law. Plainly under
New York Convention Article V(2)(b), an enforcing court could reject an award that
so misapplied national antitrust law as to violate public policy. This seems what the
Eco Swiss Court has in mind for European Union law—though it does not tell us
what level of scrutiny is called for.

If the Baxter opinion is read to mean only that a U.S. court will not engage in de novo review of an award applying U.S. antitrust law, it would seem more reasonable. As the first paragraph of Question 3 tries to suggest, it would not take much deference to the award to conclude that the arbitrators’ application of U.S. antitrust law was reasonable. Although Judge Cudahy disagrees, many antitrust experts (and Judge Easterbrook is one) may well see the covenant not to compete as a reasonable ancillary restraint. The trouble is, of course, the Easterbrook opinion is not written in these terms. It does not say that the award applies U.S. law in a reasonable way. Instead it says that the arbitrators’ application of U.S. antitrust law is beyond review.

The second paragraph of Question 3 is an attempt to pose a hypothetical involving an unquestionable violation of U.S. antitrust law. The facts are intended to portray a sham transaction that constitutes a disguised agreement between two competitors not to compete in each other’s national market - a per se violation of U.S. antitrust law. It is hard to believe that a misguided arbitral award granting Baxter the relief it seeks would be enforced in the U.S., although the bald language of the Baxter International opinion would seem to call for that result.

**Question 4.** This question is intended to point up that the Easterbrook opinion sidesteps an important issue. Easterbrook reasons that if the arbitral award threatens to force Baxter to violate antitrust law by preventing Baxter from competing with the Ohmeda process, Baxter has a remedy ready at hand. It can simply divest itself of the Ohmeda process — that is, it can sell the rights to the process to another competitor. But not every antitrust scenario would yield such a straightforward solution. The extension of the Question 3 hypothetical sketched here is intended to pose one such dilemma. If it is really true that an award would bind only the private parties and not the antitrust authorities or a third party litigant — a result that seems on its face correct — then enforcing an erroneous antitrust award could place a litigant between a rock and a hard place — as the extended hypothetical is intended to illustrate. The proper solution to this dilemma would seem to be to allow a reviewing court to refuse to enforce an award that plainly misapplies U.S. antitrust law. Moreover, it would also seem necessary to provide some form of immunity to a litigant forced into an antitrust violation by a court order enforcing an erroneous (though perhaps not manifestly erroneous) arbitral award.

**Note:** Arbitrating Competition Law Issues and the Efficacy of the “Second Look” — Two European Rulings

**SNF v. Cytec**

**Questions 1 - 3.** Whereas Baxter seems to renounce all review of an arbitral tribunal’s application of U.S. antitrust law (as long, perhaps, as the tribunal actually sought in good faith to apply U.S. antitrust law), the Cour de cassation in Cytec is willing to some extent to review the correctness of an arbitral tribunal’s application of EU competition law. French courts will interfere and refuse to enforce an award only if the award “flagrantly” violates EU competition law. Note that the Belgian court of first instance in a set-aside proceeding in the same case, took a different approach and set aside the award because it concluded that the arbitral tribunal had
not applied EU competition law correctly, (Apparently the Brussels Court of Appeal in an unpublished opinion found no violation of public policy and reversed, as indicated in the text.) It remains to be seen what kind of a misapplication of EU competition law French courts will consider to be a flagrant violation.

One might say that under the approach of the Belgian court of first instance the second look amounts to a review of the correctness of the arbitral tribunal’s application of EU competition law with little or no deference; the French approach amounts to a weaker second look, because it involves considerable deference to the arbitral tribunal’s decision; and the Baxter case amounts to a virtual abdication of any responsibility for a second look, because it calls for complete deference to the arbitral tribunal’s antitrust decision—or almost complete deference, because even in full accord with Baxter a U.S. court might reject an award if the arbitrators refused to apply the U.S. antitrust law in a case in which, under U.S. standards, a U.S. court would consider the U.S. antitrust law to be applicable.

How do the Belgian and French approaches compare with the ECJ pronouncements in Eco-Swiss? One might wonder whether the French approach is consistent with Eco-Swiss. In Eco-Swiss the ECJ clearly called for some level of scrutiny of an arbitral tribunal’s application of EU competition law. It referred to that scrutiny as being “more or less extensive depending on the circumstances * * *.” See para. 32 quoted above in Question 6 following Mitsubishi. Thus the exact level of scrutiny the ECJ will require remains an open question, to be decided in a future case. (Indeed, one might wonder why the Cour de cassation did not refer the level-of-scrutiny issue in Cytec to the ECJ for a preliminary ruling, since after Eco-Swiss this appears to be a question of EU law.)

In the Note cited in Question 3, Professor Gaillard is critical of a result that requires enforcement of an arbitral award that actually violates international public policy—which the ECJ in Eco-Swiss says is defined by the standards of EU competition law—even though it does not violate international public policy “flagrantly”. He suggests that such a result may lead to a loss of respect for international arbitration as an institution. Do you agree? What will students think?—especially if one asks them to consider that an arbitral award only binds the parties to the arbitral agreement and not public authorities who are still free to enforce competition law correctly.

X (S.p.A.) v. Y (S.r.l.)

Questions 1 - 3. Since the Swiss Federal Tribunal does not consider an alleged violation of EU competition law to rise to the level of a violation of international public policy (Switzerland as a non-member of the EU not being bound by the Eco-Swiss decision), it is unwilling to allow an enforcing court in a Swiss set-aside proceeding to review the merits of an arbitral tribunal’s application of EU competition law. Thus, if there are assets in Switzerland, the award is fully enforceable in Switzerland against those assets. This seems essentially the same result as in Baxter, with respect to U.S. antitrust law.

The award would not be enforceable in Belgium, it seems, and perhaps not in France if the violation were “flagrant”. In Cytec Belgium applied its public policy concept in a set aside proceeding, but presumably it would construe the public policy
standard in New York Convention Article V(2)(b) applicable to recognition and enforcement as equally demanding. Certainly one could conclude, in the light of Eco-Swiss, that enforceability of the award in the EU would be doubtful.

On the other hand, had the award been made in an EU country, that country might have set the award aside (for violation of EU competition law), and then Swiss courts would probably have refused to enforce it under New York Convention V(1)(e) (an award set aside in the jurisdiction where the award was made). So parties would indeed have an incentive to choose a Swiss arbitral seat in order to ensure enforcement of the award at least in Switzerland. The likelihood of enforcement of the award outside of Switzerland and outside of the EU might also be enhanced by choosing a Swiss seat, because a Swiss court would confirm the award and thus eliminate V(1)(e) as a ground for refusal to enforce in other countries, especially those outside the EU not bound by Eco-Swiss.

Question 4. Fact finding in an antitrust case can be particularly time consuming and complex—and at the same time crucial to the outcome, especially where, as occurs often in litigated cases in the U.S., the “rule of reason” applies. Under the U.S. “rule of reason” the decision maker must weigh pro-competitive and efficiency effects against anti-competitive effects stemming from the private agreement or measures under scrutiny. There may be a need to define the limits of both a product market and a geographic market within which potential pro-competitive and anti-competitive effects can be assessed. Reluctance to enter into the fact-finding thicket may well have exerted some influence on the judicial panels that decided Baxter and Cytect. In the case of X v. Y, the Swiss Federal Tribunal refers expressly to the limited jurisdiction a Swiss court has to review the facts found by an arbitral tribunal. One example of such a restriction is discussed below in Maran Coal (subsection V.2.d.i.) where the Federal Tribunal explains that in the circumstances of that case (a challenge to the arbitral tribunal's jurisdiction) a Swiss court is only allowed to review the facts on the ground that arbitral tribunal violated certain procedural guarantees in reaching its factual conclusions.

II.2.c.ii. Arbitrability of Cargo Damage (COGSA) Claims

Question 1. It does not seem at all clear that arbitration abroad would be more expensive than litigation in the U.S. Since in arbitration there is no appeal and little or no discovery, arbitration – even abroad – could be less expensive than litigation at home. Uncertainty on this point probably encouraged the Court in its decision.

Question 2. That the award could include attorney’s fees and other costs of arbitration cuts against the Sky Reefer result, because it increases the chance that the cost of arbitration would deter a potential cargo owner from bringing a claim. Such an outcome would seem to conflict with the Hague Rules/COGSA policy of not allowing a ship owner to lessen its liability by provisions in the bill of lading. But of course whether a potential claimant would be discouraged from bringing a claim to an arbitral tribunal (as compared to litigation in the U.S.) would depend on the overall cost comparison between arbitration and litigation, not just the treatment
of attorney’s fees and costs.

**Question 3.** Such a provision would seem to clash at least with the spirit of COGSA section 3(8) because it would seem to be motivated by the desire to discourage cargo claims. On the other hand, the reasoning of *Sky Reefer* restricts section 3(8) to provisions that directly limit the carrier’s liability, not those that govern dispute settlement. Of course a U.S. court could always declare the provision unconscionable and refuse to enforce it, especially since a bill of lading is an adhesion contract. At the same time the arbitration clause could still be recognized as valid.

**Questions 4 and 5.** It seems very unlikely that the Japanese law differs at all from the U.S. COGSA result. The claimants (the insurer and consignee of the cargo) apparently argued that the Japanese law would not make the carrier liable for the stevedore’s negligence in loading or stowing the cargo when the stevedore is hired by the shipper (the owner/seller of the cargo). This would also be the result, however, under U.S. COGSA law. The carrier is not liable for damage to the cargo caused by the shipper itself or its agents. The Supreme Court’s “but see” citation seems to show its awareness of this flaw in the cargo claimant’s argument. Of course COGSA’s express choice of law provision indicates Congress’s concern that the U.S. COGSA result should prevail on all shipments into or out of a U.S. port. But application of Japanese law by the arbitrators would not seem to violate this principle, since the outcome would seem to be the same under either Japanese or U.S. law.

**Question 5.** What if the carrier includes in the bill of lading choice of law and foreign arbitration clauses specifically designed to evade COGSA and to lessen the carrier’s liability? The *Maritima* hypothetical is intended to raise that issue. The *Sky Reefer* court quotes from the *Mitsubishi* decision as follows (see text page 294):

> “Were there no subsequent opportunity for review and were we persuaded that ‘choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies … we would have little hesitation in condemning the agreement as against public policy.’”

How important is the opening phrase: “Were there no subsequent opportunity for review . . .”? If subsequent courts follow the pattern in *Sky Reefer* and merely stay the court action while arbitration proceeds, is “subsequent opportunity for review” guaranteed? (Question 6 below explores this issue further.) And if so, does that mean that even in a case like our *Maritima* hypothetical a court would send the parties to arbitration? Wouldn’t that be an exercise in futility? We believe that a court would not order arbitration in a case in which it was convinced that the carrier was deliberately attempting to lessen its liability by evading application of the mandatory COGSA rules.

**Questions 6 and 7.** If the carrier wins in the arbitration so that there is no award for the cargo claimant or an inadequate award, there would then be no reason for the cargo claimant to seek enforcement of such an award. Instead the cargo claimant might want to return to court in the U.S. seeking adjudication of its
claim. The carrier would then be forced to try to block that proceeding by urging the
court to recognize the arbitral award as res judicata. Thus the U.S. court would
be guaranteed a chance to review the award. It is in the light of this possible
scenario that Justice O’Connor’s discussion has particular relevance. If the district
court retains jurisdiction, there would be no statute of limitations problem should the
cargo claimant seek to re-open the case in the district court. Though Justice
O’Connor seems to assume that the situation would be different in the case of a
choice of foreign forum clause, in principle a district court could still retain
jurisdiction, even in such a case. The tradition, however, seems to be for courts not
to do so.

Note that a further point of importance would be the availability of assets in
the U.S. against which any such “revived” court judgment could be enforced. The
original action was brought in admiralty and included a claim “in rem” against the
carrying vessel. The normal procedure in such cases is for the ship owner’s liability
insurer to enter the proceeding and file a commitment (“letter of understanding”) to
pay any judgment up to the value of the vessel. When such a commitment is on file,
the vessel is normally released. This means that by retaining jurisdiction the district
court presumably also retained the insurer’s commitment to pay any subsequent
judgment (up to the value of the vessel).

II.2.d. Law Applicable to Arbitrability

Questions 1 and 2. The purpose of the Belgian legislation must surely be to
protect Belgian distributors who are in a weak bargaining position when they
negotiate a distribution agreement and who are especially exposed to loss if a
ruthless manufacturer terminates the agreement once the distributor has invested
considerable effort and funds in building a market for the manufacturer’s product.
After a distributor is terminated by the manufacturer, the distributor is no longer in a
weak bargaining position (given the guarantees of the Belgian statute and assuming
Belgian law is applied), and honoring an agreement to arbitrate at that point would
not be inconsistent with the policy of the Belgian legislation.

If it does not truly thwart the Belgian statute, the Company M result seems to
some extent to compromise it. Though a manufacturer would not be able to defeat
the provisions of the Belgian statute by detailed clauses in the distribution
agreement, the Company M result seems to allow the manufacturer to do so by
choosing arbitration and the applicable law. Or rather, the Company M result tells us
that a Belgian court (or at least the Court of Appeal of Brussels) is willing to send the
parties to arbitration despite the provisions of the statute. Would the resulting award
be enforceable in Belgium? If the express terms of the Belgian legislation and the
interpretation of the Belgian Cour de cassation are to mean anything, it is difficult to
see how a Belgian court could refuse to allow the Belgian distributor to sue in a
Belgian court for its statutory rights, even after an arbitral award is rendered – unless
perhaps the award properly honored the Belgian distributor’s statutory rights.

If this is correct, what then is the point of sending the parties to arbitration? In
paragraph 7 of the Company M opinion the court seems to say that many awards
are honored “spontaneously or under the pressure of moral or professional
sanctions ...” This hardly seems persuasive. Would the “second look” idea of
Mitsubishi and Sky Reefer be a better explanation? If the arbitrators properly take
into account and apply the Belgian law, then the award would be enforceable in Belgium and the matter would be res judicata; if not, then it would not be. This encourages respect for arbitration, especially in international cases, without giving up entirely the protections of the Belgian law. Whether the distributor could enforce a Belgian court judgment that rejected the arbitral award would seem to depend on whether the manufacturer had assets in Belgium. That would presumably be true, however, even if the Belgian court had found the matter non-arbitrable in the first place.

**Question 3.** In general we agree with van den Berg’s analysis and believe that arbitrability should be decided by forum law. At the same time we are attracted by arbitrability law that incorporates the “second look” approach of Mitsubishi. Perhaps the Company M case could be seen as an attempt by the Court of Appeal of Brussels to move in the direction of the second look doctrine without openly challenging the Belgian Cour de cassation’s interpretation in the Audi-NSU Auto Union case (see Question 1.) making Belgian distributor claims under the Belgian statute non-arbitrable as a matter of Belgium law. Thus, in an international case if the parties include a choice of foreign law clause along with an arbitration clause, Belgian courts could achieve something like the “second look” doctrine by applying the chosen law to uphold the arbitration agreement, while at the award-enforcement stage applying Belgian public policy to allow re-litigation in Belgian courts if the arbitrators refuse to apply the Belgian statutory protections. Of course there is still the risk that at the enforcement stage a Belgian court would reject any award, no matter what the outcome, on the ground that the subject matter is non-arbitrable under Belgian law. (See New York Convention Article V(2)(a).) Obviously, this would not be consistent with a “second look” approach.

Belgian law would be more coherent if the lower courts applied the lex fori principle for arbitrability and left it to the Cour de cassation to introduce any shift to a “second look” approach in Belgian arbitrability law.

**Question 4.** The Egyptian Local Authority award differs from the cases we have thus far been considering because it is an arbitral award, not a court decision. Moreover, since an arbitrator owes allegiance to the parties and their agreement, there was perhaps more of a reason for the Egyptian Local Authority arbitrator to follow the parties’ express choice of law clause, than there was for the Company M court to do so. On the other hand the choice of law provision was probably not intended to apply to questions of arbitrability. It was not contained in the arbitration clause itself and seems to have been aimed at the law to be applied to the merits of the dispute.

Since Swiss law was the lex arbitri, referring to Swiss arbitration law to decide arbitrability seems sound and a close approximation of the lex fori principle for courts. It is also not inconceivable that the presence of Article 177(2) in the Swiss Private International Law Act influenced the parties in their choice of Geneva as the place of arbitration. Indeed, one might speculate that this was the intent of the Swiss in including Article 177(2) in their law – that is, the Swiss sought to encourage arbitration in Switzerland, especially when one of the parties is a government entity. Since the Egyptian Local Authority clearly agreed to arbitrate in Switzerland, one could see the result as holding the parties to their agreement. Of course enforceability of the award would probably require the presence of
Egyptian Local Authority assets outside of Egypt.
CHAPTER III

THE ARBITRATORS

Chapter III is devoted to the main protagonists of the arbitration process – the arbitrators. The text is divided into three subchapters. The first one (The Arbitrators, Qualifications, Rights and Responsibilities) aims to investigate who can be an arbitrator, and how an arbitrator should act. The second subchapter is devoted to the procedure of appointment, and variations of appointment by parties, courts, or appointing authorities. The third subchapter, in scrutinizing the institution of challenge, again focuses (from a different angle) on the persons who may act as arbitrators.

What’s new in the 6th Edition: Introductions to all parts have been updated. In the part on challenges we replaced the 1991 van den Berg introduction with a summary of issues formulated by the authors. In the part on “Arbitrators - Qualifications, Rights and Responsibilities” there are less changes than in the 5th Edition. We omitted the 1995 Lowenfeld article (although some interesting questions raised by Lowenfeld will be discussed in Questions and Comments). In the subchapter entitled “How to Get (or Not to Get) the Right Arbitrator” we have shortened the Hacking and Nathan articles, but we have also added some questions and ideas regarding geographical and gender based balance raised in new scholarly writings. Concerning codes of ethics and guidelines, we omitted the parallel between the 1977 and 2004 AAA/ABA Codes of ethics, but we have added a discussion of new (2013) IBA Guidelines on Party Representation In International Commercial Arbitration. In the part dealing with fees we have added summaries of a Hong Kong and of a Hungarian case introducing the issue of proportionality of attorney’s fees. We have also added a number of new cases to the questions and comments discussion dealing with fees, awards on advance costs, and related matters. In the subchapter on appointment we have added a new 2013 decision of the Swiss Supreme Court dealing with the issue of appointment supported by the menace of denial of justice. We have expanded the subchapter on challenges (and disclosure) by a number of decisions of institutional authorities including Swedish cases, and an ICSID case. In questions and comments a number of new cases have been summarized testing the standards of impartiality and the range of the duty of disclosure. Furthermore, we have included other changes to reflect the adoption of new legislative acts and new arbitration rules – such as the 2013 Belgian Judicial Code, the 2014 Dutch Code of Civil Procedure, the 2014 AAA ICDR Rules, the 2013 Vienna Rules, the new 2014 JCAA Rules, the 2014 LCIA Rules, and other enactments.
III.1. The Arbitrators - Qualifications, Rights and Responsibilities

III.1.a. Note

III.1.b. Oaths as Safeguards of Impartiality

**Question 1.** If the oath (fear of Gods) is the instrument designed to keep at bay the undercurrents of bias or simple corruption, then it is certainly important to make this instrument work at all times when bias or corruption could affect the outcome. Taking the oath before voting might be too late, because it is quite conceivable that biased arbitrators would bring about an unfair and unbalanced procedure in taking evidence, which would yield a distorted basis for voting. Bias would thus be built into the decision, even if no further bias operated in the decision-making process.

**Question 2** calls for a closer reading of the text of the oaths reproduced in the Tod book. Students are expected to detect rather subtle variations of bias and corruption. In the oath stated in the decree passed by the Cnidians, gifts are excluded, but the oath also tries to stop circumventions by specifying that gifts (in connection with the trial) must not be received by the arbitrator, or by “anyone else, man or woman” on behalf of the arbitrator, “in any way, or under any pretext whatsoever”.

The Delphian oath aims to weed out bias that may have roots in various sources: “favour, or friendship or enmity”. The curse that would fall on anyone breaking an oath is also formulated with the meticulous precision of lawyerly contract drafting. Punishment is not left to just one of the gods (who might err in administering it, or whose attempts could be thwarted by a rival god); sanctions are to be administered by an all-inclusive list of relevant gods (Themis, Pythian Apollo, Leto, Artemis, Hestia) plus the eternal fire and finally a catch all clause referring to all gods and goddesses.

This style of drafting reveals an interesting combination of the divine and the human. Justice depends on the proper behavior of the arbitrator and that, in turn, rests on the fear of gods, but faith and a general direction are not sufficient. Everything depends on very human formulations, on details and nuances that reflect rich and mature experience of (again very human) tactics of circumvention, evasion and fraudulent interpretations.

Note also that the Greek examples show that impartiality was always a key concern of the arbitration process.

Discussion may also be prompted by the fact that “enmity” is not an
element recognized only by the Delphian oath. The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration have also recognized the relevance of enmity. Article 3.3.7 of the Orange List states among circumstances that need to be disclosed the existence of enmity between an arbitrator and counsel appearing in the arbitration.

**III.1.c. Getting Closer to More Modern Considerations and Devices (Neutrality, Independence, Disclosure)**

The Bernini article raise two kinds of issues: first, how much impartiality (or neutrality) is really needed; and second, how can the requisite impartiality (neutrality) be assured.

**Question 1.** The discussion may start with the question as posed. You may later go one step further and ask how much one should heed personal relations that do not amount to family and business ties. The question is particularly difficult in arbitration within trade associations, where one can hardly find persons who do not know one another, or who do not know the parties. You may also use as an example a court in a small town where judges and attorneys know each other very well and may like, or perhaps actively dislike, each other. Such considerations could hardly be allowed to influence whether a judge or attorney should be allowed to serve. Borderline connections may often be cleared, if the connections are disclosed and the parties thereafter raise no objections. This does not appear to be an ideal solution in the case of former lovers.

**Question 2.** Legislators are disinclined to make a distinction – probably because this would jeopardize the clear principle that arbitrators must be impartial. It could be dangerous to distinguish between various degrees of requisite impartiality. At the same time, however, such a distinction is often made in practice, and this is facilitated by the most common mechanism of choosing arbitrators. Typically, each party appoints one of two arbitrators, and these two party-appointed arbitrators choose the third. Party choices are based on party confidence, and this is no secret to the other party. Therefore, even without assuming any impropriety, parties will tend to look at the third arbitrator as someone who is more neutral than the other two arbitrators.

Some arbitral institutions, competing for more business and trying to raise the comfort level of the parties, state in their rules that the third arbitrator (or the sole arbitrator) may not have the nationality of any of the parties. (E.g., article 13(5) of the 2012 ICC Rules; Article 6.1 of the 2014 LCIA Rules – See Documents Supplement.) Article 12(4) of the 2014 AAA International Rules shows an awareness of the problem, but the solution reflects some hesitation. (“At the request of any party or at its own initiative, the administrator may appoint nationals of a country other than that of any of the parties.”) The ICC and LCIA
provisions may introduce a discussion on a possible distinction between the third arbitrator or the sole arbitrator on one hand, and other arbitrators on the other hand. Should there be a higher standard of neutrality for the third arbitrator (if there are three), or for the sole arbitrator? This distinction has not been recognized by legislation, but it has some foothold in practice (in arbitration clauses) and in institutional rules. The discussion may also take into consideration that Article 13(5) of the ICC Rules, while setting a special requirement regarding the sole arbitrator (or third arbitrator), also provides for possible exceptions. According to Article 13(5), the sole arbitrator (or presiding arbitrator) may have the same nationality as that of one of the parties “in suitable circumstances” and if none of the parties objects. Thus, a departure from the neutral nationality requirement (for the sole or third arbitrator) is possible. According to a commentary on the 2012 ICC Rules, Article 13(5) does not even apply if the sole or third arbitrator is nominated by the parties, rather than by the arbitral institution. (Fry, Greenberg, Mazza, The Secretariat’s Guide for ICC Arbitration, ICC Publ. 729, Paris 2012). It is questionable whether the wording of Article 13 provides support for such an interpretation. Yet, even if the neutral nationality requirement set in Article 13(5) remains relevant in case the sole or third arbitrator is nominated by the parties, the exception set by Article 13(5) also remains relevant, and there is hardly a better example for “suitable circumstances and no objection” than nomination by common consent. Article 6.1 of the LCIA Rules also allows an exception; the sole arbitrator or the third arbitrator may have the same nationality as that of one of the parties – if the parties agree on this in writing. In sum, exceptions set by Article 13(5) of the ICC Rules, and Article 6.1 of the LCIA Rules, may reduce the difference between party nominated arbitrators and sole (or third) arbitrators, but a certain distinction regarding the standard of neutrality remains.

**Question 3.** Students may be invited to put themselves into the position of an arbitrator signing – let us say – the UNCITRAL statement of independence (modeled after other mainstream statements of independence.). Could one sign it in good faith in spite of having acted in a previous unrelated case as attorney for a party to the present arbitration proceedings? One could argue, of course, that this is not a circumstance that would affect the arbitrator’s impartiality and independence. One may, of course, very well assume that a seasoned professional is, indeed, capable of acting both as an attorney for one of the parties and later as an unbiased arbitrator in an impeccable way. But there is also the problem of appearance of bias.

Another question could be raised. What is actually wrong (if anything) in the case decided by the Genoa Court? The fact that the arbitrator received money from one of the parties for his/her services? Could one be an arbitrator after having sold an apartment to one of the parties (and having, of course, received payment for it)? Does the problem lie in the parties’ need for confidence in arbitrator’s neutrality?
**Question 4.** The Goldstein case raises the issue of the rational limits of disclosure. Mr. Goldstein notes in his blog that he heard from many colleagues that “experienced European arbitrators would not have made the disclosures of social contact” that were made by him. One can argue that it is safer to disclose as much as possible. At the same time, it is difficult to visualize “close friendship” through the number of dinners or lunches with or without spouses and life partners. One can also raise the following question. If it is really a duty to disclose diners, wine-tasting parties and other gatherings at which the arbitrator and the counsel participated, does this mean that an arbitrator should keep a record of social contacts? If he/she attends a dinner, should he/she make a list of people present (because some of these people might wind up as party representatives in an arbitration case)? It is difficult to define “close friendship”. Also, when you pick from your memory social events in which a given person was present, and when you provide a *collage* of these data in your disclosure, the result may be some mistrust in your independence and impartiality.

Sustaining the challenge may not have been an incongruous decision. Dismissal of the challenge was also reasonable option.

**Question 5.** The discussion opened under Question 2 may be continued by asking what actual differences may exist among arbitrators (assuming that they are all impartial). Because a party will generally choose as arbitrator a person belonging to that party’s own legal culture, this arbitrator will probably understand the legal environment and the position of “his” party better, and may convey this understanding to the fellow arbitrators. This may, indeed, be helpful—but it could hardly be mandated.

**Questions 6 and 7.** There are of course no “absolutely right” answers to the questions posed. It is not unusual for an arbitrator to be interviewed by a party who wants to appoint him (her). Arbitrators typically do want to be appointed. Is this the same thing as wanting to “sell themselves”? Students are expected to discover the fine line between answers that help to confirm expertise, to promote confidence, and answers that might give rise to expectations of bias. Out of the five questions, the first and last invite you to state facts; considerations of confidentiality would normally not prevent you from stating the facts as they are. The three questions between the first and the last are more difficult, because they may be inspired by the problem pattern of the case, and an answer might be indicative of your likely position on the merits. You might certainly refer the parties to articles you have written on the subject (if any); you might give an evasive answer; you might say that all depends on the specific circumstances of the case; you might say that you feel uncomfortable answering a question that might be the key issue of the case. An honest professional answer that does not dodge the question is also one of the possible options. Students should weigh these options.

Again, the purpose of the discussion is to bring within close range the
dilemmas connected with appointment, rather than to distinguish between right and wrong answers. Much, of course, depends on party strategies. If you have a good case and if you want your arbitrator to be a person of integrity, a positive answer to the last question (“Have you ever decided a case against a party who appointed you?”) might inspire confidence.

Let us also say, that a great number of arbitration decisions – probably a large majority of them – are unanimous. So there are arbitrators who decide cases against the appointing party. The same considerations suggest that an arbitrator who has ruled against you in an earlier case, might still be an arbitrator who deserves your trust (the circumstances of the earlier case are, of course, important). A prospective arbitrator’s refusal to answer is thus not necessarily the best approach to this dilemma.

Role-playing in class usually works well for the issues raised in questions 5 and 6. One student can be asked to be the prospective arbitrator and another, the appointing attorney. The “attorney” can be invited to ask the “arbitrator” questions, and the “arbitrator” can decide how to answer. For example, the “attorney” might be prompted to ask: “Have you ever decided a case against the party who appointed you?” The “arbitrator” and the class can discuss whether it is a good idea to ask such a question and how, if it is asked, the “arbitrator” should answer it. A follow-up question could be whether the “attorney” would appoint the “arbitrator” if the “arbitrator” refuses to answer, or says that he (she) has in fact decided against the appointing party in prior cases. Another relevant question is what the appointing party should be seeking in an “arbitrator” - (i) someone who will always argue and vote for the appointing party on all issues; (ii) someone who will exercise his (her) best judgment and argue and vote for the appointing party on issues the arbitrator can “reasonably” support; (iii) someone who will make sure that the appointing party’s arguments and positions are fully understood by his (her) fellow arbitrators, but who will exercise completely independent judgment on how to vote; (iv) someone who will appear to an objective observer (in particular, the third arbitrator) to be completely unbiased and independent, but who, in his (her) “heart of hearts” strives always to get the most possible under the circumstances for the appointing party; (v) someone following some other “game plan”.

**Question 8.** There are more and more attempts to chart attitudes and to define ethical standards. The 2011 CIArb guidelines belong to these attempts. Both party appointed arbitrators and third arbitrators (chairmen of the arbitral tribunal), or sole arbitrators have to remain impartial. The fact remains, however, that different methods of appointment yield some differences. The claimant is usually appointing its arbitrator in the claim itself. It would be unusual to discuss elements of the claim with the respondent. It would probably be a step too far to require the presence of both parties while interviewing a party appointed arbitrator.
**Question 9.** The WIPO standard would probably rule out certain questions, such as our hypothetical questions ii), iii), and iv) formulated in Question 5. Probably – but not certainly. The issue is what methods are permissible in ascertaining the “candidate’s qualifications”? You can certainly ask questions about the candidate’s education. You can ask what he/she has published. You can ask about his/her arbitration experience. Can one also test the candidate’s qualifications with exam-type questions? The authors doubt that this would make a candidate happy, and the candidate would certainly be within his/her rights in refusing to be tested. On the other hand, if the candidate allows such questioning without objection, he/she takes the risk that the process may evolve towards queries like our hypothetical questions ii), iii), and iv), which would probably contradict at least the spirit of the WIPO rule.

**Question 10.** The duty of disclosure helps to simplify things. If a connection that may or may not have a bearing on neutrality is disclosed, parties have a choice to make or not to make an issue out of it. By the same token, failure to disclose is a stronger and more discernible basis for disqualification than some link of questionable relevance. But what do you really need to disclose? Does a family tie count even if the uncle and the cousin have never seen each other? The authors are inclined to think that the arbitrator would do better to disclose this newly discovered family tie. (At the given late stage of the proceedings, however, disclosure might serve as a foothold for dilatory tactics by the party whose interests would be advanced by delay.) Still, family ties have to be disclosed. But suppose we are dealing with a second cousin?

**Question 11.** The appropriate minimum age for an arbitrator is a consideration typically left to the wisdom of the parties (or of the appointing authorities). Legal qualifications (and the time to achieve them) do not necessarily serve as an indirect guarantee of maturity, because arbitrators need not be lawyers. (Most arbitration statutes do not make legal training or expertise a requirement.) Twenty-four is, of course, arbitrary – but the same point could be made about any age limit.

**Question 12.** The key is in the “unless otherwise agreed” language of Article 11 of the Model Law. By submitting their case to the ICC, or LCIA, the parties are accepting the rules of these institutions – so they do agree otherwise.

One should also note that the Model Law is not applicable either in France or in England – but this argument is not always pertinent. The lex arbitri of an ICC arbitration need not be French law. The problem also arises in countries that have adopted the Model Law and that have arbitral institutions with rules containing something similar to Article 13(5) of the 2012 ICC Rules, or Article 6 of the LCIA Rules. The solution is, thus, in the “unless otherwise agreed” language.

**Question 13.** Family ties and, even more importantly, financial ties, are usually perceived as indicators of possible bias. The argument could be raised
that fear of bias might be carried too far if students who attended the same class would be equated with individuals who have family or financial ties. In the actual Italian case the links were of an academic nature, but more personal and direct. (Being in the same class is not the same thing as writing a book together.) The links identified in the Italian case may have prompted the need for disclosure. Whether academic links between an arbitrator and a counsel represent a sufficient ground for challenge is an open question.

**III.1.d. The Relevance or Irrelevance of Group Affiliation**

**Question 1.** It is clear that color or race cannot be used as a legal criterion. It is a much more intricate question whether in the given circumstances of a case it would be wise to choose a judge who does not belong to either side of the dividing line that enflames emotions—and that risks tainting the case.

**Question 2.** Once nationality becomes a consideration (via institutional rules), the definition and the borders of the concept of nationality can emerge as a question. Typically this is not a difficult problem, but the European integration movement, for example, might give rise to uncertainties. Assume EU residents have the same passport (not just the right to use the same separate corridor for passport control). Are they EU nationals or nationals of a given member state, or both?

The LCIA solution makes it clear that restrictions pertaining to nationality do not apply to affiliation with the EU. It is noteworthy, however, that the drafters of the Rules felt the need to explain that “citizens of the European Union shall be treated as nationals of its different states and shall not be treated as having the same nationality”.

**Question 3.** Ethnic or religious differences may yield (justified or unjustified) expectations of bias. Active ethnic or religious rivalries and conflicts, however, yield strong expectations of bias. The issue of the potential relevance of ethnic affiliation will typically give rise to quite passionate debates among students. The dividing axis is often that which separates principles and practical considerations.

A Croatian party will almost certainly feel uneasy if the arbitrator is an ethnic Serb (and vice versa). Should we ignore these predictable feelings? On the other hand, if we give weight to ethnic affiliations, are we returning to tribalism? And what about corporate tribalism? Can a retired Pepsi Cola employee arbitrate a case involving Coca Cola and a third party? Is the issue the same when the case involves Greeks and Turks, Arabs and Israelis, Serbs and Croats? Or is corporate rivalry different from ethnic rivalry? Is it more rational?
Some will argue that a scrupulous observance of various possible group affiliations might restrict choices to an unreasonable extent.

**Question 4.** In practice, group affiliation (combined with historic and/or present antagonism) is often heeded, and parties do try to make arrangements that take account of such considerations. Institutional rules may not recognize various group affiliations, but in making appointments institutions try to gain the confidence of both parties—and therefore they often take account of predictable sensitivities even if the formal rules do not mandate that they do so.

It may still be open to discussion, of course, whether this pragmatic attitude is the correct one.

One may qualify as a (fervent) striving for neutrality a choice based on ethnicity, when a historic feud may be in the mind of the parties, and they have difficulties in perceiving as a neutral arbitrator someone who has ethnic links with one of the sides of the divide. Still, such a stipulation is certainly neither praiseworthy nor advisable. In the (really unlikely) case that a French and a German party would exclude any arbitrator who is a Muslim, it would be difficult to find any other explanation but prejudice.

**Questions 5 and 6.** There is certainly a dividing line between choices guided by considerations of group affiliation (typically without spelling them out), and acquired rights and positions of individuals. It would represent a clear violation of human rights if someone were removed from the position of arbitrator, just because he/she is a Serb, a Croat, a Greek, a Turk, a Jew, or a Muslim. Thus, ethnicity in itself cannot be the basis of a challenge. If a person has not yet acquired a right or position, but is only one of the candidates contemplated in confidential conversations, the situation is somewhat different. In such a situation, ethnic considerations need not be spelled out, but it is not completely irrational to heed political considerations in order to avoid any appearance of bias.

A more subtle question is whether a distinction should be drawn between making a choice guided by considerations of ethnicity or religion, on one hand, and including in an arbitration agreement a written stipulation requiring arbitrator selection to turn on such considerations, on the other hand. Justice Steel in the first instance Commercial Court speaks about “legitimacy”. There is, of course, a practical difference. It is difficult to challenge a consideration that has not been spelled out and that may have been mixed in with other considerations. Also, the potential harm is not exactly the same if in one case one heeds a (questionable) concern under specific circumstances, and if in another one formulates a questionable consideration as a rule.
Questions 7 and 8. The GOR (genuine occupational requirement) exception arises within the context of employment. Restricting the pool of arbitrators to those who belong to a given religion is certainly an unusual provision—and the sensitivities generated by such a provision presumably explain the different court decisions. The Commercial Court mentioned that the situation created by the stipulation in the Hashwani case is not much different from “dispute resolution under the auspices of religious groupings such as the Beth Din” (section 56 of the decision of the Commercial Court –EWHC 1364, 2009). If religious issues are at stake, the requirement of a certain religious affiliation is easier to accept. In this context such a constraint resembles a requirement pertaining to expertise. It would also make sense to restrict the pool of arbitrators to a specific group (say religion, or tribe) that is known for practicing specific dispute settling techniques. Deciding ex aequo et bono is also a special dispute settling technique; it is certainly not restricted to a specific religious community, but it is not irrational to assume that a search for equitable solutions may be enhanced if all players belong to the same ethical community. The Hashwani case was not a case about religion. The Court of Appeals held that the parties stipulated the application of English law. (This is actually not visible from the arbitration clause as reproduced in the judgment. A possible foothold for such an assertion is the fact that the parties agreed that the arbitration would take place in London—which triggers the applicability of English law as the lex arbitri.) An additional justification behind requiring Ismaili arbitrators is the fact that costs could be considerably lower, if the decision makers act according to the customs of the Ismaili community.

At any rate, the main ground relied upon by the Supreme Court appears to be more persuasive. The arrangement between the parties and arbitrators cannot be equated with employment, and hence, the special safeguards pertaining to employment are not pertinent. The Supreme Court stresses that one of the distinguishing features of arbitration is the breadth of discretion left to the parties (and to the arbitrators) in structuring the process. If one were to conclude that the relationship between parties and arbitrators falls within the concept of “employment” as conceived by the Regulations, the choice between the position of the majority and that taken by Lord Mance would become more difficult.

Question 9. The main focus of the Jivraj v. Hashwani case was on employment. In this context, discrimination is a particularly sensitive issue, and there are powerful reasons to avoid discrimination. If we accept the quite persuasive assumption that the appointment of arbitrators cannot be equated with employment, the problem becomes somewhat less sensitive. Outside the field of employment, it is more justified to allow the parties to agree on decision-makers with special affiliations and qualifications. The equality of the parties should remain a guiding principle—but this principle was apparently not
jeopardized in the *Jivraj v. Hashwani* case.

**Question 10.** Restricting the choice to members of a certain group may be perceived as an expression of a special trust. (Although trust and mistrust are sometimes just different sides of the same coin.) Eliminating someone (or a group) on the ground of religious affiliation seems more clearly and more directly to constitute discrimination. Yet some—if not all—restrictions of this kind may be understandable (even if one cannot be sympathetic to them). Parties that belong to ethnic or religious groups divided by violent confrontations should, of course, know that not every individual belonging to a group shares the group bias, but nevertheless, it may be understandable for such parties to seek neutral decision makers outside the two antagonistic groups.

**Question 11.** Even accepting that outside the field of employment there is a considerable “breadth of discretion”, some restrictions might violate public policy concerns. It is not easy to establish a clear and simple dividing line. The question might be raised whether it would be illegal (in addition to being inane) to stipulate that the arbitrators can only be blond—or dark haired. Or, that they must be above (or below) 60 years of age. And what if the parties were to agree that the arbitrators must be male? There is a subtle dividing line between idiosyncratic stipulations that are just bizarre, and those that mirror and reinforce unsolved contemporary challenges to equality.

**Question 12.** The Court of Appeal’s view is certainly plausible. A stipulation stating that all arbitrators have to belong to a religious group is probably guided by some strong convictions, and thus, it would be difficult to qualify it as a negligible detail of the arrangement.

**III.1.e. How to Get (or Not to Get) the Right Arbitrator**

**Questions 1 and 2.** The debate about the alleged pro-Western and pro-male bias is a relevant one – although one hears more of this debate in countries that are considered by Nathan as underprivileged. There is not much restraint in the Nathan article, but it reflects quite adequately the arguments raised by many – particularly in developing countries. These arguments may represent one side of the coin. Yet, since the success of international commercial arbitration is very much dependent on its global acceptance, the arguments should be considered.

It would be difficult to discard the criteria advanced by Hacking. Nathan is right that they are somewhat vague, but the question arises whether it is possible (and desirable) to articulate criteria that would restrict the maneuvering room of the appointers. Still, the imbalance is real. Nathan devotes more attention to
imbalance along the East/West axis, but he also mentions imbalance between men and women.

Market forces have not brought about much of a correction. Arbitration institutions in Cairo and Kuala Lumpur, for example, offer more chance to arbitrators from developing countries (although they have relied on quite a few "Western" arbitrators as well). These institutions have gained considerable recognition, but their market share is not significant. One could mention at this point the considerable success of the Stockholm Court of Arbitration specializing in East-West disputes (East-West, meaning Western Europe and the U.S. on one side, and the former socialist countries on the other side). The Stockholm Court of Arbitration has relied to a significant extent on arbitrators from Eastern Europe. Let us also mention that fee scales of institutional tribunals in Eastern Europe are considerably lower than those of the ICC or of the LCIA. Singapore has recently made significant advances as a center of international arbitration. Arbitral institutions in Central and Eastern Europe handle a significant number of cases (including some East-West cases), and they offer more opportunities to arbitrators from their region – but their impact on a world-wide scale is still limited.

Students may be invited first to state whether they do or do not perceive a problem. (Reliable statistics would be most helpful here, but they are not readily available.) Some might just conclude that reputation is only in part based on rational and measurable facts – and appointments are based to a large extent on reputation. Those who see a problem should be invited to propose solutions. Some sort of affirmative action? Better P.R.? If there is really a club spirit within the circle of frequently appointed arbitrators, how could one overcome it?

**Question 3.** Reputation is certainly a consideration and an asset – and this is something what newcomers (including the truly talented ones) are lacking. The points made by Yu-Jan Tay make sense. Reputation is a basis for trust, and it is also a possible shield against criticism if the outcome is not the desirable one. It is difficult to blame someone for a bad choice if he/she chose an arbitrator with an excellent standing. One should also take into consideration the fact that most arbitrators with an excellent reputation are trying to maintain such a reputation. If an arbitrator is accepting more cases than he/she can properly handle, this will impair the performance, and sooner or later it will impair the reputation as well. Therefore, while it is true that "the most reputable arbitrators in each region tend to get repeated appointments", it is also true that many of these arbitrators also tend to decline some appointments. This is one of the (several) reasons why we have always had a chance for newcomers as well.

**Question 4.** It is certainly true that more information about able candidates from developing countries or more information about women
arbitrators could help. But how could such information be circulated? Some arbitration associations (like the Swiss) publish brochures with C.V.’s and pictures of their members. Swiss arbitrators are, indeed, often chosen; but – at least according to the knowledge and experience of the authors — not because they are described or pictured in a brochure. We would venture to say that parties would opt for an arbitrator more often because they have heard that he/she is a competent and fair decision-maker, than because they have read a description of him or her in a brochure.

At the same time, written information can be helpful to arbitral institutions and appointing authorities.

**Question 5.** It is true that there is no balance between geographical areas on the map of international arbitrators. Education and conferences involving participants from various geographical areas could certainly play a positive role. The idea of coaching is an interesting one, worth exploring. One should also take into account some likely difficulties. Problems might arise regarding the requirement of confidentiality. The question should also be raised whether the coaches will act pro bono, or whether their participation will increase the costs. A consent of both parties might be needed regarding both the confidentiality and the cost issue. A further problem might be that of the availability of potential coaches.

**Question 6.** The underrepresentation of women in the pool of international arbitrators is an issue that needs and deserves attention. It is certainly true that it is easier to expect some action from State actors than from private actors. It is difficult to imagine a treaty obliging States to designate more women to the ICSID Panel, but some coordinated actions and recommendations appear to be feasible. One also has to bear in mind that investment arbitration is a rather specific domain. There are arbitrators who are getting appointments both in investment arbitration cases and in international arbitration cases, but there are quite a few truly successful international commercial arbitrators who have not been active in the field of investment arbitration. The question also arises how often do parties seek orientation by taking a look at the ICSID Panel. Presence at the ICSID Panel would, indeed, improve visibility; but it is difficult to say how much practical effect would this yield.

**Question 7.** It is certainly true that a person who knows more about the dispute is in a better position to select a suitable decision-maker. The question is whether familiarity with the details of the dispute is really essential? There are competent and less competent arbitrators. The really competent ones usually do a good job in various kinds of disputes. Moreover, some basic features of a dispute are discernible without much scrutiny. One does not need to go deeply into a case to know, for example, that it concerns intellectual property issues. A
once-through reading of the claim would suffice. Thus, some choice based on arbitrator expertise is possible without a deep study of the dispute. If the appointers were to insist on having a full (or at least a better) picture of the controversy, however, appointment would be delayed – and remission of the case to the actual decision-makers would be postponed

**Question 8.** It does not seem unreasonable to allow arbitral institutions to confirm (or not to confirm) party-appointed arbitrators. The institution also has a stake in the decision-making process. Its reputation depends on the quality of the arbitral proceedings and result, and hence on the ability of the arbitrators. Let us also mention that arbitral institutions that do have the power to confirm party appointment have used this power with much restraint. Offended parties do not help the reputation of the arbitral institution. According to unofficial information available to the authors, lack of competence is very rarely relied upon as a ground for an institution to reject a party-appointed arbitrator. Lack of independence has more often been stated as a ground for denying confirmation. (Lack of independence, may, of course, also jeopardize the validity of the award.)

**Question 9.** Nathan is probably right in suggesting that language skills need not be at the level of an expert advocate. International commercial arbitration is a cross-cultural enterprise. Although in this setting language skills represent a huge advantage, less than perfect command of the language of the proceedings is quite common.

In practice, a distinction is often made between the language skills needed to be the presiding arbitrator, and those needed to be a member of the tribunal. This is because the presiding arbitrator is usually responsible for written communication with the parties and typically drafts the award.

Command of other languages (other than the language of the proceedings) is certainly an advantage. If documents presented as evidence are written in a different language (which is quite common), it is most helpful if arbitrators can evaluate these documents directly, without the interposition of a translator. It is certainly an advantage if at least one of the arbitrators speaks the language of the document. (He might flag mistakes or shifts of emphasis in the translation, which could prompt further inquiries and possibly the commissioning of another translation in order to establish the exact meaning of the document.) It is also an obvious advantage if the arbitrators (or some of them) can read statutes and cases in the original language – if the applicable law is not written in the language of the proceedings. It would generally be unrealistic to require that all arbitrators have command of all languages implicated in a proceeding. Nevertheless, it would be rational to consider skill in the relevant languages as an important attribute of a potential arbitrator – and overall “language coverage” could be an important consideration in the composition of the arbitral tribunal.
**Question 10.** One of the elements of being suitable is being available. This is an important consideration, because it has a substantial impact on speed. At the same time we should mention that this element of suitability is usually not considered with rigor.

Group affiliation might also be considered under Article 9(1) of the ICC Rules, which speak of the “prospective arbitrator’s nationality, residence and other relationships with the countries of which the parties and other arbitrators are nationals”. How far can one go with such considerations, however, without infringing human rights or civil liberties principles. It would be difficult, for example, to approve the rejection of a prospective arbitrator on the ground that his/her religion is the same as the dominant religion in the country of one of the parties (or on the ground that an earlier-appointed arbitrator has the same religion).

**Testing Professional and Linguistic Skills**

**Questions 1 and 2.** Some difference exists between stating that the arbitrator has to be someone who speaks, say French, and stating that the language of arbitration is French. In the first case, if you appoint someone who does not speak French, you will wind up with a tribunal “the composition of which is not in accordance with the agreement of the parties”, which is a broadly accepted ground for setting aside or refusal of recognition. If it is only stated that the language of arbitration is French, the appointment of an arbitrator who does not speak French does not violate the wording of the arbitration agreement; such a wording would only be violated if the language of the proceedings were not French (and – with the help of an interpreter - the language of arbitration may remain French, even if one of the arbitrators does not speak this language). At the same time, one could say that the nomination of an arbitrator who does not speak the language of arbitration, even if it does not violate the wording of the agreement, is not in line with its spirit. This is why codes of ethics state that an arbitrator should not accept an appointment if he/she does not speak the language of arbitration.

The decision of the Hungarian court is defendable (since the wording of the arbitration agreement was not infringed).

As far as the Mexican decision is concerned, here it appears to be clear that expertise was posited in the arbitration agreement itself, hence the appointment of someone who is not an expert in accounting and broadcasting matters would have yielded a “composition not in accordance with the agreement of the parties”. In this situation, the appointment can only be deemed valid if the court comes to the conclusion, that the arbitrators are, indeed, experts (unless
the need for such a conclusion can be avoided by way of reliance on waiver).

Let us add that in the Hungarian case the arbitrator never contended that he spoke Hungarian. One can imagine cases in which the parties state specifically that the arbitrator should speak a given language, the arbitrator says that he/she does, and the question emerges, whether the level of command of the given language is really satisfactory.

**Question 3.** Both the IBA Rules and the Croatian Rules state explicitly that the prospective arbitrator should not accept appointment if he/she does not speak the language of arbitration. (The IBA Rules speak of “adequate knowledge,” the Croatian Rules speak of “sufficient knowledge” – aiming probably at the same standard). This makes sense, since by accepting appointment without knowledge of the language of arbitration, the arbitrator is imposing quite considerable logistic and financial burdens on the proceedings. As far as other qualifications are concerned, the IBA Rules use broader terms, speaking of competence “to determine the issues in dispute”. The Croatian Rules are more specific, and speak of “sufficient knowledge of the law regulating procedure and of the relevant law for the merits of the dispute”. The question is what amounts to “sufficient knowledge” in this context. Someone who has never spoken Spanish will certainly have no adequate (or sufficient) knowledge to conduct arbitration proceedings in Spanish. Someone who has never applied Spanish law may not be clearly disqualified, especially if he/she has legal education and experience linked to other European countries. Hence, the Croatian Rules probably need a more flexible interpretation regarding legal expertise.

**Question 4.** Education and practice are the obvious points of reliance. One also has to bear in mind that the task of the arbitrator does not require a professional achievement in broadcasting, or accounting, or in some other professional domain. He/she needs expertise in some specific areas in order to be able to understand the issues submitted to the arbitrators.

**Question 5.** In line with what was said in connection with Q. 3, the two problems are not within the same range. A good British lawyer may not know Hungarian law, but – with some added effort – he may gain information and shape a professional opinion regarding the legal norms at issue. Discussions with the co-arbitrators may also help to clarify matters. In the given case things were facilitated by the fact that the issues were linked to energy law – and the British arbitrator was an expert in energy law, hence he was familiar with the problem patterns and questions. Questions do not necessarily have the same answer in English and Hungarian law, but coming to understand specific answers in a domain which is a domain of his expertise, is a surmountable task. The situation is obviously different with regard to (lack of) command of language.
**Question 6.** A specific procedural order regarding costs of translation may, indeed, strike a balance. It would make sense to state that added costs incurred by the need for translation should be shouldered by the party who insisted on the nomination of the arbitrator who did not speak the language of the arbitration. Another option would be to change the language of the arbitration. This, of course only makes sense if the other two arbitrators and the counsels of the parties are comfortable with English – and if both parties agree to modify the binding stipulation in the arbitration agreement.

**III.1.f. Codes of Ethics**

Arbitrators are rightly expected to be competent, responsible and impartial. It is impossible, however, to express all expectations in the form of legal rules. Attempts have been made to cover gray zones by rules in codes of ethics. Neither the AAA/ABA nor the IBA rules or guidelines represent binding norms. They do offer, however, some orientation – and they also offer a starting point for discussion and debate.

Let us add that there have been attempts to treat the provisions in codes of ethics as binding rules. This was the case with earlier versions of the Chamber of National and International Arbitration in Milan, Italy (CNIAM) rules. In the present 2010 Chamber of Arbitration Milan Rules there is no direct reference to the Code of Ethics, but the Code of Ethics itself contains such a provision. According to Article 13 of the same Code of Ethics, an arbitrator who does not observe the Ethics for Arbitrators shall be replaced by the Chamber; which may also refuse to confirm him in subsequent arbitration proceedings.

**Questions 1 and 2.** Canon X of the 2004 AAA/ABA Code provides for exemptions “for arbitrators appointed by one party who are not subject to rules of neutrality”. Canon X.A (1) states: "Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness." The 1977 AAA/ABA Code contained the very same provision, except that it spoke of “non-neutral arbitrators” rather than of “Canon X arbitrators”. Thus the size of the tent remained about the same.

It is not easy to assess the precise meaning of the term “predisposed” in the given context. Is this a limited license for bias? Can predisposition be compatible with acting “in good faith and with integrity and fairness”? Should we read this phrase to mean that Canon X arbitrators may be “predisposed” but they must remain fully impartial nevertheless? Could one perhaps say that Canon X arbitrators cannot be challenged on the ground of appearance of bias? In other words an arbitrator who acted as counsel for one of the parties earlier, (or who is working in the same law firm where a counsel for one of the parties is employed)
cannot (without more) be challenged on the ground that he or she may be “predisposed”? In other words, does “predisposition” allow appearance of bias (while still excluding actual bias)?

Or could one perhaps compare Canon X arbitrators with party appointed expert witnesses?

The core of the difficulty lies perhaps in the fact that legislation concerning international commercial arbitration does not distinguish between various levels of impartiality, while party expectations are somewhat different (and there are some differences in practice as well). The AAA/ABA Code reacts to this reality, but the reaction is less than fully articulate. The IBA Rules ignore the difference. The AAA/ABA canons call attention to the distinction between party-appointed and non-party-appointed arbitrators only in domestic arbitration. The question remains whether the de facto difference should be recognized and formalized (with an eye to narrowing the distinction), or whether refusal to make distinctions among arbitrators would better serve the ideal of impartial decision-making.

**Question 3.** Since the mandate of arbitrators rests on party confidence, it is certainly in line with common sense for an arbitrator to step down if he (she) loses the trust of both parties. In fact an arbitrator should consider resignation even if only one of the parties so requests. The UNCITRAL Rules try to soften an arbitrator’s natural resistance to such resignation by stating in Article 11(3) that withdrawal does not “imply acceptance of the validity of the grounds for challenge”.

But the question is whether withdrawal is the only ethical thing to do. The parties may not be aware that if an arbitrator is replaced, the proceedings may have to start over from the beginning. Is it below an arbitrator’s dignity to warn the parties and explain to them the consequences of replacement? Probably not. Also, if an arbitrator believes that he (she) is a victim of false rumors, he should probably have the right to fight a challenge. (One could also argue, of course, that in a party driven process, if both parties agree on the replacement of an arbitrator, no challenge procedure is actually needed.)

In “An American Critique of the IBA’s Ethics for International Arbitrators”, Coulson suggests that mandated resignation actually helps the arbitrator, relieving him (her) from an “uncomfortable quandary” (J.Int’l Arb’n, June 1987, 103). Do you agree?

**Question 4.** Separate arrangements between a party and its arbitrator concerning fees are not typical, but such arrangements do exist in ad hoc arbitration. Some arbitrators request a fee when approached by the party who intends to nominate them, and in consequence a party may enter a fee arrangement with its appointed arbitrator. The UNCITRAL Rules, which have become dominant in ad hoc arbitration, suggest a different course of action.
Articles 38 and 39 provide guidelines regarding the assessment of arbitrators’ fees: the fees are to be stated separately for each arbitrator, but they are to be fixed by the tribunal itself. (In institutional arbitration, fees are set by the institution.)

Separate arrangements between the party and the arbitrator are, thus, not in line with UNCITRAL’s effort to promote uniformity and good practice, and they are also not particularly common. Such arrangements may not prove, or even be good evidence of, bias, but they may nevertheless give an appearance of bias. Canon 6 of the IBA Code of Ethics takes a position against “unilateral arrangements for fees and expenses”, although it does not rule them out completely. You might want to ask whether students think that Canon 6 has found the right formula.

Consider the following question. In principle, fees and expenses should be set by the same yardstick. They are advanced by both parties, but they will eventually be borne by the unsuccessful party. (The arbitrators may also apportion fees and costs between the parties, considering first of all the success of the claim and any counterclaim, and possibly other circumstances as well.) Suppose that the winning party has made a separate arrangement with its arbitrator, and the fees of this arbitrator are much higher than the fees of the other two arbitrators. Could (and should) the winning party recover the total amount of the fees it agreed to pay?

**Question 5.** By the nature of the arbitration process, arbitrators and the parties are much more likely to meet than are judges and parties. The site of arbitration is typically a place to which most of the persons involved in an arbitration have to travel, and the most suitable travel arrangement for one party might also be the most suitable arrangement for the other party and for some (or all) of the arbitrators. Hearings are sometimes held in a hotel, and it is quite natural that everyone will try to get a room in that same hotel. This leads us to the questions posed in the book: What if an arbitrator is on the same plane with one of the parties? Should the arbitrator sit in a seat adjacent to the party, or to one of the lawyers? Should an arbitrator sit at the same breakfast table with a party (or a lawyer) if they are in the same hotel?

There are certainly no rules that would give precise answers to these questions. Codes of ethics do not (and maybe cannot) spell out specific guidelines for such situations. Some guidance may be found in Canon 5.5 of the IBA Code, which states that arbitrators “should be particularly meticulous in avoiding significant social or professional contacts with any party”. But does this mean a separate breakfast table if the arbitrator and the party are in the same hotel and happen to come to breakfast at the same time. (Of course, we are not talking here about a valid ground for challenge; we are talking about safeguarding both neutrality and the appearance of neutrality.) The 2013 IBA Guidelines on Party Representation concentrate on communication in connection
with arbitration. They clearly do not prohibit other communication, but one could also argue that they simply do not cover other communication.

**Question 6.** The AAA/ABA Code and the IBA Rules are fairly similar with regard to acceptance of appointment. The AAA/ABA Code specifies that the arbitrators should be independent, not only with respect to the parties, but also with respect to potential witnesses and the other arbitrators. This angle of independence is not stated in the IBA Rules. Should independence from the other arbitrators have the same (or at least similar) weight as independence from the parties? Should an arbitrator resign if one the witnesses is his/her second cousin? If so, when should he/she resign; when such a witness is proposed or when the arbitration tribunal decides to hear such a witness? Or should these circumstances be disregarded, because they might represent an encumbrance, or even a vehicle for stalling? How about possible personal links between the arbitrators?

Both the AAA/ABA canons and the IBA Rules state that one should not accept an appointment unless one is satisfied that he/she is competent to serve. At this point the IBA Rules contain somewhat more detail. They specify that the prospective arbitrator should be competent “to determine the issues in dispute,” and that he/she should have “an adequate knowledge of the language of the arbitration”. Are these provisions helpful? (Are they necessary?)

It is true, of course, that an appearance of bias might also be created after appointment. The AAA/ABA Code sets out specific guidelines for conduct after appointment. Should these standards be the same as those pertaining to connections, characteristics and behavior prior to appointment? It might create an appearance of bias if an arbitrator is the father-in-law of the daughter of one of the attorneys. Does this connection have the same weight if it first becomes known when the arbitration proceedings are already well underway? Should the arbitrator do something in order not to become the father-in-law while the arbitration proceedings are ongoing? Non-acceptance of a proposed appointment before the proceedings have actually started yields very little, if any, postponement or interference. Resignation shortly before the award would otherwise have been rendered might represent a major setback, and might thwart the possibility of having efficient proceedings. These considerations might suggest a more relaxed standard with regard to appearance of bias based on circumstances that emerge after appointment. Still, the arbitrator could and should avoid gestures and connections that might create an appearance of bias after appointment as well. (But the resolution of the hypo regarding the father-in-law status of the young couple should be left to the judgment of the students.)

**Question 7.** It is certainly difficult to set clear guidelines regarding disclosure. There is no doubt that one should disclose facts like the existence of a business partnership between the arbitrator and one of the parties. An arbitrator should certainly disclose that an attorney for one of the parties is his
wife. Should he also disclose the fact she is his former wife? Former girlfriend? Girlfriend 25 years ago? Is it necessary to disclose that the arbitrator and the owner of one of the parties both serve on the board of trustees of the same university? Or that they are both sitting on the advisory committee of a particular soccer club?

It is probably impossible to find a sentence that would give us clear guidance in each case. All cited formulations have some merits – and can prompt discussion. One may note that all formulations make it clear that the judgment of the arbitrator himself is not conclusive. The standard is either an objective standard ("justifiable doubts", "might reasonably create an appearance of impartiality") or the perception of the parties ("facts or circumstances of such a nature as to call into question the arbitrator’s independence in the eye of the parties"). A certain difference in emphasis may also be noted between the formulations "in the eye of the parties", and "in the eye of any of the parties". The problem is, of course, that the judgment has to be made initially by the prospective arbitrator; he/she has to decide what might call into question his/her independence by either objective standards, or "in the eye of the parties". The relative merits (and the relative stringency) of the given formulations is open for discussion.

Question 8. Canon VI(B) states that “Unless otherwise agreed by the parties, or required by applicable rules, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.” This seems to suggest that an arbitrator should not reveal considerations (other than those stated in the award) in explaining which arguments were found to be persuasive and which not. You might want to ask a student what purpose would be served by providing this kind of information. (One obvious danger zone is the risk of assisting a party in challenging the award.)

Question 9. Most of the Canon VI rules clearly make sense in the arbitration context as well. Are there differences at all? The prohibition of ex parte communication should, of course, apply to arbitrators as well. But isn’t there a need to add “after appointment”?

The Commentary states that “The proscription against communication concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceedings.” The argument may be made, of course, that if the arbitrator consults a law professor – even if the professor never learns the names of the parties and merely speculates on issues arising between party “A” and party “B” – the opinion might influence the arbitrator (at least this is what the authors, who are law professors, think). In this situation should the arbitrator disclose his conversations to the parties in order to give each side a chance at rebuttal? Would this be fair? Would it be practical?

Question 10. The focus is normally on the connection between an
arbitrator and one of the parties. In this setting, the direction of a potential bias is rather clear cut. It is much more difficult to identify the direction of the bias if we are talking about a link between two arbitrators, rather than about the link between an arbitrator and one of the parties to the dispute. Furthermore, scholarly links are less indicative of bias than business links. For this reason it would be difficult to perceive as an indicator of bias the fact that two arbitrators are alumni of the same law school. (Students may be invited to discuss in what direction a scholarly link between two – or three – arbitrators could conceivably have an impact.) It is a somewhat different matter if scholarly links exist between an arbitrator and a counsel of one of the parties. If the co-arbitrators are not only colleagues, but one is the subordinate of the other, then it is more rational to speak of a certain direction of influence. The Russian Rules also speak of a need to disclose if the arbitrator is a former academic supervisor of a party. Here, the question might be raised whether it is rational to assume that the arbitrator (and his/her impartiality) is likely to be under the influence of a former student. In every professional world, actors – particularly actors who are not new – tend to know each other, they attend the same conferences, and have personal contacts. Many of them have the same academic background. An overzealous investigation of connections may pose a difficulty. At the same time, it remains important to safeguard independence and impartiality as hallmarks of international commercial arbitration. There is much room left for discussion.

**Question 11.** The color coded lists are helpful, and offer somewhat more guidance than general formulations do. The orange list uses the three year time limit regarding a number of situations. (E.g. “the arbitrator has within the past three years served as counsel for one of the parties”, “the arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties”, “the arbitrator…has served within the past three years as arbitrator in another arbitration on a related issue involving one of the parties”, etc.) One may very well perceive the three-years-time limit as a dividing line between the orange list and the green list. The question arises, however, whether this is in accordance with the standard “in the eye of the parties” set out in some codes of ethics, and in the ICC Rules as well. If the arbitrator acted as counsel for one of the parties five years ago, or three and half years ago, would this not be a circumstance of such a nature “as to call into question the arbitrator’s independence in the eye of the parties”? – It is also important to note that standards set out in institutional rules supersede code of ethics canons.

**Question 12.** The Milan Code of Ethics is issued by the Milan Chamber of National and International Arbitration. In itself, it could not regulate arbitration proceedings. Arbitral proceedings are governed by arbitration rules if the parties accept these rules. Parties to a dispute normally do not submit to codes of ethics. A link would be needed with the Milan Rules. The Milan Rules of International Arbitration contain, however, no reference to the Code of Ethics. Article 21 of the Milan International Rules dealing with replacement of arbitrators does not mention the reason stated in Section 13 of the Milan Code of Ethics. This makes
the application of Section 13 questionable, unless the parties specifically agreed on the application of the Code of Ethics.

Codes of ethics usually contain a number of rules of varying degrees of importance. Were one to contemplate making the ethical canons binding, the question would arise whether one should reduce them to the really consequential rules. Otherwise, a small and inconsequential transgression (for example, an arbitrator having breakfast with one of the parties in the hotel where they are both guests) might jeopardize the arbitration proceedings. Another approach would be simply to shift the important ethical canons to the arbitration rules. This might bring about more transparency. A party acting with due care will study the arbitration rules; whereas there is no practice of consulting codes of ethics.

The Milan Code of Ethics is a rather short text containing a limited number of prohibitions. Article 15 of the earlier version of the Code stated that “The arbitrator who does not comply with this Code of Ethics may be replaced”. Article 13 of the 2010 Code uses stronger language. It says that an arbitrator who does not comply with the Code shall be replaced. A related issue under the Milan Code of Ethics is how a transgression of the code would come to the attention of the Arbitration Council. Party motion is an obvious possibility. Were the Arbitration Council to learn of a transgression from another source, however, it might be advisable to consult the parties before deciding on replacement. Should replacement be contemplated even if both parties, knowing of the transgression, still opposed replacement? The authors are inclined to say no.

Questions 13-15. We have dealt here with several codes of ethics – but there are many more such codes. The variety of codes of ethics raises the issue of potential conflicts among them. Suppose that in a case some arbitrators belong to a professional group influenced by the AAA/ABA Code, while others owe allegiance to the IBA Rules. Could different ethical canons apply to different arbitrators in the same case? The problem would be greater, of course, if the ethical canons were binding rules. They are not.

Arguably, it might make sense to draft different codes of ethics for different types of arbitration. One can imagine, for example, different rules for domestic and international arbitration respectively. Is it also justified to have different ethical canons for specialized arbitrations in different branches of trade? (Assuming that we are talking about arbitration rather than, say, conciliation or expertise). Some rules of evidence may need to be adjusted to the character of the subject of the dispute (services, specific kinds of commodities, etc.) Does this mean that ethical canons should also be different?

The conversion of ethical rules into binding procedural norms would entail some dangers. The possible infringement of binding procedural norms is a ground for setting aside of the award or for denying recognition. If ethical rules were elevated to the category of contractually binding procedural norms, the
threshold for possible set aside (or refusal of recognition) would at the same time be lowered.

If ethical rules are not binding procedural norms, the question arises what is the sanction for the possible infringement of such norms. If a sanction does not reach the product (the award), it might reach the authors (the arbitrators). The Milan solution certainly makes sense, but this sanction would only hurt those arbitrators who would otherwise have an opportunity to act frequently as an arbitrator at the Milan Chamber of Commerce. (The sanction would not really impair say an English, American, or Russian arbitrator for whom arbitration in Milan is a once-in-a-lifetime experience.) What do you think of a possible reduction of fees?

Would it be fair to say that codes of ethics help participants in the arbitration proceedings in perceiving ethical dilemmas but leave the resolution of such dilemmas to the arbitrators and attorneys themselves? Is this all the codes aim to accomplish? (The Milan Code of Ethics is certainly more ambitious.)

**III.1.f.i. An Example of Reliance on IBA Guidelines in Court Practice**

**Questions 1-3.** “Objective grounds” to which the Swedish Supreme Court refers are indicative of appearance of bias as a standard. This is in line with the rule set forth in Article 8 of the 1999 Swedish Arbitration Act, which states that an arbitrator shall be discharged, if there exists any circumstance that may diminish confidence in the arbitrator’s impartiality. The Supreme Court says that it does not really matter whether the link with the Ericsson Group did or did not influence arbitrator Lind. What matters is whether the given link did or did not call into question the impartiality of the arbitrator. The Court relies on the IBA Guidelines in identifying those circumstances that “may diminish confidence in the arbitrator’s impartiality”. The second paragraph (the last sentence) of the Non-Waivable Red List probably does not apply here. It applies if the arbitrator “regularly advises the appointing party, or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom”. In our case the Mannheimer Swartling law firm may have had a significant financial income from Ericsson, but it would be difficult to say that arbitrator Lind was “regularly advising” Ericsson. He did not have direct client contacts with Ericsson, and – as a consultant of Mannheimer and Swartling – he only advised Ericsson through two legal opinions. For the same reason, Section 2.3.7 of the Waivable Red List is probably not applicable either. One the other hand, item 2.3.6 appears to be applicable, since for Mannheimer Swartling, the relationship with Ericsson was a significant commercial relationship. This conclusion is strengthened by the rules of another code of ethics, the Code of Conduct of the
Swedish Bar Association, according to which an attorney must show loyalty towards the client. (It should be brought to the attention of the students that the 2004 Guidelines applicable in the Swedish case have been replaced by the 2014 Guidelines. Differences exist, but the points considered in the Swedish case – including Section 2.3.6 of the waivable red list - are still relevant.)

**Question 4.** The “importance from a business point of view” standard is certainly a flexible standard. A more stringent option would be to exclude those lawyers who had any contact with a party to the arbitration. The reason behind the more flexible standard is that law firms have many clients. Some give rise to significant cases (and income); others do not have a really significant link to the law firm. It is important to note that item 2.3.6 of the IBA Guidelines speaks of current significant commercial relationship, thus making the standard even more flexible. Arguments may be advanced both in favor and against flexible standards.

**Question 5.** The lists of the IBA Guidelines do not make a distinction between party appointed arbitrators on the one hand, and sole arbitrators (or third arbitrators) on the other hand. Typically, legislative acts do not make a distinction either. Some institutional rules do distinguish between party-appointed and other arbitrators. Even if no distinction is made, however, in case of doubt, the fact that the arbitrator who has some links with one of the parties is the sole arbitrator (or the third arbitrator) calls for a stricter interpretation. At the same time, one could argue that in this case there was not much doubt as to whether item 2.3.6 applied.

**III.1.g. Rights and Responsibilities of the Arbitrators**

The focus of this subsection is on remuneration and possible liability of the arbitrators. Fouchard states that the status of the arbitrator is contractual in its origin. This contract is rarely written and the details are rarely spelled out. It is somewhat more visible in case of ad hoc arbitration than in an institutional setting. The Fouchard excerpt and the Norjärn case endeavor to shed more light on the nature and on the elements of this contract.

**Question 1.** Liability of arbitrators rarely emerges as an issue. In those few cases that reach the courts, procedural omissions are usually alleged. In an unpublished case, the dissenting arbitrator refused to sign the award. According to the applicable procedural law the two arbitrators who represented the majority opinion were supposed to sign the award and to sign a declaration witnessing that the third arbitrator refused to sign. The two arbitrators failed to notice this procedural requirement and simply signed the award without witnessing on the face of the award that the third arbitrator had refused to sign. The award was annulled, and the case was later resubmitted to arbitration. One of the parties
stated the view that the arbitrators should pay the costs of the renewed proceedings. No such demand, however, was actually submitted. The arbitral institution felt that a gesture was necessary and waived the arbitration fees. (Of course, the party still had to pay extra attorney’s fees.) An instructor might ask what the outcome should have been had the party formally asked (or sued) for costs. Section 29 of the English Act would not mandate liability, because the arbitrators probably did not act “in bad faith”. But they were guilty of a professional omission. Whether the standards of liability should also extend to lack of necessary expertise is an open issue.

The English Arbitration Act speaks of a possible liability of the arbitrator “for anything done or omitted in the discharge or purported discharge of his functions”. The Portuguese Act speaks of liability for “damages resulting from decisions” (decisões). The wording (particularly when compared with the English one) is narrower – unless one would give a most extensive interpretation to the word “decision”. Resignation is normally not perceived as an arbitral decision. The limitation of liability by way of comparison with judges expressed in the Portuguese Act, probably yields a similar standard as that of the English Act that restricts liability to acts and omissions in bad faith. The restriction of liability to responsibility towards the parties appears to exclude liability of the arbitrators towards the arbitral institution under the Portuguese Act.

**Question 2.** The Vienna form (Statement of Independence and Undertaking to Observe Rules on Costs) gives students another perspective on the responsibilities of the arbitrator, focusing on responsibilities toward the arbitral institution. Failure of the arbitrator to comply with the stated duties should not affect the regularity of the procedure. If the arbitrators invite an expert to testify without making sure that the necessary cover is available, this should have no impact on the propriety of the proceedings. It is conceivable, however, that the institution would ask the arbitrators to cover the expert’s costs, if the parties fail to do so. This is not very likely to happen, but the provisions of the contract may have an important role in bringing the problem to the awareness of the arbitrator, and hence in reducing the risk of its occurrence.

One may notice that the title speaks of an undertaking to observe the rules on costs. The text states that the determination of arbitrator’s fees shall be made exclusively by the Secretary, but a reference to the Rules is added. An arbitrator could probably challenge a determination of fees alleging that the determination was not made in accordance with the Rules.

**Question 3.** The wording of Article 34 of the 1998 ICC Rules represented a rather radical exclusion of liability. It is debatable whether such an exclusion would be enforceable – and whether it is helpful. There are various arguments against such a radical exclusion of liability, and this is probably the reason why the 2012 ICC Rules adopted some caveats. The 2012 Rules maintain an all encompassing exclusion of liability “for any act or omission in connection with the
arbitration”; but this is subject to an exception: “except to the extent such limitation of liability is prohibited by applicable law”. The interpretation of Article 40 of the 2012 ICC Rules may raise some questions. In many cases, the applicable lex arbitri may not contain a norm addressing the issue under the specific angle envisaged by Article 40. In other words, the applicable lex arbitri may not have a provision specifically prohibiting limitation of liability, but it may have a provision regarding the duties of the arbitrator. For example, Article 1464 of the 2011 French Code of Civil procedure says “Both parties and the arbitrators shall act diligently and in good faith in the conduct of the proceedings”. Is this a prohibition of limitation of liability? Indirectly, it probably is. One could argue that an exclusion of liability runs contrary to the duty to act diligently and to conduct the proceedings in good faith, so that one should remain liable if one conducts the proceedings in bad faith. But other arguments are also conceivable.

Some commentators have also asked whether the provision of Article 34 of the 1998 ICC Rules might discourage parties from bringing their case to the ICC. Students might be invited to state whether such a provision would or would not make them hesitate. (Statistical studies have not demonstrated much impact. It is also a question, of course, whether those who agree on the jurisdiction of the ICC do so after a thorough reading of the Rules, or make their choice on the basis of the general reputation of the ICC.)

Questions 4 and 5. In its decision the Cour de cassation takes a position based on principle. The French Supreme Court admits that the mission of the arbitrators is essentially of a jurisdictional nature, but it also has contractual elements. One may argue that since the arbitrators are paid for their services, it would make sense to hold them liable for improper performance of the service they are supposed to provide. Do the arbitrators have an “obligation of result”? Does an “obligation of result” mean that the arbitrators are liable if they do not render an award within the statutory time limit set? It would be somewhat difficult to accept such a conclusion. It is always possible to render some award within the statutory time limit set. But sometimes – due to reasons which cannot be ascribed to the arbitrators – it is just not possible to render a meaningful award within the statutory time limit set, because the situation is just not clear enough. Hence, it might not be fair to posit the rendering of the award within the statutory time-limit as an obligation “de résultat”. The fact that the arbitrators failed to seek an extension probably played an important role in the Cour de cassation’s ruling.
III.1.g.i. The Issue of Fees

**Question 1.** The award does not grant fees to the arbitrators, but allocates between the parties the duty to pay fees. Normally, the fees are advanced, and are already in the possession of the arbitrators (or of the arbitral institution) at the time the award is rendered. The losing party will, in principle, have to bear the costs and fees as well. If the victory is not full, the fees and costs will be apportioned.

The bottom line is that the arbitrators are only entitled to settle the dispute between the parties. They cannot impose a solution regarding the amount of the fees, because this is not part of the dispute submitted to them by the parties (but rather an issue between them on one hand, and the parties on the other hand). The arbitrators may refuse to render an award before having received their fees (set by the fee-scales of the institution, or otherwise agreed upon by the arbitrators and the parties). If the arbitrators expect $100,000, they will not deliver their award before each of the parties has paid $50,000, or one of them has advanced the whole amount. The award will then allocate between the parties responsibility for paying the fees, which is a decision on one of the elements of the dispute between the parties.

**Question 2.** The question is: what is indeed the substance of the contractual obligation of the arbitrator? To act with professional diligence? To render a decision which is enforceable? One could argue that if the status of the arbitrator is contractual, he should be bound by general principles of contractual liability – possibly modified by institutional rules (which tend to reduce liability) and the lex arbitri, which may supersede institutional rules at this point.

**Question 3.** The arbitrator’s best collection technique is payment in advance. If this has not happened, a suit against the parties or the arbitral institution would be a possibility. In institutional arbitration it is typically up to the institution to collect the fees - although there are some well-known institutional rules (like the Swiss Rules or the DIS Rules) that leave collection to the arbitral tribunal. Assuming that collection is the task of the institution, the arbitrators will be paid by the institution, and they could sue the institution for nonpayment. Most institutions have explicit rules stating that the proceedings will not start before fees have been received. Essentially the same approach was also adopted by the Swiss Rules, which state in Article 41 that the tribunal (rather than the institution) is entitled to request advance for costs. The Swiss Rules add that if no advance payment is made, the arbitral tribunal may order suspension or termination of the proceedings.

**Question 4.** As a rule of thumb the presiding arbitrator will get 40% while
the two other arbitrators get 30% of the total amount of remuneration. But this is subject to variations. The AAA Rules, just like the LCIA fee schedule, or the Swiss Rules, certainly permit distinctions to be made between the two non-presiding arbitrators. “Particular circumstances of the case”, “complexity of the case” (LCIA Rules) are considerations that allow distinctions to be made between cases, but would hardly justify different remuneration of arbitrators in the same case. However, “taking into account the time spent by the arbitrators” (AAA rules) could justify such distinctions. For example, one of the arbitrators, more familiar with the relevant law than the other arbitrators, might analyze the case under that law and prepare a draft opinion. One of the arbitrators might check various translations. Another might check accounting issues. Similarly, “special qualifications” mentioned in Article 2(a) of the LCIA fee schedule may refer to special expertise, such as command of a relevant language, etc., and thus could be a basis for distinguishing between the two party-nominated arbitrators.

Distinctions have sometimes been made between two attorneys acting as arbitrators in a given case on the ground of the fees these attorneys normally charge in their respective practices. Such distinctions are somewhat questionable. The work of an arbitrator is different from other professional work an arbitrator may do. On the other hand, a lawyer who charges a high hourly fee may think of his or her “opportunity cost”—the income potential he/she is otherwise giving up in agreeing to act as arbitrator—and the skill level he/she brings to the table that justifies the high hourly fee in other contexts and that may be in large measure, if not fully, transferable to arbitrating. Are such distinctions justified under the AAA or LCIA Rules?

(One could possibly introduce here as a topic for discussion Article 31(2) of the ICC Rules that states: “The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.”)

**Question 5.** One problem with hourly fees is, of course, that they are open ended. They may also provide the wrong incentive. At the same time, one could argue that they are more just. Disputes about large sums of money are usually more complex and require more time and energy, but there are disputes about relatively small amounts that are intricate, complex, and require a lot of work. The question is, however, whether an open-ended fee scale is fair towards the parties. Even if the case is truly complex, the parties may not be willing to pay arbitration fees that exceed the amount in dispute. (At this point it is also relevant that arbitrators’ fees are in typical cases distributed in the award according to the relative success or each side’s claims and defenses.) The Japanese solution tends to counter the incentive problem (the incentive to spend more time on the case than necessary in order to charge higher fees).

Within the legal profession, there are practically no professionals who are
just arbitrators. Arbitrators are typically recruited from among practicing attorneys or law professors. A possible line of discussion is to invite arguments pro and con on hourly fees in general. Hourly attorney’s fees have not been the rule in Continental Europe, but this is changing. More and more one can find European attorneys who are working on the basis of hourly fees. Should arbitrators’ fees also shift in the direction of hourly fees?

**Question 6.** Agreeing to arbitrate without an arrangement on fees is probably ill advised. One reason for not doing so is of course the difficulty in establishing the appropriate remuneration. There may also be difficulties in collecting payment. Moreover, one might ask whether the submission of the dispute to arbitration has really been perfected without fixing the costs of the service agreed upon. It may be legally possible to establish remuneration ex post, but it is more prudent and fairer if the parties know in advance the cost of the service they have ordered and if the arbitrators know what they will receive for their work.

**Question 7.** Court adjustment of arbitrators’ fees that have been agreed upon directly or by choice of institutional rules and fee scales is quite rare – and this is probably as it should be. One can imagine a case in ad hoc arbitration in which the parties and the arbitrators have agreed on fixed fees, the case ends with an early settlement, and yet the arbitrators request the whole amount of the agreed fees. (Institutional rules would normally provide for an adjustment in such cases, but the ad hoc arrangement may be silent on this issue.) In such a case, a court-ordered adjustment might be appropriate. Should a court consider adjusting arbitrators’ fees if the proceedings have run their full course and the fees were negotiated at arm’s length? This is a far more difficult question; the only conceivable reason for such an adjustment would seem to be that the given fees are way above customary levels.

**Question 8.** The 2007 Stockholm Rules have adopted an interesting new approach. Article 45(4) of the new Rules has retained the rule according to which, if one of the parties fails to pay its share, the Secretariat will invite the other party to do so. The case will be dismissed, unless the Arbitration Institute receives the whole amount. What is new is that after the moving party has paid both its share and the share of the other party, it may request the Arbitral Tribunal to issue a separate award obliging the other party to reimburse its share. Thus, the Institute will receive full payment from the moving party, but this party will not have to wait until the final award for reimbursement. Several questions may be raised in connection with this solution. One is the question of fairness. The Article 45 solution could certainly be fair – if there are no serious jurisdictional objections, and if the claimant has a strong case on the merits. In its award of February 13, 2008, the Arbitral Tribunal points out that there are cases in which a separate award on costs should not be made. It gives two examples: “the jurisdictional objection is well founded”, or “the final award is imminent”. Do you agree with these examples? Would you add some other examples?
Some other interesting questions may also be raised in connection with awards rendered under Article 45(4). Is such an award a final award? It will normally oblige the recalcitrant party to pay 50% of the arbitration fees and costs. The final award on the merits will also distribute the fees and costs, depending on the outcome of the case, and it may very well oblige the parties to pay different portions. Can an award rendered under Article 45(4) be recognized under the New York Convention? (Article V of the New York Convention does not explicitly use the word “final”; it only speaks of “binding” awards.) Suppose recognition of the partial award on reimbursement of fees has been requested in a country, but the proceedings on recognition are still pending when the final award is rendered (which contains a different decision regarding costs). What happens to the award on reimbursement of costs?

Questions 9-10. The Russian argument has some merits. In most cases the final allocation of the costs is not the same as the requested advances. This would only happen if the claimant succeeded in 50% of its claim, or if some other balancing considerations would yield a 50-50% allocation of costs. Thus in most cases, the 50-50% advance will not be confirmed in the final award. The New York Convention does not use explicitly the word “final” – although this characterization is present in many commentaries. Article V(1)(e) states that the award has to be “binding”. Is an award on advance of costs binding? Arguably it is. At the same time it may be replaced (and in the majority of cases it will be replaced) by another binding decision at the end of the proceedings.

Question 11. Institutional rules typically provide for sharing of advance costs – and typically do not have a means of compelling the respondent to pay its share. In such a situation, the only practical option is to ask the claimant to deposit 100% (instead of 50%) of the advance costs. This will be recovered of course if the claimant is successful on the merits and the award (including costs) is paid voluntarily or is enforceable. This is a somewhat imperfect solution, since the remedy is postponed. (Of course, if the claim is without merit, it makes sense not to oblige the respondent to pay any advance costs.) The 2007 Stockholm Rules have come up with a new solution. It remains to be seen whether the Swedish experiment will be successful. We mentioned in connection with the Swedish case that the status of the award on costs may be somewhat unclear in comparison with the final award. It would not be rational to allow the co-existence of two inconsistent awards. (One obliging the respondent to pay 50% of the costs, and another (the final award) obliging the respondent to pay a portion of the costs in accordance with the outcome of the case – or not to pay anything if the claim is denied.) It might be rational to assume that the final award will supersede the award on costs – but this would introduce specific categories of awards without a clear foothold in contemporary arbitration acts and conventions. In connection with the Austrian case, one might also ask, whether it makes sense to render a separate award on costs less than two months before the final award. One should add that one and half months before rendering the final award, the
arbitrators normally have a rather clear idea about timing. It is difficult to see persuasive reasons that would justify the rendering of an award on costs without regard to the merits, if after one and half months costs will probably be distributed in a different way in the final award.

The Austrian case raises an added issue – that of jurisdiction. Suppose we have a typical clause conferring to the arbitrators any disputes arising out or relating to a contract. Is a dispute about advancing costs of the arbitral proceedings a dispute arising out or in connection with a sales agreement (or some other contract)? It remains an open question whether a partial award on costs represents a justifiable solution.

**Question 12.** The 2007 Swedish Rules (Article 45/4) speak of separate “awards” for reimbursement of advance on costs. Article 42 of the Vienna 2013 Rules states that the arbitrators may order reimbursement of advance on costs “by an award or other appropriate form”. The Singapore Rules leave an option between “order or award”. The difference is not just a matter of terminology. The New York Convention has only created an obligation regarding recognition and enforcement of awards.

One of the arguments of the 2005 Austrian decision was lack of jurisdiction relating to the advance on costs. This argument appears to be moot after the enactment of the 2013 Rules. One could argue that by accepting the Rules, the parties have also accepted the jurisdiction of the arbitrators to order payment of fees. One has to note that Article 42(4) states that an award or some other appropriate form of decision on fees may be rendered if the tribunal finds that it has jurisdiction over the dispute (Rechtsstreit). It appears from the context that what is in the focus, is jurisdiction over the basic dispute (Rechtsstreit), rather than the specific disagreement over advance on costs. Hence, an award or other form of decision on costs will not be rendered before the arbitral tribunal establishes that it has jurisdiction over the basic dispute – which is a sensible solution. This understanding was confirmed in the Commentary issued by the Vienna Center (VIAC Handbook, Vienna Rules, A Practitioner’s Guide, Vienna 2014). The Commentary stresses on page 253: “Consequently, if no arbitration agreement exists for the case at hand, there is also no contractual basis for the claim to reimbursement of half of the advance on costs. In this regard, the issue of jurisdiction constitutes a preliminary question as to the existence of a contractual obligation to pay a share of the advance on costs, which must in any case be clarified before an arbitral award on reimbursement of the amount paid in substitute can be issued.”

**Questions 13-15.** International commercial arbitration has attracted most talented party representatives, and they have certainly contributed to the quality and sophistication of the arbitration process. Temptations have also appeared on the scene. Efficient proceeding need not be in line with efficient billing. A hearing that takes 34 days will certainly yield more fees than a one day hearing. And it
might not be easy to tell – particularly not in advance – whether a long hearing is really needed. Hence different motivations may find shelter. In the same vein, a protracted documents production phase (with elements of a fishing expedition) might be motivated by an endeavor to establish all facts and circumstances that might be relevant; it might also reflect surrender to the temptation to bill more. The arbitrators have, of course, an important role in the charting of the proceedings. They might schedule one or two, instead of 34 days for a hearing. But if the party representatives agree on 34 days, this has to be followed, otherwise the result might be “proceeding not in accordance with the agreement of the parties” – which is a ground for set aside or refusal of recognition.

The Hong Kong case is an odd one. Some might use the word “outrageous”. One has to note as a caveat that the Hong Kong Judgment does not indicate what amounts were claimed and counterclaimed between the parties. Some claims and counterclaims were dismissed for lack of jurisdiction. Knowing the amounts claimed – and knowing which claims reached the merits phase – would be certainly helpful in assessing how disproportionate the attorney’s fees were. What we know is that the award yielded USD 89,106.10 plus 2,000 bowling bowls. We also know that the judge was informed that each party had spent more than USD 10 million on legal fees – and this is striking. The question might be raised with students whether there is anything one should (and can) do? Unfortunately, the IBA Guidelines on Party Representation in International Commercial Arbitration do not really address this issue.

The Hong Kong Court did not and could not address this matter. What is in the focus of a setting aside case, is the award. The award did not oblige any party to pay USD 10 million as attorney’s fees. Hence these 10 million dollars were not the subject matter of the challenge. What we have in the Hong Kong Judgment is just record of an information available to the judge. Let us add that under most rules, arbitrators have a considerable discretion in allocating fees. The losing party may be ordered by the award to pay the attorney’s fees of the winning party, but the arbitrators need not oblige the losing party to compensate irrationally high attorney’s fees.

In the Hungarian case the disproportion is not as blatant as in the Hong Kong case, but the setting is different. Here we are talking about attorney’s fees amounting to about EUR 1 million, which were awarded to the Respondent. In other words, the award obliged the unsuccessful Claimant to shoulder the attorney’s fees spent by the Respondent in the amount of EUR 1 million. Hence the attorney’s fees were legitimately in the focus of setting aside proceedings. The reasoning of the Hungarian court is interesting – and debatable. The court stated that awarding 1 million Euros as attorney’s fees “contradicted social value judgments”. This was an unprecedented amount in Hungarian practice, and the court decision reflects an attempt to keep such a practice (such amounts) outside the sphere of normalcy. Critics have stressed on the other hand that the Hungarian decision gives a too extensive interpretation to the notion of public
policy. This is a difficult question. The question remains whether one could and should take any action with regard to unusually (or disproportionately) high attorney’s fees, which might also undermine some comparative advantages of arbitration.

If one takes a hypothetical variation of the Hong Kong case, and assumes that the losing party was obliged by the award to compensate the attorney’s fees of the other party in the amount of USD 10 million (in addition to shouldering its own attorney’s fees in the amount of USD 10 million), one is certainly tempted to support some action. Control of the award (like in the debatable Hungarian case), and amendments to the Guidelines on Party Representation, are examples of such a possible action.

III.1.g.ii. Conduct and Misconduct of Arbitrators Regarding Fees

Questions 1-4. A party request for 12 weeks of hearings is certainly most unusual. The problem is not only with the extraordinary length; such a proposition also interferes with the authority of the arbitrators to structure the proceedings, and to set their own pace. Nevertheless, given the fact that the parties are free to shape the proceedings (short of a violation of due process) there is nothing illicit in such a stipulation. Arbitrators may or may not accept their mandate under such circumstances; if, however, they agree to arbitrate, they must follow the rules set by the parties. In this case, the arbitrators did not try to step out of the logic of extraordinary length. They just tried to get some reduction (to 60 days) staying within the range of extremely long hearings. They also conditioned the acceptance of appointment for such a task with a commitment fee.

Commitment fees are unusual, and typically ill advised. Under the given circumstances, however, a commitment fee was not irrational; and such a request probably does not amount to misconduct. As far as the second issue is concerned (the option that the commitment fee would be paid by Norjarl alone), students should be reminded that it is quite common to request Claimant to advance the whole amount of the fees if Respondent refuses to pay its share. Is the Norjarl situation different? If it is, how would one articulate the essential difference? Students may notice that in the given case there was a legitimate dispute between the parties about the appropriateness of the remuneration. This is different from the situation in which the amount of the fees is not contested, and Respondent simply refuses to pay. (In the case of institutional fee schedules, a party could not easily contest the amount of the fees, because the parties are deemed to have accepted the fee schedule by submitting to the rules of the institution.)

A rule that disallows unilateral payments when the amount of the fees is contested (but allows them if payment is simply refused without an argument
about the amount) may sound logical, but may also open a dangerous loophole for blocking ad hoc arbitration. In the absence of fee schedules (the acceptance of which may be presumed), the party who does not want arbitration may oppose any arrangement about fees in order to frustrate the arbitration. (Note that the offer to pay a commitment fee was made to two arbitrators, since the third arbitrator did not seek such fees.)

Lack of party agreement on fees need not create an absolute impasse. In such a situation arbitration statutes or rules typically allow the arbitrators to set their own fees (subject to possible court adjustment upon party motion), or provide that an appropriate court or other authority can fix arbitrators’ fees upon motion of one of the parties or of an arbitrator. (See e.g. Section 28 of the English Act, Article 41 of the 2010 UNCITRAL Rules.)

Note that the *Norjarl v. Hyundai* case reached the Court of Appeals upon an appeal and a cross appeal. (Decision of the Court of Appeals, Civil Division of February 21, 1991, 1 Lloyd’s Rep. 524) The judgment was confirmed. The Court of Appeals held that although it was not improper for a party appointing an arbitrator to agree upon the arbitrator’s fees before appointment (since the appointing party and the proposed arbitrator were respectively free to appoint someone else or refuse the appointment), once the appointment had been made, it was contrary to the arbitrator’s quasi-judicial status for him to bargain unilaterally with only one party for his fees. Therefore under this approach, after arbitrators have accepted appointment, any arrangement made between the appointing party and his arbitrator or a third arbitrator for the payment of any fees to either arbitrator—without the consent of the opposing party—probably constitutes misconduct, and in any event allows a court to impute bias to the arbitrator or arbitrators involved.

In its reasoning the Court of Appeals emphasized that unilateral negotiations were conducted after appointment, when the arbitrator acquires a “quasi-judicial status”. (This appears to be a valid argument.)

**Question 5.** There is, indeed, a difference between “seeking” and “pressing”. It is also important whether the issue of the cancellation fee is raised before or after the arbitrator has accepted nomination and the tribunal has been constituted. The Australian decision takes note of the “quasi-judicial” position of the arbitrator. This is a certain privilege, but once such a position is acquired, it also imposes restrictions. Can a decision maker negotiate on an equal footing with a party towards whom the decision is directed? Can an arbitrator use procedural orders as a negotiating tool?

There is certainly a difference between negotiating with fervor (or “pressing”) before and after the “quasi-judicial” position has been acquired. This is a point that was also made in the *Norjarl v. Hyundai* case.
There are several differences between the *Sea Containers* case, and the *Norjarl v. Hyundai* case. In *Sea Containers* we had all three arbitrators on one side, and one of the parties on the other side. In the *Norjarl* case the arbitrators did not form a united front. Did this circumstance influence the outcome? Furthermore, in the *Norjarl* case, the request for a commitment fee was a response to a quite unusual party request (a request for a hearing of 12 weeks, after which the arbitrators suggested 60 days). This led the English court to conclude: “What has occurred is that both the parties and the arbitrators have reciprocally sought to negotiate a degree of commitment that goes beyond that implicit in the original appointment of the arbitrators.” Having in mind these considerations, the arbitrators were not removed in the *Norjarl* case (as requested by Hyundai). The Norjarl request to be allowed to advance fees itself (which was also denied), was not an issue in the *Sea Containers* case. Could you say that – unlike in *Norjarl* – in *Sea Containers* the request was unprovoked (and therefore more objectionable)? Does it matter whether the request was or was not “implicit in the original appointment”?

**Question 6.** It is difficult to formulate clear cut rules regarding the duty of disclosure. The IBA Guidelines may help, but various guidelines (legislative, IBA, or other) are often rather vague. Policy considerations do play a certain role. In order to eliminate any doubt, some arbitral institutions are inclined to accept challenges even in situations in which it is at best questionable whether the arbitrator failed to disclose something relevant. It is probably fair to say that arbitral institutions are entitled to give effect to policy considerations. The question is whether a challenge that was conclusively upheld by the arbitral institution, could be indirectly questioned before a court through the issue of fees. This would allow a decision on fees independent from considerations pertaining to the image of the institution. At the same time, inconsistent decisions could emerge regarding the basic question: whether the arbitrator did or did not comply with the duty of disclosure. The principle that institutional decisions on challenge are final (if the challenge is upheld) would also not be strictly accurate.

**Question 7.** What is particularly interesting in the Finnish case is that – in addition to the Finnish Supreme Court’s taking a position on the liability of the arbitrator – the district court also addressed details and dilemmas regarding the quantum of damages. Such analyses are rare. Students may follow the specific issues raised. What damages can be qualified as contractual damages if an award is set aside after it was discovered that the arbitrator did not observe the duty to remain independent? All costs incurred by a party in the arbitration case? All necessary legal costs?

The Vantaa District Court came to the conclusion that a considerable part of the work accomplished by the lawyers could be used in future proceedings (in a repeated arbitration case dealing essentially with the same issues as those involved in the award that was set aside). Is this a justifiable consideration?
Can you think of other considerations that might increase (or decrease) the amount of damages owed by the arbitrator?

III.1.h. Rights and Responsibilities of the Arbitral Institution

Questions 1 and 2. The ICC Rules do allow awards based on the opinion of one arbitrator (in a panel of three). Article 31(1) of the 2012 ICC Rules (like Article 25 of the 1998 Rules and Article 18 of the 1988 Rules) says that “If there is no majority, the award shall be made by the president of the arbitral tribunal alone”. In CUBIC, the tribunal president Wenger rendered the award.

One could conceivably argue that since the two parties to the dispute constitute one side of the contract with the arbitral institution (contrat d’organisation d’arbitrage), the will of both parties to the dispute (who together constitute one party to the contract with the institution) is needed to start a case against the other contracting party (the institution). This would, of course, make recourse against the institution most difficult. The Paris Court did not see a problem here, and allowed CUBIC to proceed against the ICC.

Question 3. The CUBIC v. ICC case reveals a rarely analyzed aspect of the arbitration process. The relationship between the parties and the arbitral institution is rarely articulated in clear legal terms, and clarification is rarely sought in legal proceedings. Once the award has been rendered, an annulment of the “contrat d’organisation d’arbitrage” would probably not affect the validity of the award. Modern arbitration statutes establish a numerus clausus of possible challenges (motion to set aside and opposition to recognition and enforcement). They also limit the possible grounds for such challenges. It would be most difficult to bring the ex post annulment of the contrat d’organisation d’arbitrage under any of these grounds.

In CUBIC, the claim seeking termination of the contractual relationship between CUBIC and the ICC was submitted before the award was rendered. This adds a complication. One could argue that termination of the contract with the arbitral institution also terminates the mandate for arbitral decision-making. Of course one could also argue to the contrary that once the arbitral tribunal (the panel of arbitrators) is validly constituted, the arbitrators have an irrevocable mandate that can only be terminated by a successful challenge of an arbitrator. From the latter argument it would also follow that even if fees are not paid, once the arbitral tribunal is constituted, the institution cannot relinquish its role and responsibilities (let alone bring about annulment of an award already rendered). One has to say at this point that the ICC Rules – like most other rules – have built-in safeguards for the purpose of avoiding this problem. Advance payment is regularly requested; furthermore, according to Article 28(1) of the 1998 ICC Rules, the Secretariat will not send the award to the parties until after they have
paid all the costs of the arbitration. (The same solution has been adopted in Article 34(1) of the 2012 Rules.)

**Questions 4 and 5.** It is beyond doubt that judicial functions (functions of arbitral decision-making) have to be separated from organizational tasks. (And distinguishing between these functions probably makes it more difficult for CUBIC to challenge the award - or prevent the arbitrators from rendering an award – while CUBIC seeks termination of the contrat d’organisation d’arbitrage.)

Article 33 of the 2012 Rules (previously, Article 27 of the 1998 ICC Rules) tends to bring about more uniformity and allows the ICC to monitor the quality of awards. Does this interfere with the decision-making process? The ICC Rules go further at this point than do most other rules. Do they go too far? The scope of Article 33 is really tested if and when the Court and the arbitrators disagree. This does not happen very often. On “points of substance”, Article 33 gives the upper hand to the arbitrators. On points of form, the solution is different: “No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.” What then constitutes form? If the arbitrators decide on distribution of costs in a manner the Court deems improper, the Court is entitled only to “draw the attention” of the arbitrators to this point. The decision remains in the hands of the arbitrators. What if the arbitrators do not deal with costs at all? Is this a point of substance or a point of form? (It is difficult to imagine, though, that the arbitrators would not heed a reminder from the Court to say something about costs.)

Consider another example (again not too likely to pose problems in practice). In some countries, it is customary to put the operative part of an award (dispositif) at the beginning, to be followed by a statement of reasons. In other countries it is the other way around. This is, indeed, a matter of form. Suppose the Court insists on the sequence that is customary with ICC awards, while the arbitrators, relying on freedom of expression, insist on the opposite. This could theoretically yield a deadlock. Would the existence of such a deadlock be evidence of non-separation of the judicial function from organizational tasks? Or, as a practical matter, is it unlikely that the ICC would ever allow such a situation to develop into a deadlock?

The right of the institution to decide on challenges is quite common. This is not a peculiarity of ICC arbitration. If the challenge is rejected by the institution, it may be repeated before a court. (The situation may be different if the challenge is sustained. Such a decision may not be subject to court review.) Decisions on challenges can probably be compared with decisions on appointment, which are clearly within the scope of “organizational tasks”.

160
**Question 6.** Article 34 of the 1998 Rules went pretty far. This was confirmed by the 2009 decision of the Paris Court of Appeal. Holding such an exclusion of liability non-enforceable was quite logical. The problem has been avoided – or, at least considerably diminished – after the adoption of the 2012 Rules. Assuming that a clause providing for a total exclusion of liability becomes a part of the contrat d’organisation d’arbitrage, the question may arise of what the consequence would be of holding the clause null and void? It is more likely that such a holding would eliminate the clause, rather than defeat the whole contract.

**Questions 7 and 8.** As mentioned in Chapter I, speed cannot be taken for granted. It was relatively easy to make speed a hallmark of arbitration, while the only cases that reached arbitration were the relatively simple ones with little at stake. Today, many of the most complicated cases involving very large amounts in dispute are also submitted to arbitration. Together with these cases, sophisticated (and less sophisticated) delaying tactics have also found their way into arbitration. Clay adds that arbitrators (or at least some of them) can also cause delay.

Is arbitrator-caused delay relevant from the point of view of the contrat d’organisation d’arbitrage? One could argue that it is, particularly if the institution chooses the arbitrators. The institution could also be deemed to have assumed some responsibility by confirming arbitrators chosen by the parties (although this is less persuasive). There are surely some delays (particularly those occurring before the tribunal is constituted) that could be directly attributed to the institution.

It is difficult to conceive of any remedies other than damages.

**Question 9.** CUBIC would probably be estopped from seeking damages for delays due to its own behavior. As far as delays caused by the other party are concerned, the question is whether the institution did or did not have instruments for preventing such delays. In this context consider the effect of Articles 5(2) and 5(6) of the 2012 ICC Rules allowing the Secretariat to extend time limits for a reply.

Delays may also be caused by national committees invited by the Court to propose arbitrators (see Article 9(3)). The choice is guided by the Court, and one could argue that the institution bears responsibility for delays caused in this process.

Some actions of the institution are not tied to specific time limits, or time limits may be set at the Court’s discretion (e.g. with respect to appointment, or challenges). One could argue that in these cases the actions of the institution could still be measured against some generally accepted standards of efficient proceedings.
III.1.i. Can the Arbitrators Abandon Their Function?

III.1.i.i. Truncated Tribunals

The Milutinovic case involves a rare but important issue. It calls attention to a problem that has not emerged frequently because most arbitrators have basically sound ethical attitudes – and because they have a vested interest in maintaining a good reputation. Failing such implicit protections – and in cases where it may be more difficult to discern right from wrong – a serious problem might emerge.

**Question 1.** In a conversation with one of the authors, Professor Jovanovic stated that he was convinced that during presentation of evidence new light was shed on the case, which suggested a different outcome, favorable to the Yugoslav side. In his opinion, in order to give appropriate consideration to this new perspective, it was necessary to recall some witnesses, and to investigate new evidence. Professor Jovanovic thought that the other arbitrators simply sacrificed truth for the sake of simplicity. He resigned because he believed that the road towards truth was blocked. His fellow arbitrators and the ICC Court of Arbitration thought differently, and were convinced that they were right. What should happen in this situation?

There is no explicit rule in either Swiss law or in the ICC Rules that provides for a competent forum to evaluate the reasons compelling an arbitrator to resign. Article 15(1) of the 2012 ICC Rules (previously, with the same wording, Article 12(1) of the 1998 Rules, and Article 2(10) of the 1988 Rules) states that one of the grounds for replacement of the arbitrator is resignation accepted by the Court of Arbitration. It is thus clear that the Court of Arbitration is entitled to accept or not to accept a resignation. This might further imply that the Court will have the right to scrutinize the reasons for resignation. But this is all in the context of replacement. In this case, there was no replacement.

Jovanovic’s resignation was not accepted. It is obvious, however, that he could not be forced to continue. Specific performance is hardly a viable option here. Could he be treated as if he were still there (because his resignation was not accepted)? This is what the two remaining arbitrators, Judge Schwebel, and the ICC Court of Arbitration seem to think – but this is not the opinion of the Swiss Federal Tribunal.

Could Article 179 of the Swiss Private International Law Act help here? Dr Blessing thinks it might. Section 1 of Article 179 says that “The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties”. (Failing such an agreement, cantonal law in force at the seat of the tribunal shall apply.) The agreement of the parties includes the ICC Rules. But do the ICC Rules have an explicit answer? (Are we talking here of appointment,
Questions 2-7. The ICC Court of Arbitration stated that "Claimant, who presented a request for removal of the other two arbitrators, by not including Professor Jovanovic in his request for removal, evidences his willingness to accept the given situation, i.e. the arbitrator proposed by claimant not participating in the further proceedings: claimant has no title to reproach the arbitrators for not presenting a request for Professor Jovanovic's removal, as he did not himself present such request."

It is interesting to compare this line of reasoning with that of the Cour de cassation of the Canton of Zurich, which also faulted someone for not asking for Prof. Jovanovic's removal. The Court stated that "Professors Bucher and Bockstiege could have requested dismissal of Professor Jovanovic on ground of his refusal to fulfill his functions; that would have been the lawful procedure to have been followed in this case." So a mistake was made in not requesting the removal of Professor Jovanovic. But whose mistake was it, and who should bear the consequences of this mistake?

Had Professor Jovanovic been replaced, a valid award could certainly have been rendered. But if this were the only possible course of action, would this not endanger the efficiency of the arbitration process? What if one of the arbitrators sees that the party who nominated him is losing and thus simply resigns in order to block proceedings veering toward an unwanted result. (But again, if one assumes bias on the side of Professor Jovanovic, can one not conceivably assume bias on the other side as well? This may be a less likely assumption because there were two arbitrators on the other side. Again, you could argue that on one side you had “Western” arbitrators and a Western party, and on the other side an “Eastern” arbitrator and party. (Perceptions of bias are sometimes not far from conspiracy theories.) And finally, what if there were no bad faith on either side, just conflicting strong persuasions?

Note that the party who appointed Professor Jovanovic was the Claimant. A Claimant cannot be interested in endless postponements (but it may be interested in thwarting a process that appears to be heading toward a denial of the claim). A possible remedy – mentioned in the Swiss decisions – is financial liability of an arbitrator who leaves the proceedings without justifiable grounds. Is this a viable remedy?

Schwebel argues that the Yugoslav party should be estopped from attacking the award, because of the general principle of law according to which “a party may not invoke its own wrong (or a wrong that it adopts) to deprive any party of its rights”. Even if Professor Jovanovic's resignation were clearly wrong, it would be difficult to ascribe this “wrong” to the Yugoslav party. Is this a wrong the Yugoslav party adopted? How did it adopt it?
Consider now the option proposed by the ICC and Judge Schwebel. Suppose in order to avoid inordinate delay after a third arbitrator has resigned without justification, two arbitrators are allowed to continue by themselves. It is important to know when in the process a resignation takes place. In this case, Professor Jovanovic walked out during deliberations on a procedural motion (before the closing arguments and before deliberations on the merits). This happened after years of proceedings. It seems clear that the later the walkout occurs, the more persuasive Judge Schwebel’s argument is. If an arbitrator participates during deliberations on the merits, but refuses to sign the award, the decision will be valid under both the ICC Rules and Swiss law (just as under practically any other law). If the arbitrator resigns – with or without justified reasons – at the beginning of the proceedings, he should be replaced. Can replacement be avoided if resignation takes place at some later moment but before the deliberations on the merits; or is replacement only avoidable when the arbitrator participates all the way through the deliberations on the merits, but refuses to sign the award? What are the due process requirements here?

Consider also that one of the reasons for refusal of recognition stated in the New York Convention is that “the composition of the arbitral authority... was not in accordance with the agreement of the parties...” (Article V(1)(d)). If the award is rendered by two arbitrators only – when the number of arbitrators agreed upon is three – do we have a ground for refusal of recognition? (This takes us back to the question whether the arbitrator who walked out could be deemed to have participated.)

Return now to the case in which the remaining two arbitrators decide to complete the arbitration alone. In this case we will have an award that may very well be (indeed, probably will be) the same as the result that would have been reached by these two arbitrators plus a replacement (only in the latter case the award comes into existence considerably later). But suppose the remaining two arbitrators cannot agree on the award, and there is no third arbitrator to cast the decisive vote. What result?

Another question that arises is whether the (unjustified) resignation of any one of the three arbitrators should have the same effect? What if it is the presiding arbitrator (rather than one of the party-appointed arbitrators) who resigns? Or – if it is a party-appointed arbitrator – what effect would that resignation (or discharge) have, if any, on the legitimacy of the presiding arbitrator, who was chosen jointly by the two party-appointed arbitrators (including the one who has walked out). According to Section 27(5) of the English Arbitration Act cessation of one arbitrator’s office has no bearing on the office of another arbitrator appointed by him (jointly with another arbitrator).

Consider now the option suggested by the Swiss Federal Tribunal. Under this alternative, the right thing to do is replacement. This may yield delay, but it safeguards due process. But suppose the Yugoslav party nominates a
replacement arbitrator, who also resigns at a critical moment. Can this go on endlessly? (Given the fact that the Yugoslav party was the Claimant, such a strategy would seem counterproductive, but suppose we are dealing with the Respondent.) One option would be to strip the party of its right to nominate the arbitrator, and let the Institution (or a court) make the appointment. But on what grounds? De lege ferenda, a provision might be added to the ICC Rules stating that if resignation of a party-appointed arbitrator is not accepted, and if the arbitrator nevertheless refuses to arbitrate, the ICC itself shall appoint a substitute arbitrator. Do you think the ICC would favor this solution in the light of its position in the *Milutinovic* case?

One of the important features of the new 2010 UNCITRAL Rules is the rather broad power given to the appointing authority. Article 14(2) tries to solve (or avoid) the quandary of truncated tribunals. Article 14(2) allows action in two directions: First, it contemplates the situation in which a substitute arbitrator is, indeed, being appointed. Further obstruction of the process may, however, (conceivably) arise, if the newly appointed arbitrator also steps down in order to thwart the rendering of the award. Therefore, the appointing authority—instead of the party—is allowed to weigh the circumstances of the case (as well as the views of the parties), and to make a substitute appointment. The second option is (again, after weighing views and the circumstances of the case) to authorize a truncated tribunal to proceed and to render the award. (This second option is only possible after the closure of the hearings.) By accepting the UNCITRAL Rules, the parties also accept the above mentioned powers of the appointing authority.

**Question 8.** Intending to create a remedy, the 1996 English Arbitration Act includes the following rules in Section 25:

"(1) The parties are free to agree with an arbitrator as to the consequences of his resignation as regards
   (a) his entitlement (if any) to fees and expenses, and
   (b) any liability thereby incurred by him.

“(2) If or to the extent that there is no such agreement, the following provisions apply.

“(3) An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court –

   (a) to grant him relief from any liability thereby incurred by him, and
   (b) to make such order as it thinks fit with respect to his entitlement (if any) to fees and expenses, or the repayment of any fees or expenses already paid.

“(4) If the court is satisfied that in all the circumstances it was reasonable for the
arbitrator to resign, it may grant such relief as is mentioned in subsection (3)(a) on such terms as it thinks fit.

“(5) The leave of the court is required for any appeal from a decision of the court under this section.”

It is interesting to note that Section 25 envisages the situation in which the arbitrator seeks an order relieving himself from any liability, but does not specifically address the situation in which a party would address the court seeking a remedy against the arbitrator. Section 29 states that an arbitrator is not liable for anything done or omitted, unless the act or omission is shown to have been in bad faith. But subsection 29(3) states that “This section does not affect any liability incurred by an arbitrator by reason of his resigning”. Subsection 29(3) adds: “but see section 25”). Do you see a solution in Section 25? Does it say anything beyond the issue of fees? Of course it also says that the arbitrator may seek an order relieving himself from liability incurred as a consequence of resignation. This relief may or may not be granted. If it is not granted the arbitrator is probably liable. But where is this liability defined? Section 29 sets a standard but expressly excludes its application to the issue of liability for resignation.

Whether the arbitrator is or is not financially liable in case of resignation will still not answer the question whether two arbitrators may continue if the third has resigned. The parties are free to agree either way (see section 27), but what if they do not agree? The English Act does not seem to provide an answer.

Return now to the point we made in the beginning. Resignation of an arbitrator (justified or unjustified) is a very rare occurrence. If it happens, there are no clear-cut remedies to help prevent a stalling of the process, short of the threat of possible financial liability of the arbitrator. Fortunately, the practical importance of this built-in imperfection of the arbitration process is very limited. Ethical and professional standards – as well as self-interest – have kept this phenomenon below the threshold of a serious problem.

**Question 9.** In the *Milutinovic* case, one of the issues was whether the resignation should be accepted. It was not accepted, and hence the question arose, whether Jovanovic should nevertheless be replaced – and whether the award was valid if he was not replaced. (The ICC Rules contemplate replacement upon acceptance of resignation.) Staying with the example of the ICC Rules, Article 15(2) states— just as earlier versions of the ICC Rules did—that an arbitrator shall be replaced if he is de iure or de facto prevented from fulfilling his functions. The situation of Mr. Wang appears to be a situation in which he is prevented from fulfilling his functions. Should such a situation (when continuing or discontinuing his functions is not up to the arbitrator) always yield replacement?
Discussion may also focus on the fact that in the Chinese case, the arbitrator left (or rather had to leave) the arbitration proceedings at a later stage than in the *Milutinovic* case. The deliberations had already started and one draft of the award had already been discussed. (Two arbitrators agreed; Mr. Wang dissented.) One could argue that further participation of Mr. Wang could not have changed the outcome. (Or, could one argue that if he had had a chance to stay in the process, Mr. Wang could have persuaded his colleagues to change their mind?) Do you agree with the position taken by the Chinese court?

**Questions 10-12.** There are basically two options: a) the proceedings will continue with two arbitrators (AAA, LCIA, Swedish Act), or b) a substitute arbitrator will be nominated (DIS, the Czech Act). Students may be invited to analyze the possible consequences of these two options.

There may be conflicting interpretations within one of the options as well. For example, according to the first sentence of Article 30 of the Swedish Act: “Where an arbitrator fails, without valid cause, to participate in the determination of an issue by the arbitral tribunal, such failure will not prevent the other arbitrators from ruling on the matter.” A potential source of conflicting interpretations is the wording “in the determination of an issue”. Section 30 deals with situations in which an arbitrator fails to participate in the determination of an issue. What does this wording really cover? Walking out at any moment during the arbitral proceedings (since one could say that the whole proceeding is about “determination of issues”)? Walking out during the deliberations while issues are being settled? Clearer wording would have been helpful.

The other problem is, of course, the “without valid cause” caveat. This is not so much a problem of wording. The caveat is necessary, and it would be difficult to make it more precise. An effort to specify by rules in advance what causes are valid, would probably be futile. If an arbitrator walks out, the two remaining arbitrators would be the first to interpret the “without a valid cause” language. They would have to decide whether they have the right to continue. Should this rather be left to the institution in institutional arbitration? The Swedish Act takes no position on this issue. One could argue that while the lex arbitri naturally envisages arbitrators as interpreters of its norms, this is not the case for the arbitral institution-- unless specifically stated. Thus, the presumption is in favor of the arbitrators. The question also arises whether one could make the institution a judge of “valid cause”, since the institution is supposed to administer the case, rather than to decide it. Could this nevertheless be considered a matter of administration?

If the presiding arbitrator is the one who walks out, the two remaining arbitrators could still agree on a valid award. If they do not agree, there is no fallback solution. It seems that a new tribunal would have to be constituted. (The practical relevance of this problem is probably negligible.)
The Czech Act opts for replacement – but allows the parties to agree otherwise. It also clarifies that the new arbitrator will be appointed by a court. According to the DIS Rules, the substitute arbitrator shall be nominated according to the regular institutional procedure (by the parties, or by the institution). Party nomination entails some dangers if one were to assume that the arbitrator resigned to thwart the rendering of an award against the party who nominated him or her. Do you have a preference as between the DIS and the Czech solutions?

One may also consider the solution adopted in Article 14(2) of the 2010 UNCITRAL Rules, which tends to be a compromise. Is this an acceptable compromise? (This solution was adopted in a number of arbitration rules, such as the 2011 Rules of the Cairo Regional Center for International Commercial Arbitration – Article 14/2)

III.1.i.ii. How Safe Are Institutional Rules That Allow Decision-Making by Truncated Tribunals?

Questions 1 and 2. In order to avoid a potential impasse created by truncated tribunals, a number of arbitral institutions amended their rules, typically for the purpose of making the decision of the truncated tribunal lawful. Article 11 of the AAA International Rules applicable in the Malecki case stated that if an arbitrator fails to participate for reasons other than those described in Article 10 (successful challenge, accepted resignation, death), the remaining arbitrators “shall have power in their sole discretion to continue the arbitration, and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate.” The question is whether Article 11 authorized the two arbitrators to render an award in the Malecki case. It seems that the wording—leaving it to the discretion of the remaining arbitrators to continue or not to continue — is broad enough to encompass the Malecki situation. The 2014 AAA/ICDR Rules might have prompted another solution. According to Article 15(1) of these new rules, a substitute appointment will be made whenever “an arbitrator resigns”. (According to the earlier rules, resignation only prompted substitute appointment if “the administrator determines that there are sufficient reasons to accept the resignation of the arbitrator.”) There may not have been sufficient reasons to accept the resignation of Mr. De Vito, hence his failure to participate allowed continued proceedings by a truncated tribunal. Article 15 of the 2014 Rules (which describes the cases in which substitute appointment has to be made) simply speaks of resignation. It is clear that Mr. De Vito did resign.

Questions 3 and 4. Another question is whether provisions of arbitral institutions on truncated tribunals can protect an award from invalidity. It is clear that it would have been wiser — and fairer — to inform the Maleckis about the withdrawal of their arbitrator. Even after the Maleckis told the tribunal that they would take no further part in the proceedings, they still remained a party to the
proceedings, and hence, they were entitled to be informed of important procedural events that could have prompted them to take steps to protect their interests. It would be difficult to argue that the discretion granted to the arbitrators by Article 11 did not become a fully binding provision after the parties submitted their case to AAA Arbitration. Institutional rules chosen by the parties do, indeed, become a part of the parties’ agreement. (It has to be mentioned, however, that under the somewhat idiosyncratic circumstances of this case, the switch from the Commercial Rules to the International Rules would generate some difficulties. The Commercial Rules have a somewhat different provision regarding truncated tribunals.) One of the important questions that may be raised and discussed, is the following. Article 11 leaves it to the discretion of the arbitrators to continue or not to continue the proceedings in situations other than those mentioned in Article 10. The Malecki situation does not appear to be one of those mentioned in Article 10. Did articles 10 and 11 of the earlier AAA/ICDR Rules also cure the failure of the arbitrators to inform the parties? Is the essence of the problem the fact that the truncated tribunal rendered an award, or the fact that the truncated tribunal failed to inform the parties about such a significant event as the resignation of one of the arbitrators?

One could say that the amendment to the AAA Rules proposed by D. Bensaude is in line with common sense. Yet it spells out a detail which is usually not explicitly addressed in arbitration rules. The French court said that “the arbitrators must fully inform the parties, including defaulting ones, of each and every procedural step and incident” (at page 84, 23 Journal of International Arbitration, 2006). Read Article 20(1) of the 2014 AAA International Rules (Documents Supplement). Does the duty to keep the parties informed of all “procedural steps and incidents” also follow from Article 20(1)?

**Question 5.** It is probably easy to reach the conclusion that it is not in line with good practice to withdraw without informing the parties. (We are assuming that it was possible to inform the Maleckis.) Would withdrawal be justified had the parties (including the Maleckis) actually been informed? This would be a close call. An arbitrator works on the assumption that he/she will be paid for his/her work. An arbitrator would also normally take steps in advance to make appropriate arrangements regarding remuneration. The Maleckis said that they would take no further part in the proceedings. Does this imply that they were also refusing to honor their arrangement with the arbitrator? Arbitrator De Vito withdrew stating that “there were no assurances” that he would be paid. Was he not obliged to make an effort to clarify this before withdrawing? At any rate, the Malecki problem would not have occurred had the fees been deposited in advance by the parties. Direct remuneration of an arbitrator by the party who appoints him/her raises concerns regarding appearance of bias, and it may also have other adverse consequences as shown in this case.
III.2. Appointment and Appointing Authorities

Arbitration does not provide a preexisting machinery for dispute settlement. Rather it offers a chance to structure one. This is a task that requires special expertise. There are two lines of complementary developments. Parties to international trade disputes have become more and more aware of the issues, and they have created suitable mechanisms of appointment. At the same time, arbitral institutions and national procedural laws have worked out procedures that come into play if party cooperation – or the party designed mechanism – should fail to produce results. The basic options are the following:

- arbitrators are nominated by consent (consent of the parties, and/or consent of the party-appointed arbitrators);
- arbitrators are nominated by an appointing authority designated by the parties themselves (or by the non-institutional rules chosen by the parties—for example, where the parties choose the UNCITRAL Rules);
- arbitrators are nominated by the institution to which the parties submitted their dispute;
- arbitrators are nominated by a court;
- a combination of any two or more of the above methods.

This subchapter is devoted to the issues that emerge in the process of structuring an arbitration tribunal according to the above options.

III.2.a. Introduction – Options in Appointment of Arbitrators

III.2.b. Appointment by Courts

Questions 1 and 2. P. Sanders concludes that the Dutch Act “bans” the issue of the validity of the arbitration agreement from the appointment stage. His conclusion rests on the provision in Article 1027 that appointment shall take place “without regard to the question whether or not there is a valid arbitration agreement”. The probable motive behind this solution is to leave any scrutiny of the arbitration clause to the arbitrators.

An arbitrator will be appointed in any case, and the arbitrators will decide whether their appointment (and the whole arbitration process) can be upheld. Does this mean that appointment can also take place without any arbitration agreement, i.e. on the ground of a mere allegation that an arbitration agreement exists? The avoidance of any scrutiny will speed up the process – particularly if it
turns out that there was indeed a valid arbitration agreement. In the latter case the Dutch solution will spare the time needed for a double scrutiny. The same solution will not prove to be so efficient, however, if there is no valid arbitration agreement. Even worse, suppose the demand for arbitration were frivolous. The 2011 Hasfeld v. Cohen decision shows that some hesitation exists within the Dutch practice as well if it can be determined without scrutiny that there is no arbitration agreement.

The merits of the Dutch solution should be measured against other options. The possible alternatives are the following:

No scrutiny at all – everything is left to the arbitrators;

Scrutiny restricted to verify whether the appointing authority itself is entitled to act (for example, to verify whether the time within which the party had to make an appointment had run, and thus whether the conditions for seeking default appointment were met);

Summary examination of the arbitration agreement in order to establish whether any agreement exists at all, and whether it has a chance to be qualified as valid (this is the essence of the Swiss and of the French solution);

Full scrutiny of the validity of the arbitration agreement by the court as appointing authority.

Arguments may be advanced for or against any of these options. Scrutiny along the lines of option 2 (verification of the conditions for appointment proper) is probably unavoidable. As far as verification of the arbitration agreement proper is concerned, a lot depends on the hypothetical case one envisages. (A basically sound arbitration agreement that will or will not be contested by the parties is one hypothesis; another is a hopeless arbitration clause.) The authors lean toward option of a prima facie scrutiny of the validity of the arbitration agreement, without drawing a distinction between court appointment based on party agreement and court appointment based on the seat of arbitration (which is in essence the French solution).

**Question 3.** A refusal to make the requested appointment, need not be based on the (perceived) invalidity of the arbitration agreement. Appointment may be refused on the ground that the request was premature, or that it was submitted to the wrong court. In such cases a second attempt is possible and likely to succeed.

Rejection of appointment based on the invalidity of the arbitration agreement would thwart arbitration. Appointment by courts is usually the last resort, hence Kompetenz-Kompetenz would not help, because there would be no arbitrators to exercise Kompetenz-Kompetenz.
Questions 4–5. The Polish Act is one of the rare arbitration acts that devote attention to the substantive validity of the arbitration agreement. (Until the 2013 amendments such a rule existed in Article 1678 of the Belgian Judicial Code as well). This means for example, that a clause that would allow one party to nominate two arbitrators, while the other party could only nominate one, would represent a violation of the Polish Code. It is a closer call whether the prohibition of giving a privileged position would be infringed, if only one of the parties would be subject to restrictions regarding the nationality of the appointees. The answer is probably yes. On the other hand, if the privilege is not tied to a specific party, but to the role a party will have in a dispute, there is probably no violation of Article 1169, because the arbitration agreement itself does not discriminate between the parties. Both of them may wind up in a position in which they have a wider option.

Similarly, the Hungarian Rules are not tying the added condition for appointment to a given party – although, if the arbitration agreement is concluded between a domestic and a foreign party, it is rather predictable, that the foreign party will be the one that will nominate a foreign arbitrator. At any rate the parties have a choice and some maneuvering room. Also, the burden imposed on the party that is nominating an arbitrator with residence abroad does not appear to be excessive. The endeavor to secure funds for extra expenses of arbitrators with residence abroad is not illogical, although it is not the only option. Another option could have been to cover the travel a living expenses of the foreign arbitrator from the overall advance on costs of arbitration. But even assuming that the latter would have been a better solution, the rule of Article 18(6) probably does not amount to a violation of the equality of the parties. (One should also note, that the living and travel expenses of the foreign arbitrator may be returned, if the party nominating the foreign arbitrator turns out to be the winner.) – Yet, there is room for discussion.

III.2.b.i. Note on Appointment by Courts

III.2.b.ii. Selected Legislative Provisions on Appointment by Courts

III.2.b.iii. Appointment by Courts in Order to Prevent Denial of Justice

Questions 1 and 2. This is a difficult case. The arbitration agreement would in all likelihood have been frustrated had the French court not stepped in. At the same time, intervention based on avoiding a denial of justice in another jurisdiction is a sensitive precedent, not without its own dangers. The courts of one sovereign state are here providing a remedy for inaction by the courts of another sovereign state.

Appointment by the ICC would have been problematic. The source of any ICC authority must lie in the will of the parties. But this was not an ICC
arbitration. The parties merely chose the “President of the ICC” as appointing authority with respect to the third arbitrator. Had this been an ICC arbitration, the situation would have been different, unless the parties had excluded the powers of the ICC regarding appointments other than that of the third arbitrator.

A party should not be able to avoid arbitration by simply not nominating its arbitrator. If there is no party-created appointing authority, courts should provide the remedy. In this case, the defaulting party is a State, and its courts failed to make the substitute nomination.

The Cour de cassation referred to an “impossibility of access to a judge, be it arbitral” (l'impossibilité pour une partie d'accéder au juge, fût-il arbitral…”). Does this mean that impossibility of access to an “arbitral judge” (arbitrator) constitutes in itself a denial of justice? Or is the impossibility of access to an arbitrator a denial of justice only if, under the circumstances, there is no practical possibility of bringing the case to a court either? (The latter proposition appears to be more convincing. It is difficult to speak of denial of justice if only one of the possible avenues to justice is barred.)

The argument of Fouchard suggests a fine line between on one hand pathological clauses that are beyond repair and do not deserve an extraordinary remedy, and on the other hand imperfect clauses. Pathological clauses are those that do not even reflect a clear intention of the parties to submit their case to arbitration. Imperfect clauses reflect a clear and certain intention of the signatories to submit their case to arbitration, but they do not provide a mechanism that would put arbitration in place without further cooperation of the parties. Is this a helpful distinction?

One has to keep in mind that even if one were to accept this distinction, this does not mean that each imperfect clause yields a denial of justice situation. Article II of the New York Convention states that courts shall not refer the parties to arbitration if the arbitration agreement is “… inoperative or incapable of being performed”. Normally, if the arbitration agreement is imperfect (inoperative, incapable of being performed) the moving party may seek justice before a court. The specific facts of this case blocked any meaningful resort to courts as well. The basic question is whether a threat of denial of justice is sufficient reason to depart from rules on jurisdiction regarding appointment.

The French court tried to stay as close as possible to both French law and to the arbitration mechanism envisaged by the parties. It was seeking a nexus between the case and France (in the absence of the exact link set in the Code of Civil Procedure), and it tried to nominate an arbitrator who would be acceptable to Israel, (after Israel refused to make a nomination). Can these circumstances justify the outcome?

In February 2005, the French Cour de cassation returned once again to
the NIOC v. Israel case. On February 1, 2005 the First Civil Chamber of the Cour de cassation held: “The impossibility for a party to access a judge, or an arbitral judge in charge to hear its claim to the exclusion of any State courts, and thus to exercise a right which arises from the international public order established by the principles of international arbitration and Article 6.1 of the European Convention of Human Rights, constitutes a denial of justice which justifies the international jurisdiction of the President of the Tribunal de grande instance of Paris to act in pursuing its mission to assist and cooperate with the creation of an arbitral tribunal, when there is a link with France.” The contemplated part of Article 6.1 of the European Convention is probably the first sentence, which states: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” It could be discussed whether Article 6.1 is relevant in this case.

**Question 3.** Article 1505 shows that the French legislator approved the position taken in the NIOC v. Israel case. This is a significant development. On the international scene, however, the question still remains open.

**Questions 4-7.** The NIOC v. Israel case has given rise to much debate, and will probably continue to do so. The arbitration clause was deficient. It did provide a viable mechanism for the appointment of a third arbitrator, but it did not provide for a substitute mechanism for the appointment of the second arbitrator. Before the French courts this was perceived as an imperfection, and what remained to be decided was whether French court can or cannot help to overcome this imperfection. Before the Swiss court two narratives were juxtaposed. The Appellant argued that the imperfection was intentional, and the parties willingly accepted in their arbitration agreement the possibility of a stalemate, or lack of access to arbitration. The Respondent stayed with the perception of an imperfectly drafted arbitration agreement, which nevertheless reflected the intention of the parties to submit their disputes to arbitration. The arbitrators held that both parties had a duty to appoint an arbitrator (the arbitration clause stated that “each party shall appoint an arbitrator”), and stated that the lack of a substitute provision cannot represent a device for escape.

One of the questions that arose in connection with the narrative of the Appellant was: why would the parties intentionally block the appointment of the second arbitrator, and at the same time provide for a substitute mechanism regarding the third arbitrator? One could argue that - assuming that the parties really intended to build into the arbitration agreement a blocking device - it would, indeed, be logical to allow blocking the appointment of the second, rather than of the third arbitrator. Namely, in the given setting, the appointment of a third arbitrator was not a requirement for conducting arbitration proceedings. The third arbitrator would only step in if the two arbitrators “fail to settle the dispute by mutual agreement”. In other words, the option of obstructing the appointment of the third arbitrator would not guarantee the obstruction of arbitration, because the
two arbitrators may very well “settle the dispute by mutual agreement”. Also, it makes more sense to permit hindering of arbitration before it actually started.

The question remains, why would the parties stipulate an opting out under the guise of an imperfection? Arbitration agreements are normally drafted with the purpose of avoiding national courts of the parties, and to provide for a neutral non-State forum. This purpose is typically accepted as a guidance in interpretation. Had the parties to this case really wanted to stipulate in their arbitration agreement a highly unconventional option (the right to block arbitration) why did not they spell this out?

Read again the arbitration clause. Do you agree with the Swiss court that the given wording yields a legitimate expectation to settle disputes by arbitration?

**Question 8.** In the hypothesis that the parties did spell out the right to block arbitration, the question becomes even more complex. The Appellant argued that “the parties intentionally accepted the possibility of a stalemate in the arbitral proceedings, yet without excluding recourse to their national jurisdiction.” Suppose the arbitration agreement explicitly stated that any party is entitled to hinder the arbitration process by way of not appointing an arbitrator. In this hypothesis, one could argue that court assistance would be improper. In the context of this (hypothetical) situation, court appointment would not be a simple remedy of an imperfection. It would be a step beyond an intentionally chosen limitation. At the same time, one should note that the Appellant interpreted the arbitration agreement as an intentionally accepted possibility of a stalemate – “yet without excluding recourse to their national jurisdiction”. Hence, even if the perception of the Appellant had been expressed explicitly, the contemplated result should not have been denial of justice, but denial of recourse to arbitration. Yet under the given peculiar circumstances -since it became impossible to take effective action before a court - the (hypothetical) limitation would have become much more drastic than originally intended. Instead of being an impediment to recourse to arbitration, it would have become an impediment thwarting any legal recourse – it would have lead to denial of justice. Article 1505 of the French Code of Civil Procedure permits appointment if “one of the parties is exposed to a risk of a denial of justice”.

In the actual case, the French courts assumed that the parties actually wanted to arbitrate, but, by omission, they failed to provide for a substitute appointing authority, and since lack of appointment could have yielded denial of justice, the courts opted to make an appointment. In the hypothetical case the court should face the assumption that the parties intentionally opted to omit an appointing mechanism, they gave both parties an opportunity to block arbitration – but they failed to perceive that this might lead to a denial of justice. Arguably, Article 1505 might allow an interpretation that would permit appointment even under this hypothesis. Would this be a step too far?
III.2.c. Appointing Authorities Chosen by the Parties

III.2.c.i. The Nature of the Decision of the Appointing Authority

The two NIOC cases and the 1992 Swiss case turn attention to judicial and arbitral practice, and exemplify the issues and problems dealt with above through statutory provisions and discussion in law review articles.

**Question 1.** Jolidon sounds quite persuasive in stating that the decision of a judge authorized by the parties should have the very same effect as an appointment made by the parties themselves. In this interpretation, entrusting someone with default appointment is just like entrusting someone with the power to fix the price in a sale contract, in which case the price determined by the third party simply becomes part of the contract. But is this really so simple? The jurisdiction of a court in matters pertaining to the merits, (rather than in appointment matters) may very well be based on party agreement (prorogatio fori) and yet, the ensuing decision is clearly a judicial determination, rather than a party stipulation. Is there a difference? The heart of the matter is whether the parties have (and whether they could have) entrusted the President of the Swiss Federal Tribunal with judicial jurisdiction when they designated him as default appointing authority. Choice of forum is possible, and legitimate. The parties can entrust a case to a given court, but they probably cannot interfere with the organization and functioning of the judiciary to the extent of assigning specific competence to specific courts. In 1984, the Swiss Federal Tribunal rendered a decision on this issue holding that nomination made by a court chosen by the parties as appointing authority should not be viewed as a judicial act. (Decision of the Federal Tribunal of April 16, 1984.) Although the parties could not allocate specific judicial functions, they could still entrust a person (who may be a holder of a judicial position) with the task of making the default appointment. This person might accept or refuse to do so – but in either case he (she) would act in a private capacity.

In the 1992 decision, however, the Swiss Federal Tribunal interpreted Article 179(3) of the Swiss Private International Law Act of 1987 (see Documents Supplement) as producing the opposite result. It reached the conclusion that appointment by a judge, whether chosen by the arbitration agreement (Swiss PILA Article 179(3)) or as a matter of law (Swiss PILA Article 179(2)) constitutes a judicial act, subject to the appropriate appeal procedure under Swiss law.

**Question 2.** In Sapphire, there was no other source of authority for the act of the President of the Swiss Federal Tribunal in appointing the arbitrator, than the agreement of the parties choosing him as appointing authority. Suppose the parties chose the President of the Tribunal de grande instance as appointing authority, and the site of the arbitration were Paris. Article 1493 of the New French Code of Civil Procedure (p. 81 of the Documents Supplement) states that with respect to arbitration taking place in France the President of the Tribunal de grande instance shall have competence to assist “[i]f any difficulty arises in the constitution of the arbitral tribunal”. It is clear that if
the President is chosen as a private person whose judgment is trusted, he (she) is free to accept or refuse the appointment. But it would not make much sense to refuse to act in a private capacity, if he (she) must act anyway in an official capacity.

If the judicial authority chosen by the parties happens to be the same authority entitled (and obliged) to act under existing legislation, one might argue that “stronger authority” absorbs “weaker rights” to act upon the same request.

**Question 3.** A reinvestigation of the decision of the President of the Federal Tribunal would probably focus on the issue whether the conditions for the action of the appointing authority were met.

(The key clause, Article 41.2 in the Concession agreement, read: "If one of the parties does not appoint its arbitrator or does not advise the other Party of the appointment made by it within two months of the institution of the proceedings, the other party shall have the right to apply to the President of the Swiss Federal Tribunal to appoint a sole arbitrator.")

The President of the Swiss Federal Tribunal held a mandate from the parties to act in case NIOC did not make the appointment within two months from the institution of the arbitral proceedings. The question is whether arbitration proceedings were initiated (and whether the time limit started running) from the first notice given by Sapphire Petroleum Limited, or whether the critical moment was when Sapphire International Limited sent the notice. Arbitrator Cavin avoided this sensitive issue by stating that the appointment made by the President of the Federal Tribunal is a judicial decision, and therefore the matter is *res judicata*.

Students do not have this escape route. It seems obvious that NIOC was informed about the substance of the claim when it received notice from the wrong Sapphire entity, but it also seems to be true that only Sapphire International was formally entitled to initiate arbitration proceedings. Note that the request for appointment was submitted by Sapphire International, a fact that supports NIOC’s contention that only Sapphire International’s actions were relevant.

**Question 4.** NIOC actually did not contest the validity of the arbitration agreement; rather it contested the validity of the appointment. NIOC’s argument is that at the moment the President of the Federal Tribunal acted upon Sapphire International’s motion, the default mechanism of the arbitration clause had not yet been triggered.

**Question 5.** On January 10, 1961, NIOC nominated as arbitrator Charles Carabiber, a well-known French professor; while earlier, on September 28, 1960, Sapphire nominated Mr. Tippit, an attorney from Denver (who later testified as a witness for Sapphire). This again shows that the arbitration clause itself was respected by both parties. It is interesting to note that NIOC nominated its arbitrator exactly on the day when Sapphire International addressed the President of the Federal Tribunal with the request for default nomination. Suppose NIOC had made its nomination a day earlier –
would the President have been entitled to act – even if we assume that the time limit for appointment started running from the notice given by Sapphire Petroleum? Can a default appointment be made when party appointment is not made in time but is made before the request for default appointment is submitted?

In the given case Carabiber’s appointment was disregarded on the ground that it was (allegedly) made late, and was therefore inconsequential. Tippit’s appointment became moot, because, according to the arbitration agreement, if one party fails to make the appointment, the appointing authority appoints, not a substitute, but rather a sole arbitrator. Mr. Cavin became a sole arbitrator.

**Questions 6 and 7.** An appointing authority need not undertake a full scrutiny of the arbitration agreement. A “summary examination” (as suggested by the Swiss Act) might be sufficient. Article 179(3) of the Swiss Act actually provides that appointment shall be made “[u]nless a summary examination shows that no arbitration agreement exists between the parties.” The wording focuses on "existence" rather than validity, which suggests a rather restricted scrutiny, deferring a more comprehensive review to the arbitrator. The Swiss Act is, of course, only valid in Switzerland, but the Swiss Act is one of the few that takes an explicit position regarding this issue, and the solution adopted in Article 179(3) reflects a growing international trend. It is logical to assume, however, that the appointing authority – while deferring to the arbitrators a more thorough scrutiny of the arbitration clause, which is the basis of their jurisdiction – will verify the conditions of its own authority to act. In the Sapphire case this meant that the President of the Federal Tribunal had to take a position regarding the issue whether two months had or had not elapsed since the “institution of the proceedings”. This entailed, of course, an interpretation of the phrase “institution of the proceedings” – keeping in mind that the first notice was sent by Sapphire Petroleum, rather than by Sapphire International.

**Questions 8 and 9** Courts derive their competence from the law. If the law (Article 179(3) of the Swiss PIL Act) says that a judge designated as appointing authority by party agreement has the duty to act, then he/she has the duty to act, and to “[m]ake the appointment unless a summary examination shows that no arbitration agreement exists between the parties”. One may note that – just as in the Sapphire case – the question might also arise whether the conditions for acting as appointing authority were met. The first obvious condition is the arbitration agreement itself, but there are normally other conditions as well. If the (otherwise valid) arbitration agreement says that the judge shall make an appointment if a party has not done so within 30 days from the date on which it received the claim, court appointment is only possible after the expiry of the said 30 days. Thus, a distinction can be drawn between the validity of the arbitration agreement (which is the basis of the jurisdiction of the arbitrators), and the satisfaction of the conditions that trigger the duty to make an appointment. Article 179(3) says that appointment shall be made if a summary examination shows that an arbitration agreement exists. This is logical. It would make no sense to assist in the formation of an arbitral tribunal, if it appears prima facie that this arbitral tribunal could not validly function because no arbitration agreement exists. Article 179(3) makes no
reference, however, to the conditions triggering the action of the judge him or herself. Is there a problem here?

Another issue is that of the rationality of the basic underlying idea in Article 179(3), namely the proposition that whenever the parties agree that a Swiss judge will act as appointing authority, the judge will have no discretion in deciding whether to accept this assignment. He/she will have to act – and to make an appointment— unless a summary examination shows that no arbitration agreement exists. (Always assuming that Swiss procedural law is applicable.) One could argue that this is a pro-arbitration solution.

The difficult question is whether the decision on appointment under Article 179(3) – assuming that it is a judicial act – is binding on the arbitrators. Courts and arbitration tribunals do not belong to the same hierarchy. There is some court control over arbitral awards (in setting aside or recognition proceedings). Challenges of arbitrators might also be decided by courts. But it is generally understood that the arbitrators have competence to decide upon their own competence. The 1992 Swiss Supreme Court (Federal Tribunal) decision states that “there is no possibility to question the decision of the judge in future arbitral proceedings”. But it is very important to add that the Swiss Supreme Court (Federal Tribunal) comes to this conclusion with regard to decisions denying appointment. The court makes it quite clear that the situation is different with regard to decisions granting appointment. This is a logical distinction. If appointment is denied, what thwarts arbitration is not only the perceived conclusive judicial character of the decision, but also the fact that there is no arbitration tribunal in place, and there is no way to get one constituted (because the fallback provision did not yield appointment). The situation is radically different if appointment is granted. Here we do have an arbitral tribunal, and this tribunal has both the right and the duty to investigate its competence. Furthermore, this will be the first opportunity to undertake a full investigation of the validity of the arbitration agreement, because the state court was only entitled to undertake a summary investigation. For this reason, we believe that an arbitrator would not be bound by the decision of a Swiss court which makes an appointment, not even if this is considered to be a judicial act.

The remaining question is whether the arbitrators could reverse a court decision to make an appointment, not because they would conclude that the arbitration agreement is invalid, but because they find that the conditions for the intervention of the judge were not met. This is the Sapphire situation. It was clear that appointment by a court could only take place if the respondent failed to make an appointment within two months of the institution of the proceedings. The question arose whether this time period started running from point at which notice was given by Sapphire Petroleum Limited (not a party to the proceedings), or only from the second notice, given by the real party to the proceedings. The President of the Swiss Federal Tribunal counted the two months from the first notice. Can this issue be reinvestigated by the arbitrator thus appointed? Is he/she allowed (or maybe even obliged) to reconsider whether his/her own appointment was legitimate? In the Sapphire case we had a sole arbitrator. Suppose the Swiss Federal Tribunal appointed a third arbitrator. Would the situation
regarding reconsideration of the appointment (this time by the arbitration tribunal) be different?

**Question 10.** Article 179(3) refers to appointment by judges (not by courts). The terminology is consistent. Article 179(2), which speaks of court appointment in the absence of a party designated appointing authority, also refers to judges (“[t]he judge where the tribunal has its seat” shall make the appointment). Having this terminology in mind, it would be logical to perceive judges not as individuals but as representatives of a given judicial instance. Thus, following this same line of reasoning, the acts of the judges could be categorized in accordance with the place of the given instance within the judicial hierarchy.

**Questions 11.** In NIOC v. Elf Aquitaine (unlike in Sapphire), the validity of the arbitration agreement was contested. In this case, NIOC argued that the arbitration agreement was no longer valid, and hence that the provisions on default appointment in the arbitration clause were also invalid and inoperative. Justice Hvidt decided to proceed with the appointment without resolving the issue of the continued validity of the arbitration agreement. Another option would have been to scrutinize independently the validity of the arbitration agreement, and to make, or not make, the appointment depending on the outcome of that scrutiny.

It seems likely that the arbitration clause would pass a “summary examination”. A more exhaustive examination would have to face the issue of the territorial and temporal scope of the 1980 Iranian legislation. In line with the Kompetenz-Kompetenz principle, the arbitrators had the authority to make these determinations, and they would probably not have been bound by the findings of the appointing authority. By making the appointment, M. Hvidt gave the arbitrators the opportunity to exercise their authority to resolve these issues.

**III.2.c.ii. An Appointing Authority Not Relied Upon**

**Question 1.** In Philips v. Hyundai, we confront the issue of parallel appointing authorities. The arbitration agreement designated the Chairman of the Hong Kong General Chamber of Commerce and the ICC as appointing authorities – and yet the parties wound up before a Hong Kong court. The Hong Kong Court obviously scrutinized the agreement to some extent, after which it refused to make the requested appointment. Its scrutiny focused on whether the triggering point for court intervention had been reached. The court identified two possible triggering points under Hong Kong Law: (a) failure to reach an agreement between the parties (Article 12(1) of the then applicable Hong Kong Ordinance), and (b) failure of the party designated appointing authority to act (Article 12(2) of the then applicable Hong Kong Ordinance). The court held that Article 12(2) was applicable – and this seems fairly persuasive.

The validity of the arbitration clause proper was not at issue. One could argue that “summary examination” had in fact occurred, because it was obvious that some
arbitration agreement did exist, and that both parties had relied on that fact. Their dispute did not go to the issue of validity.

The court held that court appointment would be premature, because the party-designated options had not been exhausted.

**Question 2.** The Hong Kong Arbitration Ordinance stated in Section 12(2)(b) that the appointing authority must make the appointment within the time specified by the parties, or within a reasonable time if no time has been specified. This is certainly a flexible solution. It is difficult to anticipate how quickly an appointing authority would be able to act, and the Hong Kong Ordinance cannot regulate the ICC (or other) institutional procedure. At the same time, some limits should exist — and hence, the "reasonable time" standard.

A specific number of days, would of course be easier to administer and would create greater certainty — but could prove to be rigid.

Once the students have assumed the role of the Hong Kong legislator, they might consider the following option: Would it make sense to fix a specified number of days within which the party must petition the appointing authority? (Instead of — or in addition to — a specified number of days within which the appointing authority must act.) The new 2011 Hong Kong Ordinance did not solve the time limit issue by way of adopting Article 11(4)(c) of the UNCITRAL Model Law. The Model Law speaks of a failure of the appointing authority "to perform any function entrusted to it". This seems to include failure to make an appointment within a time limit set — if a time limit was set. If no time limit was set, we are back to the question of what amount of time may still be considered reasonable, or — under the Model Law test — when can one conclude that the appointing authority “failed to perform a function entrusted to it.”

**Question 3.** The designation of more than one appointing authority without setting some hierarchy or temporal sequence, is not a good idea. Suppose the parties try but fail to agree on a sole arbitrator, and thereafter one party petitions to the Chairman of the Hong Kong General Chamber of Commerce, while the other party invokes the ICC. Both appointing authorities respond positively, and both appoint a sole arbitrator. Which appointment is valid? Neither the Ordinance nor the arbitration clause provide a clear answer.

One option would be to consider valid only the appointment that was made first. Students may be invited to investigate whether court intervention under Article 12(2) of the Ordinance may be invoked in such a situation. (Probably not.)

The lesson in this is that more than one appointing authority enhances the chances of getting a viable arbitration panel (there is another default mechanism at hand if one of the appointing authorities refuses to act); but the relationship between the designated appointing authorities has to be clarified by establishing some hierarchy or sequence.
Questions 4 and 5. The question arises whether court appointment would be authorized, if a party petitioned the ICC but it refused to act within a reasonable (or any) time period, because the party did not pay the fees required by the ICC Rules. Article 12(1) of the Ordinance described the triggering condition as: “that person refuses to make the appointment or does not make it within the time specified in the agreement, or if no time is specified, within a reasonable time.” Was this condition met in our hypothetical?

The wording of the Ordinance itself allowed a positive answer, but one should also take into consideration the wording of the second party-designated default appointing mechanism: “in accordance with the Rules of Conciliation and Arbitration then obtaining of the International Chamber of Commerce”. One could argue that this latter mechanism was in fact not relied upon because a request in accordance with the Rules (which entails the payment of appropriate fees) was never submitted.

III.2.c.iii. An Appointing Authority That Ceased to Exist

Question 1. In all probability Gatoil and NIOC (and their lawyers) made a mistake in referring to a judicial body that had ceased to exist – or at least, that had changed its name. The most likely way this could have happened is as follows. The parties used an arbitration clause that had already been used in many contracts, and they failed to notice that an important detail was not up-to-date. The designation they used to identify the appointing authority was not correct after the post-Revolution reorganization of the court system.

After the mistake was made, three possible interpretations emerge. One could conclude that:

- the whole arbitration clause is invalid;
- the provision on appointment is invalid;
- the arbitration clause (including the provisions on appointment) is valid, and the reference to the President of the Appeal Court of Tehran should be interpreted as a reference to the legal successor of this court, which is the Municipal Court of Tehran.

There are arguments for each of these interpretations; indeed, this is in part a matter of general contract interpretation. We do not know enough about the restructuring that took place in the Iranian court system, but in principle if one assumes that an appointing authority chosen by the parties does not exercise a judicial function but rather acts in a private capacity on the ground of the authorization received from the parties, (see the Sapphire case and the comments), then it is not relevant whether a judicial function was or was not transferred to another court. Assuming that the appointing authority chosen by the parties does not perform a judicial function, the following line of reasoning becomes available: The parties wanted as appointing
authority the person who was the president of a court at the moment when the need for appointment arose. It was not critical that the court’s name had changed; hence the president of essentially the same institution under a new name should be considered competent. But what if the re-named court was not “essentially the same institution”?

It may also be relevant that the president of the new judicial institution has a more limited pool of potential arbitrators to choose from than the President of the Appeal Court of Tehran had. (The choice is restricted to those who reside within the jurisdiction of the new appointing authority, the Municipal Court of Tehran.) Gatoil could argue that accepting the new appointing authority would mean changing the bargain.

Assuming that the parties’ agreement could not be interpreted as encompassing the new institution, the question arises whether the arbitration clause proper was still valid. The question may be raised whether the elimination of the clause on appointment would - or would not - have a substantial impact on the positions of the parties established through the contract. This leads us to the question of what would happen without the clause providing for the party-designated appointing authority. Since the site of arbitration is Tehran, in the absence of choice made directly by the parties, appointment would probably be made by a Tehran court.

Gatoil could still argue that it would have never accepted Tehran courts as appointing authorities on the condition that only residents of Tehran were available as arbitrators. (Of course, the choice of a Tehran court as appointing authority clearly allowed the Tehran court to nominate a Tehran resident, and this was the likely outcome anyway. The only way to have prevented this outcome would have been to have designated the nationality or residence of potential appointees in the arbitration clause, which was not done.)

**Question 2.** Whether the parties had concluded their arrangement while the Appeal Court of Tehran was still functioning but after the Iranian Revolution had taken place, or whether the agreement was struck after the court change itself had already taken place, could have limited relevance for the following reason. If the parties designated an existing institution that was later changed, Gatoil could claim that the turn of events put it into a less favorable position than the one bargained for. If the change took place before the contract was drafted, Gatoil’s good faith (or diligence) is put into a somewhat different perspective. In this latter case, the problem is that the parties (including Gatoil) overlooked a turn of events that was a matter of public record. The question still remains whether this is critical.

**Question 3.** Assuming that the agreement was struck before the Iranian Revolution, both the new court, with its newly defined restrictions, and the whole post-revolutionary environment would have emerged as a wholly unexpected set of circumstances. Under this scenario, Gatoil could have argued that it would never have accepted arbitration in Tehran had it known the post-revolutionary legal and emotional environment. This takes us back to the issue of changed circumstances discussed in Chapter II.1.i in connection with the post-Yugoslav developments. The fact that in the
actual case the parties agreed on Tehran after the revolution, certainly makes it more difficult for Gatoil to argue that this was a substantially inconvenient forum imposing an unexpected and excessive burden.

**Question 4.** As a matter of general principle, the powers of an appointing authority are probably not "inheritable". If the parties choose a person because of his (her) personal expertise, their confidence in that person could not be automatically extended to his (her) natural heirs. The question is more complicated if the person is designated by his (her) function. Here, confidence is vested in the institution; the parties typically do not even know who the president of a court, or of the chamber of commerce, is, whom they have chosen as appointing authority. Such a designation can only be interpreted as a reference to the person who at the appropriate time occupies the position of president (or chairman, or secretary general, etc.) of the given institution. But what if we have a succession of institutions? Suppose the parties choose the president of the Zurich Chamber of Commerce, and this entity merges with other institutions to form the Swiss Chamber of Commerce? Or to take a real example, the Soviet Chamber of Commerce and Industry becomes the Russian Chamber of Commerce and Industry? Here the answer is not obvious; the analysis will presumably have to focus on the magnitude and relevance of the changes.

**Question 5.** Gatoil’s argument to the effect that "it is impossible to find a qualified arbitrator who is willing to go to Tehran" is not particularly persuasive. Recall that Gatoil submitted to arbitration in Tehran after the revolutionary changes, and Gatoil’s own people were probably negotiating in Tehran. There are qualified arbitrators all over the world, and a fair number of them would have probably been willing to face the challenge of arbitrating in Tehran. Gatoil did not really submit any evidence that such an arbitrator was difficult to find in England; four negative responses do not amount to such evidence.

**Question 6.** One of the difficult dilemmas the Gatoil counsel faced after the Queen’s Bench Division decision, was whether to cooperate in the appointment of arbitrators. The arbitration clause could not be held inoperative as long as the constitution of a tribunal was in the hands of the parties. If Gatoil were to nominate an arbitrator, it is at least possible that this arbitrator and the arbitrator chosen by NIOC could agree on a presiding arbitrator. Gatoil could not claim that the clause failed to operate as intended as long as its operation depended on Gatoil’s own actions. (Cooperation also would mean, of course, arbitration in Tehran. Furthermore, the discussions of the arbitrators on the person of the presiding arbitrator would be conducted under the shadow of last-resort appointment of the third arbitrator by the Tehran court, if the parties could not agree.) On the other hand, refusal to cooperate would mean a court of arbitration constituted exclusively by Iranian parties or institutions, and an award rendered under these circumstances. The chance of attacking the award would be diminished by the fact that the Iranian appointing authority would have been forced to act precisely because Gatoil had failed to act.
III.2.d. The Role of Lists of Arbitrators in the Appointment Process

Questions 1 and 2. It is clear (and this was accepted by both the District Court and by the Second Circuit) that recognition and enforcement could only be denied on the ground of one of the seven reasons enumerated in article V of the New York Convention. Students should scrutinize Article V. The most fitting reason (and probably the only fitting reason) is that of Article V(1)(d): “the composition of the arbitral authority … was not in accordance with the agreement of the parties.”

The Second Circuit held that the “exceeded their powers” ground is not among those enumerated in the New York Convention. Maybe not in the context of the Encyclopaedia case. Article V(1)(c) provides, however, for denial of recognition if the arbitrators decided on matters beyond the scope of what was submitted to them, i.e. beyond the powers they received from the parties.

Question 3. This is a close call. Both the District Court and the Second Circuit have adopted a reasonable line of argument. One could also argue in the following way: Decker’s first appointment was clearly premature. But the premature appointment of Decker did not “irremediably spoil the arbitration process”, because the arbitration process did not actually start after this appointment. The Luxemburg Tribunal stayed the appointment, and invited the parties for a meeting. (One may note that such a meeting was not foreseen in the arbitration agreement.) Finally the Luxemburg Tribunal issued an order for Decker to proceed as an arbitrator. (This order was, incidentally, issued by a different judge, not the same judge who made the initial appointment of Decker.) It was after this that the arbitration proceedings got under way. One could argue that under these circumstances the actual appointment of Decker was made on February 22, 2000, rather than on April 22, 1999. If so, the question is whether one could demonstrate that the two arbitrators attempted but failed to agree on the third arbitrator before February 22, 2000. Suppose on February 22, 2000 the Luxemburg Tribunal appointed another arbitrator, not Decker. Could you still argue that the first appointment “irremediably spoiled the arbitration process”?

Questions 4 and 5. The authors believe that the Second Circuit was right. In a proceeding about recognition and enforcement the court can only decide about recognition and enforcement. This is also in line with the principle of the autonomy of the arbitration process. Courts may control the result of this process, but – at least in principle – cannot interfere with it. The New York Convention does not state or imply any departure from this principle. Thus, recognition may be refused, but the court just cannot decide how future arbitration proceedings should be conducted. Of course, after repeated proceedings recognition might be sought again before the same court – and this fact might indirectly influence the arbitrators. Arbitrators will normally try to render awards that have a good chance to be recognized.

If Danziger were once again nominated, this could hardly represent a reason for denying recognition, because it would be practically impossible to qualify the appointment of Danziger as a violation of Article V(1)(d). The possible appointment of
Danziger would not infringe the agreement of the parties regarding the composition of the arbitral tribunal. If the Luxemburg Tribunal were to nominate Decker, this might come closer to a violation of Article V(1)(d). The agreement of the parties states that the third arbitrator needs to be from the list of the British Chamber of Commerce. There is no such list anymore. Yet it is certainly true that the choice of someone from the LCIA list would be closer to the original intention of the parties than selection of an attorney admitted to the courts of Luxemburg. (We are assuming that Mr. Decker was not on the list of the British Chamber of Commerce, nor on the LCIA list.) Having said this, we also have to point out that it would be difficult to state that a choice from the LCIA list is the only possible choice that would accord with the original intention of the parties. There are several lists of arbitrators in the U.K. Moreover, quite a few arbitrators who were on the list of the British Chamber of Commerce – and who were thus contemplated by the parties as trusted arbitrators – are in all likelihood still active. A choice of someone who was on the list when the parties executed their arbitration agreement would probably be an “as-good-as-possible” choice (even if he/she were not on the LCIA list).

III.2.e. Multi-Party Arbitration and Selection of Arbitrators

**Question 1.** Note that the *Cour de cassation* would have enforced the agreement had the parties entered into it after the dispute had arisen. It would then have been clear to the two German companies, BKMI and Siemens, that they were agreeing to appoint one arbitrator for their side of the case, even though their interests were not identical. BKMI and Siemens are highly sophisticated business enterprises. Nevertheless, it seems conceivable that they did not realize the full import of the arbitration clause they signed. In any event, because of the unusual fairness issues in the agreed arbitration clause, the *Cour de cassation* will enforce such an agreement only if it is confident that the parties entered it with their eyes open. One should also note that the joinder of the two claims (one against Siemens, and the other against BKMI) may have had rational motivations, but it was not the only option. Had the two claims been pursued in two separate arbitral proceedings, the problem with appointment may have been avoided. (On the other hand it is more rational to consolidate proceedings that are based to a considerable extent on the same facts.)

**Question 2.** As the arbitration was structured, it seems actually to have worked to the benefit of BKMI and Siemens. They were able to arbitrate on the merits, but under protest. Had they won, that would have been the end of the matter. Having lost on the merits they got “another bite at the apple” by seeking annulment, at which of course they were successful. With hindsight, it seems that Dutco would have been better off bringing two independent claims against each of the two respondents in two separate arbitrations.

The option of having each party appoint an arbitrator would clearly have been rejected by Dutco. In that scenario two of the three arbitrators would have been appointed by the respondents, who had a common interest in avoiding liability altogether. After Siemens and BKMI were unable to agree on an arbitrator, should Dutco have suggested that the ICC be authorized to choose their arbitrator? Such a
solution would have yielded Dutco’s arbitrator and two neutral arbitrators, an outcome that Siemens and BKMI would probably have rejected. (Of course, such an outcome emerges in two-party arbitration whenever one of the parties fails to appoint its arbitrator and the default appointing mechanism is triggered. But in such a case the disadvantage of having a neutral arbitrator in place of a party-appointed arbitrator is attributable to the non-appointing party’s own default.)

Because the arbitral seat was in France (a conclusion we draw from the willingness of French courts to entertain annulment proceedings) Dutco could have sought the assistance of the President of the Paris Tribunal de grande instance (TGI) under the then applicable Article 1493 of the French Code of Civil Procedure (now Article 1452 and1505) . Dutco could have asked the Paris TGI President to appoint all three arbitrators. The problem with this solution, however, is that it is not in accordance with the agreement of the parties. Presumably any resulting award could have been refused recognition and enforcement outside of France on the ground of New York Convention Article V(1)(d) (“The composition of the arbitral authority … was not in accordance with the agreement of the parties …”)

**Question 3.** The solution in each of the three sets of rules (2012 ICC Art. 12(6) and (8), LCIA Art. 8, and 2014 AAA International Rules Art. 12(5)) is essentially the same. If there are multiple parties on either or both sides of the case and the parties cannot agree on the appointment of the arbitrators, then the institution appoints all the arbitrators. (Under 2012 ICC Art. 12(6) and (8), first the multiple parties must fail to agree and then all the parties must fail to find some acceptable solution. LCIA Art. 8 appears to assume that unless the multiple parties on one side of the case have a common position, the only viable solution is for the LCIA to appoint all arbitrators. Article 12(5) of the AAA International Rules sets a time limit of 45 days from commencement of the arbitration for the parties to agree, after which the administrator appoints all the arbitrators.) When the parties have chosen one of these sets of arbitral rules, selection of the tribunal according to the agreed-upon rules is “in accordance with the agreement of the parties”, and hence the award is not vulnerable under the New York Convention.

**Question 4.** Until 2010, the UNCITRAL Rules did not contemplate multiple-party arbitration. The adoption of a new solution in Article 10 shows a growing awareness of the importance of the problem. The AAA, ICC and LCIA rules have adopted a clearer divide between the option of nomination based on balanced party influence, and nomination by the institution rather than by the parties. If there is no clear agreement that multiple parties as claimant and/or respondent will jointly nominate an arbitrator, the option of party nomination will be abandoned, and all three arbitrators will be nominated by the institution. The UNCITRAL Rules have retained the upper hand of the appointing authority in case of lack of party agreement, but have not ruled out the option of confirming party appointments made without a full consensus regarding the method of appointment. Several lines of argument could be developed at this point.

According to one possible line of argument, this might introduce some added flexibility, but it might also yield a less than clear mixture of principles. Fairness might be
achieved either by way of balance (if both parties have equal influence on the constitution of the tribunal) or by reliance on a neutral authority. If balance does not work (because there are more actors and more interests on one side), it might be clearer and more convincing not to rely further on party appointments, but rather to authorize the institution (or the appointing authority) to make all appointments. The option of reappointing someone appointed by a party (and without the parties’ full consent concerning the appointing mechanism) might raise unnecessary doubts. [But of course in another sense the parties will have consented by adopting the 2010 UNCITRAL Rules.]

**Question 5.** Article 16(3) does not really help, because it is clear that in the *Dutco* case the parties did agree on the number of arbitrators. They said that all differences shall be resolved by a panel of three arbitrators. The solution provided by Article 17(4) is also triggered by lack of party agreement. Could we say that the parties failed to agree on the procedure of appointment? They did agree on the application of the ICC Rules. The ICC Rules do have provisions on appointment. The parties did not take into account, however, the fact that the dispute that might emerge could be a multi-party dispute. Could one say that they did not agree on the procedure of appointment? (They did agree on a procedure of appointment, but they did not devote special attention to the fact that the contemplated dispute might be a dispute between three rather than two sides, and involving three rather than two separate interests.)

**Question 6.** The district court came up with an innovative solution, but it departed from the arbitration agreement, which stated that the number of arbitrators should be three. The guidance given by the Fifth Circuit is closer to the agreement of the parties, but problems remain. The first option suggested by the Fifth Circuit is not likely to work in the light of the fact that Exxonmobile and Noble could have done this at the outset, but they argued instead that all three parties should have equal rights regarding appointment (meaning that both Exxonmobile and Noble – just as BP – should be entitled to appoint an arbitrator). The second option suggested by the Fifth Circuit is a plausible one, but it would still not yield equal rights of all three parties regarding appointment. If there are two roles (that of the claimant and that of the respondent) but three players, full equality could only be achieved if all three arbitrators are appointed by a neutral appointing authority. – This is the fallback solution of Article 6(5) of the ICDR Rules, and the parties accepting the ICDR Rules are also deemed to have accepted this solution.

**III.3. Challenges**

**III.3.a. Introduction**

There are three basic questions raised in this chapter in connection with challenges: who, when, and on what grounds. Or in other words: 1) Who – what institution is competent to decide upon challenges; is this within the competence of fellow arbitrators, courts, arbitral institutions, appointing authorities, or a combination of
these; 2) When could and should a challenge be lodged, during the proceedings, after the proceedings, or at both times; and 3) What grounds make a challenge justified.

**Question 1.** The UNCITRAL Model Law has tried to keep the challenge procedure as much as possible within the arbitration process. For these reasons, it is for the “arbitration tribunal” to decide upon a possible challenge. (Article 13(2) of the Model Law – See Documents Supplement.) Only if such a challenge – or any other challenge procedure agreed upon by the parties – is unsuccessful (i.e. rejected – see Article 13(3)), may a court be petitioned for redress. (In Russia, instead of a court, the President of the Russian Federation Chamber of Commerce and Industry will be the last instance to decide upon the challenge – see articles 6 and 13 of the Russian Act in the Documents Supplement.)

In institutional arbitration, Article 13(2) will probably never be reached, because challenge before the institution will be the challenge agreed upon by the parties (by virtue of their submission to the rules of the institution). The problem is more delicate in the case of ad hoc arbitration, and in the absence of a specific challenge procedure agreed upon by the parties. Article 13(2) says that the “arbitral tribunal” will entertain the challenge. But part of the arbitral tribunal is the challenged arbitrator himself. Still, it is difficult to read Article 13(2) in any way other than to allow the arbitrator who is challenged to participate in the challenge procedure. The Holtzmann-Neuhaus Commentary (Guide to the UNCITRAL Model Law on International Commercial Arbitration, Kluwer Publ. 1989, pp. 406-407) confirms this view. This solution will yield an even more odd situation if the challenged arbitrator happens to be the sole arbitrator, who will thus decide himself and alone on his own challenge. The Holtzmann-Neuhaus Commentary suggests that in this case there would be no need for a formal decision on the challenge, because the arbitrator’s refusal to resign would constitute a rejection of the challenge. In such a case, the remaining remedy is to continue the challenge before the competent court under Article 13(3).

The UNCITRAL Rules state that decision on the challenge will be made by the appointing authority, notwithstanding whether this authority was, or was not, involved in the original constitution of the tribunal. If no appointing authority was chosen by the parties, the party pursuing a challenge may request the Secretary-General of the Hague Permanent Court of Arbitration to designate an appointing authority.

Facing the situation of a challenge of one of the arbitrators the ICSID Rules leave the decision in the hands of the remaining two arbitrators.

**Questions 2-3.** Within recognition and enforcement proceedings as regulated by the New York Convention, one will not find provision for a challenge that would replace an arbitrator and bring about proceedings before a new tribunal. This does not mean, however, that a valid ground for challenge may not be posed as a ground for denial of recognition. Students should be invited to read Article V of the New York Convention.

Within Article V, subsection V(1)(d) may offer a foothold. If an arbitrator was
biased or had business, family or other ties to one of the parties, one could possibly argue that “the composition of the arbitral tribunal was not in accordance with the agreement of the parties”. (Much depends, of course, on the wording of the arbitration agreement.) Public policy in subsection V(2)(b) might also be invoked. If an arbitrator was not independent, this may amount to violation of due process and hence violation of procedural public policy.

A challenge previously decided in the negative by the arbitration tribunal or by the institution, need not bind the court deciding on recognition, just as a decision of the arbitration tribunal on its jurisdiction will not bind the recognizing court. The New York Convention puts severe limitations on the grounds that may be invoked against an arbitral award. The available grounds are only those enumerated in Article V – but with respect to these grounds the recognizing court need not defer to the findings of the arbitrators. A more intricate question arises if the challenge was refused by a court. If this is a court of the same country in which recognition is sought, respective rules on res judicata and collateral estoppel will provide guidance. A decision of a foreign court will only gain relevance if recognized by the domestic court.

The timing of the challenge is an issue that is still very much debated. Assuming that the challenge is well founded, it is, of course, better to deal with it as soon as possible. (Otherwise, the arbitration procedure which is doomed to failure will consume much wasted time, effort, and money.) But the challenge procedure is also time consuming, and the challenge might be ill founded. If the arbitration procedure were halted to wait for the outcome of a groundless challenge, this would also result in a waste of time, energy, and money, and would open the door to dilatory tactics. The UNCITRAL Model Law struck a compromise position by allowing the challenge to proceed at any time, but without mandating a stay of proceedings during the challenge. The question is who decides whether arbitral proceedings should or should not be stayed during the pending challenge. The Model Law says that this is up to the arbitrators, rather than up to the court deciding on challenge. Do you agree?

**Question 4.** The parties to a challenge procedure would understandably prefer a reasoned decision on challenge. Such a decision would also provide more guidance. At the same time, while most institutional rules require a reasoned award (unless the parties would agree otherwise), this requirement is not posited with regard to other decisions (like procedural orders, or decisions on challenges). For example, an explicit position was taken in the new Rules of the Japan Commercial Arbitration Association (JCAA) effective since February 1, 2014. Rule 31(5) states that decisions on challenge will be issued without statements of reason. The ICC Rules do not have such an explicit provision. According to Article 31(2) of the ICC Rules: “The award shall state reasons upon which it is based”. As far as decisions on challenges are concerned, no such rule is stated. Article 14(3) only provides that all parties concerned (the party submitting the challenge, the other party, and the arbitrator who is challenged) should have an opportunity to submit comments. The same position was taken regarding procedural orders (Article 22). Hence, the authors tend to agree with the Swiss court. A statement of reasons is required regarding awards, but it is not required with regard to procedural
orders or decisions on challenges. – It is another question what would be more in line with “best practice”.

**Question 5.** Professional activities tend to shape communities of experts, and arbitration is not an exception. Within every profession there are conferences, seminars, book launches. Being a participant at a conference is not indicative of any special relationship with other participants. At a conference one normally meets friends, but also people whom one never met before, and with whom one will or will not exchange a few words. Being a speaker at a conference makes one more visible, but does not indicate any close relationship with other speakers. Hence the fact that two arbitrators and one expert spoke at the same conference does not seem to justify a challenge.

### III.3.b. Challenges – Challenge before the Arbitral Institution

#### III.3.b.i Challenges in Institutional Practice

**Question 1-2.** The practice of the SCC is in line with a growing sensitivity with regard to independence and impartiality, and of a trend of resolving doubts in favor of the challenge. Rather subtle indicators of an appearance of bias have gained recognition. The first SCC decision is an exception. Was this exception justified? One can certainly argue that when appearance of bias is at issue, links with a party are should have more weight than links with the legal representative of a party. Nevertheless, links with a party representative can also be relevant. It is often not easy to draw a line between relevant (intolerable) personal connection, and belonging to the same community of professionals. There is certainly a difference between teaching at the same university and working in the same law firm. If the arbitrator and a party representative were affiliated with the same law firm, one could argue that the arbitrator is a member of the team that undertook to represent one of the parties. Teaching at the same university, or writing a book together are not professional affiliations that could be linked directly to a given case. Co-authorship is indicative of a closer personal connection than belonging to the same faculty. It may be below the threshold of a justification of a challenge – but not by much.

**Question 3.** Here, the link in focus is not a connection with a party representative. We have instead an (indirect) link with a party. The law firm of the arbitrator acted in cases in which the Claimant (the party that appointed the arbitrator) was involved. The arbitrator was not directly involved in these cases. It is probably not without relevance that the arbitrator’s law firm was acting both on behalf and against the Claimant. Had the law firm acted only on behalf of the Claimant, the case for challenge would have been stronger. In the actual setting what we have is more likely a professional routine than some special bond. It would take us to far, if one would take the position that a member of a law firm can never be an arbitrator in a case in which one of the parties was earlier a client of the law firm. Such a restriction would be even tougher if we consider large international law firms. What could have served as a
distinctive basis of the challenge is the fact that one of the cases in which the law firm of
the arbitrator acted, was an ongoing case involving the Claimant. (A recent, rather than
ongoing case, might have yielded the same conclusion).

Questions 4-6. It is not easy to define what has to be disclosed. In line with a
general trend of elevating the standards of impartiality (or, in other words, lowering the
threshold for a successful challenge) disclosures are nowadays extending to
connections that were not considered potentially relevant one or two decades ago.

Statements of independence that have to be submitted are offering the option to
the arbitrator to make a disclosure in case he/she feels that the circumstances disclosed
will not impair his/her impartiality, but could prompt questions from the perspective of
the parties. Thus, what needs to be disclosed is (at least in the eyes of the arbitrators)
less than a justification for challenge. One could agree with the decision of the two
ICSID arbitrators stating that “non-disclosure cannot make an arbitrator partial or lacking
independence”. It is quite common, however, in practice, to point out non-disclosure as
an aggravating circumstance. Also, lack of disclosure may be viewed independently as
a violation of an obligation of the arbitrator.

The ICSID decision made another important point. Insistence on over-extensive
disclosures may create a fertile ground for frivolous challenges. It is, of course, most
difficult to draw the line. A reading of the green orange and red sections of the
Guidelines may prompt a useful discussion.

It would be difficult not to agree with the arbitrators in the Turbowitz case.
“Shared educational experience” in itself cannot be equated with bias or appearance of
bias. The conclusion would probably remain the same even under the assumption that
the “shared educational experience” was not long ago, but it was a recent experience.
Being students of the same university at the same time probably cannot in itself disallow
former students to assume different roles in the same arbitration case. – Particularly
not, if we are talking about a large number of students.

III.3.b.ii. How Conclusive Is the Challenge Before the Arbitral
Institution?

The Syrian Refineries Case

Question 1. The Syrian Refineries case certainly lends some support to the
proposition that a party-chosen arbitral tribunal (the ICC in this case) is the sole judge
for challenges against arbitrators, if the place of arbitration is France. In the given case,
the Tribunal de grande instance refused to revisit a challenge that was upheld by the
ICC. The question is whether the situation would be the same had the ICC rejected the
challenge? One may argue that in the actual case there was less reason to scrutinize
the institutional decision, because it was not alleged that the institutional decision had
resulted in bias; it was rather alleged that the change of the arbitrator was unnecessary,
because the originally nominated arbitrator was also acceptable. Under these circumstances, the Tribunal de grande instance was not really interested in the merits of the challenge; it only raised the question whether institutional rules were properly observed. (In other words, whether the arbitration process was conducted in accordance with the procedure chosen by the parties.)

Were the institution to deny the challenge, the situation would be different, because now the emerging question would be whether the impartiality of the decision-making process had been compromised. It is not clear whether the Syrian Refineries case contains an answer to that question.

It may be mentioned that the assumption of weak or non-existent court scrutiny in the face of an institutional decision on a challenge would surely not hold for the parallel case of ad hoc arbitration in which the arbitrators themselves decide upon a challenge raised against one of them. But of course this would not be a case of institutional arbitration.

Another possible line of discussion might be initiated by asking what happens after a court sustains a challenge. Should the court make the new appointment itself, or should the party that made the initial appointment (or the arbitral institution) be invited to make the substitute appointment.

**Question 2.** The fact that proceedings were initiated against the ICC itself, is consistent with the circumstance that the challenge was upheld (by the ICC Court of Arbitration). The authors do not believe that the outcome was influenced by the fact that this was not a dispute between the Claimant and the Respondent, but a dispute between one of the parties on one side and the arbitral institution on the other side. But, again, the outcome was probably influenced by the fact that the contested challenge was upheld, rather than rejected by the ICC Court of Arbitration.

**Questions 3 - 5.** The Model Law is, of course, not a world law, but it has indeed served as a model, which has been followed worldwide. The decision of the Constitutional Court of Egypt addresses a somewhat controversial provision of the Model Law. The solution in Article 13(2) leads to a somewhat unwieldy situation where the arbitration is ad hoc. If one of the three arbitrators is challenged, he/she participates in deciding on the challenge. If a sole arbitrator is challenged, his/her position may be even more awkward, because he/she is supposed to decide on the challenge alone. During the drafting of the Model Law, it was proposed that where a sole arbitrator is challenged in an ad hoc arbitration, there would be no need for a formal decision on the challenge, since the arbitrator’s refusal to resign would constitute a rejection of the challenge. (See Holtzmann – Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Kluwer 1989, p.407, fn.3). This proposal was not accepted. Would you have favored its acceptance? Is this in line with the position taken by the Constitutional Court of Egypt? Should the same proposal be also extended to situations in which the arbitrator who is challenged is one of the three arbitrators? In other words, should it be assumed that a refusal of an ad hoc arbitrator to resign should
be taken to mean that he/she rejects the challenge (which would allow the party to bring its challenge directly before a court)?

It would certainly be difficult to defend the Article 13(2) solution in the context of ad hoc arbitration without the presence of an alternative remedy (bringing the challenge before a court under article 13(3)). Is this alternative remedy sufficient to justify Article 13(2) in the face of the arguments advanced by the Constitutional Court of Egypt?

The Swedish solution eliminates the safeguard offered by Article 13(2) - but it does so in the context of institutional rather than ad hoc arbitration. In an institutional setting, an organ of the institution - rather than the arbitrator(s) concerned - will decide on the challenge. Of course, the safeguard (recourse to courts) will only be eliminated if the parties so agree. Is this in line with the logic of Article 13(1) of the Model Law, which provides that the parties are “free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article” (which provide for challenge before a court)? Having in mind the danger of delays, is the provision of the Swedish Act a good solution? Is it necessary? (Consider Article 13(3) of the Model Law which provides that while a challenge before a court is pending, “the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award”.) One could argue that since arbitration is a creation of the parties, the parties should be allowed to shape proceedings for challenge as well. One could also argue that impartiality is one of those few issues concerning which unwaivable guarantees are needed.

III.3.c. Challenge of Arbitrators in the Context of Challenging the Award

III.3.c.i. The Issue of Disclosure

The Applied Industrial Materials Case

Questions 1 and 2. Even before the Applied Industrial Materials case was decided, the Commonwealth Coatings case - although it was not overruled - was interpreted in a more permissive way, with much reliance on the concurring opinion of Justice White. Still, there are no unequivocal guidelines for deciding which connection is “trivial” and which is not, or what disclosure is appropriate. A part of class discussion might be focused on hypos inspired by the Merit Insurance and the ANR Coal cases. Suppose, e.g., that the president of one of the parties was the supervisor of the neutral arbitrator not 14, but 5 years ago. Or suppose that not the president of one of the parties, but the brother of this president was the supervisor 3 years ago. Suppose that in an ANR-like situation the merger lasted three rather than one year, and suppose the arbitrator was not battling illness but was active during these years. These and similar questions do not have an unequivocal answer, but might lead to a better understanding of the issue
If a “benign” non-disclosure would violate institutional rules, this could represent a problem during recognition and enforcement proceedings. Article V(1)(d) says that recognition may be refused if “The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties”. According to Article 13(1) of the AAA-ICDR Rules “The arbitrator shall disclose any circumstance likely to give rise to justifiable doubts as to the arbitrator’s impartiality or independence, and any other relevant facts the arbitrator wishes to bring to the attention of the parties.” Institutional rules are chosen by the parties, and they may very well be considered as part of the agreement of the parties. Thus one could argue that the “arbitral procedure was not in accordance with the agreement of the parties”. The question arises whether disclosure before acceptance of the appointment is actually part of the “arbitral procedure”. According to a number of rules, disclosure is not an action prior to appointment, it is an action accompanying appointment. In both options, one could argue that the arbitral procedure actually starts only when an arbitral tribunal is in place. A broader interpretation might include as part of the “arbitral procedure” steps that precede the constitution of the arbitral tribunal. Read carefully article V(1)(d). It speaks of the “composition of the arbitral authority” or “the arbitral procedure”. Does this suggest a narrower understanding of the notion of “arbitral procedure”? If it does, another question might also be raised. Non-disclosure in violation of institutional rules might possibly fit under a different part of Article V(1)(d); namely, the question arises whether disclosure not in conformity with the institutional rules could yield the conclusion that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

**Question 3.** The *Applied Industrial Materials* case demonstrates that on the issue of impartiality, the logic and reasoning applied by U.S. courts in domestic cases would also apply to an international case. This makes sense because it would be difficult to find an argument for either a higher or a lower standard of impartiality in international cases, as compared with domestic cases. It is certainly not easy to find a standard that clearly separates partiality from impartiality. The “evident partiality” standard offers considerable maneuvering room. The same applies to the “reasonable person” standard, which has been relied upon to implement the “evident partiality” criterion. In the *Applied Industrial Materials* case the focus was on a current business relationship between a division of the arbitrator’s company, and the parent of one of the parties. Suppose we were talking about a business relationship that ended 7-8 years ago. Would this still constitute evident partiality for a “reasonable person”?

**Question 4.** Arbitrator Fabrikant stated that when he was initially informed that SCF was engaged in discussions with Oxbow, he told SCF’s president that he “wished to know nothing about SCF’s conversations, or be a party to information about our activities with Oxbow or be consulted concerning any business with them.” According to this account, arbitrator Fabrikant did not even know that the deal was eventually struck between his company and the parent of one of the parties to the dispute. This is what he calls a “Chinese Wall”. The *Applied Industrial Materials* court stated that it could not evaluate “whether the arbitrator had knowledge of the relationship that would compel a reasonable person to conclude that he was partial”. The Second Circuit added that had this been the only issue, it would have been inclined to remand to the district court. The remaining issue was that the arbitrator did not consult the parties about his intention to erect a “Chinese Wall”. Suppose that he
had informed the parties about the “Chinese Wall”. Would that have been sufficient, or would the consent of the parties have been needed?

**Question 5.** The ancient Greek oath (Section III.1.b of the book) includes enmity (in addition to friendship) among the motives that may lead to “false judgments”. It is not difficult to explain that animosity might also lead to bias, just as affinity can. We wonder whether “enmity” would be the right term to describe the relationship between Coca Cola and Pepsi Cola. It is certainly not less than rivalry. Would this rule out a Pepsi Cola executive as a possible arbitrator in a case that has nothing to do with Pepsi Cola, but in which Coca Cola is involved? The answer is probably yes. But how would you exactly define the basis for elimination? In defining the standard, the ICC Rules state in Article 7(1) “Every arbitrator must be and remain independent of the parties involved in the arbitration”. Do we have here (in the case of the Pepsi Cola executive) a lack of independence?

And how about a person who is not a Pepsi Cola employee but who gave legal advice to Pepsi Cola for money? Should business ties with a party and business ties with a rival have equal weight? (And if not, why not?)

**Questions 6 and 7.** One could also raise the question whether – independently from any relationship with the parties – the relationship between arbitrators themselves is relevant. Can they be friends? Need their possible friendship be disclosed? Friendship between one of the party-appointed arbitrators and the presiding arbitrator is particularly sensitive. All arbitrators are supposed to be independent, yet scrutiny of the neutrality of the third arbitrator is more stringent. For example, according to a number of institutional rules – and according to an even wider practice – the third arbitrator should not have the nationality of any of the parties; whereas such a requirement is generally not imposed with respect to the party-appointed arbitrators. Similar expectations may arise concerning friendships. Thus if one arbitrator (who has to be independent but is viewed as being closer to the party that appointed him (her)) is a close friend of the third neutral arbitrator, this may make the other party feel uneasy. But is this enough for disqualification? Should it be?

Take the example of a small town court. The number of judges is limited – and so is the number of attorneys appearing before the same court. They meet every day; it is to be expected that they will develop social ties. In a bigger city judges and attorneys need not know each other, but of course judges sitting on the same court will be colleagues, friends, or rivals even in large cities. It would be next to impossible to put together a panel of judges restricted to colleagues who have had no social contact with one another. In a jury system, links between a judge and a jury member may be more sensitive. U.S. civil procedure law includes a large number of rules and devices shielding the jury from improper influences. Distinctions between admissible and inadmissible evidence are detailed and subtle. Continental European civil procedure law exhibits much less concern for such matters, because it is assumed that judges are rugged professionals who cannot be easily influenced and swayed by suggestive questions or by ties of friendship within the court that do not rise to the level of family or business relationships.

Where would you put arbitrators? Closer to judges, or closer to jury members?
At this point arguments may again be invited for and against the relevance of social links among arbitrators themselves. And yet, if one arbitrator is the godfather of the other arbitrator’s first child, this is a piece of information that the third arbitrator ought to know. (And the parties as well?)

**Question 8.** In the *Applied Industrial Materials* case the Second Circuit held that the arbitrator had a duty to disclose, once he “was aware that a non-trivial conflict of interest might exist”. Applying this standard to arbitrator Carrard, was he obliged to disclose? Another question which might lead to an interesting discussion is whether the Swiss Supreme Court upheld the award because the circumstance that was not disclosed was not really significant, or because of waiver? (You may consider here Section 4.4.2 of the IBA Conflict of Interest Guidelines—corresponding to Section 4.3.2 of the 2014 Conflicts of Interest Guidelines.)

Speaking of waiver, can one expect a party in a CAS case to verify who the arbitrators were in previous cases? Consider a hypo in which Carrard is an arbitrator and Bernasconi is counsel for one of the parties, but in which the arbitration is not before a CAS tribunal. Would it matter that Carrard and Bernasconi had sat together as arbitrators in a previous CAS case?

**Question 9.** The Russian case (compared with the Swiss case discussed in the previous question, or with the American cases discussed above) shows that standards that are not very different, still can offer room for considerably different interpretations. It is certainly open to debate whether the fact that was not disclosed in the Russian case was of sufficient importance. Conferences have many participants, and sometimes a number of organizers and sponsors. Does the relationship between the organizers and the participants give rise to an appearance of bias? Or create an impression of partiality in the eyes of a reasonable person?

It is interesting to note that the Russian court actually articulated a more stringent standard (“excluding any doubt”), than the one set forth in Article 12 of the 1993 Russian Arbitration Act, which speaks of “justifiable doubts”. Does the fact that an arbitrator participates at seminars, the co-organizer of which is a law firm representing a party, give rise to a justifiable doubt regarding the impartiality of the arbitrator?

The IBA Guidelines are not binding norms, but they certainly reflect contemporary approaches to disclosure and impartiality. None of the fact-patterns described by the IBA Guidelines fit the fact-pattern of the Russian case especially well. Section 3.4 of the Orange List might be considered, but it is somewhat difficult to extend it to the case at hand. Section 4.4.1 of the Green List is probably closer.

A possible topic for discussion could also be the juxtaposition of the perception expressed in the ICSID case (*Turbowitz*) discussed earlier, with the position taken in the Russian case (and in some other cases). In the *Turbowitz* case the ICSID arbitrators stated that “non-disclosure cannot make an arbitrator partial or lacking independence”. Is this position contradicted by the Russian case? Or does the Russian case elevate failure to disclose to a separate ground for dismissal of the arbitrator (based on violation of a duty set by the rules, rather than on partiality)? Does it make sense to treat omission of disclosure as a separate ground, or should
such an omission rather be treated as a supporting argument of a challenge based on lack of independence and lack of impartiality?

*The AT&T Case*

**Questions 1 and 2.** The hypothetical issue raised in Question 2 is not difficult. Had Fortier failed to disclose that he was a non-executive director of one of the parties, this would have probably represented a valid ground for challenge - even if his position was more of an incidental than a vital part of his professional life.

Was Fortier obliged to disclose that he was a non-executive director of a competitor? One of the authors was once interviewed as a prospective third arbitrator in a dispute between an investor from a Central European country and a U.S. contractor. The arbitration clause provided that the third arbitrator must not have the nationality of the country of the investor, of the country of the contractor, and of six other listed countries, the countries of unsuccessful bidders. This is the same type of concern, as the one expressed in the *AT&T* case. (Actually, in the case in which one of the authors was interviewed, this concern was taken even more seriously, because the arbitration clause eliminated not only those who had links with the competitors, but also those who had links with the competitors’ countries.) Of course, parties may set standards of selection as they please. These standards may very well be much higher than those generally required. The point is that the concern about links with other bidders (competitors) is not an unknown.

Still, is there an obligation to disclose ties with competitors? Is this a circumstance “which might be of such a nature as to call into question the arbitrator’s independence in the eye of the parties”? (Article 7(2) of the ICC Rules applicable in the *AT&T* case – now Article 11(2) of the 2012 ICC Rules.)

**Question 3.** Consider the following line of argument: If there is an obligation to disclose ties with competitors, a secretarial error can hardly relieve the arbitrator from this duty. It is difficult to understand how there could be anything other than an objective standard regarding the duty of disclosure. If this is so, it does not really matter whether the error was made by the secretary, or by the arbitrator himself. Neither does it matter what the arbitrator considered to be his duty. The issue is not whether the arbitrator did or did not act in good faith. The issue is whether the arbitrator disclosed what he was supposed to disclose according to the standards of disclosure.

Do you agree, or do you see another possible line of argument?

**Question 4.** Unlike arbitration acts, the ICC Rules do make a distinction between the third arbitrator and the other two arbitrators. With regard to the chairman (the third arbitrator) a higher standard is set. Subject to some exceptions, the third arbitrator “shall be of a nationality other than those of the parties” (Article 9/5 of the 1998 ICC Rules – Article 13(5) of the 2012 Rules), whereas no such requirement applies with regard to the two other arbitrators. One could argue that since the standard is higher for the third arbitrator, this should result in a somewhat higher level of scrutiny with respect to disclosure as well.
Question 5. In neither of the two cases was the arbitrator linked to an actual party in the proceedings. In the *Pinochet* case, Amnesty International did participate, but the proceedings were not about its rights and obligations. Amnesty International was pursuing a cause (the advancement certain human rights values), and the *Pinochet* case had relevance for that cause. Nortel did not take part in the *AT&T* proceedings, but it may also have had a cause, or interest (a financial one in this case), and the case had some relevance with regard to that cause.

The fact that Amnesty International was a formal participant in the proceedings may offer a foothold for distinguishing the two cases. But does this difference translate into a difference regarding the danger of bias?

Justice Longmore is right in saying that many experienced arbitrators have some interest in business affairs, but this does not really justify a lower standard. One would still have a sizeable pool of arbitrators even after limiting the choice to those with no business interest either in the parties to the dispute, or in the parties’ direct competitors.

The absence of appellate review in arbitration is a factor that argues for a higher standard of disclosure and protection against bias.

One should also recognize that in practice different yardsticks are applied to the third arbitrator and the other two respectively.

Question 6. The wording adopted by the Court of Appeal indicates a narrower scrutiny, limited to investigating whether the institutional rules were breached. The question may be raised, however, as to how large the practical difference is between investigating whether the ICC Rules were breached, and scrutinizing the case under the standards of the English Arbitration Act. Most rules - and most arbitration acts - use rather broad standards that may be subject to various interpretations.

Question 7. There are many differences. One important difference is that what Fortier failed to disclose was the relationship with a non-party (although with a competitor of one of the parties). Also, Fortier attempted to distance himself from the lack of disclosure by referring to a secretarial error. Fabrikant tried to distance himself from a relevant business connection by the “Chinese Wall” concept.

Question 8. What makes the Malaysian case most unusual is the fact that the challenge was directed against an award by consent. Awards by consent are recording the settlement reached between the parties. Hence it is questionable whether the arbitrator is actually a decision-maker. Requirements of impartiality and independence as normally tied to the role of the decision-maker. When an award by consent is at issue, the decision is actually made by the parties. The arbitrators are recording the settlement in the form of an award, in order to make it directly enforceable. One has to add that the arbitrators may (or rather should) check whether the settlement is in line with public policy; whether it is not, for example, a disguise for money laundering. But all things considered, the role of the arbitrators is closer to notarization than true decision-making. One could also raise the question
what could have prompted the parties to attack their own settlement.

According to the Kula Lumpur judgment, the arbitrator invited the parties to enter into negotiations, and the parties did so. The allegation of lack of impartiality could have been more persuasive in a context in which the arbitrator would have had a more active role in the shaping of the settlement.

III.3.c.ii Some Further Issues Pertaining to Disclosure

Further Testing of the Range of Disclosure

**Questions 1 and 2.** The question may be raised of who the actual subjects of investigation are when one tries to establish whether the arbitration process is tainted by bias or appearance of bias. The obvious answer is that one should focus on the relationship of the decision-maker (the arbitrator) and the party who might win or lose depending on the decision. There are, however, situations in which the link is more indirect, and the answer is not so obvious. Since arbitrators are relatively rarely self-employed, and more often are employees (of law firms, companies, universities, etc.) or members of partnerships, the question has arisen whether links of the party with the firm, or company of the arbitrator are also relevant. The answer is yes. If a law firm is representing Company X in a number of cases, a partner in this law firm (although he has personally not advised Company X) will not be considered a truly neutral arbitrator in a case involving company X. (At least, he would have to disclose this circumstance.) This was the pattern in the French case. The situation is more delicate when the focus is not on the relationship between the arbitrator (or his/her firm) and a party, but on links between the arbitrator and a law firm representing a party. If the arbitrator was recently employed by the law firm, this may be indicative of conflict of interests. In the Swedish case, the only connection between the arbitrator and the law firm was the fact that the law firm repeatedly appointed the arbitrator in various cases between various parties. This is certainly indicative of a mutual trust between the law firm and the arbitrator, but the trust of the law firm may have had perfectly legitimate grounds. (The law firm may simply have been convinced that the arbitrator is a competent professional.) In such a situation, one would need further information; e.g. information on voting patterns. It is also relevant whether the awards were or were not unanimous. (The question also arises whether these data may or may not be shielded by confidentiality.) Different positions may be taken on plausible grounds regarding repeated appointments by the same law firm.

**Questions 3 and 4.** The Swedish case is a borderline case. Circumstances also matter. If someone has a really good reputation, it may be quite natural that one or more law firms will tend to nominate the same person repeatedly. If someone is never nominated by anybody else, but only by one law firm (which nominates him/her repeatedly), there is more ground for suspicion. In the Swedish case, the arbitrator received 10% of his appointments from the same law firm. The Swedish court is probably right in holding that this is not sufficient in itself to create an appearance of bias.

In the context of the Swedish Act one could certainly say that an arbitrator “was unauthorized” if he/she was partial. Section 34 of the Swedish Act spells out
ground for setting aside. Section 34(5) does not refer to Section 9 (devoted to disclosure) in identifying instances of an arbitrator’s “acting without authorization”—but refers instead to sections 7 and 8. Read, however, Section 9 (see Documents Supplement), which states that an arbitrator should disclose all circumstances which, pursuant to sections 7 and 8 might be considered to prevent him from serving as an arbitrator. Hence, one could argue that disclosure (Section 9) is nevertheless relevant for setting aside. – The question remains, however, whether lack of disclosure in the given case could be qualified as a ground for setting aside.

**Questions 5 and 6.** One may submit to discussion the following possible inference from the French case. What matters is not whether the decision-maker (the arbitrator) was personally aware of some links (and thus, whether he/she could have been influenced by such links) but whether links (with the arbitrator’s law firm) actually existed, and whether improper discovery could be ascribed to the arbitrator’s law firm (to an oversight of the conflicts checking department). Is this a fair position?

**Question 7.** Considering membership in professional organizations or participation at conferences as an indicator of bias could lead us towards irrational limitations. Those who tend to gain more knowledge (and who tend to put themselves on the map), will logically endeavor to attend conferences, and to become members of professional organizations. This is a normal way to become a member of a community of experts, and it would be an undue restriction if members of a community of experts could not assume different roles in the same case. The Eleventh Circuit found that joint participation in summer programs and membership in the same professional organization is not only below the threshold of bias, it is also below the threshold of the duty of disclosure – and this is probably right.

The supporting argument stated by the Eleventh Circuit introduces an interesting angle. It was said that the given professional contact “does not give Naon a motive for using his decision to curry Astigarraga’s favor”. Does this mean that the case for challenge is stronger if the arbitrator has a “lower rank” in the professional organization, hence he/she might be motivated to come up with a decision that might please the party representative in the arbitration case (who has a higher rank in the professional organization)? There is some logic behind this angle, but one has to bear on mind that an arbitrator does not need to be an ethical hero to stick to his/her professional convictions instead of trying to curry favors of someone who has a higher rank in the professional organization. The situation is different if the professional organization is actually a workplace. If the dean of the law school is a party representative and the arbitrator is an associate professor whose promotion to the rank of full professor is pending, we might have a valid ground for challenge.

**III.3.d. Can an Arbitrator Challenge a Co-Arbitrator?**

**Questions 1 and 2.** It is difficult to accept the first explanation. The arbitrators and the parties are, indeed, parties to a contract, but this does not make the arbitrators parties to something else – the arbitration case. The second argument deserves more attention. An arbitrator does have a vested interest in the future of the award, and he has a professional duty to avoid setting aside. At the same time,
Submission of a challenge needs procedural entitlement. Arbitration rules and arbitration acts normally posit the parties as the actors who may lodge a challenge. If a co-arbitrator cannot initiate a challenge, what could (should) a co-arbitrator do if he/she becomes aware of some connections (of a fellow arbitrator) that should have been disclosed? He should probably mention this to the fellow-arbitrator. Could he alert one of the parties? Or perhaps write a letter addressed to both parties and all arbitrators? Inform the arbitral institution? (What makes the setting of this case unusual is the fact that the party that would have had an interest in initiating the challenge opted not to participate in the proceedings.)

Since apparently all previous appointments were with the same Malaysian arbitral institution (PORAM), could the institution be asked (by a co-arbitrator or by a party) to provide information? Or is this prevented by confidentiality?

Questions 3-6. Article 41 of the 2012 ICC Rules does not contemplate actions taken by individual arbitrators. As a matter of fact, such actions have no foothold in other provisions of the rules either. (An exception is allowed with respect to rights and duties regarding one’s own appointment, and with respect to some limited entitlements of the chairman regarding technical elements of the proceedings.) One may argue that the duty to preserve the integrity of the tribunal cuts both ways. A dispute between the arbitrators regarding the range of disclosure will not contribute to a positive image of the arbitral tribunal. If the question at issue is that of multiple appointments of one of the arbitrators, a challenge by the other arbitrator may be perceived as a matter of jealousy as well. But what if something weightier is at issue? What if an arbitrator learns that the other arbitrator is simply corrupt? Should the co-arbitrator remain silent? (Probably not, but the question remains whether the appropriate step in such a situation is challenge.)

Questions 7-9. It is difficult to find in General Standard 7 a foothold for an inquiry regarding the impartiality of another arbitrator.

The fact that the respondent (who had an interest to challenge the arbitrator nominated by the claimant) refused to participate may prompt arguments in a number of directions. Due to the inaction of the respondent, a built-in safeguard of the arbitration process failed to function. (Challenge is normally submitted by a party who believes that an arbitrator may favor the other party.) It is difficult to imagine that the respondent was unaware of the circumstances that prompted the challenge (particularly not after the co-arbitrator started court proceedings). If one assumes that the respondent did not find the grounds for challenge (alleged by the co-arbitrator) persuasive – then we have even less justification for the action of the co-arbitrator. In the (somewhat more likely) case that the respondent thought that there was no basis for the tribunal’s jurisdiction, and simply did not want to participate, there is still no justification for inaction. The respondent could have contested jurisdiction, could have challenged the arbitrator (or first, just challenged the arbitrator), and could have proposed a stay of any other procedural action until these issues were clarified. We are not aware of all the circumstances, but it appears to be rather clear that the inaction of the respondent cannot be fully justified. Can the respondent’s inaction be considered a waiver regarding appointment?
In any case it would have been appropriate for the Malaysian judge to invite the parties to take a position regarding the challenge.

### III.3.e. Can an Attorney (Rather Than the Arbitrator) Be Challenged On the Ground of Links Between the Attorney and the Arbitrator?

#### Questions 1 and 2.

The duty of disclosure is primarily perceived as a duty of the arbitrator (or potential arbitrator). The IBA Guidelines have extended the (ethical) duty of disclosure to the parties. The question could be raised: Why? One conceivable explanation might be that if a party has links with the law firm of the arbitrator (of which the arbitrator may be unaware) it would be helpful and fair to bring this to the attention of the arbitrator. (The same logic should apply to the law firm of the arbitrator as well.) Do you see any other reason behind the rule set out in General Standard 7(a)?

Attorneys or counsel are not specifically mentioned in General Standard 7. Should the same logic apply to them as well?

#### Questions 3-5.

Since it is the decision-maker (rather than counsel for a party) who should be unbiased, one would normally expect that the decision-maker will be the one who will be removed in case a link between him/her and an attorney for a party becomes known. It is questionable whether the “principle of immutability” could turn this around. Immutability cannot offer a shelter for bias. What makes the removal of the attorney (rather than of the arbitrator) plausible in the ICSID case, is a combination of circumstances. The link between the arbitrator and the counsel was on the borderline of relevance. Apparently, it was the counsel (rather than the arbitrator) who first became aware of the potential conflict. And the issue came to the fore at a relatively late stage of the proceedings. Changing the chairman would have probably meant that the proceedings would have had to start over from the beginning. The removal of the counsel led to a postponement of the part of the hearing that was supposed to deal with quantum. Is this sufficient justification for removal of the counsel? Suppose the link becomes known after the first exchange of written submissions. What result?

#### Question 6.

It is quite possible (even likely) that Guidelines 5 and 6 were inspired by the Elektroprivreda case. Guideline 5 is giving expression to a logical principle. Since the relationship between an arbitrator and a party representative may represent a ground for challenge, it is improper for a person to accept party representation – after the Tribunal got constituted – if a relationship conducive to conflict of interest exists between the arbitrator and the party representative. After having accepted appointment in good faith, the arbitrator cannot prevent a conflict of interest arising after appointment – but the party representative can, by way of not accepting representation. One has to add that in the absence of the rule formulated in Guideline 5, opportunities for obstruction would arise. Assuming that the arbitrator were the only possible target of challenge, a party who feels that things are not going in a promising direction (or a party who wants to gain some extra time) might nominate a representative with the purpose of bringing in a conflict of interest that might obstruct the proceedings.
As far as Guideline 6 is concerned, the question might be asked whether it belongs to a code dealing with ethical guidelines for party representatives. Guideline 6 speaks of the rights of the Arbitral Tribunal. Institutional rules or legislative acts could represent a better suited normative environment for such a rule. The Comments on the Guidelines demonstrate an awareness of this problem, stating that a party representative may be excluded if the Arbitral Tribunal “has found that it has requisite authority”. At this point we are returning to the question on what ground could the arbitrators exclude a party representative. The grounds mentioned in the *Elektroprivreda* case – just as the grounds mentioned in the Guidelines - are general principles (immutability, integrity of the proceedings) rather than specific rules. It remains to be seen whether institutional rules or arbitration acts will adopt formulations like that stated in Guideline 6.

One may discuss possible meanings of the wording “all or part of the arbitral proceedings”. The most logical understanding is probably exclusion from the moment of the (successful) challenge. What remains after the successful challenge is normally a part of the proceedings. If the party representative was nominated (and the challenge was launched) after the appointment of the arbitrator, but before the proceedings had actually started, one could say that this is an exclusion for “all proceedings”. (In such a case however, the arguments in favor of excluding the party representative, rather than the arbitrator, are weaker.)
CHAPTER IV

FOCAL POINTS IN THE ARBITRATION PROCESS

This Chapter takes up the arbitration process from the moment the arbitrators have been selected on the basis of a valid arbitration agreement, and follows the process until it ripens into an award. The “focal points” chosen are those that reveal the distinct nature of arbitration and that are of particular relevance in arbitration practice. Within the first subchapter the first problem addressed is that of the scope and relative importance of the lex arbitri. This is combined with an investigation of the relationship between various sources of potentially applicable rules (following up on problems first raised in Chapter I.3, but considered here from the perspective of more specific procedural concerns). This introductory question of the lex arbitri is followed by a scrutiny of selected elements of the arbitration process. The second subchapter is devoted to choice of law issues emerging before the arbitrators. The third subchapter is devoted to examining the award, its variations, the process of rendering an award, and award authentication.

What’s new in the 6th Edition: We have made changes to reflect significant new developments. Often we added new cases – or summaries of new cases – to Questions and Comments. A German case was added to the subsection on terms of reference demonstrating that issues comparable to those that may arise in connection with the ICC Terms of Reference, may also arise in connection with similar procedural devices. Regarding the issue of records and minutes, we omitted the 1987 discussion in connection with a hypothetical case, and added more recent practical examples. In the subsection on discovery, we added a case on production of documents by court order in a European setting, which prompted questions similar to those arising in U.S. discovery cases. In the subsection on language issues we added a Swiss case dealing with the language of documents in recognition and enforcement proceedings. We introduced some modifications to the subchapter on confidentiality, omitting the first decision (of the Supreme Court of Victoria), in the Esso v. Plowman case, and explaining the history of this case in the introduction to the decision of the Supreme Court of Australia. In the subsection on confidentiality we also added information about a high profile English case between partners of related law firms (Emmot v. MWP). In Part III dealing with the award, we took note of new developments, adding among others, a French case dealing with the distinction between awards and procedural orders. We omitted the 1995 decision of the Italian Corte di Cassazione, and we devoted attention to the question whether filing by the arbitral institution may satisfy the requirement of authentication. Where appropriate, we have referenced and discussed new acts and rules, such
as the 2013 Belgian Judicial Code, the 2014 Dutch Code of Civil Procedure, the 2013 Vienna Rules, the new 2014 LCIA Rules, the 2014 ICDR Rules, the 2015 CIETAC Rules, and a number of other new legislative acts and institutional rules.

**IV.1. Selected Elements of Procedure Before Arbitration Tribunals**

**IV.1.a. Note**

**IV.1.b. The Scope and the Relative Importance of the Lex Arbitri**

One assumption proposed in the Note may invite further discussion. It was submitted that “During the beginnings of modern commercial arbitration, the endeavour to find an informal alternative method of dispute resolution was essentially an endeavour of those parties who maintained some basic mutual understanding. As arbitration has become not only a possible alternative, but the dominant method of settling international disputes, it has acquired the chore of accommodating disputes of a wide variety, including conflicts in which deep mistrust thwarts any procedural cooperation. Under these circumstances, the task of arbitration is to find a proper mix of flexibility and procedural safeguards.” The question is whether this is a desirable course of events. Becoming dominant, arbitration is also becoming in a sense “mainstream”. One sensible option in handling this question is to return to it near the end of Chapter IV.1, after the students get a better picture of the “mix of flexibility and procedural safeguards”.

**Questions 1 - 3.** The choice of a procedural law different from the law of the place of arbitration yields results which are clearly not desirable. Such choices may be the result of the parties’ attempt to reach some sort of a negotiating balance. (Buyer proposes France as the site of arbitration and the procedural law of France, Seller sticks to his proposal, which is The Hague as site and Dutch procedural law. The parties realize that clear and simple victory is not possible, and they accept as a compromise arbitration in The Hague under French procedural law.)

One possible line of discussion is to ask whether any choice of a national procedural law is advisable. The choice of an arbitration act, as in the *McDonnell Douglas* case, will yield a choice of a number of rules regulating “external supervision” (such as setting aside), which are difficult to divorce from the site of arbitration. Judge Saville came to the conclusion that by saying that “The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act 1940...” the parties had actually contractually imported from the Indian Act those provisions of that Act that are concerned with the internal conduct of their arbitration. This may be a commendable (and narrow) escape from a difficult situation, but such an interpretation may not give full consideration
to the choice made by the parties. Arbitration acts offer helpful orientation, but typically they do not provide as much guidance on “internal conduct” as do institutional rules, or the UNCITRAL Arbitration Rules. A broader reference to the “procedural law of state X”, or to the “Code of Civil Procedure of state X”, would not produce any better result, and might increase uncertainty and confusion, given that a substantial part of the rules of civil procedure would not be compatible with the arbitration process. (Clearly incompatible are provisions on jurisdiction, on appeal, etc.) A better option appears to be to leave “external control” where it normally belongs (to the procedural law of the site of arbitration) and to regulate “internal conduct” by reference to institutional rules or the UNCITRAL Rules.

Arbitration statutes do not distinguish between “external supervision” and “internal conduct”; the distinction is simply a “creative device” that Judge Saville introduces to resolve the potential dilemmas arising from the wording of the McDonnell Douglas arbitration clause. One may argue that in addition to acts of court intervention (setting aside, challenges) “external supervision” includes court assistance (appointment, ordering provisional relief, judicial assistance in taking evidence), and also some basic standards concerning the internal proceedings proper (such as standards of due process).

Questions 4 and 5. The clause agreed upon between McDonnell Douglas and the Union of India that says “arbitration shall be conducted in accordance with the procedure provided by the Indian Arbitration Act of 1940 or any re-enactment or modification thereof”, looks pretty much like an agreement placing arbitration under the auspices of Indian law. The question may be raised whether the (sensible) interpretation found by Judge Saville actually reflects the true intentions of the parties. Judge Saville relied on two provisions of the contract language in explaining that the parties actually wanted what he came up with. The first is the choice of the wording “arbitration shall be conducted in accordance” (instead of, for example, “arbitration shall be governed”, or “the procedural law applicable to arbitration shall be”); the second is the use of the term “seat” instead of “place”. In guessing what the parties may have had in mind, the authors of this casebook do not have more information than what is included in Judge Saville’s opinion. It seems unlikely though that the parties would have chosen the formulations they actually used as a result of a careful weighing of the implications of using the term “seat” as opposed to the term “place”. The choice of words was probably not conscious and deliberate. The parties may also have had different understandings about the terms used. Note that the 1996 English Arbitration Act appears to give more weight to the term “seat” (according to Section 2(1), “The Provisions of this part apply where the seat of the arbitration is in England and Wales or Northern Ireland”). On the other hand, the 1996 Indian Arbitration Act uses the term “place” when determining the applicability of the Act (Section 2(2)).
**Question 6.** A reading of the 1996 English Act, and/or of the 1996 Indian Act shows that neither of the two acts devotes much attention to “internal conduct”. The prevailing concept is that internal conduct should be left to party agreement or decision of the arbitrators. The English Act states plainly: “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.” (Section 34(1)). The Indian Act makes it clear that (if Indian law were the lex arbitri): “The arbitral tribunal shall not be bound by the Code of Civil Procedure 1908 or the Indian Evidence Act, 1872.” This makes perfect sense, since most rules of any code of civil procedure or any code of evidence are ill adapted to the arbitration process. At the same time – as is the case for most arbitration acts – the Indian Act also does not offer a set of alternative rules carefully adapted to the characteristics of arbitration. This has been left to the parties and to the arbitrators. There are, of course, some basic rules defining due process, but it would simply not be possible to conduct arbitration proceedings using only the rules of the English or Indian Act regarding “internal conduct”; and in this respect the English and Indian Acts are not exceptional.

The point is that it was simply not possible to ignore the party agreement on the applicability of the Indian Act, yet the ground ceded to the 1940 Indian Act had a very limited relevance; and the situation would be the same under the present Indian (or English) legislation.

This might introduce a discussion on the practical options available in choosing applicable procedural rules. In the opinion of the authors, the choice of a municipal law other than that of the seat of arbitration may not be legally impossible, but it is not advisable. The *McDonnell Douglas* reasoning shows that it is practically impossible to extend such a choice to “external supervision”. For example, the availability of a setting aside procedure in the country of the seat of arbitration (which is considered to be where the award is rendered) cannot be excluded by contract (except in a few countries and under special circumstances see Section V.2.a of the Casebook), and hence the creation of a parallel authority for external supervision in another country could create confusion. On the other hand “internal conduct” has not received that much attention in arbitration acts; it has essentially been left to the parties and to the arbitrators under the guidance of a few general principles.

The desirable solution is to choose an existing set of arbitration rules (those of an institution, or the UNCITRAL rules) for internal conduct, and to defer external supervision and the formulation of standards of due process to the procedural law of the country of the seat of the arbitral tribunal.

**Question 7.** Assuming that England had adopted the UNCITRAL Model Law, Article 19 would apply. Subsection (1) of Article 19 gives priority to party autonomy in determining the applicable procedural rules, but the wording
suggests a more restrictive interpretation of party autonomy. Article 19(1) says: "[S]ubject to the provisions of this Law the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". This certainly sounds like reference to "internal conduct" and not to "external supervision", which is in line with the interpretation reached by Judge Saville. But this need not be the right conclusion. In order for Article 19 to apply, one must assume that the Model Law (adopted in our hypo as the law of England) is already applicable. In other words, the provisions of the Model Law are built on the assumption that it has already been determined that the Model Law is the lex arbitri. From that point on, party autonomy can only extend to the rules of internal conduct – subject to mandatory provisions of the Model Law; while external supervision will be provided by the applicable lex arbitri (which in our hypo is the Model Law) and will be beyond the reach of the parties.

Once a lex arbitri is established, the parties can only choose rules of internal conduct. The question remains whether the parties can choose any other lex arbitri, except the law of the site of arbitration. Article 1(2) of the Model Law states that "[t]he provisions of this Law, except articles 8,9,35, and 36, apply only if the place of arbitration is in the territory of this State." (Articles 8,9,35 and 36 deal with referring the case to arbitration, interim measures, and recognition and enforcement of foreign awards.) This seems to suggest that in the countries that have adopted the rules of the Model Law as their arbitration act, most provisions of such arbitration act will only apply if the seat of arbitration is in that country (and not where the parties choose that arbitration act as the lex arbitri while placing the seat elsewhere).

**Question 8.** "The law applicable to arbitration" in Article 61(b) of the WIPO Rules seems to define the lex arbitri, which implies a reference to both external supervision and internal conduct (on the understanding that WIPO's own rules on internal conduct will apply and will not conflict with the due process principles of the lex arbitri). It also appears that the WIPO Rules start from the assumption that it is, in principle, possible to choose a lex arbitri that is not the law of the site of arbitration – if this is allowed by the law of the site of arbitration. In the *McDonnell Douglas* context this would mean that the choice of the Indian arbitration Act is valid as long as English law permits it. In other words, party autonomy regarding the choice of a lex arbitri is permitted if the presumed lex arbitri (the law of the site of arbitration) allows such a choice to be effective. [The principle sounds right, but it is questionable whether the setting of such principles is within the legitimate domain of arbitration rules.]

One could ask why the drafters of the WIPO Rules drafted Article 61(b) in this way; that is, why qualify the parties’ freedom to choose the lex arbitri by giving mandatory force to the lex arbitri of the site of arbitration. Why not simply recognize the parties’ freedom to choose whatever lex arbitri they prefer? Wouldn’t that make the WIPO Rules more appealing to contracting parties,
whose freedom to do as they please would thereby be acknowledged and reinforced?

The answer is probably the concern of the drafters of the WIPO Rules to protect the parties from consequences they might not have envisioned. Article 61(b) will validate the parties' choice of a lex arbitri only if the situs lex arbitri also would validate their choice. If it would not, then the parties might be confronted with two different states, each willing to exercise supervisory control under its own arbitration law, including the exercise of set aside jurisdiction (the two being the situs state and the state whose law the parties had chosen as lex arbitri). On the other hand, if the arbitration law of the situs would recognize party autonomy, then the potential conflict could not arise. The potential for conflict is quite real, of course, because so many arbitration laws provide – as does the Model Law – that the state's own arbitration law applies if the situs of arbitration is in that state.

**Question 9.** Article 19 of the 2012 ICC Rules mentions procedural rules of national laws only as one of the options among which the arbitrators (or the parties) are free to choose. This could imply, at first sight, arbitration independent of any municipal law. It is important to observe, however, the context. Article 19 speaks of “proceedings before the arbitral tribunal”, which clearly does not include external supervision. The ICC Rules – which are rules on internal conduct – may be supplemented by either party-made rules, or by “rules of procedure of a national law”. It is clear that, even in the domain of internal conduct, the rules of a private institution cannot – and probably do not intend to – supersede mandatory norms of the lex arbitri. It is also clear that it is quite unlikely that rules governing the proceedings of well-established international arbitral institutions would conflict with due process standards of the lex arbitri.

Summing up, the most practical solution is to leave external supervision to the procedural norms at the site of arbitration, and to regulate internal conduct by institutional (or UNCITRAL) rules.

**Note on the Seat’s Arbitration Law as the Presumptive Lex Arbitri**

**Questions 1-2.** The English court was probably right giving more weight to a clause that was specifically negotiated, over general conditions (of GENCON). One could find a supporting argument in the fact that while Article 23 of the Fixture Note dealt explicitly with the place and applicable law, Article 24 referred to other terms and conditions stated in GENCON. Hence, one could argue that GENCON was only relevant with regard to issues other than the place and the applicable law. (One could advance as a possible counter-argument that what was agreed in Article 23 is only the venue of the hearing, hence the question of the seat remained open - and therefore possibly covered by the reference to GENCON). But again, if the parties specify in their arbitration agreement one place, this is normally the seat.
If Clause 24 of the GENCON were applicable, one should note that it refers to the Arbitration Acts of 1950 and 1979 “or any statutory modification or re-enactment thereof for the time being in force”. This leads to the conclusion that in our case the present (1996) Act would apply, rather than earlier enactments. Under earlier enactments it was a presumed solution that the arbitrator appointed by one party will act as sole arbitrator, if the other party does not duly appoint its own arbitrator. The 1996 Act does not accept this presumption. The question arose whether Article 23 of the GENCON contains a specific stipulation justifying the appointment of arbitrator Rayment. The Commercial Court held that it did not, and this is certainly a persuasive position, because neither the 1996 English Act, nor the Hong Kong Ordinance allow the arbitrator chosen by one of the parties to act as sole arbitrator if the other party fails to nominate its arbitrator. (Both the English Act and the Hong Kong Ordinance envisage, instead, substitute nomination of the other arbitrator.)

**Questions 3-5.** It is not uncommon in arbitral practice to hold hearings at a venue which is different from the seat of arbitration. It is very uncommon, however, to set a place of hearing (other than the seat of arbitration) in the arbitration agreement proper. An agreement on the venue of the hearing (different from the place of arbitration) is usually reached after the proceedings had started, and after some circumstances (witnesses, residence of party representatives, visa problems of witnesses, site visits, etc.) lead to the conclusion that it would be more rational to have the hearings (or one of the hearings) at a venue different from that of the place of arbitration. It is even more uncommon to state in the arbitration agreement only the place of the hearing different from the seat – without stating the seat itself. The wording of Article 23 “arbitration to be held” (instead e.g. “the seat of arbitration is”) may trigger some doubts. Nevertheless, the court is probably right in saying that there are no indicia sufficient to displace the prima facie conclusion that the arbitration to be held in Hong Kong means arbitration with its seat in Hong Kong.

As far as the reference to English law is concerned, once again, the typical and mainstream interpretation leads to the conclusion that the applicable law is the law applicable to the merits (particularly when a seat triggering a lex arbitri was specifically chosen).

If Hong Kong is the legal seat, then Hong Kong law is the lex arbitri, and Hong Kong norms (practically the UNCITRAL Model Law) will apply. Under articles 10 and 11 of the Model Law, the presumed number of arbitrators is three, and if a party fails to appoint its arbitrator, substitute appointment will be made by the appointing authority. Hence, under Hong Kong law, Mr. Rayment was not properly appointed.
Bifurcation between the law of the seat and a different law chosen as lex arbitri is certainly not desirable. In *Mc Donnell Douglas* the English court found an imaginative and narrow escape by way of distinguishing between “internal conduct” and “external supervision”. This was discussed earlier in this subchapter. If more than one lex arbitri were applicable, this might yield conflicts, and uncertainties. Article 1(2) of the Model Law makes it clear that the law of the seat/place of arbitration is applicable. If another arbitration act were applicable too, this would yield difficult dilemmas and “jurisdictional complications”. Hence, it makes sense to interpret a reference to another law (other than the law of the seat) as reference to substantive law, rather than to lex arbitri, unless it is explicitly and unequivocally stated that the parties chose a law as lex arbitri.

In the *Shagang* case, Hong Kong law became applicable on the ground of the place of arbitration. In connection with Article 2(1) of the Model Law the question may also be raised, whether the arbitration act of a Model Law country may become applicable otherwise, but as a consequence of the seat of arbitration. Can the arbitration act of a Model Law country be validly chosen if the seat of arbitration is not in that country? Article 1(2) states that the provisions of this Law apply only if the seat is in the territory of the given State. Hence, one could argue, that the arbitration statute of a Model Law country could not apply if the seat is not in that country. This approach might possibly reduce “bifurcations”, but would also restrain party autonomy. In their Commentary of the Model Law, Holtzmann and Neuhaus note that the drafters of the Model Law considered the “autonomy criterion” but finally opted not to adopt it; hence only the seat could trigger the application of the arbitration act of a country that adopted the Model Law. (Holtzmann-Neuhaus, *A Guide to the UNCITRAL Model Law*, Kluwer 1994, pp.35-36). One has to note, however, that the Hong Kong Arbitration Ordinance (Article 5), while adopting the concept stated in Article 1(2) of the Model Law, omitted the word “only” (as did the Indian Arbitration Act (Section 2(2)). Thus, in the two acts that became relevant in our discussions in the *Mc Donnell Douglas* and in the *Shagang* cases, the seat/place of arbitration was accepted as a basis, but without stressing that this is the only basis for application of the arbitration act.

**Question 6** An interesting discussion might be triggered by the question whether set aside under section 67, or refusal of recognition and enforcement under section 103 of the English Arbitration Act, was the right procedural channel. It speaks in favor of section 103 that the court held that the seat was actually Hong Kong, and thus the lex arbitri was actually Hong Kong law. Hence the award was (or should have been) a foreign award, and it is section 103 that deals with recognition of foreign awards. At the same time, section 103 supposes that a request for recognition was submitted to an English court – which was here not the case. It is difficult to refuse recognition, if recognition was not requested. On the other hand, setting aside under section 67 assumes seat in England, or English law as the lex arbitri – and in our case, set aside was granted after the
court came to the conclusion that the seat of arbitration was not in England, and the lex arbitri was not English law. Hence, one could argue that section 67 was not properly invoked. This is an interesting question, and valid arguments may be advanced in both directions. The co-authors have in part different opinions regarding this intricate issue.

All the authors are persuaded that the U.K. Commercial Court was correct in holding that the parties agreed on arbitration in Hong Kong, and hence the only proper seat should have been Hong Kong. But this common position still allows different arguments. According to one of the co-authors, the following argument could be made: It is a fact that the arbitrator acted as if the seat were in England; he conducted the proceedings as London based proceedings. According to Article 1(2) of the Arbitration Act for England Wales and Northern Ireland the Part of the Act containing Article 67 applies if the seat is in England, Wales, or Northern Ireland. In our case it is clear that the seat was in Hong Kong, yet the arbitrators acted on the assumption that the seat was in England. As the court stated in section 5 of its February 5, 2015, judgment, Daewoo “brought London arbitration proceedings”, and the arbitrator held that the lex arbitri was English law. One may argue that a challenge is normally put on track by the holding of the award (rather than by the eventual determinations of the court); hence in this case a challenge under section 67 makes sense. Thus, it was possible to initiate set aside proceedings in England, and if in the course of these proceedings it turned out that the arbitrators were wrong in determining the lex arbitri, this could have represented a ground for setting aside. Furthermore, there is another reason for which proceeding under Section 103 would not have been the right track. Even if one would take the position that jurisdiction under Section 67 could only be based on the true seat (rather than on what the award – wrongly – perceived as the seat), proceeding under Section 103 could not be validly conducted, because it supposes a request for recognition. Hence, if there was no jurisdiction to proceed on the ground of Section 67, the U.K. Commercial Court should have dismissed the motion for set aside for lack of jurisdiction, rather than to conduct proceedings that are qualified by Section 103 as “recognition and enforcement of a New York Convention award…”.

One of the co-authors would not accept as plausible an argument holding that the English court had proper authority to set aside the award under section 67, once that court ruled that the seat was in Hong Kong. That co-author would not find it relevant that the arbitrator found the English law to be the lex arbitri or that the claimant sought set aside under section 67. The English Act states plainly in Section 3(a) that the “seat” means the “juridical seat” as designated by the parties in the arbitration agreement. Since the English court found the seat designated by the parties in the arbitration agreement to be Hong Kong, under the terms of English Act the seat could not be changed by the arbitrator’s contrary ruling. Thus, by the English court’s own ruling, it had no authority to set aside the award under section 67. That co-author believes that the English court
should have explained that it was actually ruling under section 103 of the English Act and hence was actually rendering a judgment refusing to recognize or enforce the award, not that it was acting under section 67 to set the award aside. In effect the English court would simply construe the award debtor’s action as one for a declaratory judgment that the award could not be recognized or enforced in England.

**IV.1.c. Organizing Arbitral Proceedings**

*Questions 1 and 2.* The UNCITRAL Notes on Organizing Arbitral Proceedings start with an Introduction full of caveats. These may have been prompted by criticism like the one formulated by Fouchard. The Introduction stresses that the Notes are not binding, that they are “[n]ot suitable to be used as arbitration rules”, that they “[c]annot imply any modification of the arbitration rules that the parties may have agreed upon”. What then is the purpose of the Notes? An answer is suggested in subsections (4) and (5) of the Introduction. It has rightly been noted that arbitration rules that represent the mainstream today (including the UNCITRAL Rules) give a very wide discretion to arbitrators in the conduct of arbitral proceedings. Subsection (5) of the Introduction suggests that in this situation it is desirable to give the parties timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed.

Guidelines, reminders, can certainly be helpful. Not all arbitrators are experienced arbitrators; the Notes might alert arbitrators to procedural steps they should take. One way of analyzing the usefulness of the Notes is to direct the students’ attention to some item of the Annotations, such as, for example, item 2 (language of proceedings). Students can be invited to read the text of the Annotation, to comment on its style and substance. (Is it articulated like a reminder? or like new information? Does it identify options? Is it helpful? Would other information also be helpful? Would you prefer to have the Notes spell out, for example, who bears the risk of a mistranslation? Should they raise the issue of the addressees of the translation? Suppose the language of the proceedings is English, some documents submitted by the Claimant are in French, and all three arbitrators can read French, but the attorney for the Respondent cannot. In this case should translation be the responsibility of the Claimant, or of the Respondent?)

The question also arises whether procedural options and details must be disclosed to the parties in advance – or even whether the parties should be asked to agree upon procedural rules in advance. If party agreement is sought, every departure may jeopardize the award, because departure from procedural rules agreed upon by the parties is one of the most common grounds for setting aside or refusal of recognition. (It is important to note that according to the first
sentence of section 7, “Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties.”).

Students will probably differ regarding whether the Notes are a welcome assistance to parties and arbitrators, or instead pose more of a threat to the flexibility and subtlety of the arbitration process.

**Question 3.** More often than not, arbitrators require written submissions following a sequence. The claim will be followed by an answer to the claim, after which the claimant might get another chance to submit a written brief, and the respondent might be invited once again to state his position regarding claimant’s brief. Such a sequence is logical in a process that does not start with simultaneous submissions, but rather with the claim. There are situations, however, in which simultaneous submissions make sense. Suppose the key issue is a legal problem (let us say the question of the applicable law, or the interpretation of a given statute of limitations). The arbitrators may invite the parties to state their positions in briefs to be submitted simultaneously. Again, parties might want to react to the arguments of the opposing party – and we may wind up with consecutive pairs of simultaneous briefs.

Consecutive submissions give more opportunity for clarifications, but may also give an advantage to the party filing the last written submission. Students will also notice that a choice between the approaches may affect the pace of the process.

The question also arises whether the sequence of written submissions should be determined in advance. In other words, whether the arbitrators should state, for example, that after the statement of claim and answer to the claim, the parties shall exchange another round of submissions before the hearing. Such a position might help the parties in planning the proceedings, but might also tie the hands of the arbitrators who may feel after the first exchange of written submissions that no further briefs are necessary. It is probably better not to set the number of submissions in advance. It is difficult to take a position about post hearing briefs in general. In most cases the parties will be invited to submit their statements of fees and expenses either at the hearing or within a short time period after the hearing. This is also a post-hearing brief. In some cases, the arbitrators feel that the case is not ripe for decision after the oral hearing. They may be contemplating another oral hearing, but may feel that things might get clarified through an exchange of post hearing briefs. After the briefs are submitted, the arbitrators will decide whether another oral hearing is necessary. The need for post-hearing briefs may show that the planning of the proceedings was less than perfect. It does not seem rational, however, to exclude the option of post hearing briefs in advance, and thereby to sacrifice a chance to clarify the issues – should that be needed – even late in the course of the proceedings.
IV.1.d. Party Discretion, Discretion of the Arbitrators, and Due Process

Questions 1 - 3. In the Abati v. Häupl case the arbitrators sitting in Vienna sent a notice on August 11 for a hearing on September 8. This is clearly less time than the Italian legal notice period (which is 90 days). The time period set by the Vienna arbitrators also happens to fall within “Ferragosto”, the usual vacation time in Italy during which time limits for most proceedings before Italian courts are suspended. Is this critical? Students will typically disagree. Some will argue that the Vienna arbitrators cannot ignore customs and rules regarding notice in the country of the party notified; others will contend that by accepting arbitration in Vienna Abati accepted Vienna rules on notice.

One might also ask which rules on notice are fairer and better suited - those that select a specific number of days, eliminating uncertainty, discretion, and case by case scrutiny, or those that choose a general standard (such as “reasonable notice”, or “proper notice”), and that allow an adjustment of the length of the notice according to the complexity and characteristics of the case?

In the authors’ opinion arbitrators cannot be expected to follow notice rules in the countries of the parties concerned. This would be very difficult to administer and might yield unequal treatment. (Notice periods for one party might be suspended between August 1st and September 15; while for the other party they might not. One could imagine, of course, extending the more generous yardstick to both parties, but this would not equally benefit both the party on vacation and the party who takes vacation in some other month and would prefer to arbitrate on September 8th.) If one were to observe rules on notice in the countries concerned, arguably one would have to observe other procedural rules as well, and this would seriously undermine the autonomy and rationality of the arbitration process. In our opinion, recognition cannot and should not be refused on the ground that Italian rules on notice were not observed. What still matters, however, is whether due process standards were or were not infringed. These standards need not coincide with specific detailed provisions of any national law. The question is whether Abati was given notice that enabled him to present his case. Following this line of reasoning, 29 days would appear to be sufficient, considering the nature and standard speed of arbitration proceedings. The real question is whether it matters that these 29 days happened to be 29 days during Ferragosto – that they were within a period when most Italian businesses close down for summer holidays.

One could argue that arbitrators in Vienna should have known about Ferragosto, and should have observed it. One could also argue, however, that Abati should have been aware of the arbitration proceedings, and should have made appropriate arrangements. Abati could have instructed a janitor, a building...
supervisor, or a neighbour to forward to him all mail coming from Vienna. Another possible course of action would have been to ask the Vienna arbitrators in advance not to schedule hearings within Ferragosto.

**Question 4.** Had the Italian party received the arbitrators' summons but been unable to find any competent Italian lawyer willing to appear in Vienna on September 8, he could have tried to find an Austrian lawyer. (We should add that while Ferragosto may be quite serious, it is not sacrosanct. There are Italian lawyers who are ready to prepare for a hearing on September 8th, and who are willing to travel to Vienna on September 8th.) But even if it had been impossible for Abati to find an Italian lawyer, it is questionable whether the emerging situation would amount to a denial of due process. Infringement of due process is less likely to be found if Abati did not even attempt to seek postponement.

**Question 5.** International commercial arbitration is a cross-cultural undertaking, and able arbitrators should be able to understand cultural differences. (This does not mean, of course, that a person who does not know the date of the Orthodox Christmas cannot be an international arbitrator.)

Incidentally, there are always additional nuances. Romania is also an Orthodox country, but Romanians belonging to the Orthodox faith celebrate Christmas on December 25th.) As we state in the casebook, experienced arbitrators will typically respect religious and cultural customs and differences – and this is the right thing to do. The question is whether a less broad-minded attitude would affect the validity of the arbitration process – and of the award. What about a hearing scheduled for a day on which an Orthodox Jew must not perform any activities – where one of the attorneys is an Orthodox Jew? What if the day of the hearing coincides with Bayram – where one of the attorneys is a true Muslim believer? Or what about hearings involving an American party scheduled for July 4th – or hearings involving a French party scheduled for July 14th? Again, giving advice is easy. Arbitrators should observe cultural differences as much as possible. The difficult question is what the consequences of non-observance should be, when the non-observance results either from lack of information or from inability to harmonize the requirements of cultural and religious diversity with the demand for a speedy and efficient process.

Students could be asked to analyze separate instances of a clash between religious and cultural values on one hand and the requirements of a speedy process on the other (hearing on December 25th, on January 7th, on a day the Jewish attorney is not supposed to act, on July 4th etc.) Let us add that within the framework of a given state some religious holidays are also state holidays, on which courts do not work. Should the arbitrator simply observe state holidays of the country of the seat of arbitration? (This would be a simple approach, but not necessarily correct, because arbitral tribunals are not state
authorities, and arbitrators have a supranational task that is rooted in a mandate stemming from parties from different countries.)

Questions 6 and 7. Notice may be a quite sensitive issue when parties are from different countries and different environments. A debtor’s not informing the creditor about a change of address may be a strategy to avoid payment. It is also possible, of course, that failure to inform the contractual partner about a change of address is not the result of some cunning strategy, but a simple oversight. We do not know why the respondents failed to inform the claimants about the change of address in the Swedish and Hungarian cases. Article 11(6) of the Hungarian Rules establishes a presumption of delivery. (Article 3(3) of the 2012 ICC Rules adopts the same approach.) In their comments on the 1998 ICC Rules (which also adopted this same solution), Derains and Schwartz note that while notification to the party’s last known address may be sufficient for the purposes of the ICC Rules, it is not certain that this will also satisfy the requirements of Article V(1)(b) of the New York Convention. Therefore, they state: “Notwithstanding the provisions of Article 3(3), parties should therefore do all that they reasonably can to ensure that notice of the arbitration is actually received…” (Derains-Schwartz, A Guide to the ICC Rules of Arbitration, 2d Edition, Kluwer 2005, p. 39). It is, of course, difficult to say how much is “all that one can reasonably do”. Fairness would, of course, also require the party who is changing its address, to inform its contractual partners. In both the Swedish and the Hungarian cases, the respondent failed to inform its contracting partner. The difference is that in the Swedish case the change of address was notified to the official company register. Is this an acceptable dividing line? (Company registers in different countries may or may not be easy to check. Nevertheless this may be within the notion of “all what one can reasonably do”.)

Questions 8 and 9. In the case decided by the OLG Hamburg between a U.S. Claimant and a German Respondent, we have a direct infringement of the principle of equal treatment of the parties. The letter submitted by the U.S. party was not submitted to the German party, and thus the latter party was not given an opportunity to react. Moreover, the letter of the German Ministry submitted by the German party was not considered by the arbitrators (while the letter submitted by the U.S. party was considered). In the Abati case, there is no allegation that different yardsticks were applied, but one could argue that there was indirect discrimination. Even if the parties got equal notice and equal time periods within which to prepare for the oral hearing, in the context of Italian habits and practices the same deadline imposed more hardship on the Italian side than on the Austrian side. The case therefore presents the question whether one should go one step beyond direct discrimination, and consider indirect discrimination as well.

In the case of the AAA award, the question could also be raised whether proof of unequal treatment always clinches the matter, or whether one should go
one step beyond (or below) the surface. The German court decided not to do so, stating that violation of due process could not be cured by the fact "[t]hat the arbitral decision would not have been otherwise if there had been a fair trial" (i.e. if the German party had had a chance to respond, and the arbitrators had examined and considered the document submitted by the German party). We will return to this issue in Question 10.

The students can also be asked how the losing German firm could have known that "the arbitrator had not paid any attention to the letter of the German Ministry, which was submitted by the German firm, F"? Arbitrators typically list in their statement of reasons the documents, submissions, and evidence they scrutinized. If the procedure yielded a long list of written submissions and evidence, arbitrators tend to insert a phrase such as: "The arbitrators considered and carefully weighed the complaint, the answer to the complaint, the ... and all evidence submitted, including evidence and submissions not explicitly mentioned in this statement of reasons." Without such a caveat, omitting an item or submission from the list might cause one to conclude that the arbitrators had failed to consider that item.

**Question 10.** The question raises the following hypothetical: The arbitrators inform both parties that the Respondent is accorded 30 days to submit its statement of defence. Respondent writes to the arbitrators asking for an extension, but the arbitrators deny the request. The arbitrators fail to communicate to Claimant Respondent's letter seeking an extension, and they also fail to inform Claimant of the tribunal's response. Clearly, this is unilateral communication; the principle of equal treatment is not strictly respected.

What distinguishes this hypothetical from the case decided by the AAA is that in the AAA case the unequal treatment could have had an impact on the merits. Only an analysis of the decision – including the merits – could reveal whether it actually did have such an effect. In the hypothetical case the consequences of the one-sided communication could not conceivably have influenced the merits. In the AAA case a more thorough analysis could have shown that the procedural error did not actually result in an unjust or improper decision. A deeper scrutiny of the award could thus have saved the award, showing that the mistake was not consequential. But there would also have been a drawback to this approach. One of the achievements of modern arbitration regimes has been to limit court scrutiny of an award essentially to form and procedure, without allowing courts to second guess the arbitrators' decision on the merits (unless public policy is at stake). A green light for court scrutiny of the merits to assess the weight of a procedural error might save some awards, but perhaps at the expense of the principle of restrained court examination of awards.
(In the hypo, the irrelevance of the given unilateral communication is self-evident without a scrutiny of the merits.)

**Question 12.** This question examines the position taken by Article 27(4) of the UNCITRAL Rules. ("The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered.") Would Article 24(6)’s flexibility make it easier or more difficult for an arbitrator to accept evidence not contradicted by the other party in spite of the arbitrator’s own doubts or knowledge.

Of course, it would be next to impossible to contest the award (or to sue the arbitrator) on the ground that he (she) accepted the uncontested allegation of the claimant concerning the number of kilometres between locations in Latvia and Russia. A litigant would not be likely to get very far by introducing evidence showing that the arbitrator had to be aware of the right number of kilometres (because the arbitrator himself had travelled between the two locations). Still, the wide discretion the arbitrator possesses would at least allow him (her) to take into consideration his (her) own knowledge and experience. Student opinions will typically differ when the question is raised whether a responsible professional is expected to do this. At this point one could inquire about the nature of decision-making. Is the arbitrator (or the judge) obliged to seek the truth, or is he (she) simply expected to provide and safeguard the proper procedural framework, making sure that the parties have an equal chance – and leaving further responsibility for the outcome on the merits to the parties? Another line of discussion could be developed by asking whether the arbitrator must notify claimant if the arbitrator decides to check the number of kilometres alleged against his (her) own knowledge and experience.

**Questions 13-14.** It is logical to assume that the right to be heard implies the right to be considered. In other words, the right to advance arguments and evidence will become meaningless, if the decision-makers do not consider the arguments and evidence advanced by a party. The difficult question is whether the duty of the arbitrators to consider implies the duty to mention (in the award) what was considered. One may assume (or guess) that in the Swiss case there were not too many materials to consider. Such a guess is supported by the amount awarded, and by the fact that the case was decided by a sole arbitrator. Cases submitted to sole arbitrators involving relatively limited amounts of money usually yield more modest files. Really big cases can yield files that may weigh over 100 pounds. More materials are prompted by greater complexity – and sometimes also by the endeavour to justify more billing hours. If there is no duty to mention everything, is there, at least a duty to read every paper in the files? The answer is normally yes, but in some situations the answer is not obvious. Suppose you have hundreds (or thousands) of pages of arguments and evidence dealing with the quantum of damages. Do the arbitrators have to read this, if they come to the conclusion that there is no liability? Or, if several self-sufficient
arguments have been advanced in favour of accepting or rejecting the claim, do the arbitrators have to scrutinize all arguments after they have found one of them to be persuasive?

One could agree with the Swiss Supreme Court that “there is no right to reasons based on the principle of the right to be heard”. It is certainly advisable to mention as many arguments as possible in the award – particularly if a party (rightly or wrongly) gave emphasis to an argument or document. Yet the failure to mention a document (or argument) cannot itself amount to a violation of the right to be heard.

In some situations it may be difficult to establish whether the the arbitrator failed to mention a document or argument because “it could not change the result”, or because of an oversight.

Suppose that arbitrators accept a party allegation explaining that “it was not contradicted” - and yet it was contradicted. Do we have a violation of the right to be heard in this case? Does it matter whether the allegation was or was not a critical pillar of the decision?

**Question 15.** The wording that introduces the statement of reasons is certainly helpful. Such, or similar, wording is rather common, and it reflects caution. It may strengthen the award, but it cannot save it if it can be demonstrated that the arbitrators failed to consider some truly relevant argument or evidence.

**IV.1.e. What Belongs to Arbitration Proceedings?**

**Questions 1, 2 and 4.** An onsite inspection conducted by experts appointed by the arbitral tribunal appears to be a part of the arbitral proceedings – but not a part of the hearing. In setting standards of due process, the UNCITRAL Rules state in Article 17(1): “[t]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.” This provision appears to cover more than just the hearing. Equal treatment and opportunity to present one’s case are requirements that should not be restricted to the hearing alone.

The 1995 CIETAC Rules (which were applicable in the *Polytek v. Hebei* case) did not contain a general rule on due process.

Considering the UNCITRAL standards, one could argue that each of the parties was given an opportunity to present its case. Respondent had an
adequate opportunity to state its position with respect to the expert opinion. Was this “full opportunity”?

The question also arises whether the parties were treated with equality. Not every possible step in the arbitration proceedings is a step undertaken in the presence of the parties. Absence of (both) parties need not be a violation of equality or of due process. What makes this case more intricate is the perceived presence of one of the parties. Of course, one can also ask whether it is proper to say that Hebei was present. Neither party was invited. The inspection took place in Hebei’s premises, and two technicians of Hebei assisted the inspection. Can this be equated with the presence of a party? The two technicians were in all likelihood not persons entitled to represent Hebei in the arbitral proceedings. But they were technicians of Hebei. So, was Hebei present?

Even if one takes the position that Hebei was present, the question arises whether this was or was not an opportunity for Hebei to present its case. The Court of Final Appeal took the position that inspection in the factory was neither a hearing “[n]or was it an occasion for either party to present its case.” Do you agree? (If it was not an occasion for either party to present its case, there are reasons to conclude that the issue of equal treatment is moot.)

One can imagine that there could be unequal treatment even if a party had an opportunity to present its case. If a party had full opportunity to present its case, it would perhaps be more difficult for that party to argue that it had been subjected to unequal treatment. Can the issue of equal treatment arise at all, however, with regard to a step in the proceedings (such as an on-site visit of experts) at which neither party has an opportunity to present its case?

**Question 3.** International commercial arbitration is more of an arbitrator-driven than a party-driven process. As compared to judges in the U.S., arbitrators – like judges in continental Europe – have more manoeuvring room and may take more initiative in collecting evidence. The discretionary power formulated in Article 38(2) of the CIETAC Rules (Article 41(2) of the 2012 CIETAC Rules, and Article 43 of the 2015 CIETAC Rules) appears to be consistent with the principles of an arbitrator-driven process.

Article 17(1) of the 2010 UNCITRAL Rules allows the same result. The limits to such discretionary power are set by the principle of equal treatment of the parties and by the requirement of giving each party full (or adequate) opportunity to present its case.

It is, thus, possible to conduct expertise and to collect evidence in the absence of the parties, as long as the parties are treated equally, and as long as the parties have an opportunity to challenge the evidence or the expert’s findings.
Does one need a special provision regarding on-site investigation conducted at the premises of one of the parties? Here the question again arises as to whether the presence of technicians or other personnel amounts to party participation. If it does, the other party should probably be invited. Does this mean that all three arbitrators should also be invited? In *Hebei v. Polytek* the Court of Final Appeal concluded that the "Chief Arbitrator was there to assure the propriety of the conduct on the part of the experts; [h]e was not there to form any kind of judgment". Do you agree?

**Question 5.** Party presence during witness testimony may be rational, because this allows cross-examination. The right of the parties ex post to comment on witness statements or to formulate objections or challenges, is important, but probably less efficient than cross-examination. At the same time, if a witness who cannot appear before the arbitrators is examined and cross-examined before a court, the arbitrators (the real decision makers) may be excluded. It should be kept in mind that arbitrators might also decide to rely on written witness statements (which also excludes cross examination).

One could argue that both solutions (examination of witnesses in the presence or in the absence of the parties) are within the limits of proper proceedings as long as the parties are treated equally, and as long as they have an opportunity to state their position.

**IV.1.f. Terms of Reference**

**Question 1.** The dilemmas surrounding the desirability and use of a Procedural Timetable are very similar to those we encountered in relation to the UNCITRAL Notes on Organizing Arbitral Proceedings. The difference is, of course, that while the Notes are a recommendation, Article 24 of the ICC Rules is a rule that binds parties who submit their case to ICC Arbitration. The 1998 Rules spoke of "provisional timetable". The 2012 Rules have opted for a more resolute term: "Procedural Timetable". (Modifying the timetable remains a possibility under the 2012 Rules.) The "Case Management Conference" is a new feature of the 2012 Rules. Of course, organizing such a conference was not impossible under the earlier rules, but the 2012 Rules have made it mandatory. Appendix IV of the Rules (see Documents Supplement) provides a list of case management techniques that may serve as a guideline and reminder. These rules push the parties (and the arbitrators) to devote full attention to the case at an early stage. This may prove to be a positive step towards a rational organization of the proceedings. Later developments may also prompt the arbitral tribunal to revisit and change the structure designed during the Case Management Conference. It is also important to mention that the arbitrators have a wider manoeuvring room regarding the Procedural Timetable. As far as the Terms of Reference are concerned, an agreement of the parties is needed (which can be replaced by an approval of the Court – not of the arbitrators). With regard to the Procedural
Timetable, the parties are to be consulted, but they need not enter a formal agreement. It remains the decision of the arbitrators, and they can change it, on the understanding that any modifications shall be communicated to the ICC Court of Arbitration and to the parties. The same applies to measures of case management. Attempts to plan and chart proceedings are likely to be more efficient if all concerned keep an open mind, and the timetable remains adjustable.

**Questions 2 and 3.** The Terms of Reference function to identify the issues and to chart the proceedings. Although it has not gained wider popularity, it has become a staple of ICC proceedings, and such proceedings make up an important segment of all international commercial arbitration occurring worldwide. Those who argue in favour of the TOR, usually point out that initial pleadings may not offer proper orientation. Therefore, by identifying the issues in advance the Terms of Reference make it easier for both the parties (and the arbitrators) to deal with the issues. Doubts have also been expressed regarding the rationality of the Terms-of-Reference device. The question has been raised whether it is possible at all, to define the issues before the argument is closed.

Whether having Terms of Reference speeds up or slows down the process is also controversial. Proponents have argued that once the issues are defined in advance, there will be fewer deviations from the main course and the procedure will become speedier and more rational. The other side has argued that the drafting of the TOR may take a long time; it will take even longer if the parties do not agree and the arbitrators are forced to submit the TOR to the ICC Court. They add that later in the proceedings more precious time may be lost on debates about the meaning and consequences of the formulations in the TOR.

The advantages and disadvantages of the TOR may be better assessed if one takes into account their legal relevance. If there is truth in the contention that it is often impossible to define the issues at the outset of the proceedings, any definition that tends to be precise and exhaustive might prove to be a straightjacket. It is important therefore to know, how binding the TOR actually are.

Suppose the arbitration agreement states that all disputes arising out or in connection with the contract shall be submitted to arbitration, and suppose the TOR specify that the issues are: a) what law governs the sale agreement; b) whether respondent (buyer) owes $100 000 to claimant (seller) considering that the goods were delivered 10 days late; c) who is to bear the costs of the arbitration proceedings. The TOR are narrower than the arbitration agreement. Does this result in a modification of the arbitration agreement precluding, for example, seller’s later claim for tortuous interference with the contract? Would buyer’s motion to declare the contract invalid also be precluded, because the validity of the contract was not among the issues identified in the TOR? The
scope of the dispute as defined by the TOR probably cannot narrow the scope of the arbitration agreement. The question still remains, however, whether issues that are within the arbitration agreement, but that are not included in the TOR, can be arbitrated within the same case for which the TOR were drafted. If not, another arbitration case could in principle, still be initiated, but this would be costly and most inexpedient. (The motion regarding invalidity of the contract would not make sense in a different proceeding. The question arises whether the preclusive effects of the TOR should extend to the issues identified, or only to the basic claims.)

According to the 1988 Rules, new claims and counterclaims were only possible if they were within the limits fixed by the TOR, or “[s]pecified in a rider to that document [the TOR], signed by the parties and communicated to the Court.” In other words it was not possible to submit a new claim or counterclaim outside the limits of the TOR, unless the other party agreed. The 1998 Rules were more flexible, and the 2012 Rules confirmed this approach. Article 23(4) of the 2012 Rules allows the arbitrators to accept claims that fall outside the limits of the Terms of Reference even if the new claims are opposed by one of the parties who signed the Terms of Reference. The position of new claims and counterclaims under Article 23(4) is not much different from the position of new claims and counterclaims in arbitration proceedings in which no TOR are drafted. According to Article 23 (2) of the UNCITRAL Model Law: “[U]nless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.”

The new Article 23(4) of the 2012 ICC Rules reduces the binding nature of the TOR by diminishing the discipline imposed on the parties, but it also diminishes the negative side effects of the TOR procedure.

If the scope of the TOR is wider than that of the arbitration agreement, the TOR will, indeed, represent a broadening of the arbitration agreement. The parties are free to agree what to submit to arbitration, and there is no rule preventing them from adding new items.

**Questions 4.** The *Carte Blanche* case (affirmed by the Second Circuit Court of Appeals, at 888 F.2d 260 (1989)) exemplifies the dilemmas and
concerns raised in connection with the preclusive force of the TOR. The issue is whether after they have been formulated, the TOR do or do not preclude claims and arguments that were not contemplated within the original wording.

If CBS moved formally to amend the Terms of Reference to include consequential damages, and CBI explicitly opposed this, one could assume that both parties by their conduct had recognized that consideration of consequential damages required an amendment to the TOR; hence without an amendment consequential damages could not be included merely by interpreting the TOR. In this case it would be difficult not to agree with Derains’ assertion that Article 16 of the 1988 Rules was violated. (Article 16 did not allow new claims without a rider to the TOR signed by both parties.) The present solution in Article 23(4) of the 2012 Rules is more flexible and allows the arbitrators to consider new claims that are beyond the limits of the TOR.

The holding of the District Court presupposes that it was possible to interpret the TOR as including the given claim for consequential damages. Students should be invited to analyze the excerpts from the TOR, and to take a position.

One of the supporting arguments advanced by Judge Leisure was that the ICC Court of Arbitration scrutinized and confirmed the award, and “[T]he ICC Court is the best judge of whether its procedural rules have been satisfied ...” This does not seem fully persuasive. Students should be reminded that according to Article V(1)(d) of the New York Convention, recognition and enforcement may be denied if the arbitral procedure was not in accordance with the agreement of the parties. Terms of Reference signed by the parties are, indeed, an agreement of the parties on arbitral procedure. That the TOR are signed by the arbitrator as well, does not change the fact that they constitute an agreement of the parties.

One of the options recognized under the ICC Rules is for the ICC Court to approve the TOR if any of the parties refuses to sign. Could a departure from such TOR (approved by the ICC Court in the absence of agreement of the parties) be considered to violate Article V(1)(d) of the New York Convention? Could one argue that if arbitrators depart from such TOR they would thereby violate the procedural rules of the ICC, which represent the procedure chosen by the parties when they opted for ICC arbitration?

Whether Judge Leisure was right or not, the Carte Blanche case is certainly not the best advertisement for Terms of Reference. It is clear that the dilemmas Judge Leisure faced were real dilemmas – and they could have been avoided had there been no TOR. Another possible inference from this case is that the wording of Article 23 of the 2012 Rules, (just as was the case with changes in Article 19 of the 1998 Rules as compared with Article 16 of the 1988
Rules) represents an improvement and eliminates some difficulties. Had Article 23 been applicable, allowing or not allowing a claim for consequential damages in the *Carte Blanche* pattern would have been within the discretion of the arbitrators, and not reviewable by courts. (Courts can review whether the arbitrators respected procedural rules adopted by the parties, but they cannot review arbitrators’ decisions made within the maneuvering room bestowed on them.)

**Question 5.** Party disagreement over the Terms of Reference and the refusal of one party to sign can, of course, delay the proceedings. This is one of the reasons critics have objected to the TOR device. One also has to note, however, that refusals to sign the Terms of Reference are not common. One of the possible reasons for not signing the TOR is a debate whether some issues stated in the draft TOR are, or are not, within the scope of the arbitration agreement. Under the Kompetenz-Kompetenz principle, the right to decide would normally belong to the arbitrators. Yet, once the parties have accepted the ICC Rules, they are also deemed to have accepted the powers of the ICC Court of Arbitration.

**Questions 6-7.** If the parties agree on a procedure to be followed, this procedure has to be followed. If the arbitrators come to the conclusion that the procedure agreed upon is not rational, they should raise this question with the parties. In the Frankfurt case a procedural stipulation (named “terms of reference”) was not followed. It is important to note that the Frankfurt court also considered the “causal link” – it considered whether a full observance of the terms of reference could have yielded a different result. This is a more flexible (one could say more generous) interpretation of the requirement that the proceedings should be in accordance with the agreement of the parties. In court practice, one can find more strict interpretations as well (according to which proceeding not in accordance with the agreement of the parties is a sufficient ground for challenge notwithstanding the relevance of the departure from party agreement).

Article 23(4) of the ICC Terms of Reference contemplates a specific problem – the issue of new claims. Problems have emerged in practice in connection with this issue, and the 2012 Rules give more flexibility (and more power to the arbitrators). Under the ICC Rules, the Frankfurt problem-pattern would have probably led to the same conclusion. It is true that under the DIS Rules what we had was a direct agreement of the parties, while under the ICC Rules, Terms of Reference may result from the approval of the ICC Court (in case one of the parties refuses the sign the terms of reference). Nevertheless, terms of reference approved without the agreement of both parties could probably still be qualified as a procedural arrangement between the parties, because, by accepting the ICC Rules, the parties have also accepted the option of approval by the Court stated in Article 23(3) of the ICC Rules.
**Question 8.** The approach taken in the Terms of Reference of the 2010 ICC case is rather common. Knowing that “proceeding not in accordance with the agreement of the parties” may put the award into a precarious position, procedural arrangements tend to be flexible. Nevertheless, the arrangement does contain some stipulations that must simply be observed. It is up to the arbitrators whether to invite the parties to address questions to the experts (or whether the arbitrators will formulate questions themselves). It is up to the arbitrators whether the expert will be invited to an oral hearing. Yet, the parties will always have a right to be assisted by technical experts, and the parties will always have a right to comment on the technical expertise.

**IV.1.g. Records and Minutes of the Hearing**

**Question 1.** In addition to the explanations offered in the Introduction, one could add that a verbatim record of the oral hearing cannot be ready at the end of the hearing, and in most cases it cannot be ready before the parties leave the city (and the country) of arbitration. This means in practice that signing by the parties “on the spot” is not a realistic option. (The UNCITRAL Notes are more optimistic at this point than the authors. The Notes say in item 82 that professional stenographers may prepare verbatim transcripts “often within the next day or a similarly short time period”. According to the personal experience of the authors, this is unlikely to be possible with longer hearings. Even if it were possible, it would be logistically difficult to keep both the parties and the arbitrators at the site of arbitration for one or more days after the oral hearing has ended.) Signing by the parties at a later time may be problematic. If changes or clarifications are suggested, the best way to deal with them is in the presence of all the parties and arbitrators. Consider also that no matter how professional the stenographers are, mistakes will in all likelihood occur. In sum, a verbatim record typically cannot be combined with the idea of a record signed by both the parties and by the arbitrators (or by the presiding arbitrator of the tribunal). Signature of the parties is useful, and it may become critical if statements made in oral pleadings have not been repeated in written submissions.

The ICC Rules – like many other rules – do not specify a method of recording the oral hearing. Nor do they even articulate possible options. The Vienna Rules, the Hungarian Rules, the Estonian Rules and the DIS Rules provide for an option. The CIETAC Rules provide for several options. (Students should look up Article 40 of the 2015 CIETAC Rules.) The UNCITRAL Notes provide for a wider variety of options in section 17(g) (items 82 and 83). Because there is such diversity in practice, one can hardly single out one method as the only satisfactory one. Different cases may justify different methods.

Arguments for one or another method can be tested in class discussion. We shall advance here some arguments in favor of the approach adopted in the Cairo case in Section IV.1.g of the Casebook. (Other arguments pro or con could
also be advanced.) According to the solution in the Cairo case, the hearing is tape recorded (and the tape is stored), but a transcript is, in principle, not prepared. The presiding (or sole) arbitrator summarizes and dictates the arguments of the parties, as well as the responses of the witnesses. This may save time and can eliminate redundancies. At the same time — no matter how neutral and professional the arbitrator is — filtering all presentations through one person’s understanding may produce distortions. Thus, the method of dictated summaries should be supplemented by giving the parties and the fellow arbitrators an opportunity to suggest corrections after the presiding arbitrator completes a portion of his or her dictation. Another safety device is the tape recording.

Practice has shown that this method may work quite smoothly in many cases. Conflicts will very rarely emerge, and if they do, the matter can be settled by listening to the tape. It is noteworthy that quite oftentimes tapes are actually not used. Interventions and suggestions from the parties (or fellow arbitrators) are much more common. The most frequent suggestions are those aiming at the inclusion into the summary of a statement or of a detail that the presiding arbitrator deemed irrelevant. At this juncture, an experienced presiding arbitrator would typically defer to the suggestion, which is certainly the wiser choice (since the consequences of including something irrelevant are far less serious than those of omitting something relevant).

As soon as the hearing is over, the summarized minutes can be printed out and offered to the parties and to the arbitrators for further scrutiny before they are signed. If there is disagreement, the critical passage can be checked again on the tape. The existence of the tape means that a transcript can be prepared later, if desired. (Limiting the transcript to the testimony of witnesses makes sense, because parties rarely advance arguments at the hearing that they do not repeat in written submissions.)

Question 2. There is no standard solution at this point. Diversity is also demonstrated by the examples cited in the Casebook. According to the Austrian Rules, the minutes shall be prepared and signed by the chairman (or sole arbitrator). The same position is taken by the DIS Rules. The Estonian Rules require the signatures of all arbitrators. The Hungarian Rules also provide for the signatures of all arbitrators, adding that the parties should have an opportunity to “inspect the minutes” (in practice, the parties usually sign the minutes upon inspection). Some other institutional rules (or institutional practice) also provide for the signature of both the arbitrators and of the parties. According to Article 40(1) of the 2015 CIETAC Rules, the arbitral tribunal may (if it considers it necessary) “[…] take minutes of the oral hearing and request the parties and/or their representatives, witnesses and/or other persons to sign and/or affix their seals to the written record or the minutes.”
The signature of the parties reinforces the authenticity of the minutes. It also opens the gates for a possible deadlock were a party to refuse to sign the minutes. The Chinese Rules appear to leave it to the discretion of the arbitrators whether to require signatures of the parties (and of witnesses as well).

**Question 3.** Many institutional rules have left open the issue of the structure and contents of the minutes. For example, the 2010 Rules of the Chamber of Arbitration of Milan simply state in Article 24 (3): “Minutes shall be taken of the hearings of the Arbitral Tribunal”. Another approach was taken in the Hungarian and the Estonian Rules. They contain specific technical elements (like names of the parties, name of the arbitral institution, time and place of the hearing), and add broader formulations regarding substance (like “claims and relevant statements”, “petitions or requests of the parties”, or “short description of the course of the hearing”). Such instructions are helpful. The question arises, whether it is advisable to make these elements mandatory – and hence to elevate possible omissions to the level of “proceeding not in accordance with the agreement of the parties”, since the arbitration rules become part of the agreement of the parties. (According to the information accessible to the authors, no challenge proceeding has been based on non-observance of the Hungarian and Estonian rules pertaining to minutes.) Nevertheless, if the elements listed are mandatory, it is conceivable that a technical omission might prompt a challenge.

**Question 4.** If a summary is dictated (by the chairman, or by a co-arbitrator), it is necessary to offer an opportunity to the parties (and to the other arbitrators) to propose corrections or additions. The parties and the co-arbitrators will typically have two opportunities to propose changes. The best opportunity is while the chairman is dictating the summary (or immediately thereafter). The next opportunity is after the minutes are printed out and offered to the parties and to the arbitrators to check before signing. This second opportunity is specifically provided for by the Hungarian Rules and in some other rules – but not by all rules that provide for minutes by way of a summary. (According to the Estonian Rules, the minutes will be signed by the arbitrators – but it is not stated that they will also be inspected by the parties.) As far as the first opportunity is concerned, this should be an opportunity for the witnesses as well; they are present while their statement is being summarized/dictated, and it would be logical to allow them to suggest rectifications. The second opportunity may not be open to a witness, but some rules – like e.g. the 2015 CIETAC Rules – provide that (if the arbitrators so decide) all persons involved (including the witnesses) should sign the stenographic record or the minutes.

**Question 5.** According to the Estonian Rules, sound recording does not appear to be mandatory, it is stated as an option (“A sound recording of the session may be annexed to the minutes..”). This is certainly a safety device.

**Question 6.** The distinction adopted in the 2008 UNCITRAL case makes some sense, because party presentations at the oral hearing are most often
repeated or rephrased in written submissions of the parties. The opinion of a witness might also be presented in a written form as well, but often the oral hearing is the only opportunity for a witness to provide information. Hence, there is some logic behind providing a more complete recording (verbatim transcripts) of witness statements. At the same time, parties not only re-state arguments, they also respond to questions raised by the arbitrators (or by the other party). The parties' responses to the questions raised probably justify the same method of recording as witness statements. Also, the question might be raised whether it is rational to have more parallel ways of recording of the same hearing.

**IV.1.h. Presentation of the Case**

**IV.1.h.i. Problems with Discovery and Other Forms of Court Assistance in Taking Evidence**

*An example that led to the conclusion that an international arbitral tribunal is not a “foreign or international tribunal” under § 1782.*

**Question 1.** The NBC case directs our attention to some of the structural characteristics of court proceedings in the United States, and their compatibility with international commercial arbitration. Some of these differences highlight the contrast between the American system of taking evidence compared with the approach of Continental European courts. It is well known that the process of taking evidence is party-driven in the United States, while it is court-driven in Continental Europe. Arbitration itself is, of course, essentially a creation of the parties, but the procedural pattern that has become dominant—and that has found expression in practically all the important institutional rules—is that of an arbitrator-driven process. The AAA Rules are no exception. (Students could be directed to read Article 20 of the 2014 AAA Rules, and to compare it, for example, with Article 17 of the 2010 UNCITRAL Rules. Both rules reflect the assumption of an arbitrator-driven process.) Pre-trial discovery clearly presupposes some pre-trial authority granted to attorneys either by national legislation or courts. Such authority is not available in the context of international commercial arbitration. Discovery during an ongoing arbitral proceeding may very well be needed, but cannot be coerced by arbitrators. In his article “The Flexibility of Evidentiary Rules in International Commercial Trade Dispute Arbitration: Problems Posed to American-Trained Lawyers” (J. Int'l Arb'n, Sept 1996, 5) R. Ward states: "[F]or a common-law lawyer trained in a notoriously litigious country like the United States, limited discovery threatens one's livelihood." One of the authors of this manual has lived in several countries, and in each of them he has heard it said (boasted?) that that country was the most litigious one. The competition for this honor is vigorous. Uses and abuses of discovery—and fishing expeditions in particular—may of course threaten the efficiency of the adjudicatory process. But sometimes it is difficult to achieve a just result without documents that are in the possession of the other side, and in such cases
effective discovery vehicles are especially welcome. The fact remains, however, that discovery—and pre-trial discovery in particular—is not a hallmark of arbitration.

**Question 2.** One of the arguments raised by respondents in *Technostroyexport* is that they could not obtain from Technostroyexport in Moscow the same discovery rights as those to which they were subject in New York. This is certainly true. U.S. rules on discovery are broader than the corresponding rules in European countries. The argument was made that therefore discovery could not be “two-way”. The question is whether this represents a reason to deny discovery in the U.S. (Or, if discovery were granted, could the award be contested on the ground of unequal treatment of the parties?) What is equality in this context? To offer to a foreign party before an American court the same options that are available for American parties as well – or to offer to the foreign party those opportunities that are available to American parties in the given foreign country? Or should the court simply restrict its consideration to the propriety of the assistance sought by its own standards? Arbitrators definitely have to be concerned about treating both parties equally; this is one of the prime procedural postulates. They could, indeed, seek discovery from courts in various countries, leveling the discovery they authorize to the standards of the less responsive country. But is this necessarily the right thing to do? Discovery may not be equally needed on both sides; as a matter of fact, it is not rare that discovery is only needed by one of the parties. Does the principle of equal procedural treatment require the arbitrators to desist from using available devices for taking evidence from one party if the same device (were it needed) would not be available to benefit the other party? Can parties be fully equal regarding the practical availability of evidence? If lawyer-client privileges were not the same in the countries of the two parties concerned, would this be a reason not to seek evidence from an attorney who is allowed to give it, if the attorney on the other side would be prohibited from testifying in an analogous situation? Suppose archives in the Claimant’s country are kept for 50 years, while in the Respondent’s country they are only kept for 25 years; does this mean that the arbitrators could not seek evidence older than 25 years in the archives of the Claimant’s country? Or can these examples be distinguished?

For a modern arbitration statute’s approach to judicial assistance in evidence gathering at the place of arbitration, see the 1996 English Arbitration Act Articles 43 and 44 (in the Documents Supplement).

**Questions 3 and 4.** In the *NBC* case the district court did say that Section 1782 does not extend to arbitration. The absence of a request from the arbitrators themselves was probably perceived as a supporting argument. The Second Circuit takes an even clearer position: Section 1782 does not apply to arbitral bodies established by private parties. The fact remains, however, that the *NBC* case did not really contemplate the availability of discovery upon request from the arbitration tribunal (and it does mention “lack of direction from the
arbitrators”). It is certainly more difficult to exclude arbitration from the ambit of Section 1782 if the request comes from the arbitrator.

The Republic of Kazakhstan decision opens some interesting perspectives. The Republic of Kazakhstan court suggests that discovery in aid of international commercial arbitration may be possible if this is pre-arranged by the parties. One could possibly extend this argument to discovery sought by the arbitrators since their role is also “pre-arranged by the parties”. Article 19 of the UNCITRAL Model Law relied upon in the Republic of Kazakhstan case simply says that the parties are free to agree on the procedure to be followed by the arbitral tribunal, and that failing such agreement, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate. Thus, a request for discovery submitted by an arbitration tribunal would be in line with the logic and structure of arbitration. Only a request submitted by a party without prior party arrangement could conceivably “thwart private international arbitration’s greatest benefits”. The authors prefer this line of argument – but this is not the only possible one. The Kazakhstan court concedes that it is the majority view of the commentators that private commercial arbitration is within Section 1782. But this is certainly not the position adopted by the Second Circuit. Let us also note that in the closing paragraph of the Kazakhstan decision the court states: “For the foregoing reasons, we conclude that the term ‘foreign international tribunals’ in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitration.”

Question 5. The wording of the Hague Convention does not support the extension of assistance to arbitration tribunals. Article 1(1) makes it clear that requests may be submitted by “a judicial authority of a Contracting State”. This does not only rule out parties, but it also appears to rule out decision-making authorities that are not “judicial authorities of a Contracting State”. It would be most difficult to interpret the adopted phrase in a way that would include arbitration tribunals. (The Hague Convention simply focuses on courts.) A new testing of the range of Section 1782 might offer more hope.

Question 6. Moving the hearing (or a hearing) to California is an option that is perfectly possible. Having hearings in more than one country is not so rare in arbitration practice. If one of the parties is from California (and possibly one of the arbitrators as well), this may even be a rational solution. (If no actor is from California, the situation is different from a practical point of view.) Seeking assistance from a court at the seat of arbitration is possible under most arbitration acts. The question is whether one could seek the assistance of a Canadian court as the authority that would submit the request (rather than as the authority that would grant the request). Probably not. Section 1782 contemplates requests for assistance “in a proceeding in a foreign or international tribunal”. In our hypo, the proceeding is actually not conducted before the Canadian court. The Hague Convention does not use the same language, but the context is the same. The Canadian court might also be reluctant to play the role of a Trojan
horse. As far Section 7 of the FAA is concerned, it does provide for judicial assistance to arbitrators in obtaining evidence, but on the assumption that arbitration is conducted in the U.S.

**Question 7.** There is a basic difference between the 1998 and 1999 Technostroyexport decisions on one hand, and the earlier decisions on the other hand. In the 1994 Technostroyexport case – just as in the NBC case and in the Kazakhstan case – the issue was the availability of discovery in assistance to arbitration. The 1998 and 1999 Technostroyexport cases belong to the post-arbitration phase. After the Moscow award was recognized by the Second Circuit, requests for further discovery were made in connection with court proceedings in the U.S.

*A case that led to the conclusion that an international arbitration tribunal is a “foreign or international tribunal” under §1782 and,*

*A case accepting that conclusion, but putting into focus other preconditions for granting discovery*

**Questions 1 and 2.** If § 1782 applies to all “decision makers” that are constituted to hear disputes, to weigh evidence, and to issue rulings, it is quite clear that no distinction can be made between a directorate general and a court of arbitration. On the other hand, the European Directorate General may very well be characterized as a “governmental body”, while arbitral tribunals cannot.

One argument against extending § 1782 to private decision-making bodies is the simple fact that this might interfere with the specific profile and logic of private arbitration. Such interference is more pronounced if the motion for discovery is made by one of the parties, rather than by the arbitration tribunal. Arbitration not uncommonly relies on court assistance in constituting the tribunal, and it also needs court assistance in the post-arbitration phase (where enforcement of the award is required). The conduct of arbitral proceedings proper is, however, an autonomous process, without (or practically without) court interference. Sometimes it is not easy to distinguish assistance from interference. This is one of the key problems linked to various interpretations of Section 1782.

One conceivable (although not too persuasive) argument against the extension of § 1782 to arbitration tribunals is that of reciprocity. The concept of reciprocity may work between States and “governmental bodies”. The NBC (district) court states that there is no evidence that the statute was intended to induce assistance for domestic arbitrations. (Meaning that there is no evidence that Congress contemplated assistance to foreign arbitration in order to induce or encourage—on the basis of reciprocity—foreign court assistance to U.S. arbitration proceedings.) This takes us to the well known (and traditionally controversial) reciprocity argument. The first question is whether judicial assistance (or relief) should, indeed, be granted on a tit-for-tat basis, or on the ground of other principles. Even if one were to accept as a standard that “we
should be helpful if others are helpful too”, the question arises of who the “we” are, and who the “others” are in that formulation? Suppose the arbitration has its seat in Paris, and it is the American party who needs discovery in the U.S. Should the U.S. court deny discovery to the American party on the ground that French courts would not give the same assistance to U.S. arbitration? Would this advance U.S. interests? (In the NBC case it was exactly the U.S. party who sought discovery, moving to enforce subpoenas served on six third-party entities.) The idea of reciprocity has been adopted by some legislatures (while it has been rejected by others). The trend in comparative law is nowadays against reciprocity.

**Question 3.** The Consortio Ecuatoriano case simply shows that hesitations continue (at least in the Eleventh Circuit). A foreign court is obviously a “foreign tribunal”. Discovery was granted, because it was needed not only for arbitral proceedings, but for foreign judicial proceedings as well. Thus, the problem was solved – and avoided at the same time.

**Question 4.** The outcome of the Oxusgold case is plausible, and in line with modern trends, but the reasoning is not particularly convincing. The fact that arbitration was conducted under the UNCITRAL Rules does not make it more “public”. The UNCITRAL is, indeed, a commission of the United Nations, but it did not set up a U.N. decision-making body (like the International Court of Justice); it rather promulgated model arbitration rules that are often chosen by the parties in ad hoc arbitration. (It is difficult to imagine a decision-making body which is more private than ad hoc arbitration.) The fact that the arbitration agreement was contained in a BIT (thus, in a treaty between two States) still cannot qualify that decision-making body itself as public.

It is important to note, however, that even in the circuits that took a position against extending § 1782 to arbitration, there have been attempts to introduce exceptions.

The fact remains that it is difficult to extend § 1782 to arbitration while maintaining the relevance of the “public v. private” distinction.

**Question 5.** This is again an example of the trend to extend § 1782 to arbitration, without facing head-on the position taken by the Second and Fifth Circuits. The Intel decision could only solve the problem if one were to focus on its characterization of the Directorate General as “first instance decision-maker”, which clearly applies to arbitration tribunals as well. It is also a fact, however, that the Directorate General is a public authority, and hence the holding of the Supreme Court does not confront the public v. private distinction. The “receptivity” of the Israeli arbitrator (mentioned in the Hallmark case) returns us to the relevance of whether discovery was sought by the parties, or by the arbitral tribunal. This circumstance was important in the Technostroyexport case and
may form the basis of a generally acceptable compromise solution in the application of § 1782.

**Question 6.** One of the arguments against discovery on party motion is that such discovery might undermine the autonomy of the arbitration process. (Unless the parties specifically design their arbitration proceeding to include discovery on party motion — which is extremely rare, and not binding per se on courts.) The position taken in the *Hallmark* case (stating that even if the district court were to permit discovery, the arbitrators need not accept the result of such discovery as evidence) may be perceived as a solution that would safeguard the autonomy of arbitration. The question is whether this would be a practical solution. Granting discovery by a court, and obtaining evidence through discovery, might be a complex and time consuming process. The question arises, whether it is in line with expediency to embark on such a process, if its result may not be heeded in the arbitrators’ decision-making deliberations.

One may note that some well known arbitration acts have provided that court assistance in taking evidence is only possible upon a request of the arbitral tribunal - or upon a request of one of the parties, but with the approval of the arbitral tribunal. (See in the Documents Supplement, Section 1050 of the 1998 German Arbitration Act, or Article 184 of the 1987 Swiss Act on Private International Law.)

**Questions 7-9.** §1782 does not mandate “receptivity”, a point noted by the *Babcock Borsig* court. Nevertheless, the court did not allow discovery “[u]ntil if and when the ICC provides some affirmative indication of its receptivity to the requested materials”. Once receptivity is accepted as a precondition, it appears to be necessary to have a request from the arbitral tribunal (or to have a party-initiated request confirmed by the arbitration tribunal). It is difficult to see how one could establish receptivity of the arbitral tribunal without knowing the position taken by the arbitral tribunal itself. The *Babcock Borsig* court quotes the Supreme Court stating that the purpose of §1782 is to “assist foreign tribunals…”. It would be logical to offer assistance to foreign tribunals when the tribunals themselves think that assistance is needed – rather than when a party thinks that the tribunal needs assistance. Allowing discovery only when this is requested or approved by the arbitral tribunal would contribute towards maintaining arbitrator-control of the proceedings. This is in line with the nature of the arbitral proceedings, hence it may be qualified as a “pro-arbitration” position. One can discern in contemporary judicial practice a trend toward requiring arbitral tribunal receptivity as a precondition to granting discovery – and this appears to be a pro-arbitration trend.

**Question 10.** The *Ecuador* case is not only a signal that a uniform position would be desirable, it is also a step towards uniformity. It may be perceived as a step towards consistency – at least within the limits of the same dispute. The point raised by Chevron (there is nothing inconsistent in following
different laws in different circuits) may be an interesting subject for discussion. One can make different requests in different jurisdictions. Is it compatible to qualify the same facts differently in the light of different national laws? Suppose one has an oral arbitration agreement providing for two alternative seats. Can one oppose arbitral jurisdiction in one country on the ground that only an oral arbitration agreement exists, and that cannot be valid; and later rely on the same oral arbitration agreement in another country which adopted Option II of Article 7 of the UNCITRAL Model Law? Is it relevant that in the Ecuador v. Chevron case inconsistent actions were taken in the same country?

Assuming that before other circuits Ecuador was opposing discovery, the picture is getting blurred, since, in this case, inconsistent behavior could also be ascribed to Ecuador. A possible dividing line could be drawn if one accepts detriment to the other party as one of the elements of estoppel. Ecuador’s inconsistent behavior (if such behavior existed), did not yield detriment. Furthermore, after Chevron’s requests were accepted, equality could only be achieved by accepting Ecuador’s requests as well.

The estoppel doctrine may contribute to more consistency, but it cannot replace a position taken by the Supreme Court.

A case on production of documents by court order in a European setting

Questions 1-2. Arbitral tribunals were not in the focus of attention when §1782 was drafted. This might explain the ongoing debates and dilemmas pertaining to the applicability of §1782 to arbitral tribunals. What adds to the complexity of the problem is the fact that parties have a more consequential role in the process of gathering evidence in the U.S. than in civil law countries. The standard approach taken in international arbitration also gives the upper hand to the decision-makers (the arbitrators). This is why U.S. courts have had to face two tasks in adapting §1782 to arbitration: The first is to adopt an interpretation that would extend the range of the notion “foreign or international tribunals” to arbitral tribunals. The second task is to heed the autonomous nature of arbitral decision-making. As far as the second issue is concerned, in Sweden (just as in practically all European countries – and most non-European countries as well) it follows from the logic of the system that court assistance in gathering evidence is actually assistance to the arbitral tribunal (and not to a party on its own motion). In the U.S. discovery is based on different principles, but a bridge towards the solution was found by way of reliance on a pro-arbitration policy that received a particularly strong emphasis in U.S. practice. This is how receptivity (of the arbitral tribunal) has become a fundamental consideration. “Receptivity” is not as simple a concept as the rule formulated in Article 26 of the Swedish Arbitration Act, but it leads us towards a similar result.
There is very little or no difference of principle between the second and the third option: request submitted by a party with permission of the arbitral tribunal, and request submitted directly by the arbitral tribunal.

The position taken by the Swedish Supreme Court according to which the court is barred from trying the application without consent of the arbitral tribunal is a logical consequence of the concept of arbitrator-driven taking of evidence. This is not much different from saying that discovery is conditioned by the receptivity of the arbitral tribunal.

A step beyond “receptivity” is the decision of the Swedish court obliging Flexiboy to submit the requested documents to the arbitrators directly, rather than to Euroflon (the party seeking court intervention in taking evidence).

**Question 3.** The logic would probably remain the same. If a party to the arbitration proceedings is in the focus, the arbitrators may request production of documents directly, but cannot enforce such orders. Hence, the request (submitted by a party or by the arbitrators themselves) may reach a court, and here the logic behind requiring receptivity remains the same.

**Question 4.** Taking emergency steps before the constitution of the arbitral tribunal has become a topical issue, and a number of new rules have created instruments yielding emergency measures. (In addition to the ICC and the Danish Rules, similar instruments have been crafted e.g. in the new 2014 AAA-ICDR Rules, the 2014 Japan Commercial Arbitration Association Rules, and the 2014 LCIA Rules). The Danish court endeavoured to take a step heeding the concern that prompted rules on emergency arbitrators. It allowed the appointment of an expert prior to the constitution of the arbitral tribunal. One question that could be raised in discussion is whether this step of the Danish court is closer to the original American approach (allowing court assistance on party motion only).

Such requests may make sense. Suppose a factory suffers physical damage – allegedly due to the fault of a contractor. It is necessary to repair the damage as soon as possible, but is also necessary to assess the damage. This may call for expertise, and one cannot wait until the arbitral tribunal gets constituted and designates an expert. Appointment of an expert by a court is one possible solution.

It is an open question whether §1782 could offer a shelter in such situations. The question could first be raised whether this request (for appointment of an expert) could be qualified as a request for discovery. Is such a request within the wording (or within the logic) of §1782? What makes things even more difficult with the problem-pattern that reached the Danish Supreme Court, is the fact that the relevant “foreign or international tribunal” did not yet exist at the time of the request. The UNCITRAL Model Law identifies a date prior
to the constitution of the arbitral tribunal as the date of commencement of arbitral proceedings. One may also note that §1782 speaks of “proceeding in a foreign or international tribunal”. Can one perceive as “proceeding before a foreign or international tribunal” procedural steps that take place before the tribunal comes into existence? Let us also mention that in a real emergency situation the starting date (of the arbitral proceedings) set by the Model Law might also come too late.

The question is a difficult one. It is difficult to find a satisfactory solution without stretching the rules – or adopting a solution like the one on “emergency arbitrators” provided for in Article 29 of the 2012 ICC Rules.

**Question 5.** Threat by adverse inference may be conducive to more cooperative behaviour. At the same time – if documents are not produced - adverse inference is an imperfect and uncomfortable point of reliance. A logical reason behind non-production of documents is a fear that the document in question may support the allegations of the opposing party. But there may be other conceivable reasons as well. The document may contain sensitive information that is not directly relevant in the given dispute. The question also arises whether one can assume a full match between the content of the non-disclosed document, and the allegations of the other party. It is also an open question whether reliance on adverse inference can reverse the burden of proof. Choosing between reliance and non-reliance on adverse inference is a difficult choice. Things are simpler if – in terms of reference or by way of other procedural arrangements – the parties accept reliance on adverse inference.

**IV.1.h.ii. Experts**

**Questions 1 - 4.** In accordance with the principle of a basically arbitrator-driven hearing, arbitrator-appointed experts play a dominant role in international commercial arbitration. New arbitration legislation in common law countries, such as the 1996 English Arbitration Act and the 1996 Indian Arbitration and Conciliation Ordinance, confirm this development. Also indicative of the trend are the new AAA International Rules, which distinguish between experts appointed by arbitrators, and expert witnesses retained by the parties. The main role is allocated to the experts appointed by the arbitrators. (See Article 25 of the 2014 AAA/ICDR Rules). A discussion of the relative merits of neutrality and balance is still pertinent, however. If the class includes students belonging to various legal cultures, the instructor should encourage them to state opposing views. Hunter states that the main disadvantage of the common law system is that expert evidence presented to the arbitral tribunal is “bought” by the party presenting it, in the sense that a party would only present expert evidence if it is favorable to its case. Unlike courts, arbitration tribunals do not have vehicles to eliminate or discourage partisan experts. This built-in failure can be corrected, of course, by the vehicle of balance (the other party may also present its expert).
The question is whether juxtaposed expert testimonies may or may not give sufficient guidance to the arbitrators.

Consider the following argument that could be advanced in favor of party-appointed experts. The testimony of one (neutral) expert tends to convey a simpler image of the truth than the conflicting testimonies of party-appointed experts. This may be in line with an inclination of many lawyers to confine controversies and intricacies to their own world. But is this the best path to the truth? It is easier to rely on the opinion of one expert only—and it is more difficult to depart from the expert’s opinion—if this is the opinion of the expert appointed by the tribunal and if that opinion is not contradicted by the opinion of another expert. (We shall see a pathological version of this issue in the Sacheri v. Robotto case in IV.3.a.iii.)

Having said that arbitrator-appointed experts have become the main vehicle of expert evidence in contemporary international commercial arbitration, we should also add that expert witnesses have also gained some currency, even outside common law countries. Students could be invited to compare the compromise adopted in Article 25 of the AAA International Rules with the wording of Article 29 of the 2010 UNCITRAL Rules, Article 26 of the UNCITRAL Model Law, or Article 1443 of the Mexican Act. Within the setting of these rules (just as in Article 26(2) of the Indian Act) party-appointed experts (expert witnesses) will help the parties in cross-examining the arbitrator-appointed expert. This opens the door to a more adversarial treatment of non-legal matters—and possibly of legal matters as well.

Hunter makes the point that a structure including both experts appointed by the tribunal and experts presented by the parties may be too costly. “Expert conferencing” relies essentially on the same idea as that in Article 29 of the 2010 UNCITRAL Rules. The challenge is how to better streamline this process.

One of the differences between common law and civil law countries concerns whether legal issues—including issues regarding foreign law—can be the subject of expertise. With respect to arbitration, the distinction between foreign and domestic law becomes volatile. Civil procedure rules in the lex arbitri may answer this question, but such rules are generally not mandatory. The UNCITRAL Rules and the UNCITRAL Model Law do not define the issues that may be the subject of expertise. Expert opinion regarding foreign law—or law in general—is thus, not excluded.

**Question 5.** In the Paklito v. Klöckner case, neither party had a chance to comment on the expert’s report. Respondents also felt that appointment of an expert was an unfair move in itself, given that they took a policy decision to confess and avoid inspection reports.
The authors believe that the appointment of an expert despite strong objections of one of the parties did not violate due process. In an arbitrator-driven process, it is clearly within the discretion of the arbitrators to appoint an expert whenever they feel that an expert’s testimony would help to clarify the issues. Experts can be appointed despite the opposition of one of the parties. Much more problematic, however, is the lack of opportunity for the parties (and respondents in particular) to comment on the expert’s findings. Judge Kaplan gives special weight to the New York Convention principle requiring the arbitrators to give each party an opportunity to present its case. This principle is clearly not observed if one party is denied a chance to respond to the allegations of the other party. Do we also have an infringement when a party is denied an opportunity to contest the findings of a neutral expert appointed by the arbitrators? We probably do. Giving a chance to a party “to present his case” is in essence a chance to state that party’s case regarding assertions emerging in the proceedings that might influence the outcome. An expert opinion is surely such an assertion.

Another question is whether cross-examination is a precondition for meeting the standard of “being able to present his case”. Here, the answer is probably negative. Cross-examination is one of the possible techniques of contestation, rather than an intrinsic requirement of due process. If the parties accept arbitration rules that do not provide for cross-examination of experts, they should be content with the characteristics of the chosen procedure. The total absence of any procedural avenue for challenging a consequential assertion does amount, however, to a denial of due process. Do we also have unequal treatment? There was no explicit inequality. Neither of the parties had a chance to respond. Of course, the position of the parties was different, because the expert opinion favored one of them, and had ruinous effects on the other. This may mean, in fact, unequal treatment. It is also a fact, that the mechanism of disallowing any response was not a priori tilted in favour of the claimant and against the respondents. Had the expert found otherwise, claimant (and not respondent) could have found himself in a difficult predicament.

**Question 6.** Even if the expert is an arbitrator-appointed expert, his/her opinion does not bind the arbitrators. The decision-making should remain in the hands of the arbitrators. In an arbitration case in which one of the authors participated, the arbitration agreement stated that in case a dispute arises and it involves the issue of the chemical structure of the product sold by one party to the other, Mr. X. should be appointed expert, and the arbitrators should accept his findings. After some hesitation, the arbitrators decided (by a majority decision) to refuse to arbitrate, stating that the clause regarding the expert would tie their hands, and prevent them from meeting their full responsibilities as arbitrators. Was the majority right?

**Question 7.** The argument would be that “the right to present his case” implies the right to comment and challenge assertions made during the
proceedings. The question is whether a distinction should be drawn between an assertion that supports the given party’s claim, and an assertion that opposes it. The expert opinion in Paklito v. Klöckner supported the claimant’s position.

Suppose the arbitrators had decided not to give credit to the findings of the expert because of some imprecision or contradiction that actually could have been removed without changing or jeopardizing the basic findings. Could Claimant raise a due process argument because he had no opportunity to comment on the expert opinion? He probably could. Note that it is much easier to implement and administer the principle of the right to present one’s case if the arbitrators (and judges) simply always allow both parties to comment on assertions made, without subjecting that right to preconditions and without engaging in a difficult and possibly controversial analysis to decide how a particular assertion would affect the outcome of the case.

**Question 8.** Against the background of the new 2015 Rules, Judge Kaplan’s holding would not have been different, only more obvious and easier to reach. Article 44 makes it abundantly clear that both parties must have an opportunity to comment on the expert’s report. The CIETAC proceedings in Paklito did not meet this standard.

Cross-examination is not a must. It is within the discretion of the arbitrators to allow it upon party motion. Within the logic of the CIETAC Rules, the right to comment is a due process requirement. The method or means of expressing comments or challenges (through written submissions, cross-examination, or both, or otherwise) is not an issue of the same magnitude.

The wording of Article 44(3) of the 2015 CIETAC Rules appears to envisage cross-examination (explanations given by the expert at a hearing) upon party motion, and “when the arbitral tribunal considers it necessary.”

**IV.1.h.iii. Language Issues**

**Questions 2 and 3.** If in the Swiss-Romanian case notice had never been sent to the respondent in a language it could understand that is, if the only notice had been in Romanian – this would have been a more difficult case, but the outcome could have remained the same. The Swiss party might not have spoken Romanian, but finding a translator in Basel would not have been an excessive burden, particularly not for a party who had agreed to arbitrate in Bucharest. One could argue that the party receiving the notice might not even know that it comes from a court of arbitration. But this is not particularly persuasive, because the Romanian name of the Court of Arbitration at the Romanian Chamber of Commerce is not very different from the French designation (it may alert the English-speaking reader as well), and it is difficult to miss the message from the letterhead. But even supposing that “Curtea de Arbitraj International” would not
remind the French-speaking reader of “Cour d’Arbitrage International”, or would not ring a bell for someone who only speaks English and is expecting a notice from the (Bucharest) Court of International Arbitration, a party in good faith just cannot ignore a letter from Bucharest after having submitted to Bucharest arbitration.

**Question 4.** Quite often, translations are less than perfect; and – not so often – it happens that translation or mistranslation affects the outcome of the case. A mistranslation most often occurs because it is done by a linguist not trained in law who does not have a full understanding of legal terms and nuances. If one of the parties contests the accuracy of the translation, the arbitrators might be able to clarify the matter themselves. International arbitrators often speak more than one language, and often the languages arbitrators can read, speak and write will influence their selection for a particular case – indeed this is one of the comparative advantages of an arbitrator in an international case. Hence, it is likely that the arbitrators (or at least some of them) will have a command of the relevant languages. (The arbitrators chosen by the parties are often from the country of the respective party, which makes it likely that they will speak the language of witnesses from that country, and the language from which some of the documents in the case have been translated.) If not all the arbitrators can compare the translation with the original, one can imagine opportunities for abuse on the part of the arbitrator who speaks both languages, but this is hardly a real danger. The safeguard against translation chicanery lies not only in the ethical standards of arbitrators, but also in the fact that this is a type of misconduct that is quite easy to discover and to prove.

If no arbitrator is able to compare the original document with the translation, then the arbitrators always have the option of hiring an expert to assist them.

Let us add that the arbitrators are free on their own motion to verify the accuracy of translations submitted to them, and they frequently do so. If they uncover any important discrepancies, they should inform the parties of their findings and give them a chance to react.

**Question 5.** If, after the arbitrators have been chosen, the parties agree on a language that is understood by only two of the three arbitrators, we have a real problem. In principle, one could rely on an interpreter, but this should be avoided if possible. There is a difference between communication via an interpreter between the arbitrators and a party (or a witness), and communication through an interpreter among the arbitrators themselves. Deliberations without a common language are not inconceivable, but certainly not advisable. Direct communication is preferable given both the sensitive nature of the communication, and the aim of having a clear mutual understanding.
If the situation envisaged in this question would indeed arise, the arbitrators should first try to persuade the parties to opt for a language they all speak. If the parties are unwilling to accept this suggestion – or if the arbitrators have no common language – the remaining imperfect options are either reliance on an interpreter or resignation by one or all arbitrators.

Once again, the only really good solution is for the parties to agree on the language of the arbitration before the arbitrators are chosen. Then command of the designated language can operate as one of the important criteria in choosing the arbitrators.

**Question 6.** Language is a quite important part of arbitration strategies, which is sometimes overlooked. The attorney who speaks the language of the arbitration proceedings has a clear advantage over a colleague who does not. This may or may not be balanced by extraordinary legal talent, or by special trust. It is conceivable, that after weighing the pros and cons, a party will opt for an excellent attorney who enjoys his confidence, even though this attorney does not speak the designated language. This is a possible choice, but it should only be made after a careful weighing of considerations. One must not simply assume that a good translator will be able convert from, say, English into, say, French, or Polish, all nuances, subtle refinements, gestures, and suggestive emphases. Communicating via translator is a handicap. It may not be an insurmountable one, but it is serious enough to be considered. A possible solution is to add an attorney who has an adequate command of the chosen language, which is safer than relying on a translator only.

**Question 7.** The first screening device that might eliminate mistranslations would be the arbitrators themselves. The question is what happens if the error is not corrected before the award is rendered. Among the reasons for which setting aside of such an award (or refusal of recognition and enforcement) might be requested, the ground “otherwise unable to present his case” perhaps suggests itself (New York Convention Art. V(1)(b)). If the language of the proceedings is German, and the English witness (or party) states that the contract was duly executed, and “execution” is translated as “Vollstreckung” or something along the same lines, meaning enforcement, one can immediately grasp the potential for misunderstanding. If this at the same time had an effect on the outcome, one could argue that the party was unable to present his case, because he was unaware of the misperception created by someone else (the translator), and was unable to correct the miscommunication created.

If the translator was retained by the party who suffered from the mistranslation, it is questionable whether he could still be deemed as being unable to present his case, because the translation was within his responsibilities.
One could also ask whether an award based on an obvious misunderstanding could be qualified as being contrary to public policy.

**Question 8.** The real question is whether English was properly designated as the language of the arbitral proceedings. If it was, the parties have to adapt their strategies to cope with English. There is no excuse for a party’s having an inadequate command of the language properly designated as the language of the proceedings, just as there is no excuse for inadequate knowledge of the applicable law. The 1988 ICC Rules provided that the language or languages of the arbitration shall be determined by the arbitrators. Article 15(3) also says that in determining the language, the arbitrators shall pay due regard “to all relevant circumstances and in particular to the language of the contract”. Thus, the language of the contract clearly has pronounced importance, but Article 15(3) does not turn it into a binding presumption. Article 16 of the 1998 Rules somewhat decreased the relevance of the language of the contract. (Article 20 of the 2012 rules continues this approach.) Instead of stating “all relevant circumstances and in particular the language of the contract”, the new Rules state “all relevant circumstances including the language of the contract”. Another difference is that the 1998 and 2012 Rules state that the arbitral tribunal will only determine the language or languages of arbitration “in the absence of an agreement by the parties”.

**Question 9.** If a party does not have a sufficient command of the language of the proceedings, he will have to cope as best he can. The linguistic competence of the arbitrator may be a more difficult issue, and it is not sure that final judgment has to be left to the conscience of the arbitrator. The following hypo may be an unlikely one, but if the arbitral institution would appoint a sole arbitrator whose command of the language of the proceedings is poor and this leads to misunderstandings and to a distorted outcome on the merits, the argument may be made that the party was “unable to present his case” if he was unable to make himself understood – and this was due to the arbitrator’s inadequate command of language. But again, this is most unlikely to happen.

In international commercial arbitration, the language of the proceedings is rarely the first language of all participants. Difficulties with accents and expressions do emerge, but ensuing misunderstandings are normally clarified, and even if some small misunderstandings go uncorrected, it is generally unlikely that they would affect the outcome in any event. It remains important, however, to recognize that language is indeed an issue, and it deserves consideration.

**Question 10.** “[C]hosen court accepted by the Hungarian Chamber of Commerce” does not make much sense. As the casebook explains, “chosen court” is a literal translation failing to convey the real meaning. “[A]ccepted by” is probably also a clumsy translation, although here the origin of the mistake is not obvious. The Hungarian original was not signed, did not appear during the proceedings, and is unknown to the authors.
One possible way of dealing with this arbitration clause would be to read what it says, and to conclude that the wording does not make much sense.

Another possible approach would be to give an opportunity to the parties to explain what they meant. The Hungarian party (if he/she wants to arbitrate) would certainly bring to the attention of the arbitrators (or of the court) that “chosen court” is the Hungarian term for arbitration. The U.K. party would in all likelihood argue in the same vein, if the U.K. party were the one who wants arbitration. The party who wants arbitration would also point out that the heading of the critical clause reads: “Arbitration”. Also, the party opposing arbitration may have serious difficulties giving an alternative meaning to the clause that does not imply arbitration. In other words, he/she would have difficulties explaining what he/she had in mind upon by signing the contract.

Suppose the case is submitted to the Court of Arbitration at the Hungarian Chamber of Commerce. The U.K. party wants arbitration, the Hungarian party opposes arbitration. You are one of the arbitrators. How would you decide?

Would your position be the same if the Hungarian party were the one who wants arbitration? Can one presume that the Hungarian party bears more responsibility for the mistranslation? Is this relevant?

**Question 11.** The authors tend to agree with the opinion of the Paris Court of Appeal, for the following reasons. Lazareff notes that two of the arbitrators were given an opportunity to work in a language that was not the official language of the proceedings. This is true. The arbitrators thus obtained a kind of benefit beyond what was bargained for. But this does not amount to a reason for annulment. One could argue that the two arbitrators may have devoted more attention to the Spanish language submissions; or that the Spanish party was fishing for some pro-Spanish bias. Still, without further evidence this is still weak. Receiving a translation of a submission in one’s mother tongue could hardly corrupt an arbitrator with normal ethical standards. All arbitrators received the very same information. When the language of the proceedings is English, oral arguments and written submissions must be submitted in English. Does this mean in English only? The Spanish party’s attorney could have presented oral arguments in Spanish with translation into English. Would this have been much different from submitting written pleadings both in English and in Spanish?

During the oral hearing in a case in which one of the authors acted as the third arbitrator, one of the parties was trying to add emphasis by repeating certain key phrases in your author’s first language (which is not a language understood world-wide). The party said “but the actual intent of the parties” then he raised his voice and repeated (still in English) “the actual intent of the parties” - and then he said again “the actual intent of the parties”, this time in the language of the third
arbitrator, (not with a perfect accent, but understandably). The gambit (a pitch for some added sympathy) was rather transparent – but pretty harmless too. Let us mention another actual case bearing some resemblance to the French case. The language of arbitration was German. None of the three arbitrators was German. All three arbitrators had an adequate command of German. The chairman of the tribunal also had a German degree and was working in Germany. The proceedings were conducted in German. During the deliberations in turned out that the arbitrators were relatively more at ease in English, and they switched to English. The award was written in German. Do you see any impropriety here? Excessive ease of annulment would undermine the arbitration process. Inequality has to be real and consequential in order to yield annulment.

**Question 12.** This problem is somewhat similar to the problem of the “initial language”, but there are differences. The initial language is the language of communication before the language of the proceedings is chosen. Thereafter, the language of the proceedings rules. The “language of correspondence” will be the language of communication until the language of the proceedings is determined, but it remains the language of communication between the parties and the institution thereafter as well. In other words, even if French were chosen as the language of arbitration, the Vienna Arbitral Center would still communicate with the parties in English or in German. This is practical (particularly for the Institution), because it would be most difficult for any institution to communicate in whatever language is chosen as the language of the arbitration proceedings.

The wording of Article 4(a) (later Article 6, now Article 5) would, indeed, allow German communication with an English speaking party. This is, however, not likely to happen. The Vienna Arbitral Center (like all arbitral institutions) has a vested interest in attracting parties. It enhances the goodwill of the Center if the Center corresponds in English with parties who address the Center in English (and in German with parties who address the Center in German.)

The language of the documents in recognition and enforcement proceedings

**Question 1.** Students may be invited to read Article IV(2) of the New York Convention. It is difficult to contest that the wording of this Article allows rejection of the request for recognition on the ground that a certified translation of the award (and of the arbitration agreement) were not presented. The Swiss Supreme Court seeks support in comparative court practice, and also tries to find points of reliance in the “object and purpose” of the Convention. The Court qualifies its own interpretation as a “generous interpretation”. And it is, indeed, a generous interpretation. One could also say that it is an interpretation heeding present realities. Article IV(2) protects the rights of sovereign States to establish their official language (or languages) and to require submissions in this language or languages. At the same time, if the judges speak the language which was agreed upon between the parties as the language of arbitration, “generosity” is practical and helpful.
One should add, that while the Swiss Supreme Court's position is based on rational considerations, a contrary position (requesting full translation into one of the official languages of Switzerland) could not be qualified as a misapplication of Article IV(2).

**Question 2.** Here again, the interpretation is “generous”. It is difficult to accept, however, the assumption that the parties may waive the rule contained in Article IV(2). One of the authors of the casebook participated in an arbitration case between a Swiss party (owned by persons from the former Yugoslavia), and a party from the former Yugoslavia. The parties designated “Serbo-Croatian” as the language of arbitration – and the award was rendered in Serbo-Croatian. Suppose recognition were requested in Switzerland, and neither party objected to submitting the award and the arbitration agreement in Serbo-Croatian. Should this mean that the Swiss court will be obliged to consider Serbo-Croatian documents? Obviously not. Article IV(2) establishes an entitlement of the recognizing authority to receive documents in the court’s official language(s). This entitlement cannot be waived by the parties. – But a “generous interpretation” remains possible – particularly if the judges speak the language of the award (and of the arbitration agreement).

**Question 3.** The Liechtenstein decision shows that the “generous interpretation” adopted by the Swiss court (and by some other courts) is a sensible option – but not a must. The approach of the Supreme Court of Liechtenstein taken towards certification may be qualified as somewhat rigid, but it cannot be perceived as exceeding the requirements contained in Article IV(2). Hence, in the light of modern developments, one may hope that translation, or certified translation, will not be needed (particularly if the language of the award is English), but one cannot bank on this. It is important, however, to note that submission of the award and of the arbitration agreement without proper translation cannot yield refusal of recognition. The appropriate “sanction” is resubmission – and this was made clear by the Liechtenstein court. In order to reach this conclusion we do not need “generosity”. One could argue that the reasons for refusal of recognition set in Article V are exclusive – and they do not include the requirements provided for in Article IV. Hence non-compliance with Article IV cannot result in refusal of recognition – but (in the absence of a generous interpretation) recognition will not be contemplated before the requirements set out in Article IV are satisfied.

**IV.1.i. Action or Inaction in Connection in Presentating the Case That Amounts to Waiver**

**Questions 1 and 2.** Waiver offers an added chance for the survival of the award. In the words of Lauterpacht: "The absence of protest may [...] in itself become a source of legal right inasmuch as it is related to—or forms a
constituent element of estoppel or prescription. Like these two generally recognized legal principles, the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability—a requirement even more important in the international than in other spheres; it is a precept of fair dealing...” (H. Lauterpacht, Sovereignty over Submarine Areas in 27 British Yearbook of International Law 1950, 376, at pp. 395-396). In the Minmetals case, Ferco was not deprived of the opportunity to present its case—it failed to take advantage of the opportunity.

**Question 3.** Remission proved to be a helpful option in the Minmetals case. It allowed correction (giving an opportunity that was not offered during the initial proceedings), without starting completely new proceedings. At the same time, the argument can be made that remission establishes closer court control, and puts courts nearer to an appellate level authority - which is not fully in line with the autonomy of arbitral proceedings.

**Question 4.** Arbitral awards are typically shielded by confidentiality. Hence, an award rendered between Minmetals and a third party (China Resources) may not have been available to Ferco, not even if it had been rendered earlier. It may also be questioned whether the equality of the parties was or was not infringed. During the initial arbitral proceedings, the “sub-sale award” was not known to either of the parties—yet it was one of the parties (Ferco) who had an interest to challenge the findings of the sub-sale award. The question is whether the arbitrators are obliged to share with the parties information on which they intend to rely in their award. It is difficult to establish a hard and fast rule in this regard. The English Commercial court relied on article 53 of the 1995 CIETAC Rules. The provision of Article 53 (of the 1995 Rules) is not in force anymore. The corresponding article in the present (2015) CIETAC Rules is Article 49(1) stating that the arbitral tribunal shall render “a fair and reasonable award”. Reference to “fairness and reasonableness” is somewhat vague, but it may serve as a guideline. The authors tend to agree with the Commercial Court that initially, the arbitrators “did not act in accordance with international practices and the principle of fairness and reasonableness”, since Ferco, was, indeed, not given an opportunity to learn of and possibly rebut some findings that influenced the award. This was, however, remedied by the remission ordered by the Beijing court.

**Question 5.** Facing this question, one has to consider the circumstance that Ferco did not have to abandon its original line of defense in order to take advantage of the opportunity to discuss the sub-sale award.

**Question 6.** Article 4 of the Model Law - just as does Article 579 of the Austrian Code of Civil Procedure - speaks of waiver in the context of proceeding with arbitration without objection. In this case, the behavior at issue did not take place within arbitration proceedings - such proceedings never started. Thus, a strict reading of Article 4 of the Model Law (or of Article 579 of the Austrian Code
of Civil Procedure) would not provide a foothold for the decision of the Vienna Court. Nevertheless, the decision may be justified, because it is based on the principle of procedural fairness. Waiver is just one of the existing conceptualizations of procedural fairness. In the realm of arbitration it is the most important one, and the one which has been spelled out most clearly - but it is not the only one. One may have to proceed with more caution when one relies on a procedural principle without articulated legislative guidance (such as that given in Article 4 of the Model Law). The Vienna court argues that it simply disallowed an abuse. In the given context, this sounds rather convincing.

**Question 7.** In distinguishing between permissible and impermissible waivers, the following line of argument may also be considered. One could say that waiver actually has an impact on the gravity of the situation itself. If one party is invited to comment on an expert opinion and the other party is not, this may very well be qualified as a violation of due process, and the award may be set aside or refused recognition. Could waiver neutralize such a violation? It probably could. If the party who was not invited to submit his comments knows that the other party had this opportunity and receives the comments of the other party, yet raises no objection and continues to proceed, he may be deemed to have waived his right to equal treatment regarding this specific occurrence. There may be several reasons for not raising the objection. The party who was not offered an opportunity to comment may be satisfied with the expert report and have nothing to add. Or, he/she may think that the expert report is irrelevant and hence not worth commenting upon. Another possible hypothesis is that the party has been careless and is not handling its case with proper diligence. In all of these hypotheses one may submit that some unequal treatment exists; but can we also say that the party is a victim of unequal treatment? Can a party just take note of a procedural error (and store it for use in case of emergency) instead of taking steps to protect his/her rights? An irregularity that would amount to a violation of due process without waiver certainly does not have to amount to a violation of due process if the party failed to object and acquiesced. The impairment is not the same; the violation is not the same. Nevertheless, there are some exceptional situations in which waiver is not allowed to prevail due to public policy considerations.

**IV.1.j “Taking the Parties by Surprise”**

**Question 1.** The issue of „surprise“ has gained particular attention in the course of the past years. In more and more cases parties have raised the „surprise“ issue as a ground for challenge (or an argument against recognition). There are basically two procedural grounds for non-enforcement of an award, under which the „surprise“ argument arises. In most cases the challenging party argues that the surprise prevented it from presenting its case. In some cases the challenging party argues that by considering some norms, legal characterizations or facts not referred to by the parties, the arbitrators went beyond the scope of their mandate. The non-binding suggestions of the ICC Secretariat identify three
"surprise" scenarios. The first scenario concerns a situation in which the question actually does not arise. If it can be shown that one of the parties actually did refer to a legal norm, scholarly article, or legal characterization (or fact), then the tribunal’s reliance on such norm, concept, or fact obviously cannot take a diligent party by surprise. (The ICC Secretariat does not mention “facts”, but facts established by the arbitrators themselves also belong among items that may take parties by surprise – actually facts established by the arbitrators themselves, and unknown to the parties, may yield particularly sensitive situations.) The third scenario concerns a means of avoiding the problem. If the arbitrators want to rely on a legal rule, case, fact or qualification not referred to by any of the parties, then they may do so without evoking surprise if they first invite the parties to take a position regarding such rule, case, fact or qualification. Of course, this third scenario may involve considerable delay and extra costs. The ICC’s second scenario takes us to the core of the problem. Here, the hypothesis is that the arbitrators intend to rely on a case, scholarly writing, rule, or fact, without inviting the parties to take a position on such norm, source, or fact. The ICC Secretariat suggests to the arbitrators that they should explain their authority to rely on certain sources on their own motion. The obvious explanation is the *iura novit curia* principle (the judge knows the law) – and it is not clear whether this actually needs to be explained. But the *iura novit curia* principle does not extend to facts.

Hence, if the arbitrators discover some new facts themselves, they should disclose this to the parties, and give them an opportunity to take a position on any such fact and its relevance. In the hypo stated in Question (1) the issue is whether what we have is actually a new fact unknown to the parties, or just an inference from facts presented by the parties. The date of the contract that was allegedly executed was part of the information supplied by the party who alleged that a contract was validly concluded. It probably took the parties by surprise that the alleged date of signing was actually a Sunday. In such a situation the arbitrators can probably exercise some discretion in weighing whether to seek more clarification (which would also mean that the proceedings would have to be reopened) or to continue their work on the finalization of the award.

**Question 2.** In ECHR proceedings the position of the applicant deserves special concern. Applicants are individuals, often without abilities or means to provide adequate legal articulation of their claim, hence it appears to be justified to give the ECHR some manoeuvring room regarding legal characterization. It is also true though, that the position taken by the ECHR in the *Sherif Yigit v. Turkey* case applies to both the applicant and to the State concerned. As the Judgment states, “...since the Court is master of the characterization to be given in law to the facts of the case, it is not bound by the characterization given by the applicant or the Government.” (emphasis added) Where a party seeks performance of an allegedly valid contract, it might be risky to award an amount on the ground of unjust enrichment (after finding that the contract is not valid). This may represent an ultra petita award, a decision beyond the scope of the actual claim. (Assuming that we perceive the claim as a request for the
performance of the contract, payment of the purchase price, rather than just a request for payment of a certain amount of money.) If the arbitrators find themselves inclined to conclude that the contract is indeed invalid, one option would be to inform the parties about this. At this point, however, other concerns might arise. Informing the parties about a tentative conclusion might avoid surprise – but it might also provide legal assistance to a party who failed to extend its legal analysis to some important possible legal conclusions.

**Question 3.** The German decision appears to be in line with fairness and justice. The criterion adopted may, however, give rise to some dilemmas. The position of the Dresden Court of Appeal is that even if a legal characterization takes the parties by surprise, and even if this could be characterized as an impairment of the right to be heard, this will not jeopardize the award if it did not have an impact on the outcome—if the award “would not have been different”. The problem with this criterion is the following. In order to establish whether an impairment of the right to be heard did, or did not, have an impact on the outcome (whether the award would or would not have been different without this unanticipated legal characterization) one would have to undertake an analysis of the merits of the case – and this would not be in line with the principle of limited court review of arbitral awards. (See on this question Várady, Can Proceeding Not in Accordance with the Agreement of the Parties Be Condoned? – in Kröll, Mistelis, Rogers, Perales Viscasillas, eds. International Arbitration and International Commercial Law: Synergy, Convergence and Evolution – Liber Amicorum Eric Bergsten, 2011, pp. 467-487.) At the same time, one could probably accept the position that if the arbitrators rely on some characterization, or on some legal rule, and qualify this as a “supporting argument”, then one could assume that such a “supporting argument” could not have triggered the outcome (but only confirmed it). Hence, if a supporting argument comes as a surprise, one does not need to reinvestigate the merits in order to come to the conclusion that without it, the award “would not have been different”.

**Question 4.** The dividing line the Court used in the Swiss case appears to be fair and rational. If the parties agreed upon Swiss law, but forgot to argue on the basis of Swiss law, the arbitrators are probably not obliged to inform the parties that they intend to rely on Swiss law. If the application of Swiss law was not stipulated, but it follows from rather clear-cut conflict rules, we have a closer call. In the 2009 Swiss Supreme Court decision, the Court held that the relevance of the Swiss norms—that were applied by the arbitrators—“could not have been anticipated”, and “was based on dubious grounds”. In the given case these conclusions were persuasive. It is not always easy, however, to establish whether the application of certain norms could or could not have been anticipated.

**Question 5.** The July 30, 2010 decision of the OLG Stuttgart clarified an important issue. It rejected the allegation/perception that the arbitrators are obliged to issue directions to the parties indicating their legal assessment, and
inviting the parties to address this assessment in their pleadings. Arbitrators may, indeed, come to some preliminary legal conclusions prior to the award; they may discuss such conclusions – and they may also change those conclusions in the process of drafting the award. We have also mentioned that alerting the parties to a preliminary perception or conclusion may avoid a surprise, but may also provide assistance to the party who may benefit more from this information (and who could have and should have taken this legal analysis into consideration in any event). It also appears to be convincing that if the arbitrators do choose to inform the parties about a tentative legal perception, then they should also inform the parties about any subsequent change of this perception as well.

Questions 6 and 7. Decision-makers normally conduct their own research—for example, by consulting scholarly writings and cases. Thereby they contribute to the development of certain areas of law. It is true that, unlike court decisions, arbitral awards are typically not published. Yet, there are more and more awards that are, in fact, published and play a significant role in shaping legal perceptions. The arbitrators are supposed to know the law – and not only to the extent to which the parties have informed them of it. It follows from this logic that if the arbitrators find that a case has been overruled, and if they rely on the new decision, this can hardly be qualified as a violation of the right to be heard. A caveat of “except under special circumstances” would nevertheless remain. Such an exceptional situation could arise, for example, under the following circumstances: The parties present their arguments discussing inferences from an important case. This case gets overruled after the parties have presented their arguments, and after the arbitrators have declared the proceedings closed. If the arbitrators intend to rely on a new decision rendered during their deliberations, and if they find a decisive (rather than just supporting) argument in this decision, considerations of due process might prompt the arbitrators to give the parties an opportunity to state their position regarding the new legal development.

Questions 8 and 9. The answer to the question raised in Q. 8 is more straightforward. If a statute is, indeed, in the focus of arguments, the iura novit curia principle appears to allow the arbitrators to come to an interpretation relying both on arguments presented by the parties and on the results of their own research. The situation is somewhat more complicated when the parties concentrate their arguments on interpretations under law X, and the arbitrators come to the conclusion that law Y should be applicable. In such a situation various circumstances might become relevant. For example, the circumstance whether the applicability of law Y was a logical and foreseeable option. If the arbitrators come to the conclusion that the parties are relying on arguments under the wrong law, they may give a signal by way of inviting the parties to discuss the issue of applicable law.

Question 10. The recommendations adopted at the 73d ILA Conference provide further evidence of the growing awareness of the “taking by surprise”
issue. These recommendations also demonstrate that some balancing is needed—and that it is not easy to find unequivocal guidelines. Recommendation No. 10 appears to provide that if the arbitrators intend to rely on sources not invoked by the parties, they should bring these sources to the attention of the parties, and invite their comments. In some situations this could ensure procedural fairness, but in a good number of situations it would only afford some convenience to the attorneys on both sides. It might also result in inexcusable delays if the arbitrators would be required to disclose to the parties any and all sources they come across during their own analysis of the case. This is why Recommendation No. 10 tries to introduce some balance by stating that sources identified by the arbitrators themselves need only be communicated to the parties if they “go meaningfully beyond the sources already invoked [by the parties] and might significantly affect the outcome of the case”. Is this a clear guideline?

**Question 11.** The case decided by the Swiss Supreme Court was a relatively easy one. What the arbitrators mishandled was not just the rather volatile principle of not taking the parties by surprise. They acted in disregard of a joint request of the parties, and in disregard of their own procedural instruction. If the arbitrators are presented only with separate party requests, the question may arise whether these matching requests amount to a party agreement on the conduct of the proceedings. At any rate, it is certainly advisable to accede to such requests.

**Question 12.** It is quite likely that the letter of the chairman of the arbitral tribunal was inspired by the suggestions of the ICC Secretariat. The students may now consider these suggestions from a new angle. One has to mention that the position taken by the Philippine court is a rather isolated position, and it is not really likely that it will influence decision-makers in other countries. Nevertheless, it opens an interesting angle.

If one were to follow the logic of the Philippine court, the question could be raised, whether simple reliance on the article (justified by the *iura novit curia* principle), without inviting the parties to comment on it, would be a step away from appearance of bias, or a step closer to appearance of bias? In other words, would it be safer (and less indicative of bias) not to invite comments from the parties? Or should one perhaps expect the arbitrator to secure a balance in providing scholarly articles? Do the arbitrators have a duty to find and to bring to the attention of the parties both articles that support and articles that challenge a given position? (Or do these questions just show that it is difficult to defend the logic of the Philippine Court?)

Discussion could also follow another line. Arguments (or speculations) have emerged, suggesting that the protection against being taken by surprise is actually not a protection aimed at producing transparency in the proceedings. It is rather meant to be a protection against embarrassment (before clients) of lawyers who overlooked some fundamental cases and articles. This line of
reasoning has so far gained more attention during coffee breaks than in conference papers. Does it deserve attention in conference papers as well?

We do have a trend toward exercising caution against taking the parties by surprise, and we also have a trend of elevating the standards of impartiality. Both trends have a reasonable basis, but trends sometimes lead to steps that go too far. The question could be raised whether the suggestions of the Secretariat or the position taken by the Supreme Court of the Philippines (or both of them) represent steps that go too far. The arbitrators would have wider maneuvering room if they would neither be obliged, nor disallowed, to invite comments on an article not relied upon by either of the parties. Is this a reasonable amount of manoeuvring room?

(One also has to bear in mind that points made in a scholarly paper can hardly be a self-sufficient argument in deciding a case. They are more fitted to the role of supporting arguments. One also has to bear in mind that what is being issued by the ICC Secretariat is just a suggestion.)

IV.1.k. Confidentiality and Privacy

IV.1.k.i. Confidentiality of the Arbitration Proceedings and of the Award

Question 1. According to Article 28(3) of the 2010 UNCITRAL Rules, hearings shall be held in camera unless the parties agree otherwise. This rule represents today the mainstream solution. (Compare Article 26(3) of the 2012 ICC Rules, Article 23(6) of the 2014 AAA/ICDR Rules, Article 19(4) of the 2014 LCIA Rules, Article 38 of the 2015 CIETAC Rules.) The Chinese provision is slightly different from the others; it appears that under Article 38 of the CIETAC Rules, the arbitral tribunal may – in principle – order hearings in camera even if both parties would prefer an open session. (According to the second sentence of Article 38(1): “Where both parties request an open hearing, the arbitral tribunal shall make a decision.” It does not say “shall make a decision accordingly”. It appears from the wording that the arbitrators need not accept the request of the parties – although, other interpretations are also conceivable.)

The presumption in favor of closed hearings is not strictly a matter of law. It represents an advantage offered by arbitration rules, designed to attract parties who want confidentiality whether the other party wants the same or not. (Such a presumption is unlikely to deter the party who is not interested in confidentiality. The interest in confidentiality is typically much stronger. Those who have no such interest usually do not really care.)
The UNCITRAL Notes explain in item 31 that “It is widely viewed that confidentiality is one of the advantages and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which participants in an arbitration case are under the duty to observe the confidentiality of information relating to the case.” Such an answer is typically lacking in arbitration rules as well. All the rules referred to above deal with confidentiality of the hearing. Article 34(5) of the 2010 UNCITRAL Rules also provides for the confidentiality of the award. The AAA International Rules state in Article 30 that “[A]n award may be made public only with the consent of all parties or as required by law”; adding, however, that “except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise and, unless otherwise agreed by the parties, may publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details” The Rules of the Court of Arbitration at the Hungarian Chamber of Commerce and Industry seek a compromise between the principle of confidentiality and the benefits of publication. Article 15(2) of the 2011 Hungarian Rules allows publication in “legal journals or professional publications” upon consent of the President of the Court of Arbitration. The consent of the parties is needed (and cannot be replaced by the consent of the President) if the publication were to include “the names of the parties, their countries of residence, the nature and counter value of services rendered, or any one of these particulars”. Publication without “these particulars” is possible upon permission of the President of the Court of Arbitration, but “only in such a way that the interests of the parties will not suffer any harm”.

**Question 2 and 3.** Assuming that confidentiality of the arbitration proceedings is not a creation of law (which is a safe assumption in most countries) restrictions will probably have to be created by other means. The UNCITRAL Notes suggest in item 32 a discussion and recording of “agreed principles on the duty of confidentiality”. This is rarely done, and might burden the proceedings. It may nevertheless be advisable to proceed along the lines of the suggestion given in the Notes if confidentiality is identified as an important issue at the very outset. An agreement will, of course, only bind those who are parties to it. Employees of the institution may be deemed to be encompassed and liable by way of implication – because of the liability of the institution. (Students could be invited to read once again, from this perspective, Article 40 of the 2012 ICC Rules, which excludes liability of the arbitrators, of the ICC Court of Arbitration and of the Court’s employees, for any act or omission, “except to the extent such limitation of liability is prohibited by the applicable law”.)

If arbitration rules provide for a more extended notion of confidentiality specifying rights and obligations beyond the presumption of a closed hearing – as the Hungarian Rules do – parties accepting the jurisdiction of the institution will be deemed to have accepted the stated standards of confidentiality.
Who should be bound by confidentiality? In searching for an answer to that question, it might be helpful to consider the basis or source of the obligation of confidentiality in the first place. In the English case Hassneh Insurance Co, of Israel and Others v. Stuart J. Mew (Queen’s Bench Division – Commercial Court – 22 December 1992, 2 Lloyd’s Law Rep. 243 (1993), Judge Colman tried to define the scope of confidentiality. Accepting the idea of an implied obligation, Judge Colman mentions two possible sources of this obligation: a) the nature of arbitration itself; and b) the arbitration agreement. In a sense both of these sources derive the implied obligation of confidentiality from the arbitration agreement. One can advance the following line of argument against this proposition. The arbitration agreement is an agreement between the parties, and it binds the parties. But it is a strictly formal agreement. It must be “an agreement in writing”. This characteristic tends to cut against the theory of implied obligations. Only an arbitration agreement in writing is binding; thus, one might argue that only what is in writing is binding.

Even if one were to assume that an arbitration agreement is capable of generating an implied obligation of confidentiality, that obligation still would not extend to the arbitrators, because the arbitration agreement binds only the parties. The obligation of the arbitrators concerning confidentiality must come from another source. One could argue perhaps that the receptum arbitri contains such an implied obligation.

The 2012 Swiss Rules give a rather comprehensive list of actors bound by the duty of confidentiality. The question again arises, however, as to the source of this obligation. The best answer is probably that it derives from the Swiss Rules themselves. The parties accept the duty of confidentiality by submitting their dispute to the Swiss Rules. The arbitrators and tribunal-appointed experts may be deemed to have accepted confidentiality obligations under the Rules by accepting appointment (and fees) under the Rules. The same reasoning applies to the secretary of the arbitral tribunal. The Chambers (the various Swiss arbitral institutions) have formally adopted the Rules, and thus might also be considered bound by them.

Witnesses remain a problem. When they agree to testify, they typically agree only to speak the truth and nothing but the truth. The WIPO Rules try to shift responsibility to the party who calls a witness. This may be a solution, but questions still arise. Can the party really exert control over the witness? Is it fair to hold the party responsible? Should the party pay damages if the witness repeats his/her (truthful) testimony in public? What about witnesses invited by the arbitration tribunal itself?

Questions 4 and 5. In Hassneh Insurance Judge Colman states that the minimum requirement of confidentiality implied in every agreement to arbitrate is “that the hearing shall be held in private”. The privacy of the hearing is, incidentally, the standard set in most institutional rules. Judge Colman goes a
step further when he states: “privacy must in principle extend to documents which are created for the purpose of that hearing”. He distinguishes, however, the determination of rights and duties (the award itself) from the “raw materials” for that determination. Awards can, of course, be legitimately used for the purpose of enforcing or challenging the award itself. In *Esso v. Plowman* the Supreme Court of Victoria accepts what Judge Colman considers the bottom line (privacy of the hearing); but refuses any further extensions of privacy (keeping confidential what takes place in the course of the arbitration).

Confidentiality is often understood as a barrier against publicity. The winner should be content with the awarded benefits, and must not use the award or statements given during the process for P.R. purposes. This aspect of privacy can be contrasted with a prohibition on using the award or documents generated in the arbitration process for another lawsuit. (At this point, the LCIA Rules and the Swiss Rules take a rather clear position.)

One possible line of discussion is to compare (as Judge Colman did) the obligation of secrecy between banker and customer, on one hand, with confidentiality of the arbitration process, on the other. Is this an appropriate comparison?

The LCIA Rules and Swiss Rules are very similar in that they both give more explanation regarding confidentiality than do most other rules. Under the LCIA and the Swiss Rules confidentiality clearly extends to the “raw materials” generated for the purpose of making an award. It includes “all materials in the proceedings created for the purpose of arbitration”. Yet, these materials can still be disclosed, if there is a duty of disclosure, or if they are relied upon in court proceedings, such as actions for enforcement or setting aside. The 1998 version of the LCIA Rules contained a provision according to which materials generated for the purpose of arbitration may only be used in post-award legal proceedings, if these are *bona fide* proceedings. Hence, the losing party may challenge the award, and may submit to the court materials generated in the arbitration proceedings, but only if this is a *bona fide* challenge. This principle made some sense, but it was difficult to envisage effective implementation. It would be most difficult for a court to characterize a request as abusive (and to block disclosure) before the parties have presented their arguments. The 2014 Rules have dropped the *bona fide* requirement. Hence, materials created for the purpose of arbitration may be submitted to courts in the course of challenges or enforcement proceedings. The question also arises as to what limitations are contained in the wording “all materials in the proceedings created for the purpose of arbitration”. Documents that have already been used for other purposes are obviously excluded (they are not deemed confidential). What about a written agreement known only by the parties that was presented as evidence during the arbitration? Is this “material created for the purpose of arbitration”?
**Question 6.** According to the IBA Rules, the arbitrators have an ethical duty to keep the contents of the award and the deliberations of the tribunal confidential “in perpetuity”. Institutional rules are another possible source of the arbitrator’s obligation; if the rules of the institution state that the award must not be made public (without consent of the parties), the arbitrator who agreed to act and receive fees in accordance with the rules may rightly be deemed bound by a prohibition on publicizing the award.

Perhaps everyone would agree that it would be improper for an arbitrator to give an interview revealing the conduct of the deliberations and the content of the award. But how about citing the award in a scholarly article? The latter is probably not unethical as long as the parties are not identified by name or otherwise. But what are the sanctions against infringement of this ethical canon?

A transgression would in all probability have an adverse effect on the arbitrator’s reputation. This sanction is quite consequential. It would be much more difficult to find a reliable legal basis for other sanctions, such as nullity of the disclosed award, or damages.

The issue of the arbitrator’s testimony before a court is less difficult (for the arbitrator). It is up to the court to decide.

**Question 7.** *Ali Shipping v. Shipyard Trogir* reveals further difficulties deriving from the concept of an implied duty of confidentiality. One may ask what is, indeed, protected by confidentiality. If evidence from a previous arbitration is used in a subsequent arbitration, it may still be shielded from publicity by the confidentiality of the subsequent proceedings. In the opinion of the Court of Appeal this is not sufficient. “The fact that the arbitrator in the subsequent proceedings will in turn be bound by the duties of confidentiality is no cure for the damage which the objecting party perceives may be caused to his interests from an adverse decision resulting from, or influenced by, the disclosure sought to be made.” The question is whether it is rational to protect such interests. In the opinion of the Court of Appeal there is a presumption of confidentiality shielding even positions that are "more tactical than meritorious". One has to wait and see whether evidence in the subsequent process is actually "significantly at odds with the evidence of witnesses in the First Arbitration", before deciding whether it is contrary to the interests of justice to suppress earlier evidence. The Court of Appeal does not block the road to justice; confidentiality is not absolute, but the hurdle posed by the presumption is a substantial one.

**Question 8.** Confidentiality of the arbitration proceedings will not extend to court proceedings, when setting aside or recognition and enforcement are at issue. In order to decide on setting aside or recognition, the court has to focus on the award. The scrutiny of the award normally entails a scrutiny of the fairness of the arbitral proceedings. In this setting, the court obviously needs the award, and needs proper information about the proceedings in order to be able to render a
correct decision. The situation is different when we have parallel interrelated proceedings, and the question arises whether materials generated during one proceeding can be used in other related proceedings. In this context there is no significant difference between the situation in which the parallel proceeding is another arbitration proceeding (such as occurred in the *Ali Shipping* case) or when the parallel proceeding is a court proceeding.

In the *Emmot* case, it was held that that implied consent (to confidentiality) does not prevent disclosure in the given case. The court formulated four possible grounds on which one may depart from confidentiality. The first two do not say much new. There will be, of course, no confidentiality if the parties agree to lift confidentiality, or if the court so orders (adding that the court will not have “general discretion to lift the obligation of confidentiality”). The third and the fourth grounds are more relevant, because they provide considerable flexibility in dealing with the issue of confidentiality.

One could also argue that the *Emmot* decision is not really a milestone; it does not change basic principles. It provides, however, more flexible standards that permit departure from the obligation of confidentiality. When the question is whether to allow the use of evidence generated in arbitration proceedings, it is easier to meet the “reasonably necessary for the protection of legitimate interests” standard, than to demonstrate – as required by *Ali Shipping* - that the evidence presented in the parallel (or subsequent) proceedings is “significantly at odds with the evidence of witnesses in the First Arbitration”.

The fact remains that in the UK, as the *Emmot* court states: “*The limits of that obligation [the obligation of confidentiality] are still in the process of development on a case by case basis.*”

**Question 9.** We have seen that the concept of an implied term of the arbitration agreement providing for confidentiality is not generally accepted. But what about an explicit undertaking? Such stipulations are quite rare, but they are certainly possible. The obligations thereby created would certainly be stronger and more unequivocal than those inferred from an implied consent. The UNCITRAL Notes recommend agreements on the exact range of confidentiality. (See item 32) Such agreements are limited, however, by public policy. There are rights one cannot validly give up by contract. (E.g. an agreement that only party “A” will be allowed to present witnesses, while party “B” will not, infringes basic notions of due process, and it is contrary to public policy.) An agreement that would, say, bar the losing party from presenting the actual award in a proceeding to set aside that award is contrary to the principles of public control over arbitration. Explicit arrangements on confidentiality have their limits in public policy – but public policy is a last resort, an instrument rarely relied on.

**Questions 10 and 11.** Specifying what is confidential and what is not, is certainly helpful, but in shaping such definitions, legislative acts will necessarily
have to rely on a mix of specifications and broad terms. The distinction drawn by Mason CJ may inspire different opinions. The point made by Mason CJ is that if a party is compelled to provide some information, this party should be entitled to more confidentiality, because it did not disclose the information on its own motion and for the purpose of furthering its own case. Of course if a party is submitting some information on its own motion during the arbitration proceedings, this party might still expect confidentiality – on the assumption that arbitral proceedings are confidential. Willingness to submit some information during the arbitral proceedings, does not necessarily imply willingness to waive confidentiality. This takes us back to the basic question whether arbitral proceedings are or are not confidential (in the absence of a specific stipulation on confidentiality). The nature of the information should also remain a criterion. In other words the distinction between production of documents on party motion and production of documents imposed by mandatory norms may have a certain relevance, but probably cannot replace other considerations like those pertaining to the existence of an implied consent, or those pertaining to the nature of the information in question.

**Question 12.** Even assuming that the theory of the implied term is not challenged, it would be difficult to contest either the subsequent arbitration proceedings, or the result in the first one, on ground that the award, or the minutes, of the first proceeding were relied upon in the subsequent proceeding. It would be difficult to squeeze this fact pattern into one of the categories that would justify setting aside, or a refusal to recognize and enforce. One option the students might investigate is that offered in Article V(1)(d) of the New York Convention allowing refusal of recognition and enforcement if "[the arbitral procedure was not in accordance with the agreement of the parties]."

V(1)(d) does not seem particularly promising, however. The following arguments may be advanced. One cannot say that the first proceedings were not in accordance with the agreement of the parties, because the disregard of confidentiality occurred in the second proceedings. As far as the second proceedings are concerned, their confidentiality is (supposedly) covered by the implied terms of the second arbitration agreement, which was not infringed.

The breach of confidentiality described in the hypo probably cannot serve as a basis for nullifying the results of either the first or the second proceedings. Would it be possible to base a claim for damages on a breach of contract theory? This is conceivable; but it would be difficult to demonstrate awardable damages. It is not likely that a court would accept the amount of the second award itself as the measure of damages, if the second proceedings were deficient only in the sense that the winning party presented and relied on a truthful document in spite of a party agreement to withhold it.

**Question 13.** Confidentiality allows the parties to proceed without embarrassment – and to satisfy the award without embarrassment. Thus, it probably enhances voluntary enforcement. Parties may adopt a more
cooperative attitude if they know that there will be no headlines tomorrow heralding: “COCA COLA VICTORIOUS OVER PEPSI!” or maybe: “COCA COLA ADMITS DEFEAT AND SATISFIES THE AWARD IN FAVOR OF PEPSI”.

On the other hand, publication has many benefits. It is certainly a valuable assistance in shaping modern arbitration and arbitration law. For one thing, authors of casebooks would be in deep trouble if no arbitration awards were in the public domain. A scrutiny of arbitration cases, critical comments, are all natural parts of legal development.

Nowadays, awards are published with quite some frequency. In most cases, however, identification of the parties is omitted. (Furthermore, confidentiality is not an issue at all regarding awards – or parts of awards that have been integrated into court decisions in the course of recognition and enforcement, or setting aside proceedings.)

The fact that the award that was published dealt with jurisdiction only, certainly made the case less sensitive. However, the Swedish Supreme Court did not attribute any special weight to this circumstance. It held that a party to an arbitration agreement could not be held to be bound by the duty of confidentiality, unless the parties expressly agree on such duty.

**Question 14.** Assuming that the arbitration agreement implied the duty of confidentiality, the publication of the award by the winning party would have represented a breach of such an implied term. Two questions can be raised at this juncture.

First, is the concept of an implied term compatible with the rule that the arbitration agreement is only valid if it is in writing? (Can anything not in writing be a binding part of an arbitration agreement?)

The second question arises in the specific context of the *Bulbank* case, where it was important to know whether the parties remained bound by the arbitration agreement after the alleged breach of the implied term – because the merits of the case remained unresolved. The question is what consequences should follow from the breach of an implied term? The authors are not in favor of the concept of an implied term. If there were, nevertheless, an implied duty of confidentiality, the question would still arise whether a breach of this duty should result in termination of the arbitration agreement, or whether another remedy (for example damages) would be more appropriate.

Assuming that one of the parties caused publication of the award on the merits, the issue of a possible termination of the arbitration agreement would become moot (at least with respect to the same case), and the question would arise whether annulment or refusal of recognition would be proper remedies. (Always assuming, of course, that there was an implied duty of confidentiality.) It
would be difficult to find a ground for annulment in the Model Law that would encompass this situation. Grounds for annulment concentrate on possible errors made by the arbitrators (not by the parties). Furthermore, the grounds for annulment stated in Article 34 of the Model Law contemplate deficiencies that precede (and influence) the award, whereas publication in the instant case took place after the award was rendered.

**Question 15 - 18.** Having in mind the above discussion, it is difficult to envisage any remedy other than damages when the wrong consists of publishing the award (assuming such publication infringed an implicit or explicit party undertaking). Annulment does not seem to be an available remedy (for the reasons stated in connection with question 11). Termination of the arbitration agreement is not out of the question, but this will only have relevance in *Bulbank*-type situations, or with regard to different lawsuits to which the given arbitration clause would also apply.

If the duty of confidentiality is breached by the arbitral institution, annulment again seems an inappropriate remedy. As mentioned, grounds for annulment concentrate on acts or omissions that precede the award, whereas publication is a post-award event. Furthermore, annulment does not appear to be a fair response to the wrong of publication.

Damages are a more plausible option. Moreover, the reputational damage an institution is likely to suffer would also be an effective deterrent. Article 15 of the Hungarian Rules is helpful because it sets out some guidelines that are typically missing. At present, arbitral institutions do publish awards; they usually do it more or less with the same restrictions that are spelled out in the Hungarian Rules. Parties typically do not protest. This is the practice - in an area with very little regulation.

Some regulation can be helpful. The situation is clearer if the parties, in submitting their case to a given institution, can be presumed to know about the guidelines concerning publication (and can be deemed to have accepted these guidelines by agreeing to arbitrate under the given rules).

One could ask, though, whether the “[o]nly in such a way that the interests of the parties will suffer no harm” language really provides sufficient certainty and predictability as a guideline. Should the quoted language be made more specific, or would you favor dropping it altogether from Article 15?

The LCIA Rules are more cautious. They only allow publication upon consent of both the parties and of the arbitral tribunal. The Swiss Rules are more favorable toward publication in that they set up a default rule if the parties are silent. For example, if one party (or a law professor) requests permission to publish and no party objects within the time limit fixed by the Swiss Rules, publication is allowed. Like the Hungarian Rules, the Swiss Rules also
contemplate publication without identification of the parties, but – unlike the Hungarian Rules – they do not provide for further restrictions regarding the content of the published award. (Of course the Hungarian Rules’ more restrictive approach is logical considering that under the Hungarian Rules publication in legal journals and professional periodicals is possible even without consent of the parties.) Students may be invited to state their preference as between two options: (i) publication of the whole text but only upon consent of the parties; and (ii) publication without party consent, but also without elements that would reveal the parties’ identity and without other sensitive details of the dispute.

**Question 19.** The NAFTA award focuses on a special facet of confidentiality – that of public discussion of the arbitration proceedings. The arbitrators were obviously not in favor of public comment. Yet they did not find in the ICSID and NAFTA Rules any restriction on the parties’ freedom of expression concerning the dispute. The award does not accept the proposition of an implied duty of confidentiality. It states instead that unless the agreement of the parties imposes a restriction, the parties are free to speak publicly about the arbitration. The only basis for restraint is that “it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties” (to limit public discussion to a minimum). This is more a guideline than a norm. Could a party be sanctioned for violating this guideline? Probably not. But in an ongoing proceeding, the parties are normally motivated to observe guidelines and to avoid confrontation with the arbitrators. Hence, it makes sense to state such guidelines.

The NAFTA award offers an interesting juxtaposition of two potentially conflicting obligations: on one hand, the duty of confidentiality concerning the arbitration proceedings, and on the other, the duty to provide information to the shareholders. As long as we are dealing with a situation in which the duty of confidentiality is only implied, the duty toward shareholders will in all likelihood prevail. But what if the parties explicitly stipulate for confidentiality concerning the arbitration proceedings? The outcome of the arbitration can probably not be withheld from those whose money is at risk. What about information concerning events during the proceedings?

**On Breach of Confidentiality by the Arbitrators**

**Questions 1 and 2.** The Québec Court of Appeal makes a distinction between confidentiality imposed by legislative norms on the one hand, and the concept of an implied duty on the other hand. The only relevant legislative provision at hand was that of deliberative secrecy. It is quite clear that disclosing that the award (that was not yet formalized and communicated to the parties) will be a unanimous award, represents a violation of deliberative secrecy. The more difficult question is whether deliberative secrecy should also prevent the disclosure of information about the respective positions of the parties. Arbitrator Vautour stated that the issue of the adjustment of the purchase price (foreseen
but not sufficiently explained in the contract) represented the core of the dispute. He even added that the positions of the parties were about 2 million Canadian dollars apart. In all likelihood, these issues were raised and discussed during the deliberations as well. Should these disclosures be a part of deliberative secrecy? The Quebec Court held that they were not. As the court states in paragraph 43 of the Judgment: “Although these disclosures also occurred during the deliberative process, they are of a different nature than the disclosure of the unanimous character of the decision to be rendered. Instead, they recount some of the evidence heard and the parties’ positions during the process without any characterization of the evidence, assessment of the arguments, nor disclosure of the reasoning process in which the arbitrators engaged.” Within this understanding, deliberative secrecy appears to cover the position of the arbitrators only, their opinions, assessments, agreements and disagreements. Is this an acceptable interpretation of deliberative secrecy? The Quebec Court has also pointed out several times that all parties were actually present when arbitrator Vautour disclosed information about the case, and no one objected (then). Is this relevant?

**Question 3.** Assessing the relevance of a procedural violation is a somewhat dangerous undertaking. On one hand, it might save an award which has been properly shaped without being influenced by the procedural imperfection. On the other hand, the analysis of relevance may take us beyond the boundaries of limited court control – because, one might need to analyze the merits of the award in order to establish what the impact of the disregard of the procedural rule was. There are, however, cases in which this difficult dilemma does not arise, because it is prima facie evident that the procedural imperfection could not have had an impact on the outcome. The Rhéaume decision appears to be such a case.

**Question 4.** If one accepts the assumption that the arbitration agreement has to be in writing, the argument could be made that the parties are only bound by an agreement in writing. This perception would leave no room for implied consent. It is possible, of course, that written party stipulations, arbitration rules and statutes dealing with confidentiality may be subject to different interpretations.

**Question 5.** As stated above in connection with Q.2, the Quebec Court offered a plausible, narrow interpretation of the duty of deliberative secrecy. The theory of implied consent has received little international support. Nevertheless, one could argue that giving information about the parties’ positions in a still ongoing case (a case still “under advisement”) is not in line with professional and ethical standards.
Questions 1 - 3. The United Kingdom is probably the country that has taken the most receptive attitude toward claims of confidentiality. The Bankers Trust case raises new issues concerning confidentiality. It has generally been understood that confidentiality extends only to arbitral awards. Bankers Trust raises the issue of whether the award and documents produced in the course of arbitration proceedings can be relied upon in subsequent court proceedings. As we have seen, the predominant opinion has been that they can be. (The 1998 LCIA Rules added a caveat here by limiting the right of disclosure to bona fide proceedings, but this caveat was lifted in the 2014 Rules.) In a case decided on 29 January 2003, the Court of Appeal of Bermuda held that the winning party in an arbitration case is allowed to disclose the award in another arbitration case even where there is an explicit clause providing for the confidentiality of the first award. The Bermuda court held that since the essential purpose of arbitration was to determine disputes between the parties to arbitration, an arbitration agreement providing for confidentiality should not be construed so as to prevent one party from relying upon an award giving that party rights against the other party. (Associated Electric & Gas Insurance Services Ltd. v. European Insurance Comp. of Zurich, Court of Appeal of Bermuda, 29 January 2003, UKPC 11, 2003) While restrictions pertaining to the disclosure of documents stemming from arbitration proceedings have been controversial, there has been a general understanding that confidentiality – even if it might possibly block disclosure of the award – could not possibly extend to the result of court proceedings. The Bankers Trust case now raises the question whether confidentiality could be broadened to encompass court decisions dealing with arbitral awards.

Note also that Lord Mance does not make confidentiality of the court decision depend on proof that publication would cause some form of detriment. Does this mean that confidentiality of a court decision dealing with an arbitral award is a general rule, rather than an exception that must be justified? Is there a presumption in favor of confidentiality (of the court decision), and is this an acceptable assumption? From what aspect of the agreement or the proceedings could one derive such a presumption? Are we returning to the idea of implied consent (extended to the post-arbitration phase)?

The publication of the Lawtel summary certainly eases the strictness of the pro-confidentiality position. The question can be raised, however, whether publication of the Lawtel summary is compatible with the assumption that there is a presumption in favor of confidentiality.
(Note also that publication of the Bankers Trust decision, which explains that Moscow City won the arbitration case, and that setting aside was denied, already supplies at least part of the information Moscow City wanted to make public.)

Questions 4 and 5. It is common ground that a “public hearing” and the principle that “judgments shall be pronounced publicly” are among the requirements for a fair proceeding adopted in the European Convention on Human Rights.

In Pretto and Others v. Italy the European Court of Human Rights stated: “The public character of proceedings before the judicial bodies referred to in Article 6 paragraph 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 paragraph 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society…” (Pretto and Others v. Italy, Judgment of 8 December 1983, Series A No. 71 pp.11-12 §§ 21-22)

It is also common ground that there may be exceptions to these principles – but that they must be justified. Students might be asked to consider whether we have in our case an exception in favor of confidentiality that fits within the exception “[i]n the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice”. The authors are inclined to think that the Bankers Trust pattern does not meet this standard.

Another possible justification is suggested by the waiver argument. A public hearing can obviously be waived – as is the case with most arbitration proceedings. Publication of the award is also waivable. Is there a reason to distinguish between waiver of publicity in the case of arbitral, as opposed to court, proceedings?

With respect to the Bankers Trust case, the “waiver” argument is also open to debate. The Suovaniemi case is not a case about confidentiality, but it is a case about arbitration, and about waiver. In Suovaniemi, the European Court of Human Rights did say that a waiver of Article 6 rights is possible, if it is a “permissible waiver”. One possible line of discussion could focus on the definition of a “permissible waiver”. There are few guidelines available for such a discussion. It is probably fair to say that only those waivers are permissible that do not endanger some basic due process standard. A waiver of the right to publication of an arbitral award probably fits within the category of a “permissible waiver”. It is also important, however, that the European Court stated in a
number of its decisions that a waiver of a right guaranteed by the Convention – insofar as it is permissible at all – must be established in an unequivocal manner. (See Oberschlick v. Austria, Judgment of 23 May 1991, Series A No. 204, p. 23, § 51, Pfeifer and Plankl v. Austria, Judgment of 25 February 1992, Series A, No. 227, p. 16, § 37) In our case, in all probability there was no explicit waiver (or “waiver established in an unequivocal manner”) extending to the confidentiality of court decisions rendered in a setting aside proceeding.

**Questions 6 and 7.** The *Esso* case and the *Bulbank* case have rejected the proposition of an implied term and of an implied duty. Does the “evidently confidential” characterization suggest a different proposition? The *Bankers Trust* court does not refer to any explicit undertaking of the parties regarding confidentiality. In the absence of such a stipulation, it is probably the nature of the information that may cause one to conclude that it is “evidently confidential”. We do not have sufficient information about the nature of the information. We do know, however, that according to Lord Mance, no detriment from publication was proven “beyond the undermining of its [Bankers Trust’s] expectation that the subject-matter would be confidential…” One could argue that reliance on an expectation of confidentiality takes us essentially back to the “implied term” theory. Do you agree?

**Question 8.** The “limited publicity” option reminds us of the question raised in the *Mexico v. Metalclad* case (see Question 16 in IV.1.j.i). In *Mexico v. Metalclad* the NAFTA Chapter Eleven arbitrators raised the issue whether the duty to provide information to shareholders supersedes the confidentiality of the arbitration proceedings. In the *Bankers Trust* case Moscow City asked for permission to send the court decision to “sub-participants in Credit Agreement No. 750”. Is this the same thing as providing information to shareholders?

One could also raise the question whether an estoppel argument could be advanced against Bankers Trust, since, prior to and during the arbitration Bankers Trust gave notice to various financial institutions that had acquired an interest as sub-participants in Credit Agreement 750.

The *Bankers Trust* court states that it is difficult to see how one could fashion a limited publication right (available to the sub-participants) and effectively limit it to the sub-participants only. This might be a good starting point for discussion. The *Bankers Trust* court also observes that it is common ground that Moscow is free to state openly the end result of the arbitration and of the litigation. Does this – combined with the publication of the Lawtel summary – actually take care of the problem? How do you compare stating the end result with the notice Bankers Trust actually gave to sub-participants prior to and during the arbitral proceedings?

**Question 9.** There is an important difference between the *Bankers Trust* case and the *Decapolis* case. In the *Decapolis* case confidentiality of the
court decision itself was not at issue. What were sealed were documents filed in confirmation proceedings (the award and the petition to confirm).

Normally, the party opposing confirmation tries to avoid compliance with the award. In this case, the respondents already complied with the award, but wanted to avoid publicity. Therefore, they first asked the court to dismiss the case, because there was no actual controversy. At the same time they submitted a motion to seal, which was granted. Therefore, one could say that in the Dallas case, the party opposing confirmation in a way prevailed, in spite of the fact that confirmation was granted.

This atypical case unveils another layer of confidentiality that might prompt interesting discussion, and might gain more importance in practice as well. One should note that what is here relevant are not only the (justified or less justified) interests of the parties, but the public interest as well.

**IV.1.I. Time Limits for Accomplishing the Mission of the Arbitrators**

**Questions 1 and 2.** Party agreements setting a time limit for rendering the award are helpful, because they put pressure on the arbitrators, influence their perception of priorities, and bring about a speedier process. At the same time – as the Dubois et Vanderwalle v. Boots Frites BV case shows – such arrangements may be dangerous as well. One possible adverse affect is an award rendered within the time limit – but before the case was really ripe for decision. The other possible danger arises from non-observance of the time limit (with or without good reasons), in which case the award is open to challenge.

Parties can certainly adopt procedural rules, and it is common ground that non-observance of these rules may subvert the award. The question is whether a late award can be rescued by reliance on other norms hierarchically above the agreement of the parties. Boot Frites, the party requesting recognition, argued that Dutch law – which was the lex arbitri – allows the arbitrators to determine for themselves when they will render the award. Mandatory provisions of the lex arbitri may conceivably override party arrangements. It is by no means clear, however, whether the provision of Article 1048 of the Dutch Act is mandatory. The Paris court did not investigate the nature of the Dutch statutory provision. It followed another line of argument, and found that the procedural arrangements laid down by the parties could not be superseded, because their observance was a matter of public policy.

Arguments can be advanced both ways. Arbitration in contravention of party stipulations may save the process (and the parties) from the consequences
of imperfect drafting in a given case. At the same time, however, a cornerstone of the arbitration process would be undermined.

Article 30 of the 2012 ICC Rules provides for a time limit of 6 months, but allows the Court to extend this time limit upon request from the arbitral tribunal, or upon its own motion. (In practice, extensions are quite frequent.) Article 38 of the 2012 Rules also allows the parties “to shorten various time limits”, but again leaves the final decision in the hands of the Court, stating that the Court may extend any time limits modified by party agreement. By submitting to ICC arbitration and ICC Rules, the parties have also accepted that the Court will have the upper hand when it comes to their own agreements on time limits. This solution helps to overcome a *Boots Frites* type of problem.

**Question 3.** After recognition was denied, Boots Frites could re-start arbitration. The success of such an attempt depends on theories of the exhaustion of the arbitration agreement. Normally, the arbitration agreement is exhausted when a valid award is rendered. (It may still be valid for other disputes arising out of the relationship within the scope of the arbitration agreement.) In this case the award was not formally declared invalid, because it was not set aside in the country where it was rendered (the Netherlands). Nevertheless, the court refused to give the award any effect, without ever having reached the merits.

Denying the winning party any further chance to effectuate its claim would be against common sense. Tardiness of the decision-maker should not eliminate a valid claim. The question is whether any new opportunity should be by way of arbitration or litigation – and there is no clear answer. A possible strategy for claimant is to initiate one or the other of the two proceedings, and to wait for respondent’s reaction. If claimant starts with litigation and respondent seeks a stay and asks the court to refer the case to arbitration, claimant should probably accept new arbitration. If respondent does not rely on the arbitration agreement to raise objections, litigation might proceed.

The question might also be asked whether further action may be blocked by a res judicata-type defense. Probably not. Respondent cannot contend claim preclusion while opposing the decision effectuating the claim.

**Question 4.** Were the lex arbitri the present (1996) English Arbitration Act, Boots Frites might have a better chance to have the award recognized and enforced than the one he had under the Dutch Act.

The English Act does not attack head on the principle that the arbitrators are bound to follow party agreements regarding procedure. This principle is a cornerstone of the arbitration process. The same principle allows, however, situations described by van den Berg as “Scylla and Charybdis situations”, which are rare, but can emerge when party agreement is in conflict with a mandatory
provision of the lex arbitri. In trying to avoid one risk of invalidity, the arbitrators may fall into the trap of a different such risk. Section 50 of the English Act tries to limit the reach of this potential problem. It distinguishes between party agreements on time limits that may, and those that may not, be extended by court order. Parties may set a time limit that cannot be extended, but the Act stresses that this has to be stated explicitly. This means that if the parties simply state that the award must be rendered within a given number of days (as was agreed in *Boots Frites*), the court may extend this time limit “[i]f satisfied that a substantial injustice would otherwise be done”. If the parties really want to make their time limit final and conclusive – in other words, if they want to exclude court intervention – they must state this explicitly in their agreement.

Were such principles applicable, the *Boots Frites* time limit could be interpreted as a non-conclusive one. (The problem would remain, however, if neither the party nor the arbitrators were to seek an extension.)

**Question 5.** The ICC included the presumption in Article 31(3) of the 2012 ICC Rules (“The award shall be deemed to be made at the place of the arbitration and on the date stated therein.”) to avoid difficulties in ascertaining the exact time and place of rendering the award. (Awards are typically rendered after the hearing, and after the arbitrators have left the site of the hearing. Sometimes they reach a basic understanding before leaving, but they do not really agree on the text of the award, because it is not ready yet. Usually the presiding arbitrator will present a draft, and the final version will be hammered out via correspondence. In this situation, endless scholarly debates could ensue regarding the place and the date of the award.) The UNCITRAL Model Law opted for a presumption regarding the place only. This allows the arbitrators to indicate one of the logical sites as the place of the award (the place where the award was formulated, or perhaps the place where the last arbitrator’s signature was added to the award) – and it also allows the arbitrators to designate as the site the one chosen by the parties, without being torn between this site and some others also connected with the making of the award. One of the reasons why UNCITRAL chose not to include a presumption regarding the date of the award was probably a fear of encouraging misuse by tardy arbitrators.

One way or another, the purpose of the presumption in favor of the date and place stated by the arbitrators is to avoid difficult dilemmas, and to offer the arbitrators a certain discretion in choosing between two or more logical places and dates.

By accepting the ICC Rules the parties may be deemed to have consented to the arbitrators having reasonable discretion to choose among several plausible sites and dates. This falls short, of course, of authorizing deliberate backdating.
**Question 6.** Time limits are helpful, because they are conducive to more efficient proceedings. It is not easy, however, to agree upon the date from which these time limits should be counted — and it is not easy to agree either, upon how stringent these time limits should be. As far as the starting point is concerned, the basic options are a shorter time limit counted from the moment when the proceedings are closed, or a longer time limit counted from the beginning of the proceedings. Different nuances may be formulated regarding the date of the closing of the proceedings (like the date when the taking of evidence is completed, the end of the final hearing, or when the arbitrators declare the proceedings closed). The “beginning of the arbitral proceedings” may also be tied to different procedural acts. The Hungarian, Vietnamese, and some other rules have fixed a short deadline, which begins to run from the moment the presentation of arguments and evidence is completed. The 2014 ICDR Rules have taken the same approach by setting a time limit of 60 days counted from the date of the closing of the hearing. The Romanian, Spanish, Brazilian (and some other acts and rules) provide a more generous deadline, but one which is measured from a different date. The Romanian Act takes as a starting date the date of the constitution of the tribunal. Under the Spanish Act the clock starts to run from the date of the submission of the statement of defense (or from the expiry of the period allowed for its submission).

The argument in favor of the ICDR, the Hungarian and similar approaches is that after the presentation of the proof is completed, most obstacles to a speedy decision, except those for which the arbitrators are solely responsible, have already been eliminated. The case is essentially in the hands of the arbitrators; it is up to them to write the award within 30 days (or 60 days).

The Romanian, the Spanish and the Brazilian acts (and the ICC Rules) provide for six months. Within these six months (from the constitution of the tribunal, i.e. from the submission of the statement of defense, “from the date of the commencement of the arbitral proceedings”, or from the date of signing the terms of reference) many things might happen – or might fail to happen – that would affect the pace of the proceedings. The arbitrators have, of course, means to avoid obstructions and delays, but their powers in this respect are not unlimited. If an expert is late with the report, the arbitrators can replace him – but this will not necessarily solve the problem of delay. If a government agency must issue an important document and the document is not issued within the time promised, there is not much the arbitrators can do.

The situation is more predictable after the closing of the proceedings, which is an argument in favour of shorter deadlines starting from that moment. On the other hand, deadlines that start running from the beginning of the proceedings exert more pressure during the proceedings. It is also important to add that most rules that set a fixed deadline typically also provide for an opportunity to extend the deadline by a decision of the arbitral institution. It is not
Questions 7 and 8. Time limits put pressure on the arbitrators, and this makes sense given that arbitrators are typically professionals with many commitments that may yield conflicting professional priorities. Of course, an arbitrator should not accept more duties than he (she) can handle within a reasonable amount of time, but prudent parties should not rely on arbitrators unswervingly observing this principle. In short, some pressure may be helpful. Time limits fixed by the parties (or by law, or by institutional rules) are one way of exerting pressure. There are other means as well. The Regulations for Arbitrator’s Remuneration of the Japan Commercial Arbitration Association (Amended and Effective February 1, 2014) provide in Article 4 for a decrease of the arbitrator’s hourly fees after sixty “arbitration hours” (The same provision was contained in the 2004 Rules). The rule thus discourages arbitrators from spending more than the usual amount of time on a case. In a similar vein, Article 2(2) of Appendix III to the 2012 ICC Rules states: “In setting the arbitrator’s fees, the Court shall take into consideration the diligence of the arbitrators, the time spent, the rapidity of the proceedings, the complexity of the dispute, and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 37(2) of the 2012 Rules), at a figure higher or lower than those limits” (emphasis added).

Time limits may exert pressure in the right direction, but they may also jeopardize the process. This is why various arbitration acts and rules have tried to combine pressure with safety valves. Several options have been developed, and some acts use a combination of them:

Some acts emphasize that the parties may extend the time limits set by themselves (which is, of course, possible, even where this option is not emphasized by the legislator);

Time limits may be extended by courts (as provided, e.g., by the English Act). Extension by court might save the arbitration process, but might also frustrate attempts to bring about a speedy award. Court scrutiny of the request for extension also takes time;

According to the Romanian Act and to the Spanish Act, the arbitrators can also extend the time limit set – but only up to two months under the Spanish Act, and up to three months under the Romanian Act.

Some rules, like Article 30 of the ICC Rules, or Article 31 of the 2009 Rules of Arbitration of the Arbitration Center of Mexico, permit extension by the administrative authorities of the institution (the ICC Court, or the Secretary General of the Mexican Center)
The dilemma is whether to fix time limits in the form of hard and fast rules, or whether a “soft law” approach is more appropriate. Students can weigh the pros and cons. The authors' preference is for time limits that do exert pressure on the arbitrators, but that cannot yield a Boots Frites type of situation. Of course, if the time limits are flexible, the pressure is less efficient – but this still appears to be the lesser evil.

**IV.2. Choice of Law Issues Before the Arbitrators**

**IV.2.a. Note**

**IV.2.b. Applicable Substantive Law—The Prevailing Concept: Party Choice or Choice by the Arbitrators**

*Question 1.* In all three norms referred to, the basic principle is the same. The parties are free to determine the applicable substantive law. If they fail to do so, the choice will be made by the arbitrators. There are, however, some differences in wording that need not amount to practical differences. Article VII of the European Convention – as well as Article 28 of the Model Law – states that in the absence of party choice, the arbitrators will choose conflicts rules at their own discretion, which will then lead them to the applicable substantive law. They do not have to opt for the private international law (conflicts rules) of a given country. They may choose a conflicts rule without identifying its national or legal origin. (It is common though, to explain that the conflicts principle chosen is well recognized, which is evidenced by its adoption by the jurisdictions concerned, or by international agreements, or “in modern legislative solutions” – and this line of argument typically entails some reference to conflicts norms of one or more countries.) In the final analysis, however, the choice of substantive norms is indirect; the arbitrators are free to choose the criterion of selection, rather than the applicable rules themselves. Article 21 of the 2012 ICC Rules – as well as, for example, Article 28(1) of the AAA International Rules – provides for a direct choice. In the absence of a choice made by the parties, the arbitrators are to apply the substantive rules that they deem appropriate.

This difference is much more a difference in style and approach than a difference in practical consequences. There is nothing to stop arbitrators from choosing a conflicts rule that would lead to the substantive norms that they deem to be most appropriate. On the other hand, arbitrators acting under the ICC Rules or the AAA Rules will normally also follow some conflicts logic. They will choose among the substantive rules that have some territorial (or other) connection to the case.

All three sources contemplated oblige the arbitrators to consider the terms of the contract and relevant usages of trade.
Again, according to all three sources, amiable composition is only allowed when it is expressly authorized in the arbitration agreement.

Article VII of the European Convention clearly set a significant trend.

**Question 2.** (a). Article 28(1) of the Model Law explicitly excludes renvoi. This means that the conflicts rules of the law chosen by the parties will not be considered. The parties’ reference to Swiss law means that the parties want Swiss law to apply, rather than the law deemed applicable by Swiss conflicts rules. There is no such clear answer to the question whether the law referred to is Swiss substantive law, or Swiss procedural law, or both. Two arguments may be advanced in favor of substantive law: 1) the wording “the law governing this agreement” is more indicative of contract law than procedural law (unless the agreement is understood as the arbitration agreement proper which is subject to both substantive and procedural regulation); and 2) it is simply more common to choose a substantive law. Thus, we probably have a designation of Swiss substantive law.

(b). Article 28(1) seems to allow the parties to choose rules that are not norms in force in any country. This understanding is supported by the term “rules of law”, which is a broad designation, including possibly rules that have not become (or that are no longer) effectively in force in any country. The arbitrators do not seem to have the same latitude. According to Article 28(2) they can only apply law, the law designated by the conflicts rules selected by the arbitrators. Conflicts rules lead to the substantive law of a state or country; they do not lead to drafts, or restatements.

(c). An early version of the Vienna Convention may be deemed a set of “rules of law”, but it is not law in force. Such a choice cannot replace or supersede, however, a basic legal setting. A contract cannot completely escape some framework of mandatory norms. It is quite possible, and even likely, that the chosen “rules of law” – such as a draft convention, or the UNIDROIT Principles, or the UCP on letters of credits – will provide a solution for the specific questions raised in the dispute, and that no one will even argue that this solution would be contrary to mandatory principles of some municipal law that may be deemed applicable. The arbitrators will, however, have to establish the applicable law if the chosen rules of law do not cover all emerging issues, and/or if some provisions of the chosen rules of law are contested as being contrary to mandatory principles of a governing law. (The arbitrators might also raise sua sponte the question of conformity of the chosen rules with principles that the parties cannot contract out of; and in order to identify these principles an applicable law has to be established.)
**Question 3.** The concept of anational arbitration is a proposition that has given rise to much scholarly discussion. It is clear that arbitration does not have a home (and a home country) in the way that courts do. If the parties choose ad hoc arbitration according to UNCITRAL rules; one of the arbitrators is a U.S. citizen, the other French, the third one Hungarian; and the hearing takes place in Switzerland – while the award is drafted through correspondence – there is no obvious national link for this arbitration process. The arbitral tribunal and the award are not obviously a tribunal and award of a given country. (This problem has been raised earlier and may emerge at later junctures in the materials as well. One can always invite students to discuss whether a given arbitration should be attached to any country, and if so, to which one.)

The New York Convention, which is the backbone of modern international commercial arbitration, has not adopted the concept of anational awards. It relies, instead, upon a distinction between domestic and foreign awards. The Model Law takes as a criterion “the place of arbitration” (Article 1(2)). This still leaves room for discussion (is the place of arbitration the place of the hearings, the place where the award was rendered, or some other place?). Article 31(3) helps by providing that the place of arbitration stated in the award shall be deemed to be the place of arbitration.

In sum, if the country of the place of arbitration is one of the countries that have adopted the Model Law, Article 28 (or its equivalent national version) will apply.

**IV.2.c. Interpreting Choice of Law Clauses and the Role of the Lex Arbitri**

This subsection can be introduced by raising the question whether the choice of law problem is essentially solved once the parties include an express choice of law clause in their contract – a fairly common occurrence. We emphasize in this subsection that even then the choice of law problem is not necessarily at an end. First, there could be problems of interpretation of the clause, and for that purpose the arbitrators might wish to draw upon rules of interpretation found in some applicable legal system. Which one? (We should perhaps add that most of the time it is rather clear what the parties mean when they provide for an applicable law. Moreover, it would be especially rare that any construction problems would be aided by rules of interpretation. Even in the *Seed Potatoes* case (*Buyer (Mozambique) v. Seller (The Netherlands)*) Arbiter Muller notes that “* * *in the present instance there is no absolute need to resort to a specific system of law to construe the said sentence [the choice of law clause].” Nevertheless Muller does, in fact, refer to Swiss law (presumably as the lex arbitri) and general principles of law for rules of interpretation.) Second, the issue of validity of the choice of law clause could be raised. To address that question the arbitrators would again need to draw upon some legal system.
**Question 1.** Arbitrator Muller says that the phrase, “the law applicable is that known in England” could refer to “procedural law”. Indeed as the McDonnell Douglas case shows, the term “procedural law” itself could mean one of two things: either (i) the lex arbitri, the law that externally supervises the arbitration (e.g., provides for appointment of arbitrators, failing party agreement; regulates challenges of arbitrators; provides rules for the set aside process; etc.), or (ii) the procedural rules applied to the hearing, to the taking of evidence, and to the arbitration process itself – as McDonnell Douglas puts it, the law applicable to the “internal conduct of the arbitration”. To the authors the McDonnell Douglas language (“The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 * * *”) can more easily be construed to mean the lex arbitri (though that is not the interpretation chosen by the McDonnell Douglas court) than the language in Seed Potatoes (“the law applicable is that known in England”).

**Question 2.** Muller applies Swiss law and general principles of law. Presumably he referred to Swiss law because it was the lex arbitri, on the ground that Switzerland was the place of arbitration – though Muller’s award does not expressly explain this point. He does say, as already noted, that “* * * in the present instance there is no absolute need to resort to a specific system of law to construe the said sentence.”

**Question 3.** After concluding preliminarily that the parties’ contract means that they chose English law to be the substantive law of the contract, Muller then analyzes whether the parties’ choice is valid. He applies both Swiss law (presumably because the lex arbitri is that of Switzerland) and English law (perhaps because it is the law chosen by the parties?). One can certainly doubt the appropriateness of this part of Muller’s award. If Muller derives his authority to arbitrate the dispute from the parties’ agreement, and if the parties have declared in their agreement that they want him to use English law to decide the merits of the dispute, what is the basis of Muller’s authority to ask whether the parties’ choice of English law is valid?

One answer could be that the parties have also chosen Swiss law as the lex arbitri, because Switzerland is the seat of the arbitration, and that hence they have implicitly authorized the arbitrator to apply Swiss law to decide the validity of their choice of law clause. This seems unpersuasive. For one thing, if the parties want English law to govern the merits of any dispute, why would they want this result only if it were allowed by the choice of law rules of some particular state?

Of course the lex arbitri is not just “some particular state’s law” but the law that supervises the arbitration and decides upon set aside proceedings. On the other hand, it does not seem that Muller actually relies on any provision of Swiss lex arbitri in second-guessing the validity of the parties’ choice of English law. A state’s lex arbitri refers to that state’s arbitration law, such as that found in an arbitration statute or the UNCITRAL Model Law, not to the state’s procedural
rules applicable in courts. Hence Swiss lex arbitri would not include the law of Switzerland that governs choice of law in a non-arbitration setting – that is, in a court setting. Muller’s award seems to refer to general choice of law rules in Switzerland, rules applicable in Swiss courts, on the question of the parties’ freedom to choose the applicable law. It does not appear from Muller’s award that Switzerland has any arbitration-specific rules limiting the parties’ freedom to choose the applicable law. Indeed, Article 187 of the Swiss Private International Law Act of 1987 (International Arbitration Chapter) mentions no limits on the parties’ freedom to choose the applicable law; it seems to give the parties unfettered discretion to choose the applicable “rules of law” – an even broader expression than the simple term, “law” (See the Documents Supplement). So again, the applicability of Swiss lex arbitri does not seem to support the need to analyze the validity of the parties’ choice of applicable law.

**Question 4.** The most common approach is to apply the lex arbitri of the place or seat of arbitration. This approach is clearly sanctioned in the New York Convention, which provides in Article V(1)(e) that a set aside judgment “by a competent authority of the country in which * * * that award was made” may be a basis for another country’s refusing to recognize and enforce the award. The *McDonnell Douglas* case shows the strong pull of the place of arbitration as the appropriate source of the lex arbitri. Arbitrator Muller in the *Seed Potatoes* case appears to be treating Switzerland as the source of the lex arbitri – because Switzerland is the place of arbitration – and hence to be following this general approach to choosing the lex arbitri.

New York Convention, Article V(1)(e) also recognizes as legitimate a set aside judgment “by a competent authority of the country * * * under the law of which, that award was made.” This clearly implies that the parties should be free to choose the lex arbitri if they wish. Even the *McDonnell Douglas* case acknowledges to some extent the legitimacy of party autonomy in this context, although the court in that case went to some lengths to find that the parties had not actually chosen Indian law as the lex arbitri.

**Question 5.** This question links back to the question with which we suggested an instructor might want to introduce subsection IV.3.c: whether the choice of law problem is essentially solved once the parties include an express choice of law clause in their contract. See the discussion above immediately before Question 1.

**Question 6.** The von Mehren and Jiménez de Aréchaga preference for an anational, delocalized conception of international arbitration would seem to argue for different reasoning in the *Seed Potatoes* case and probably a different outcome in *McDonnell Douglas*. In *Seed Potatoes* the von Mehren-Jiménez de Aréchaga approach would seem to call for omitting from the award any question concerning the validity of the parties’ choice of English law. If it is clear that the parties wanted the arbitrator to decide their dispute using English law, any questioning of that party choice (for example, under the lex arbitri of the place of
arbitration) would give a kind of prominence and legitimacy to the “jurisdictional theory of arbitration” that von Mehren and Jiménez de Aréchaga argue against.

In McDonnell Douglas it seems likely that the von Mehren and Jiménez de Aréchaga approach would have given effect to the parties’ apparent attempt to choose the Indian Arbitration Act of 1940. The Queen’s Bench Division refused to do so essentially because it privileged the lex arbitri role of the place of arbitration (England in that case). The McDonnell Douglas case is a good example of the territorial or jurisdictional approach to arbitration that von Mehren and Jiménez de Aréchaga argue against.

What Creates Departure from a Choice of Law Clause?

Questions 1 and 2. According to its Article 1, the CISG “applies to contracts of sale of goods between parties whose places of business are in different States.” Hence, the CISG is implicitly excluded if the chosen law is Swiss law “as applied between domestic partners”. This is the reason why the arbitrators resorted to a more complicated construction in justifying the observance of the rules of the CISG. The position of the UNIDROIT Principles is somewhat different. The CISG is clearly law. (It is a treaty ratified by 78 countries as of June 2012.) The UNIDROIT Principles are not “law” in the strict sense of the word. Hence, one may argue that these principles could never replace the law of a country; they could only be applied as a vehicle of interpretation.

Question 3. According to Article V(1)(d) of the New York Convention, recognition may be denied if the arbitral procedure was not in accordance with the agreement of the parties. One may plausibly argue that if the agreement of the parties states that the arbitrators are to apply Swiss law “as applied between domestic parties”, and they apply instead the CISG, the arbitral procedure was not in accordance with the agreement of the parties. Article 190 of the Swiss Private International Law Act (see Documents Supplement) contains a list of possible grounds for annulment, but these grounds do not include “procedure not in accordance with the agreement of the parties”. This circumstance may have contributed to party A’s reliance on Article 190(2)(b), which allows setting aside if the arbitrators wrongly accepted or declined jurisdiction. In our case, we do not have a decision on jurisdiction, but one may argue (and this was actually argued) that the parties exceeded the scope of their jurisdiction. This argument is not without difficulty, because the question of “scope” is usually perceived as a question of determination of the range of the claims and issues that have been (or have not been) submitted to arbitration. Hence, the question may be raised whether Article 190(2)(b) was properly invoked — and arguments may be submitted both ways. Article V(1)(c) of the New York Convention also deals with the issue of the “scope of submission to arbitration”. 
Questions 4 and 5. The question is a difficult one. Just applying the CISG would have probably been wrong, since the parties agreed to apply Swiss law “as applied between domestic partners”. But how is one to interpret a contractual provision inspired by developments in the domain of international sale, which contractual provision relies on a notion not adopted by Swiss law. Not having the text of the award before us, we are unable to see the context within which the arbitrators referred to the CISG and to the UNIDROIT Principles. Had they stated that “the CISG applies”, this would have been more difficult to defend. A less vulnerable approach would have been not to rely on Article 25 of the CISG by way of qualifying it as the applicable law, but to embark on contract interpretation within the framework of Swiss law, and to seek guidance in Article 25, since it is (just as is Article 7.3 of the UNIDROIT Principles) an internationally accepted interpretation of the expression used by the parties. This is what the arbitrators did (or, at least, this is what the Swiss Supreme Court found that the arbitrators did). One might perhaps say that it was a narrow escape. The fact that the contract does not use exactly the same words as the CISG and the UNIDROIT Principles is certainly not helpful. One may argue, however, that this is not a critical point because “material breach” and “fundamental breach” have essentially the same or very similar meanings.

Question 6. Had the arbitrators applied the law of another specific country, this would have been an even more difficult case (even if the law applied would have adopted the concept of “material breach” or “fundamental breach”). One of the reasons against applying U.S. or South African law is the (likely) fact that the parties agreed on Swiss law exactly because they could not agree on the application of the national law of either party; thus agreeing on a third neutral law was a way to avoid a negotiating impasse. Also, while it is plausible to say that an international contract can be interpreted according to some internationally accepted principles, it would be much more difficult to justify the application of the law of a specific country (other than the country whose law was actually chosen).

IV.2.d. The Role of Lex Mercatoria

Questions 1 and 2. The arbitrators made it clear that they did not apply the law of any particular country, but applied the lex mercatoria instead. Amiable composition is decision-making according to principles of justice, relying on free assessment of the arbitrators, rather than according to the norms of a municipal law. (In medieval times, “composition” was a progressive step – a substitute for revenge. The injured party received payment or other benefits in lieu of retaliation. These are the roots of the French term “amiable composition”, which means something like friendly appraisal. Amiables composites are those who make the friendly appraisal. Deciding en amiables composites means deciding as friendly “assessors”, or “appraisers” – as third parties who will make an assessment according to their best judgment, who will settle the dispute relying on their sense of equity.)
It is common ground that arbitrators are never presumed to have authority to decide en amiables compositeurs, or ex aequo et bono. In the given case, the parties did not give a specific authorization to decide en amiables compositeurs. The question is whether deciding on the ground of the lex mercatoria instead of applying the law of a particular country is, indeed, amiable composition; whether it is decision-making based on free assessment and principles of justice, or a variation of decision-making based on law.

In medieval times, a community of traders developed rules that were not rules of a given state, but rather rules of a particular transnational community. This was the lex mercatoria, or the law merchant. As sovereign states grew stronger and their competencies became more clearly defined, national commercial laws displaced the lex mercatoria.

It was in the nineteen sixties that traders started speaking about a new lex mercatoria; and at the same time scholars (most notably Professor C. Schmitthoff from England, and Professor B. Goldman from France) started writing about it. They asserted that within the community of merchants worldwide rules were developing that might replace municipal law. The INCOTERMS, and the UCP (Uniform Customs and Practice for Documentary Credits) were cited as the best examples of this development.

The exact range of the lex mercatoria has never been defined. Some authors have taken the position that it only includes rules that are not state-based, others have considered international conventions dealing with international trade law as parts of the lex mercatoria. Professor Goldman hailed the Norsolor decision as a victory for the proponents of the concept, because the decision of the Cour de cassation supports the notion that the lex mercatoria is “real law”.

Under the present Article 21(3) of the ICC Rules, the arbitrators can only assume the powers of amiable compositeurs if the parties have agreed to give them such powers. The Rules prevailing at the time of the Norsolor award adopted the same position. If powers of amiables compositeurs were not given, and the arbitrators nevertheless proceeded as if they had been, the party opposing recognition and enforcement could argue that an infringement of Article V(1)(d) had occurred, the “arbitration procedure was not in accordance with the agreement of the parties”. (It may be questioned, though, whether this is an issue of “arbitration procedure”. It is certainly a question affecting the way the arbitrators proceeded.) One could also argue that by disregarding a provision of the ICC Rules, the arbitrators disregarded the procedure agreed upon by the parties, because the parties adopted the ICC Rules as rules of procedure.

It is probably more difficult to defend the Norsolor decision under the Rules the n prevailing, than under the present Rules. The earlier Rules expected the arbitrators to establish the applicable law on the ground of some conflicts principle. The arbitrators may have been free to choose any conflicts principle,
but they had to choose and apply some such principle. It is difficult to imagine a
conflicts rule that would lead to the lex mercatoria, even if one were to assume
that the lex mercatoria was, indeed, law. Article 21 of the 2012 ICC Rules states
that in the absence of party choice, “the Arbitral Tribunal shall apply the rules of
law which it determines to be appropriate”. This is more easily compatible with
the Norsolor holding. The arbitrators do not have to rely on some conflicts rule
(which would normally lead towards some municipal law). Moreover the
substantive rules to be chosen are defined as “rules of law” (rather than “law”); it
is easier to describe the new lex mercatoria as a set of “rules of law”, than as
law. The expression “rule of law” is more flexible, and it could more easily
encompass rules that are not in force in any country.

Question 3. Article V(1)(e) clearly allows the court to refuse recognition to
an award that was set aside in the “right country” (the country “in which or under
the law of which the award was made”). The question is whether this result is
also mandated. The New York Convention was drafted with the intent of limiting
the rights of member countries to refuse recognition and enforcement. The
essence of Article V is to declare that recognition must not be refused except
on the basis of a limited number of grounds. Article V lists those grounds. This
means that it is not an infringement of the text or of the spirit of the New York
Convention if a country grants recognition and enforcement to an award even
when an Article V ground for refusing to do so exists. What the Convention really
mandates is that recognition and enforcement must not be refused on grounds
other than those listed in Article V.

The question is whether it makes sense to recognize and enforce an
award that was set aside in the country of its origin. This may give another
chance to an award, but it has been argued that it also creates more
inconsistency, or even chaos. This is a proposition that deserves discussion. A
court decision that recognizes or enforces an arbitral award is clearly inconsistent
with a prior court decision that annulled the award – but it is consistent with the
award itself. It is not easy to say which approach yields more international
harmony.

Question 4. In considering the French position one should not lose sight
of how narrow the holding of these cases actually is. An award rendered by
arbitrators given the power to decide as amiables compositeurs must be set
aside only if the arbitrators have not even impliedly employed equity or equitable
considerations in reaching the result they articulate in the award. An award that
runs afoul of such a standard must surely be rather carelessly prepared.

An alternative approach, which the French position rejects, would be to
interpret an “amiable compositeur” clause in an arbitration agreement as merely
authorizing but not requiring the arbitrators to rely on equity in reaching their
result. Is that what parties intend when they agree to an “amiable compositeur”
clause?
IV.2.e. Applicable Law in the Absence of Party Choice

Questions 1, 2 and 5. In the Korean Seller v. Jordanian Buyer case (Interim Award No. 6149) the parties chose ICC arbitration under the then applicable 1988 ICC Rules, but they did not choose an applicable law. Hence, under Article 13(3) of the 1988 ICC Rules the arbitrators were required to choose an appropriate choice of law rule and to follow it to the applicable substantive law. Since choice of law rules always point to the applicable law in a particular country and the lex mercatoria is not the “applicable law” per se in any country, it is difficult to see how an arbitrator could find his or her way to the lex mercatoria by applying a choice of law rule, as Article 13(3) requires. On the other hand, the new Article 21(1) of the 2012 ICC Rules drops the requirement that an arbitrator first choose a choice of law rule and instead allows an arbitrator to select directly “appropriate” “rules of law”. Note that the term “rules of law” is broader than the previous term in the 1988 Rules, “law”. Hence, it would seem that under the new 2012 Rules (just as under the 1998 Rules) an arbitrator would have more discretion to apply the lex mercatoria as an appropriate body of “rules of law” especially if the issues in dispute were rather general and were not likely to yield particularized solutions in different countries.

The Vienna Convention on the International Sale of Goods was mentioned in paragraph 51 of the Interim Award mostly as a surrogate for the lex mercatoria. If the Convention were applicable law in a given country, then obviously it could be reached under either the 1988 ICC Rules (if the choice of law rule chosen were to lead to the law of that given country) or 2012 ICC Rules (if the arbitrators chose the Vienna Convention as the applicable law).

The new 2012 Rules, on their face, seem to allow the arbitrators more discretion in choosing the applicable law or “rules of law”, and one might for that reason favor or disfavor the new rules. On the other hand, since under the old 1988 Rules the arbitrators were rather free to choose any choice of law rule or system, it seems highly likely that they could reach whatever substantive law they really wanted to apply, except perhaps the rules of the lex mercatoria, as discussed above.

Questions 3 and 4. For the first half of the twentieth century, the “jurisdictional” theory of international commercial arbitration tended to see arbitral tribunals as to a significant extent subject to the jurisdiction of the country where they had their seat and hence subject to the choice of law rules of that country. With the more modern emphasis on party autonomy and party intent, it is much more likely that an arbitrator would conclude that choosing Paris as the seat of arbitration would not be a sign that the parties wanted French choice of law rules to apply – or French substantive law, for that matter. The seat of arbitration is much more likely to be seen as having been chosen because of convenience of the parties or perhaps for reasons of neutrality of location.
On the other hand, arbitrators do generally assume that the lex Arbitri of the place (or seat) of the arbitration applies, and that law might have rules deciding the choice of law question. For example, Article 28 of the UNCITRAL Model Law adopts the same approach as did the 1988 Rules of the ICC – the applicable law is that chosen by the parties and in the absence of such a choice, the law one would apply under the conflict of laws rules the arbitrator considers applicable.

This approach is not the same as that applicable under the early twentieth century jurisdictional theory. Under the lex arbitri analysis the reference is not to the choice of law rules applicable in the courts of the seat of arbitration, but rather to the arbitration law – in particular to the international arbitration law – of that country. Moreover, arbitration law is likely to respond to policy considerations different from those influencing choice of law questions arising in litigation. For example, a particular country’s international arbitration law is likely to give much freer rein to party autonomy, for example, than would be the case in a matter litigated before its courts.

[Note that Question 4 refers to Article 33 of the UNCITRAL Rules. The correct article number is Article 35 of the 2010 UNCITRAL Rules.]

Question 5. If under the cumulative approach the arbitrators cannot find a happy coalescence of potentially applicable choice of law rules, another approach would be for them to opt for general principles of conflict of laws found in widely respected international agreements, such as the European Convention on the Law Applicable to Contractual Obligations (Rome Convention) or the Hague Convention of 15 June 1955 on the Law Relating to International Sales of Corporeal Movable Property. See paragraphs 47-50 of Interim Award No. 6149.

Questions 6 and 7. Taking up the mandatory law question in Interim Award No. 6149 provides a nice transition to the next subsection IV.2.f – The Problem of Mandatory Law. This Interim Award and Final Award No. 6379 (Principal (Italy) v. Distributor (Belgium)) at the beginning of subsection IV.3.f both reject mandatory law, whereas the Derains, and Lando excerpts in that subsection (and the quote from Sheppard in Question 2 of that subsection) contemplate mandatory law being applied in some situations – even where the parties have specifically chosen a body of law that does not include the mandatory law. In the Interim Award case the parties have not chosen any law and there are significant contacts with Jordan – the buyer’s place of business. Still the arbitrator does not apply the Jordanian mandatory law. The contrast between this approach and the positions taken by Derains, Lando, and Sheppard can be instructive. Questions 6 and 7 ask the students for their initial reaction to the mandatory law issue as it arises in the Interim Award context. A deeper analysis of the issues is reserved for the next subsection.

Note that both branches of the arbitrator’s analysis – i) applying the law applicable to the container contract and ii) applying the law applicable to the
arbitration agreement viewed as a separate agreement – have a “bootstrapping”
quality about them because in each branch the arbitrator presumes the validity of
the arbitration clause in order to follow the guidance of Article 13(3) of the 1988
ICC Rules on choice of law. The Note supra in the text at IV.2.a calls attention to
the logical difficulties that arise when arbitrators give preference to a choice of
law clause in order to decide the validity of the arbitration agreement. The
reasoning the arbitrator uses here is analogous. Finally, the arbitrator’s reference
to New York Convention Article V(1)(a) for the place of arbitration rule
(technically, the place where the award was made), helps to support the result,
even though V(1)(a) is not addressed to arbitrators.

The Note in Section IV.2.a points out that arbitrators have a tendency to favor
“validating” law – a tendency that one can perhaps see operating in this award.
Even if the parties had expressly chosen Jordanian law as the proper law of the
contract, an arbitrator might have refused to apply the Jordanian rule to invalidate
the arbitration agreement. In the *Egyptian Local Authority* case mentioned, that
was indeed the result. The law of the place of arbitration – that is, the lex arbitri
(Swiss law) – was used instead of the Egyptian law chosen for the contract as a
whole. Some justification for this result could be found in the separability
principle, by treating the arbitration agreement as separate from the container
contract and not governed by the choice of law clause in that contract. Hence, if
the choice of Jordanian law were in the arbitration clause itself, it would be much
more difficult, though perhaps not impossible, to reach the result of the *Egyptian
Local Authority* case. (Depending on the wording of the choice of law clause, it
might be possible to interpret it as referring to the applicable law on the merits,
thus leaving to the lex arbitri (arbitration law of the seat) the issue of the validity
of the arbitration agreement. If the wording were to suggest that the parties were
looking to Jordanian law either as the party-selected lex arbitri or as the law to
decide the arbitrability of any particular issue – that is, the validity of the
arbitration agreement – then it would be more difficult to reach a validating
result.)

IV.2.f. The Problem of Mandatory Law

*Principal (Italy) v. Distributor (Belgium) – Final ICC Award No. 6379*

**Question 1.** Here again we see the tendency of arbitrators to give effect
to party autonomy, even on the question of the agreement’s validity. The parties’
choice of Italian law in clause 27 of the Contract appears to have been aimed at
the law to govern the merits of any dispute, rather than the validity of the
arbitration agreement, which is in clause 29 of the Contract. Article VII of the
1961 Geneva Convention, upon which the award relies in paragraph 7, clearly
refers to the law governing the merits of the dispute, not the law governing the
validity of the arbitration agreement. Article VI of the 1961 Geneva Convention
(cited in paragraph 10) deals with the validity of the arbitration agreement (see
the Documents Supplement) – which is the pertinent issue – and for that purpose
chooses in order (a) “the law to which the parties have subjected their arbitration agreement” [here there seems to have been no such choice] or (b) “the law of the country in which the award is to be made” [here, Germany, not Italy].

But there are further difficulties with the award’s reasoning. Article VI of the 1961 Geneva Convention is addressed to courts, not to arbitrators. Moreover, how does one get to the Geneva Convention in the first place. A court in a Geneva Convention country would apply it as law of the forum, but an international arbitral tribunal has no forum. Perhaps one could reason that because the parties chose Germany as the seat of the arbitration, German lex arbitri governs the arbitration. (Otherwise the impact of the Geneva Convention would be quite limited.) Germany is a party to the 1961 Geneva Convention, and thus since the parties are domiciled in countries also party to the 1961 Geneva Convention (Belgium and Italy, respectively) the 1961 Geneva Convention would apply in Germany. See Article I of the Convention). Article VII of the 1961 Geneva Convention is addressed to arbitrators and could be considered part of the *lex arbitri* of Germany. An arbitrator might thus rely on Article VII by analogy (because Article VII applies to substantive issues, and validity of the arbitration agreement is not strictly a substantive issue) and choose the principles of Article VI of the Convention as being appropriate in the circumstances. That then could lead the arbitrator to apply German law (“the country in which the award is to be made”) to uphold the validity of the arbitration agreement.

**Question 2.** Under Article II (1) and (3) of the New York Convention, Belgium would not be required to send the parties to arbitration concerning a subject matter that Belgium considers nonarbitrable. Nor would Belgium be required to recognize (give res judicata effect to) the award. Article V(2)(a) is explicit that a country may refuse recognition and enforcement if the subject matter of the award is “not capable of settlement by arbitration under the law of [the recognizing and enforcing] country***” This means of course that if the Belgian courts chose to do so, they could go forward with the case and could ignore the arbitration award. The enforceability of the Belgium judgment, were it to award damages against the Italian Principal, might then depend, however, on the presence in Belgium of assets belonging to the Italian party. Outside of Belgium it is hard to predict whether a court would favor the award or the Belgium judgment.

Recall that when confronted with the issue of what law should decide arbitrability, one Belgian court applied the law chosen by the parties to govern the merits of their dispute. See *M.S. A. (Belgium) v. Company M (Switzerland)*, supra at II.2.d. of the coursebook. At paragraph 25 of the Award in *ICC Case No. 6379* the arbitrator also relies on this Belgian decision. Thus, the Belgian court seized with this same dispute could decide (could have decided) to send the parties to arbitration.

**Question 3.** The language of Article V(1)(a) clearly refers to the law applicable to the arbitration agreement, not to the container contract.
Question 4. The relevant provisions of the Rome Convention are found in Article 7:

“When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

(In line with a growing cohesion within the European Union, the subject matter of the Rome Convention now falls within the legislative competence of the EU Council and Parliament, and in consequence an EU regulation has now replaced the Rome Convention. This is Regulation No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I). This Rome I Regulation is applicable as of December 17, 2009. Article 7 of the Rome Convention became Article 9 of the Rome I Regulation – with a somewhat modified content.)

It seems likely that Article 7 of the Rome Convention influenced the draft conflict-of-laws rules for arbitrators proposed by Ole Lando in the article excerpted later in subsection IV.2.f. See Article 9 of those proposed rules, infra in the coursebook at the end of Section IV.2.f.

Even had the Rome Convention been in force in Italy at the time of the arbitral decision, it does not follow that the arbitrator should have applied it. The Italian law is applicable in the first place because of the parties' choice of law clause. Unless the clause expressly provides otherwise, all modern approaches to choice of law construe a choice of law clause as referring to the substantive law of the chosen country, not to its choice of law rules. Since the Rome Convention is a part of Italy's choice of law rules, it should not have been applied even after it came into effect.

Questions 5 and 6. Especially because of how Question 5 is phrased, the authors assume that most students will be inclined not to apply the Belgian mandatory law. The parties have expressly chosen Italian law for the merits, hence arbitrators are likely to want to honor that choice. Perhaps the distributor-protecting policy underlying the Belgian law will not seem to carry the weight that other mandatory policies might carry. Indeed, the willingness of Belgian courts to allow parties in a transnational agreement to evade the Belgian policy by using a choice of law clause, as pointed out above, underscores this point.

Question 6 is intended to give students more difficulty with the preference for party autonomy. Here the parties, though present and acting in China, are clearly trying to evade the Chinese mandatory law. Nevertheless, arbitrators still
owe their authority and legitimacy to the will of the parties. One of the strongest reasons for applying Chinese law would be if it were virtually certain that any award against the Chinese firm would have to be enforced in China. On the other hand, if the French firm nevertheless insists on an award based on Swiss law, should the arbitrators go against the parties’ written agreement? These are issues on which one cannot find complete agreement, either in decided cases and arbitral awards or in the views of scholars. Three scholarly perspectives are offered in the materials immediately below.

George Bermann, Yves Derains and Ole Lando Excerpts

**Question 1.** In the authors’ view it is indeed more anomalous for an arbitrator—as opposed to a judge—to ignore the express will of the parties by applying the mandatory law of a country other than the one whose law the parties chose. Judges are officials of a national legal system and must follow the rules and principles of that legal system—which system may or may not recognize the force of party autonomy in all circumstances. Arbitrators, on the other hand, are not officials of any national legal system. In contrast to judges, they derive their authority from the will of the parties and thus must be expected to follow the will of the parties in resolving the dispute the parties have submitted to them. Bermann, himself, clearly agrees with this proposition. In his “XIV Conclusion” section he says, “Deriving their authority from the consent of the parties as evidenced by an arbitration clause, [international arbitrators] owe respect to the choice of law the parties made in the underlying agreement, and should apply to the dispute before them the law that the parties directed them to apply.” Thus, for an arbitrator (as opposed to a judge) to do otherwise would seem to call for some form of explanation or special justification.

**Question 2.** Given the scholarly split between the von Mehren and de Aréchaga pro-party-autonomy view, on one hand, and the Sheppard, Derains, Lando pro-mandatory-law view, on the other, it is not surprising that the authors (one of whom was originally the late Arthur von Mehren), too, are not of one mind concerning mandatory law issues. The students are likely to follow suit in expressing differing views. The topic lends itself to lively and interesting discussion.

Whereas the von Mehren and de Aréchaga position seems to follow logically from the arbitrators’ source of authority—that being the will of the parties—at the same time Sheppard’s point that arbitration is not a self-contained, truly a-national system, but instead depends upon the support of national legal systems for its legitimacy and enforceability also resonates as accurate. The late von Mehren always stressed that although arbitration is clearly dependent on national legal systems for its force and effectiveness, no single legal system can control the arbitration process. Thus von Mehren might have said to Sheppard that if a given national legal system is dissatisfied with an arbitral tribunal’s privileging of party autonomy over mandatory law, that national legal system has the legitimate option of refusing to enforce the award on the
ground that it violates public policy (ordre public international in the French terminology). Is this not the safety valve needed for the arbitration system to be acceptable to sovereigns while still privileging party autonomy? And if enough countries are likely to see the award as violative of ordre public international and hence unenforceable, is this not the risk one of the parties runs by insisting on the party autonomy solution? Thus do we achieve balance in the arbitration system by encouraging arbitrators to honor party autonomy if at least one party insists upon it, while reserving to enforcing countries the ordre public international barricade against outcomes they find truly offensive?

Or is there a risk to the viability of the arbitration system itself if the pro-party-autonomy position encourages parties ever more frequently to evade legitimately applicable mandatory law through arbitration and a well-drafted choice of law clause? The country whose mandatory law is offended can refuse to enforce the award, but a different country may enforce it. Would this encourage anti-foreign-suit injunctions seeking to block enforcement of awards in foreign countries, or claw-back statutes seeking to recoup gains seen as illegitimate in the eyes of the mandatory law jurisdiction? Would this kind of jurisdictional conflict and inconsistency damage the entire system? Or is invoking such a risk merely alarmist and armchair speculative?

Question 3. The authors do not find it persuasive to argue that a clause choosing governing law for the contract does not include mandatory law stemming from a statute such as competition law. Legal systems contain many statutes that affect the validity or content of contracts—for example, a statute providing that a particular contract must be in writing, or one providing that a consumer must be given seven days to annul a sale contract entered into off the seller’s premises, or one providing that a distribution contract cannot be terminated in less than 36 months from the notice date. Similarly in the Mitsubishi case Soler seems to rely on the U.S. antitrust statutes as a defense to the claim that it breached the contract. Soler argues that Mitsubishi’s refusal to supply heaters and defoggers constituted bad faith conduct on its part, which conduct amounted to a breach of the contract that prevented Soler from performing. Soler asserted that Mitsubishi’s conduct was in bad faith because it violated U.S. antitrust law. To the authors this seems clearly to be a claim arising under the contract and hence surely within the ambit of the choice of law clause (choosing Swiss law, not U.S. law).

Bermann’s assertion that the Supreme Court in Mitsubishi applied the not-within-the-ambit-of-the-choice-of-law-clause theory does not accord with the authors’ reading of Mitsubishi. In footnote 19 of the Mitsubishi decision the Court explains that Mitsubishi, itself, agreed in the oral hearing before the Court that U.S. law should govern the antitrust claims.

Perhaps one could plausibly argue that an offensive use of antitrust law—to claim treble damages for antitrust violative conduct, for example—would not fall within the scope of the choice-of-law clause. And, indeed, Soler seems to
have asserted such a counterclaim relying on U.S. antitrust law (in addition to its
defensive use of U.S. antitrust law). It would not be impossible then to reason
that Swiss competition law applied to Soler’s defensive theory, while U.S.
antitrust law applied to Soler’s counterclaim. But would not such a line of
reasoning seem anomalous? To avoid the anomaly, arbitrators might be
expected to apply the Swiss antitrust law to both the defensive and offensive
antitrust claims—unless they could find a justification for applying U.S. antitrust
law to both claims in the face of a party-agreed choice-of-law clause calling for
Swiss law. In the Mitsubishi case itself, as we have mentioned, the problem was
solved by Mitsubishi’s express agreement that U.S. antitrust law should be
applied.

**Questions 4 and 5.** The difficulty with the Derains view expressed in
paragraph 43 is that it looks at the issue from a perspective within the legal
system containing the mandatory rule. Derains’s reasoning in paragraph 50 is
somewhat similar. For a judge in a member state of the European Union,
Derains’s argument has persuasive force. But what if the issue arises before an
arbitrator, who has authority only because of the parties’ will? If the parties can
set up a private system of procedural justice, why can’t they also instruct the
arbitrators – chosen by them or according to their agreement – to use only the
rules the parties specify for settling any disputes and to leave it to the parties to
decide what to do with the resulting award?

Sheppard’s position mentioned above in Question 2 suggests that the
institution of international commercial arbitration itself could be damaged if it
gained a reputation for not respecting the most important public policy and
governmental interests underlying mandatory law. The Derains discussion in
paragraph 50 does not articulate the issue in precisely this way, but it comes
close to doing so. The Lando excerpt alludes to this consideration explicitly
(“Today arbitration still enjoys * * * prestige * * *. If it becomes known that
arbitration is being used as a device for evading the public policy of states
which have a governmental interest in regulating certain business transactions,
its reputation many suffer.”)

Protecting the institution of arbitration is a perspective that will appeal to
some students. But even so, this purpose is not easy to square with the
arbitrators’ responsibility to carry out their charge in careful adherence to the
parties’ instructions. If the current parties did not ask the arbitrators to take into
account the interests of enterprises all over the world in having a robust and
dependable institution of international commercial arbitration available to them for
disputes arising under current or future transactions, on what basis can the
arbitrators take it upon themselves to protect those interests?

**Questions 6 and 7.** Article 9 of the Draft Recommendations on Choice of
Law Rules for International Commercial Arbitration borrows heavily from Article 7
of the Rome Convention on the Law Applicable to Contractual Obligations
(1980), as explained in the text at footnote “q”. Under both versions of Draft
Article 9 the mandatory law that an arbitrator is given discretion to apply is a smaller subset of all mandatory law; it is that subset of rules “that must be applied whatever the law applicable to the contract”. The notion of “l’ordre public international” in French law—discussed in the Bermann excerpt—is similar; it includes public policy norms of the highest order of importance, perhaps norms included in or at least approaching international morality. But if the parties nevertheless clearly instruct the arbitrators to decide without regard to such norms, what should the arbitrators do? If morality is in fact at stake, they may always resign. But if the dispute does not implicate moral issues, should they follow the parties’ instructions, or resign just the same. Or should they simply apply the mandatory law?

The Draft Recommendations on the Law Applicable to International Contracts were proposed as long ago as 1981 but have never been adopted by the ICC. Once again the newly amended 2012 ICC Rules have failed to include a provision similar to the proposed Draft Article 9. We can only speculate as to why, but perhaps the ICC would prefer not to suggest to parties—at least not in such an un-nuanced and direct way—that by opting for the ICC Rules they are giving up control over the law they want the arbitrators to apply.

The current 2012 ICC Rules do contain a provision that some have construed to authorize arbitrator discretion to apply mandatory law in appropriate circumstances. Article 41 of the 2012 ICC Rules (Article 26 of the 1988 Rules, Article 35 of the 1998 Rules)) provides that the arbitral tribunal is charged with making sure that the Award is enforceable at law. Suppose to be meaningful the award would seem to have to be enforced in the country whose mandatory law is vying for application. In that case perhaps Article 41 would authorize the arbitrators to apply the mandatory law of the country where enforcement would have to occur. Of course if there were any doubt about where the winning party might seek to enforce the award, the arbitrators could specifically ask that party in the hearing (anticipating in advance that this party might be the winning party) whether it agreed to the application of the mandatory law of the country in question. If the party were to refuse to acquiesce in applying that country’s mandatory law, however, it is difficult to see how the arbitrators could rely on Article 41 to do so anyway. Note that the opening clause of Article 41 reads: “In all matters not expressly provided for in the Rules, * * *” Note also that Article 21(1) says expressly that the parties are free to choose the law to be applied by the tribunal to the merits; thus, the applicable law is not unprovided-for in the Rules, and hence Article 41 would not seem to be triggered.

Article 9 of the Draft Recommendations on the Law Applicable to International Contracts would be a clearer grant of authority to ICC arbitrators to use discretion. Alternative 1 expressly allows the consequences of applying or not applying mandatory law to be considered – consequences such as the effect on enforceability of the award. Alternative 2 also allows the enforceability of the award to be considered. The class might be asked whether ICC adoption of
Article 9 would affect positively or negatively their willingness to recommend ICC arbitration to a client.

**Question 8.** The authors do not find the reasoning in *ICC Case #8528* persuasive. Two lines of analysis might seem at first blush to support application of Article 19 of the Swiss PILA, but in the final analysis neither is convincing.

First, one might rely on the parties’ express choice of Swiss law as a reason for applying Article 19 of the Swiss PILA. The flaw here, however, is that choice of law clauses in contracts are best interpreted as referring to the substantive law of the country chosen, not to that country’s choice of law rules. Article 19 is clearly a Swiss choice of law rule, not substantive law. For a provision giving this “best” interpretation as the default rule, see UNCITRAL Model Law Article 28. Second, one might take as a starting point the parties’ choice of Switzerland as the place of arbitration and thus conclude that Swiss lex arbitri should apply. The flaw here, however, is that Article 19 is not a part of Swiss lex arbitri, which is found in Chapter 12 of the Swiss PILA. Article 19 is placed in an earlier chapter of the Swiss Act and is addressed to Swiss judges dealing with civil litigation, not arbitration.

**Questions 9 and 10.** If one understands l’ordre public international as including only those mandatory norms that form a basic and universally recognized core of rules and principles essential to international justice and morality, then it is possible to construe the parties’ grant of authority to an arbitral tribunal as implicitly authorizing the tribunal to follow the dictates of l’ordre public international as an overriding obligation. Surely parties could not reasonably understand an arbitrator’s acceptance of appointment in a given case to mean that the arbitrator was agreeing to apply rules or to reach a result that virtually all arbitrators would deem violative of international morality (ordering reimbursement of funds used to pay bribes, for example). We are inclined to see this as an appealing approach. Of course the approach is very general and has little specific content. Its appeal lies mostly in offering a coherent theory of when and why arbitrators may sometimes apply mandatory law not specifically mentioned by the parties.

**Question 11.** Under either alternative, a or b, the contract would be invalid in all UN member countries except Yugoslavia and presumably an award ordering the seller to pay liquidated damages could not be enforced in any of those countries. If the German seller had no property in Yugoslavia, perhaps Article 41 of the 2012 ICC Rules could be a basis for applying German law, which presumably would treat the sale as illegal and disallow liquidated damages. On the other hand, if the Yugoslav party were unwilling to acquiesce in applying UN embargo law (or national law implementing the embargo), which seems certain because that law completely defeats the claim, ICC Article 41 would ring hollow as a basis for nevertheless applying German embargo law.
Scholars strongly inclined to favor party autonomy and to stress the arbitrators' allegiance to party will, might favor resignation, or declination to act as an arbitrator in the first place. Obviously situation (b) more strongly encourages this result, but (a) too, raises similar issues.

The universal morality/ordre public international theory discussed above in Questions 9 and 10 could apply effectively to this set of facts. A mandatory UN embargo offers strong support to a claim that a norm of universal morality is at stake.

**IV.3. The Award**

**IV.3.a. Form and Content of the Award**

**IV.3.a.i. Statutory and Institutional Rules**

**Question 1.** The place of the award is important; indeed, this is the main criterion for deciding the award’s nationality. (Whether an award must have a nationality is the subject of debate; some authors, for example, favor the notion of “a-national” or “floating” awards. The fact is, however, that the New York Convention – which represents the backbone of the contemporary system of international commercial arbitration – still relies on the distinction between domestic and foreign awards.) The two basic remedies against arbitral awards 1) setting aside and 2) refusal to recognize and enforce – are distinguished primarily on the ground that the first is a weapon against domestic awards, while the second is a defense against foreign awards. The New York Convention implicitly recognizes two bases on which the nationality of the award may be ascertained: the place of making of the award, and the law (lex arbitri) under which the award was made. Hence, under the New York Convention an award’s having been set aside may justify refusal of recognition and enforcement, but only if that setting aside occurred in the home country of the award, i.e. the country in which, or under the law (lex arbitri) of which, the award was rendered. Of the two criteria recognized by the New York Convention, the place of making of the award is clearly dominant. The other criterion (the country under whose lex arbitri the award was rendered) is losing ground. In recent times among major arbitration countries, only Germany exercised set aside jurisdiction on the basis of the award’s having been rendered under German lex arbitri. Now even Germany has withdrawn from this position; under the 1998 version of Chapter 10 of the German Code of Civil Procedure, Germany will exercise set aside jurisdiction only for awards rendered in Germany.

If awards are made by correspondence, the place of making of the award is difficult to ascertain. What tends to be decisive is an indication in the award itself as to the place of making. The Model Law has made this an irrebuttable presumption (See Article 31(3)). It is interesting to note, that Article 31(3)
requires the arbitrators to state both the date and the place of arbitration, but only creates a presumption regarding the place, by stating that “The award shall be deemed to have been made at that place.” The reason for this presumption is probably the absence of any other viable criterion. The question may be raised whether the presumption is absolute. It probably is, short of a party’s being able to show fraud. (As an example of fraud, suppose the award is actually rendered in country “A”, which prescribes a deadline for rendering the award. Suppose further, that the arbitrators, having failed to observe the deadline, indicate as the place of the award country “B”, which has no real connection to the making of the award but whose law poses no time limits.)

The excerpts offered in the casebook (Article 1057 of the Dutch Act, Article 36 of the 2010 UNCITRAL Rules, Article 30 of the AAA/ICDR Rules, Article 49 of the 2015 CIETAC Rules) all require the arbitrators to state the place of the award. The AAA Rules specify that the place indicated must be the place of arbitration as defined in Article 17 of the AAA Rules. These rules add that the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration.

Questions 2 and 4. Settlement will only constitute an award if it is recorded in the form of an award. The party expecting payment as a result of the settlement has every reason to insist on having the settlement recorded in the form of an award. Otherwise, this party would only have a right to sue (a cause of action), rather than a right to proceed directly to enforcement.

Awards that record a settlement do not need a statement of reasons. Such awards are not based on the judgment and arguments of the arbitrators, but on the parties' compromise. They are often signed by both the arbitrators and the parties.

Question 3. Dissenting opinions are possible, but relatively rare. Their importance is greatly diminished by the confidentiality of the award. A well-reasoned dissenting opinion of a judge has a chance to influence later legal developments. The dissenting judge may also gain moral satisfaction from public recognition of his (her) position. These points remain moot if the award is not published. Of course an arbitrator might still choose to dissent in order to impress one or both of the parties.

Dissenting opinions have been common in the U.S.-Iran Claims Tribunal cases. These cases are published, and some of them have a certain political significance as well.

Question 5. Publication of the award in violation of Article 30(3) of the AAA/ICDR Rules could yield loss of reputation (and of business) for the AAA – if the AAA caused the publication – and possibly liability for damages. If one of the parties caused publication, the other party might sue for damages (probably moral damages). Such lawsuits are very rare – and they are not very promising.
It is difficult to see how the validity of the award could be affected by unauthorized publication.

**Question 6.** The CIETAC Rules state in Article 49(6) that the presiding arbitrator’s opinion will prevail if no majority can be attained. Such a situation will emerge if the arbitrators are divided along more than two lines of opinion. (For example, one arbitrator believes recovery should be denied, another would award full recovery, and the third believes that awarding 50% of the sum requested would be the right solution.) In such cases, there is no majority decision, and the only practical way of breaking the deadlock is to give decisive weight to one of the three opinions.

The award could be signed by all three arbitrators (with each indicating his (her) position), or by the presiding arbitrator only. Article 31 of the 2012 ICC Rules provides that in such a situation the award shall be made by the presiding arbitrator (the chairman of the arbitral tribunal) only.

**Question 8.** In its "interim award" No. 6560 of 1990 the ICC tribunal decided one single issue: the applicable substantive law in the dispute between seller from the Netherlands Antilles and buyer from France. After a careful analysis of various points of contact, the arbitrators concluded that French rather than English law was the proper law of the contract.

Such an interim award may make sense in a situation in which the issue of the applicable law is the main point in contention, and the rest follows more or less from simple logic; in other words, when inferences from choosing one or the other law lead to a clear solution on the merits. If this is the case, a decision on the applicable law should give sufficient information to the parties regarding the probable outcome of the dispute, and this information might prompt settlement.

Another – although less convincing – reason why arbitrators might decide the applicable law in an interim award could be the great complexity of the issue, and the arbitrators' desire to deal with it once and for all.

It is difficult to see how (and why) such an "interim award" could be presented to a court for recognition. One conceivable reason for seeking recognition would be the parallel pendency of more lawsuits (before various courts and/or arbitration tribunals) arising out of the same contract. The party who prevailed regarding the applicable law would have an interest to extend this holding to the parallel lawsuits. This cannot be done, however, by the vehicle of res judicata, because we are not dealing here with claim preclusion. Issue preclusion (collateral estoppel) is not a generally accepted concept in comparative law.

**Question 9.** One of the important advantages of international commercial arbitration is the enhanced status of awards when being scrutinized by courts. Both domestic and foreign awards are entitled to confirmation after limited
control, and courts must defer to certain aspects of awards, such as an award’s fact finding and interpretations of the law. The duties imposed on courts are duties pertaining to awards. But who is entitled to tell whether an arbitral decision is, indeed, an award? The decision of the Swiss Supreme Court (the Swiss Federal Tribunal) shows that the last word does not belong to the arbitrators. The qualification adopted by the arbitrators does not bind the court. In the given case, the position adopted by the Swiss Federal Tribunal is quite persuasive. An order stating that one of the parties should not sell products bearing a given trademark until the end of the arbitral proceedings can rather easily be qualified as an interim measure.

**Question 10.** The dividing line between awards and procedural orders is sometimes thin. The name given (award, or procedural order) cannot in itself be decisive.

The 2013 CEPANI Rules (Rules of the Belgian Center for Arbitration and Mediation) are a rare example of rules that give a definition of the notions “award” and “order”. According to Article 2 of the CEPANI Rules, “Award means inter alia any interim, partial or final arbitration award”; and “order means the decisions of the Arbitral Tribunal relating to the conduct of the arbitration proceedings”. Using this definition, would you qualify the order to enter into an escrow agreement as an award, or as a procedural order? Does it matter that the procedural order represents an action announced by the award by stating that “further instructions will be stated by a procedural order”?

Even if the subject matter of the procedural order cannot be qualified as a decision relating to the conduct of arbitration, one should also note that the procedural order was signed by the chairman of the arbitral tribunal. Awards normally have to be signed by all arbitrators. Read Article 31 if the ICC Rules. It states that awards may be made by a majority decision, and if there is no majority, they may be made by the chairman (the president of the arbitral tribunal) alone. There is no indication suggesting that absence of a majority was the reason why the procedural order was signed by the chairman only - and this is pretty unlikely on the basis of the facts presented in the decision of the Cour de cassation. One should also note that a number of institutional rules allow the chairman of the arbitral tribunal to render some procedural orders. (Such an entitlement is provided e.g. in Article 31(2) of the 2012 Swiss Rules “if authorized by the arbitral tribunal”. ) Orders of the chairman cannot be equated with awards.

A possible line of discussion would be to consider whether the order to enter into an escrow agreement fits under the description of “conservatory and interim measures” given in Article 28 of the ICC Rules. Such measures may take either the form of an order, or the form of an award.
Courts provide mechanisms for enforcement of awards. A procedural order cannot trigger the same mechanism.

**Question 11.** In a number of countries (including European countries) judgments were rendered *In The Name of The King/Queen*, or – in some communist countries – “*In The Name of The People*”. Thus rendering judgments in the name of the Emir is not without precedent in history. It is probably without precedent, however, to include this requirement regarding acts that are not acts of State authorities – as is the case with arbitral awards. In the light of the new decision of the Supreme Court of Qatar, this may remain a short-lived episode.

**IV.3.a.ii. The Issue of Statement of Reasons**

**Questions 1 - 3.** Awards rendered without a statement of reasons emerged when the alternative character of commercial arbitration was more pronounced, that is, when the cases submitted to arbitration were typically simple cases concerning relatively small amounts of money. This was in line with the goal of having simple and speedy proceedings. The exemption from the duty to provide a statement of reasons was also facilitated by the absence of appellate proceedings. As we have noted earlier, during the past decades the character of cases submitted to arbitration – and to international commercial arbitration in particular – has changed, and this has prompted changes in the style of proceedings. Today, there is a clear presumption in favor of reasoned awards in international commercial arbitration. The duty to explain the holding imposes a higher standard on the decision-maker, and the award is less likely to be perceived as arbitrary. The absence of appellate proceedings (unless the parties agree otherwise) remains a factor, but there are post-arbitration court proceedings. Furthermore, a party who is ordered to pay a considerable amount of money would like to know why this is required. Moreover, it would be difficult to imagine the development of international commercial arbitration as a discipline without reasoned awards. Only reasoned awards can have any bearing on future practice.

In the *Bay Hotel* case the parties opted for arbitration rules that were actually designed for domestic arbitration. This explains the approach to the issue of statement of reasons. The “concise written breakdown” designation is not widely used, but it certainly suggests a lesser standard. This standard was probably satisfied. The award did provide for a written breakdown of its holding. The more difficult question is whether the arbitrators were obliged to provide for a reasoned award, and if so, whether they met this obligation. The argument against the duty to provide a reasoned award in the given case is the following. According to the AAA Construction Industry Arbitration Rules a “written explanation” of the award shall only be provided “If requested in writing by all parties prior to the appointment of the arbitrator, or if the arbitrator believes it is appropriate to do so…” In our case, an agreement on a reasoned award was reached at the preliminary hearing (thus after the arbitrators were appointed). Upon agreement of the parties and by order of the arbitrators, a scheduling order was issued. Item 7 of this Scheduling Order stated: “The form of the award in this proceeding shall be a Reasoned Award.” The question is whether priority should be given to this scheduling order, or to the Rules that state that the parties can only request a “written explanation of the award” prior to the
appointment of the arbitrator. The requirement that the type of award desired be agreed prior to the appointment of the arbitrators makes sense. An arbitrator would normally like to know what task he/she is accepting. It is also clear that by submitting their dispute to arbitration under given rules, the parties have accepted these rules.

But it is also true that the parties may depart from the accepted rules by specific stipulations. Can they do this after proceedings under the given rules have already begun? One possible line of argument is that arbitration is the creation of the parties. They can agree on whatever procedure they want (subject to statutory requirements of due process). They can also alter their agreement and prior stipulations, and all the arbitrators can do in such a case is to accept or refuse to arbitrate. Procedural arrangements of the parties after the appointment of the arbitrators are not typical, but they are not so rare either. It happens with some frequency, for example, that the parties agree on a site for a hearing different from the place of arbitration. Moreover, in the Bay Hotel case the arbitrators apparently accepted the “reasoned award” standard by signing the scheduling order.

**Questions 4 - 6.** Assuming that the award was supposed to be a “reasoned award”, the question arises whether this standard was actually met. As is demonstrated by the examples reproduced in the casebook, arbitration acts and rules typically do not specify standards for statements of reasons. Professional standards require an explanation of the result and a showing that arguments against this result were considered, rather than ignored or simply forgotten. The standard set in MINE is certainly helpful. (Note that in ICSID arbitration statements of reasons have an increased importance because the ICSID Ad hoc Committees perform a kind of appellate scrutiny.)

The essence of the Guinea v. MINE standard is that the award should enable one to follow how the tribunal proceeded from Point A to Point B. A similar standard was advocated in the Bay Hotel case by the plaintiffs, who relied on a definition given in an English case: “All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a ‘reasoned award’." Bremer Handelsgesellschaft v. Westzucker /No. 2/, 2 Lloyd’s Rep. 130, 1981, at pp. 132-133). The Privy Council did not rely on this standard. It held that U.S. law should govern this issue, and it accepted the expert evidence of Professor Saper (which was apparently inspired by standards developed in domestic arbitration).

The standard for a reasoned award in international commercial arbitration remains an open question. In the opinion of the authors, it cannot be lower than the standard defined in the Guinea v. MINE case or in the Bremer Handelsgesellschaft v. Westzucker case. The introductory phrase “on the basis of the testimony and evidence of the parties, the arbitrators find” does not really show how the arbitrators proceeded from Point A to Point B.

**Question 7.** The standard established by the Brazilian court may be considered as more demanding. It also defines expectations regarding the structure of the award. The elements stated are logical, and rather common elements (like analysis of the positions taken by the parties, analysis of the procedural steps taken,
or analysis of the “existing evidence”). It is also stressed that reasons have to be recorded. The requirement regarding procedural steps taken and “existing evidence”, might also allow an extensive interpretation. Such an interpretation would not be desirable – and, as far as we know, has not been adopted either. Not all “existing evidence” needs to be relevant evidence, and not all procedural steps taken necessarily deserve an analysis. Failure to analyse an irrelevant or repetitive piece of evidence should not be qualified as absence of reasoning or inadequate reasoning.

IV.3.a.iii. An Award Written by Someone Else

**Questions 1 - 3.** Even if a court decision were written by a clerk, and then simply signed by the judge, who did not change anything, the resulting situation would still be different from the *Sacheri v. Robotto* pattern. A cynical explanation would be that in the first case, no one would ever know whether the judge really scrutinized the draft. The threshold question is, however, whether the arbitrator (or the judge) actually delegated his/her decision-making power. In *Sacheri v. Robotto* the Corte di Cassazione found that a delegation did take place. This is clearly contrary to the arbitration agreement, which gave decision-making power to the arbitrator, rather than to someone chosen by the arbitrator.

The fact that in the Italian case the arbitrators were not even able to examine critically the award written by the expert probably helped the court in reaching the conclusion that the arbitrator did delegate his power.

The Corte di Cassazione raises the question whether the result would be the same in arbitration ex aequo et bono. The Court suggests that where there can be no action on the ground of errors of law, a delegation is possible “to propose a solution for the legal issues of the case”.

As far as delegation of the decision-making power itself is concerned, there is probably no difference between arbitration according to rules of law and ex aequo et bono. If the decision is actually rendered by someone other than the arbitrator, we have a clear breach of the arbitration agreement, yielding an award that could be nullified – and this applies to both types of arbitration. The problem is more subtle (and more difficult) if a third person is invited to propose a legal solution. This may take place in various ways. It is not uncommon for an arbitrator (or for a judge) to discuss an interesting legal issue with colleagues, and to consider the opinions offered before drafting the decision. A call to a former professor is not that uncommon either. (“You taught us that in that situation... what would you do in a situation in which...”) The professor might even explain how he personally would decide the issue – usually adding some caveats – and the arbitrator might act accordingly. This falls short of an actual delegation of the decision-making authority. Is it compatible with due process? (One of Sacheri’s contentions was that the activity of the legal expert violated due process.)

Arbitrators may have a legitimate interest in consulting an expert on legal issues. The arbitrator need not be a trained lawyer, he (she) may have a law degree but not from the country the law of which is applicable, or he (she) may just seek another opinion on a difficult question. But the parties may have a legitimate interest to comment on the opinion submitted by the expert. This is even more so when the arbitrator has no legal background himself. It seems acceptable for such an arbitrator
(or for any arbitrator) to call his (her) own expert on legal questions, but it would seem best if this were openly recognized in the process. This means that the opinion of the expert should be made accessible to the parties in order to enable them to comment on it, and possibly to cross-examine the expert. In other words, if consultations go beyond an informal friendly chat, if the colleague, professor, or anyone else assumes de facto the role of an expert, he (she) should be treated as an expert in the arbitration process.

**IV.3.b. Interventions After the Award Is Written**

**IV.3.b.i. Institutional Scrutiny**

*Question 1.* The question has arisen whether any departure from party agreement in the arbitration process justifies setting aside or refusal of recognition. The discussion may be reopened at this point. Institutional rules incorporated into party agreements by reference may provide a new angle. They are part of the agreement. The UNCITRAL Model Law confirms this unequivocally by stating in Article 2(e) that party agreements include “any arbitration rules referred to in that agreement”. Nevertheless, a distinction can possibly be drawn between procedural arrangements drafted by the parties themselves and details of institutional rules implicitly accepted by the parties by way of submitting the dispute to a given institutional tribunal. If a distinction is made, less rigor can be expected regarding procedural rules that only indirectly form a part of party stipulation.

The same argument can be made regarding the situation in which ICC arbitrators actually bypass institutional control, and render their award without submitting it to the Court in accordance with Article 33. We should note, however, that the distinction between direct and indirect party stipulations although it may be defendable, is not mandated by rules in force. The danger posed by Article V(1)d of the New York Convention remains a real one. Also, the party dissatisfied with the award can always argue that he (she) opted for ICC arbitration because of the safety provided by institutional control; thus bypassing the control frustrates the original intentions of the parties and the considerations behind the choice of ICC arbitration.

*Question 2.* The analysis can be similar with respect to CIETAC arbitration. The only difference is that the ICC wording is more insistent. (Particularly the sentence: “No award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.”) The CIETAC Rules (Article 51) only provide that the CIETAC “may bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected”. Still, the failure to submit the draft award to the CIETAC may be perceived as proceeding contrary to party stipulation. The stamp issue may, but need not, make a difference. Assuming that the arbitration rules have become part of the parties' agreement, a strict reading of Article V(1)(d) allows refusal of recognition whenever the arbitral procedure departs from the rules incorporated into the agreement. The seal will help the party relying on the award (he/she could argue that the seal proves that the award was subjected to the proper procedure before the Arbitration Commission, and that the mode of actual scrutiny is immaterial, because
the Arbitration Commission is not entitled to undertake a real and substantive scrutiny anyway).

**Question 3.** The rule is that no departure from the procedure agreed upon can be taken lightly. Does this really imply any departure? Suppose that after proper institutional scrutiny, and after all arbitrators have signed the award, it is sent to the parties by the personal secretary of the chairman of the arbitration panel, rather than by the ICC Secretariat as provided by the Rules. Would this irregularity matter? Or, if it turns out that the costs have not been fully paid after all, could this mean that the award is not binding (given that Article 34(1) of the 2012 ICC Rules states that the award shall only be notified to the parties after the costs have been fully paid)?

Presumably one can assume that the parties want a decision-making process exactly the way it is described in the institutional rules (including even the safety device of institutional scrutiny). Typically this is not exactly the case – parties are rarely aware of the intricacies of the rules of the institution of their choice, sometimes they are not even aware of the fact that the institution has new rules – but the assumption is nevertheless reasonable. It is difficult to assume, however, that the parties have conditioned their submission to an institution on adherence to rules on the internal functioning of the institution that have no bearing on the decision-making process. Article V(1)(d) allows refusal of recognition if party agreement on the arbitral procedure was disregarded. The bulk of the ICC Rules are, indeed, norms governing the arbitral procedure per se, but part of them are rules on the functioning of the institution in connection with the arbitral procedure. If the award passes all institutional scrutiny provided for and has all the signatures needed for validity, the procedural rules and safeguards are met, and it is of no real concern to the parties who sends out the award copies (as long as the award reaches them). Likewise, the technique of collecting fees by the institution may be analytically divorced from the arbitration procedure proper.

**IV.3.b.ii. Correction, Interpretation, and Additional Award**

**Question 1.** One of the distinct advantages of international commercial arbitration is that it is a one step, one level procedure. (Of course an appellate level can be created by party agreement or by institutional rules, and such arrangements are not unknown. Nevertheless, they have remained more or less marginal within arbitration worldwide.) The obvious advantage of this arbitration structure is speed. On the other hand, the lack of an appellate level means that a natural vehicle for correcting errors is also lacking.

The UNCITRAL Rules devote considerable attention to various forms of post-award intervention to correct errors. The Rules identify three types of possible post-award intervention: interpretation (Article 37), correction (Article 38) and rendering an additional award (Article 39) The same options were provided in Article 30 of the 2009 AAA International Rules. Article 33 of the 2014 AAA/ICDR Rules accepted the same approach adding some elaboration. In the *T.Co. v. Dempsey* case, the parties focused their challenge on the amended award. T.Co. moved to “vacate, modify, or correct” the amended award on the ground that the arbitrator “manifestly disregarded the law”. T.Co.’s motion included a request for correction, but
did not specifically focus on correction. The motion was rejected. Dempsey had two requests. One was a request for correction of an alleged error that the arbitrator had refused to correct (and which alleged error remained a part of the amended award). This motion was rejected. The other request focused on the correction that was, indeed, made by the arbitrator, alleging that arbitrator Friedland had no right to correct the award. This request was upheld, and hence, the original award was reinstated.

The wording of Section 11 of the U.S. Arbitration Act is not the same as that of Article 30 of the AAA International Rules (or Article 33 of the 2014 Rules). (Students may be invited to examine the differences.) Both formulations leave ample room for interpretation – and do not impose different outcomes. It is certainly preferable to give an opportunity to the arbitrators to make necessary corrections. A correction made by the arbitrator himself/herself will not be a matter of pride, but will at least not impair the autonomy of the arbitration process. This angle might lead to the conclusion that the standard applied by arbitrators could be more flexible.

It is also important to keep in mind that motions for correction are tied to time-limits (30 days in the case of the 2008 and 2014 AAA International Rules). Time limits within which corrections can be made by the arbitrators are typically shorter than the time limits within which the award may be challenged before a court. The practical consequences of longer time limits are, however, negligible, if one deals with truly clerical errors or evident miscalculations, which are normally apparent, and do not require extensive time and analysis to be understood.

**Question 2.** In his Order, Judge Crotty gives a narrow interpretation to the term “clerical error”, overruling the interpretation earlier given by the arbitrator. Hence in a somewhat paradoxical way, Judge Crotty gives support to the finality of the (original award), and at the same time overrules the final findings of the arbitrator. The arbitrators are, indeed, *functus officio* after they have decided on the matters submitted to them. Their “office” is created by the parties. The power to make corrections is an exception from the rule that the arbitrators cease to be arbitrators after they have ruled on what was submitted to them in the arbitration agreement. The Southern District of New York opted to interpret this exception narrowly. The limits of the exception are actually agreed upon by the parties (by accepting the AAA International Rules, including Article 30) – but they are a matter of interpretation. In the opinion of the District Court, the corrections that were made are a result of a “reinterpretation of the record”. One could possibly make a distinction between errors that misstate a conclusion, and errors in the assumptions that led to a conclusion. The District Court seems to rely on such a distinction, submitting that erroneous starting points for conclusions are not clerical errors. Arguments could be advanced both ways. It would certainly not be implausible to hold that “misreading a unit of measure on one invoice” is a clerical error.

The question could also be raised whether the District Court is entitled to a de novo review of the question as to what amounts to a clerical error, or whether the court should take a deferential attitude toward the interpretation already given by the arbitrators.
**Question 3.** While it is true that both parties asked the arbitrator to make corrections, it is also true that the parties never reached agreement concerning the scope of possible corrections requested by the other party. At the same time, one may possibly argue that if an arbitrator is entitled to deference regarding his/her interpretation of the scope of the arbitration agreement (which position has, indeed, been taken in U.S. court practice), the arbitrator might also be entitled to deference regarding his/her interpretation of the scope of the right to make interpretations and/or corrections under a rule chosen by the parties. Of course such deference should also have some limits.

The option introduced by Article 33(3) of the 2014 AAA/ICDR Rules is not a pleasant option for arbitrators, but it may be helpful. Arbitrators (like everybody else) do make mistakes. Some arbitral institutions (like the ICC) provide for an institutional scrutiny prior to sending the award to the parties – and this is often helpful. Some clerical or typographical errors may be harmless – and it would not make much sense to rewrite the award in order to correct Smith to Smit (unless both a Smith and a Smit are involved in the case, and the reference is consequential). But some errors (particularly errors regarding figures) may change the actual decision, and it is better to make corrections as soon as possible, including corrections *proprio motu*. Under Article 33, parties may request interpretation, correction or additional awards; arbitrators may on their own initiative provide corrections or additional awards, but not interpretation. One could raise arguments both in favour and against this solution. On one hand, one could argue that once one allows interventions in hindsight, there is no reason not to extend this option to clarifications. A possible argument in the other direction would be that it should be left to the parties to notice whether the award is clear enough, and whether interpretation is needed. Other arguments may also be advanced.

**Question 4.** If arbitrators render an award in China under the CIETAC Rules without stating the date on which the award is made, correction could possibly be asked for (and made) on the ground of Article 51.

Article 54 does not seem to envisage this situation; it provides instead for additional awards.

If no correction is sought and made, we have an award that was not rendered in full accordance with the procedural rules chosen by the parties. (Required elements of the award are stated in Article 49.) Moreover, according to Article 49, paragraph 8 of the CIETAC Rules, “[T]he date on which the arbitral award is made is the date on which the arbitral award comes into legal effect”. One could argue that the effects of the award are actually not tied to the date stated in the award, but rather to the date of making the award, and that the latter could be established by various means (including the stamp affixed by the Arbitration Commission, or the postal stamp on the letter in which the award was mailed).

The question also arises whether the date stated in the award by the arbitrators is of critical importance. Relevant procedural deadlines (e.g., the time limits for initiating set aside procedures, or for seeking confirmation) do not start running from the date stated in the award, but rather from the day of receipt of the award. As far as the deadline stated in Article 48 of the CIETAC Rules is concerned,
the relevant moment is the date the award was rendered – which, again, need not be the date stated in the award.

It is not likely that an undated award would be invalid; but the procedural irregularity – albeit minor – is there, and so is the uncertainty.

**Question 5.** It is difficult not to agree with the Hong Kong court. The correction regarding the date of the hearing is a good example of a clerical error; it might even be qualified as a typo. It is also important to take into consideration that in this case (unlike in the *Dempsey* case) the correction did not result in different rights and obligations of the parties. The correction did not affect the holding, it did not modify the amount to be paid. The aim of the correction was to make the award safer, by way of removing a clerical error that could have given rise to doubts regarding the right of the parties to present their case. In this situation, the correction was helpful, but the Hong Kong Court could have probably also established for itself whether there was a hearing on April 27th.

**Question 6.** Article 33 of the AAA/ICDR Rules provides two time limits, one in section (1) for the parties to seek correction, interpretation, or an additional award, and the other in section (2) for the arbitrators to respond to such a request. In both cases the Rules allow thirty days. The wording of sections (1) and (2) is essentially the same. An analysis of the purpose of the respective time limits may yield, however, different conclusions. The time limit imposed on the parties is more likely to be strictly observed (unless an extension is agreed upon by both parties). The party who wants to rely on the award has a legitimate interest to oppose any extension of uncertainty tied to the action (inaction) of the other party. On the other hand, one could argue that a delay not caused by a party should not hurt that party. Another possible line of argument regarding the 30-day limit for the arbitrators' response is to equate the nature of this time limit to time limits set for rendering the award. An innovation of the 2014 Rules is the explicit requirement to state reasons for interpretation, correction or additional awards – which brings these post-award interventions closer to an award. Dealing with the award, Article 30 of the 2014 Rules states a deadline of 60 days (from the date of the closing of the hearing) “unless otherwise agreed by the parties, specified by law, or determined by the Administrator”, The question arises whether this caveat also extends to interpretation, corrections, and additional awards as well.

(If the correction, interpretation, or additional award is deemed invalid because it was made after the thirty-day deadline, the award should stand as originally rendered.)

By way of conclusion, let us repeat that the lack of an appellate level saves time, but also gives rise to risks – and imposes a heightened responsibility on all participants in the process. We should also add that in practice disputes about dates not stated or time limits for rectification not met, are quite rare.

**Questions 7 - 9.** In the *Gannet Shipping v. Eastrade* case the arbitrator misread a handwritten figure and rendered the award according to this misread figure. This misreading remained uncontested during the proceedings, because the case was decided without an oral hearing (on the basis of documents and written
pleadings only). In accordance with the principle that costs follow the event, costs were allocated on the basis of the money award, which itself was based on the misread figure. The proper figure was not contested between the parties. The arbitrator (Umpire Burbridge) corrected both the award (to accord with the actual figure) and the allocation of costs. The outcome certainly sounds fair. The question is whether this outcome was in accordance with the applicable rules, which allow corrections but tend to limit the range of possible interventions after the award has been rendered.

The Applicable Rules are found in Section 57(3) of the 1996 English Arbitration Act, and Rule 26(A) of the L.M.A.A. Terms (the rules of the arbitral institution). These norms – like most norms – envisage mostly typos, or errors in calculation. In this case the award mirrored the exact figures the arbitrator wanted to put in; these figures were not the result of some miscalculation. Still, the award was based on an obvious error. The amount of the demurrage awarded was a direct result of the misread figure; the award on costs was a further consequence of the same misunderstanding.

Section 57(3) of the English Arbitration Act allows intervention in the following cases:

- clerical mistake;
- error arising from an accidental slip or omission;
- ambiguity.

Rule 26(A) of the L.M.A.A. Terms allows correction in cases of:
- accidental mistake omission or error of calculation.

(There is a 2002 version of the L.M.A.A. terms. The pertinent provisions of the 1997 and of the 2002 versions are the same. Only the numbering of the paragraphs has changed.)

The problem with the original award was not ambiguity. The original award was not ambiguous; the figures were simply wrong.

“Clerical error” normally means a technical error (like a typo) made by the arbitrator or his/her secretary. This designation appears to be unfitting too.

“Accidental slip” or “accidental mistake” are characterizations that can probably apply to the actual facts of the case. The misreading of the handwritten figure could be called a “slip” or “mistake”; and as Justice Langley states, the slip or mistake was accidental because the arbitrator clearly did not mean to use an incorrect figure. The “error arising from an accidental slip” language seems to allow removal of the consequences of the “accidental slip” – which in our case would seem to include both the amount of demurrage and the allocation of costs.

Questions 10 and 11. One of the important advantages of arbitration is that it is a one-step event. There is no appellate level (unless specifically stipulated, which is a rare occurrence). This is clearly an advantage from the point of view of speed; it is a handicap with regard to the possibility of correcting errors. This is why the main
policy consideration behind rules on correction of awards is to allow necessary corrections of simple errors, but not to allow some sort of appellate proceedings under the guise of correction or interpretation. This is why possible corrections are limited, and why possible instances of correction are described in rather restrictive terms like “clerical errors”, or “accidental slips”.

An important difference between appeal and correction is that an appeal is typically submitted to a different tribunal (although, there are some remedies in various legal systems that are addressed to the same tribunal, and that are decided by the same tribunal).

If appeal exists as a remedy, correction loses some of its importance. It is still helpful as a shortcut, but it is not the only way to rectify an inappropriate decision. For this reason, one could argue that correction deserves a somewhat broader scope in arbitration than in litigation.

But how much broader? It is difficult to imagine a court “correcting” a decision on the ground that it failed to give proper weight to a legal argument. This is the kind of issue that would be addressed in appellate proceedings. Could “correction” of an arbitral award serve the same purpose? Could hypos (a) or (b) be qualified as “clerical error” or an “accidental slip”? The category of “clerical error” does not seem to apply. Accidental slip? Completely overlooking a document containing a decisive legal argument is somewhat closer to an “accidental slip” than is insufficient scrutiny of an argument. But even if we focus on variant (a), extension of the possibility of correction to the field of legal arguments appears to be a dangerous course, bringing a motion for correction too close to appellate proceedings.

Let us mention in this connection that on October 1, 1999, the ICC Secretariat issued a Note regarding Correction and Interpretation of Arbitral Awards. This Note deals inter alia with the form of corrections. The Note states:

“If the Arbitral Tribunal decides to correct or interpret the Award, this shall be done in the form of an addendum (“Addendum”) which shall constitute part of the Award.

If the Arbitral Tribunal arrives at the conclusion that the Award does not need to be corrected or interpreted, its decision shall be set out in a document entitled “Decision”.

**Question 12.** One of the key policy reasons behind the institution of correction is to limit such interventions to technical omissions – and to prevent the introduction of a kind of appellate review, or remand, under the disguise of correction of clerical errors. This purpose leads us in the direction of an objective standard. What matters is, first of all, the character of the error, rather than the circumstances in which the error was made. On the other hand, one may assume that in a different procedural setting (including an oral hearing), the error would have probably not remained undetected.
**Question 13.** One could argue that in this case the award was actually not changed, but clarified (interpreted). The Swiss court qualified the rectification as a “correction”, but one could also describe it as an “interpretation”. The final order (dispositif) mentioned only interest; the statement of reasons explained that the interest contemplated was actually compound interest. A corresponding rectification of the “dispositif” could be described as a clarification (interpretation).

Had the statement of reasons not mentioned compound interest, the term “correction” would perhaps have been more fitting.

Time is a difficult issue. In this case it is quite clear that the original award did not state exactly what the arbitrators wanted to state. A rectification was therefore in line with the requirements of justice. At the same time, a party is entitled to rely on what the award actually states. Changing the situation after a relatively long time period may also produce injustice. Fixing a given number of days within which an award may be changed may be rigid. Leaving this open ended yields too much uncertainty and may frustrate legitimate expectations. The AAA/ICDR Rules state that a request for correction or interpretation must be submitted within 30 days from the receipt of the award, and that the arbitrators can comply with such a request within 30 days after the request. This is reasonable, but certainly not the only reasonable option. What about 70 days (the time elapsed in the Swiss case)?

**IV.3.c. Deposit, Authentication, Certification**

**Questions 1 and 2.** Arbitration – and ad hoc arbitration in particular – is informal, with informal records; yet the decision may be worth millions of dollars. Hence there is support for a public authentication process. The argument can also be made, however, that the dangers arising from informality are not really significant. They are certainly less significant, for example, than those arising from the use of checks. Unlike a check, the award cannot be converted to money without court procedure. (A party may pay without any such procedure, but a party who has participated in the procedure cannot be defrauded by a fake award.) If there are doubts regarding authenticity, these can be clarified during the enforcement process.

But forgery is not the only danger. The award can be lost. The arbitrators are not obliged to keep it. Some public record might help. According to commentator Siehr, the purpose of deposit is to keep the award safe.

The discussion may explore two distinct concepts: optional deposit and mandatory deposit. Optional deposit is “harmless”. It may increase authenticity, yet it poses no new hurdle to the award’s validity. Mandatory deposit makes some sense if one considers Article IV of the New York Convention, which obliges the party seeking recognition to supply “a duly authenticated original award or a certified copy thereof”. Of course, an award may be (and often is) effective without any process of recognition. The dilemma is the following: Deposit constitutes authentication and protects the party from further problems if reliance on the New York Convention becomes necessary; on the other hand, if the parties (or the arbitrators) are compelled to deposit the award, then inevitably the validity of the award becomes linked to deposit, and hence some awards will be jeopardized.
Question 3. One could say that the 2008 Egyptian decree (amended in 2009) actually introduces another form of control over the award. The Decree regulates the procedure of deposit “according to Article 47 of the Arbitration Act”. Hence, it follows that the control is actually exercised by the secretariat of the court, as stated in Article 47, rather than by the court itself - which is somewhat unusual. This would not represent a problem if deposit would just mean authentication. Concerns may, arise, however, if the secretariat of the court is invited to assess whether the award does or does not violate public policy or morals. Deposit may only take place after the time limit for filing a possible request for annulment has elapsed. This actually allows a certain control (more limited than control in annulment proceedings), even after the dissatisfied party has failed to take advantage of the legal remedy within the time limit prescribed.

Question 4. Institutions have administration and archives. Hence, if the purpose of deposit is to keep the award safe, keeping the award on file in the institution will satisfy this purpose. The Egyptian Decree provides, however, for some control by Egyptian courts during the process of deposit of awards rendered in Egypt. One can argue against this solution, but it would be difficult to argue that the parties may waive this form of court control. (As a matter of principle, parties can only waive or reduce court control if this is an option permitted by statute or binding precedent.)

Question 5. If the purpose of deposit is authentication, it has to be carried out by the arbitrators in order to allow verification of their identity and signatures. If the purpose is solely to create some public record, deposit by one or more of the parties would seem to suffice.

If, as is often asserted, the need for authentication were the best argument for having a deposit requirement, deposit by the arbitrators would appear to be the best solution. But this solution may not be either easy or cheap. If the award were rendered by correspondence, deposit by the arbitrators would require that at least one arbitrator travel to the place of arbitration to deposit the award.

Question 6. If the validity of the award is conditioned on deposit, the arbitrators must not be deemed to be functus officio before the deposit has been made; particularly not if deposit is part of the arbitrators’ duty. If the award does not take effect until it is deposited by the arbitrators, the act of depositing may be considered the final phase of the decision-making process. If, instead, deposit is considered optional, (or if it is being made by one of the parties) it could take place even after the arbitrator’s official functions have ended. The arbitrator could still act as a private person in witnessing that the award and the signature are his (hers).

Question 7. The wording of Article IV of the New York Convention appears to treat authentication as a matter to be verified ex officio. Article IV provides that in order to obtain recognition and enforcement, the party shall supply (among other things) “the duly authenticated original award or a duly certified copy thereof”. This requirement appears to be mandatory, that is, not subject to modification by party agreement.

Another question is whether this is the best solution. If no one contests that the award presented is, indeed, the award rendered by the very arbitrators who were
entrusted with the settlement of the dispute, it is difficult to see what public interest
could possibly be served by an ex officio scrutiny of authenticity (possibly forcing one
to deal with a conflict of rules regulating the formalities of authentication).

**Questions 8 - 10.** Authentication is required in order to avoid doubts and
disputes about the authenticity of the award. The logic is essentially the same as that
underlying the requirement of certification of the translation. If authentication or
certification are missing (or if they are incomplete) should recognition be denied even
if the authenticity of the award and the accuracy of the translation are not contested?

Let us start by saying that the court should request authentication of the award
and certification of the translation even without party motion. If the party request for
enforcement does not contain an authenticated award, the court will normally bring
this to the attention of the party requesting recognition. In most cases it is relatively
easy to remedy this formal deficiency, and to supply the requested authenticated
award (or certified translation, as the case may be). In other words, lack of
authentication or lack of certification would normally give rise to a relatively simple
extra step; it would not create an either-or dilemma. It is not clear from the Geneva
decision why the usual course of action was not followed.

Article IV is not formulated in permissive terms. It says that in order “to obtain
recognition and enforcement ...the party... shall...supply” (emphasis added). One
could argue on the other hand that Article V contains an exhaustive list of grounds for
denial of recognition and enforcement, and the requirements set out in Article IV are
not included among those grounds. Hence, lack of authentication, certification, or
translation should not result in refusal, but rather in postponement, of recognition
(until the proper documents are submitted).

One could argue that the requirements set out by Article IV lose their main
purpose if no one contests that the award presented by the party seeking recognition
is the actual award rendered in the dispute. It makes sense to introduce such a
flexible interpretation in the way that the Swiss court did. The same position was
taken by the German Supreme Court. In the case in question, a German investor
sought recognition and enforcement of a Swiss award rendered against the Republic
of Poland. Poland opposed recognition alleging, inter alia, that the German party did
not submit duly certified documents. The German Supreme Court held that it was not
necessary to discuss the issue whether the award was or was not duly certified, since
the authenticity of the award was not disputed. (Bundesgerichtshof, III. ZB 43/99,
August 17, 2000). The 2012 decision of the Supreme Court of Switzerland is a step in
the same direction. The authors tend to agree that it is sensible to adopt a flexible
interpretation of Article IV. Still, other interpretations are clearly possible, and we
would not advise a party to ignore the requirements of Article IV.

**Question 11.** Considering the filing of the award by the institution as an
equivalent of authentication or certification, is both logical and practical. One could
say that Article IV of the New York Convention allows such an interpretation, but it
would be difficult to argue that such an interpretation is mandated by Article IV.
It is also sensible to find support in party autonomy, as far as authentication is concerned. The institutional rules agreed upon by the parties may be considered as rules incorporated into the parties’ agreement. (The situation is different with regard to translation into the official language of the recognizing authority. This is a question that cannot be left to the parties only.)

It would be plausible to interpret the wording “the LCIA Court shall transmit certified copies to the parties” in a way to cover certified copies submitted by the Registrar (of the Court). Yet, the wording adopted by the 2014 LCIA Rules is safer.
CHAPTER V

THE EFFECTS AND LIMITS OF AWARDS RENDERED IN INTERNATIONAL COMMERCIAL ARBITRATION

What's new in the 6th edition: In subsection V.2.b. we have amended the Note on the 1996 Indian Arbitration Act to include the most recent decisions of the Indian Supreme Court, including the landmark Bharat Aluminium case, which finally drops the much criticized “Singer” approach (repeated in Bhatia). But it does so only prospectively.

In subsection V.2.d. on “Standard of Review” concerning jurisdictional challenges in set aside proceedings, we have added an important new U.S. Supreme Court decision, BG Group PLC v. Republic of Argentina. This is an investor-state dispute, but it was submitted to ordinary ad hoc arbitration under UNCITRAL Rules rather than to ICSID arbitration, and hence was governed by the N.Y. Convention.

In subsection V.3.c., as we turn to the procedural grounds for refusing recognition and enforcement, we have re-arranged the cases and added a new case (Clothing Manufacturer (Ukraine) v. Textiles Manufacturer (Germany). In this new arrangement, we focus first on burden of proof, under N. Y. Convention Art. V(1), V(2) and IV. The new case, Clothing Manufacturer (Ukraine), takes up the Art. IV burden of proof issue.

We have re-arranged the materials somewhat and added new cases in subsection V.3.c.vi. dealing with N.Y. Convention Article V(1)(e) (award set aside where made or under the arbitration law of which it was made). The new cases come from the U.S. and the Netherlands and deal with the “public policy discretionary” approach to the V(1)(e) ground for refusing recognition or enforcement.

In the Questions and Comments throughout the chapter we have updated references to arbitration rules and statutes and introduced minor changes and improvements.

V.1.a. Note

V.1.b. Confirmation, Leave to Enforce

V.1.c. Confirmation and Conversion
Questions 1 and 2. Once an award is reduced to judgment in a confirmation proceeding in the home country of the award, or in a recognition and enforcement proceeding in another country, both conceptual and practical issues arise concerning how to treat the award and the judgment thereafter. In the COSID case, SAIL, the respondent, argued that the award was merged into the judgment presumably because foreign judgments are not as readily enforced in other countries as are foreign awards - since there is no worldwide convention for judgments similar to the New York Convention for foreign arbitral awards. Both COSID and the Gasmac case, mentioned in Question 2, reject the merger theory; indeed, it is generally discredited. For one thing, the New York Convention does not provide that an award's having been reduced to judgment in another country is a ground for refusing recognition and enforcement of the award. The New York Convention also does not require that an award be confirmed (reduced to judgment in the home state) in order to be enforced elsewhere. The award, once it has become binding on the parties, is entitled to recognition and enforcement in its own right.

The choice between conceptions “b” and “c” given in Question 1 is not as straight-forward, and the authors, themselves, are not of one mind on this issue. Seetransport Wiking clearly adopts conception “b”, but two of the authors favor conception “c”.

Questions 3 and 4. The Rosseel case helps to make some basic points about the independence of the award and a confirmation judgment. The lawyers for Oriental may have fallen into the fundamental error of assuming that an award could not be enforced abroad until it had been confirmed in a judgment at home, and hence that they needed only to provide by stipulation that any confirmation proceedings would take place in the U.S. federal district court for the Southern District of New York. Of course this stipulation became irrelevant to Oriental’s stated purpose of ensuring court review of the lower court decision to include in the arbitration certain members of the Oriental Group. Under the New York Convention, once the award is rendered and binding (essentially when it is communicated to the parties), it can be enforced in any Convention country—subject to the limited grounds for refusal listed in Article V. To ensure court review of the disputed decision to include certain Oriental Group members in the arbitration, Oriental should have instituted an action to set the award aside.

The authors do not find Oriental’s argument, recounted in footnote 4, persuasive. Surely, Oriental could have sought to vacate the award to the extent that it bound the Oriental Group members it claimed were not parties to the arbitration agreement.

Question 5. In Seetransport Wiking, Seetransport brought to the District Court for the Southern District of New York for enforcement both the award and the French decision granting exequatur to the award. In effect this could be seen
as a single cause of action supported by two different “theories” of claim. In *Damiano*, by contrast, the claimant first sought to enforce the award in a separate action in Italy. When that action failed, the claimant obtained a judgment in England confirming the award and then sought to enforce that judgment in Italy. The Italian Supreme Court (Corte di Cassazione) ruled that the matter was res judicata and refused to enforce the judgment.

Turning to the hypothetical stated at the beginning of Question 5, an instructor might ask the students what they would do if a client had won an award and a confirming judgment but needed to collect against assets in another country. Would they try to enforce the award or the judgment first and why? And if they failed in the first attempt, would they then turn to the other ground for collection against the respondent’s assets? We believe the best answer is to proceed the way counsel did in *Seetransport*. In the same action seek enforcement of the award and the foreign judgment, as alternative theories supporting the same cause of action. This avoids “splitting a cause of action”, which would be fatal to the second claim in most (if not all) legal systems (on the ground of res judicata).

Note that in *Damiano* the Corte di Cassazione rejected the Messina Court of Appeal’s decision to enforce the British confirmation judgment essentially on the ground of res judicata. The Messina court had not undertaken a factual inquiry to rule out the possibility—indeed, it seems a highly probable possibility—that the British court had simply confirmed the very award that the Corte di Cassazione had previously refused to enforce in Italy. In other words the Messina Court had not ruled out the possibility that the matter was res judicata in Italy.

What if one has an award and must decide whether first to obtain a confirming judgment in order to seek enforcement of the judgment and the award at the same time? One of the objectives of the New York Convention was to avoid the need for “double exequatur” (a first exequatur, in the form of a confirming judgment and a second, in the form of enforcement of the award). Under the facts of the hypothetical in Question 5 (more favorable conditions for enforcing a judgment than an award), the double exequatur procedure would seem to make some sense. This, however, is only a hypothetical. Given the existence of the New York Convention for enforcing foreign arbitral awards and the absence of any comparable convention on a world-wide scale for the enforcement of foreign court judgments, the more normal situation would be one in which, if anything, it was easier to enforce an award than a court judgment. In this more normal situation, there would be no benefit to seeking a confirming judgment before going forward with enforcement of the award.

**Question 6.** Double recovery would of course be impossible to accept. We believe that the notion of “two theories” to support the same cause of action
would provide a useful solution to the double recovery dilemma.

**Question 7.** The *Bechtel* decision in France clearly follows theory "c" above in Question 1, under which a judgment confirming a home award or recognizing and enforcing a foreign award is not considered a judgment on the merits capable of being enforced as a judgment in France. The judgment’s force is understood to be limited to the territory of the court rendering the judgment. In effect the Paris Court of Appeal reads the Dubai judgment in *Bechtel* as deciding only that the award cannot be enforced in Dubai, without saying anything about the award’s force and effect in other countries. Thus, by its nature the judgment cannot be “enforced” outside of Dubai. The U.S. Second Circuit’s ruling in *Seetransport* reaches the opposite conclusion reflected in theory “b” above in Question 1. In *Seetransport* the Second Circuit enforces a French confirmation judgment in a case in which the statute of limitations had already run for enforcing the award.

In *Oriental* the U.S. federal district court notes in footnote 7 that the British recognition and enforcement judgment might have been entitled to res judicata (and issue preclusion/collateral estoppel) force in the U.S. proceeding, but does not actually decide the point because the district court preferred to resolve for itself the award’s enforceability, reaching, as it did, the same conclusion the British court had. In *Damiano*, interestingly, the Italian Corte di Cassazione refused to recognize the British confirming judgment on the ground of res judicata, not on the *Bechtel* reasoning that such a judgment is in principle not capable of being recognized or enforced outside of the rendering court’s territory. Hence *Damiano* does not directly address the issue we are considering.

The cases thus demonstrate that jurisdictions differ on how a court should treat a foreign court’s confirmation or recognition and enforcement judgments. We will return to this issue below in subsection V.3.c.vi, dealing with N.Y. Conv. Art. V (1)(e) as a ground for refusing to enforce a foreign award (when the award has been set aside where made or under the [arbitration] law of which it was made).

**V.1.d. Concurrent and Consecutive Proceedings**

**V.1.e. Concurrent Proceedings**

**Questions 1 and 3.** Parallel proceedings are a curse—a curse we must sometimes live with. Priorities are difficult to set in an international context, but an imperfect formulation of priorities is still better than simply assuming that the only relevant proceedings are those before domestic authorities. If two courts in two different countries are seized in the same dispute, time is an obvious criterion. It makes much more sense to defer to proceedings in another country when these proceedings were initiated before the proceedings in the forum court. Priority on
the basis of chronology is typically not accepted, however, without qualifications. Domestic courts will not defer to a lawsuit initiated earlier in another country without first scrutinizing jurisdiction. In some countries deference is excluded when -according to the law of that country - domestic courts have exclusive jurisdiction in the given case. Deference could also depend on the existence of reciprocity.

One may say that the situation is somewhat simpler in a competition between a court on one hand, and an arbitration tribunal on the other hand. The New York Convention mandates deference in favor of arbitration.

Whether the court proceedings have just begun or are well under way is a consideration of some relevance under the comity doctrine. The question is whether the comity argument is really relevant; whether one needs to investigate whether U.S. courts should accord comity to Greek proceedings, when both the United States and Greece are parties to an international agreement that gives priority to arbitration (assuming the dispute is arbitrable and assuming the arbitration agreement meets the requirements of Article II of the New York Convention.).

**Question 2.** The motion to stay the Greek proceedings and the action before the New York Court are not mutually exclusive. This is not an “either-or” pattern. There is also no mandatory sequence (first a motion to stay before the Greek court, and if successful, an action before the New York court). A failure to oppose court proceedings in Greece may be interpreted, however, as a waiver of the arbitration agreement. In this sense, a motion for a stay (or some other opposition to court proceedings in Greece based on the arbitration agreement) is, indeed, relevant. Article 8(1) of the UNCITRAL Model Law sets a time limit, up until which a party who opposes court proceedings on the ground of an arbitration agreement may ask the court to refer the case to arbitration. The latest moment for relying on the arbitration agreement is the time of submission of the first statement concerning the substance of the dispute. Students may be invited to analyze Article 8 (and possibly to compare Article 8 with Section 9(3) of the English Arbitration Act). An analysis will show that Article 8 envisages the situation in which one party initiates court proceedings, and the other party opposes such proceedings before the same court on the ground of an existing arbitration agreement. Would the same rule apply to the *Sumitomo v. Parakopi* pattern? Is there a reason to allow reliance on the arbitration agreement before courts of another state after the opportunity to raise the issue before the “court before which the action was brought” was missed? The authors tend to believe that parties should not be allowed to use the arbitration option for tactical advantage. A valid arbitration agreement should be a sufficient basis for a stay, but the stay request should be filed within a reasonable time and not after waiting to see which proceeding might yield better results.
Article 8 also allows a party who prefers arbitration to initiate arbitral proceedings even though court proceedings have already begun. Could commencement of arbitral proceedings replace a motion to stay in the court proceedings? (It could not. The court would not necessarily be aware of the arbitral proceedings. The party who wants arbitration must express this preference in the court proceedings initiated by the other party.)

Further discussion may be encouraged by getting the students acquainted with Section 5 of the new 1999 Swedish Arbitration Act, in force since April 1, 1999 (the newest arbitration act at the time this teacher’s manual was being written). According to Section 5:

“A party shall forfeit his right to invoke the arbitration agreement as a bar to court proceedings where the party:

1. Has opposed a request for arbitration;
2. Failed to appoint an arbitrator in due time; or
3. Fails, within due time, to provide his share of the requested security for compensation to the arbitrators.”

Is this the right approach, or is it too stringent? Is it a pro-arbitration provision?

**Question 4.** A motion to compel arbitration was not really necessary. Such a motion (an “independent” rather than an “embedded” suit) makes sense when there is doubt about the validity of the arbitration agreement, and the party wants to clarify its options at the very beginning. Sumitomo could have simply asked the New York court to act as appointing authority. (The jurisdiction of the New York court was based on the arbitration agreement, which chose New York as the site of arbitration.)

**Question 5.** Arguments can certainly be raised pro and con. The validity of the arbitration agreement is a matter to be decided, and a decision of a foreign court is certainly entitled to some respect. The point is that the UFMJRA restricts the number of issues that may be revisited by the recognizing courts—just as do other rules on recognition of foreign judgments. Recognition would not be recognition if all issues of law and fact could be tried de novo. But as to some points, the recognizing court may undertake its own scrutiny. Jurisdiction is typically one of those points. Jurisdiction of the Greek court hinges upon the validity of the arbitration agreement. For these reasons, the New York court would probably undertake its own investigation with respect to the validity of the arbitration clause. In principle, a Greek decision only becomes res judicata in the United States after it is recognized by a U.S. court (just as a U.S. decision will not be binding in Greece before it is recognized by a Greek court).
**Question 6.** As a consequence of the Kompetenz-Kompetenz principle, an arbitrator is entitled to decide on the validity of the arbitration clause. This means that the arbitrator can (and is actually obliged) to use his/her own judgment. The refusal of a court to grant a stay is, of course, a serious matter. This is even more serious when the court that refused to honor the arbitration agreement is the same court before which enforcement of the award is likely to be sought.

An arbitrator should consider the arbitration agreement with utmost care when courts have already taken a position. But the principle remains the same. Arbitrators have the right (and duty) to decide upon their own competence.

**Questions 7 and 8.** The High Court of Bombay distinguished between domestic and international arbitration. It held that if a stay is not granted, then under Section 35 of the 1940 Indian Arbitration Act, further arbitration proceedings become invalid. The High Court added, however, that “It is difficult to extend this principle of Sect. 35 to arbitration proceedings pending before a foreign tribunal.” (penultimate paragraph of the opinion). It is questionable how much control courts have over domestic or international arbitration even when it occurs on home ground. Various forms of court control and/or assistance emerge at junctures like appointment, challenges, provisional measures, setting aside, or recognition and enforcement. It would be contrary to the principles and interests of international commercial arbitration, however, to allow a court to stay or otherwise influence arbitration proceedings in another country. Section 5 of the Indian Ordinance falls under the heading “extent of judicial intervention”. It says clearly that judicial intervention is restricted to instances stated in the Ordinance. Ordering a stay of ongoing arbitration proceedings is not among the examples of judicial intervention - not even if arbitration takes place on home ground. A rule like the one in Sect. 35 of the 1940 Act is also missing.

In *Texaco v. American Trading Transport Co.*, relied on by the Fifth Circuit, the arbitration was in New York and hence domestic. The Tai Ping case involved international commercial arbitration, which we believe made the argument against the stay even stronger. The problem raises issues similar to whether a challenge of arbitrators before a court should be allowed during the pendency of arbitration proceedings.

**Question 9.** The questions raised here are connected with the referring court’s approach to the negative effect of Kompetenz-Kompetenz issues we discussed above in Chapter 2. Recall that under the French approach at Stage 1 the court will refer the parties to arbitration unless it is manifest that no valid arbitration agreement has come into existence. At Stage 3, however, the French court will decide the jurisdiction issues itself de novo. German courts, on the other hand, decide the jurisdiction issue with finality at Stage 1 (and if there is no Stage 1, then at Stage 3). Thus if the German court refers the parties to
arbitration, this must be on the basis that the court has decided that the arbitration agreement is valid. Technically, due to the narrow concept of res iudicata in German law extending in principle only to the operative part of the decision but not to the grounds, this decision could only bind an arbitral tribunal if the court had stated in the operative part of its decision that an arbitration agreement existed. While such a binding force would exist for tribunals in arbitrations having their place of arbitration in Germany, for arbitrations with their place of arbitration in a different country the further question arises whether the arbitrators have to recognize and are bound by the decision of the German court. Even if the decision by the German court is not binding it will naturally influence the decision of the arbitrators. However, a German court decision does not bind arbitrators in Yugoslavia.

The question arises of what the German claimant could do after the German court refused to consider its claim by holding that the arbitration agreement was valid, and after the arbitral tribunal, acting under the rules of the Yugoslav arbitral institution (the Foreign Trade Court of Arbitration at the Yugoslav Chamber of Commerce – “FTCA”), came to the conclusion that the arbitration agreement was invalid.

The decision of the Yugoslav arbitrators cannot be reviewed by German courts in set-aside proceedings, because the seat of arbitration was in Yugoslavia, and the lex arbitri was Yugoslav law. Recognition and enforcement proceedings in Germany do not represent an option either, because the German party is obviously not interested to seek recognition of an award that denied jurisdiction over its claim. The Yugoslav party has also no reason to take further steps with the award in Germany.

The question also arises whether set aside of an award denying jurisdiction can be sought at all. If it can, and if the Yugoslav court were to set aside the award rendered by the Yugoslav arbitral institution, then the case could be resubmitted to the FTCA (presumably before different arbitrators), and a different decision on jurisdiction would become possible.

Another option for the German party would be to resubmit its claim to a German court, arguing that the situation had changed after the FTCA tribunal denied jurisdiction. After this, the arbitration agreement—whether it was initially valid or not—became an agreement incapable of being performed, and hence it could no longer impede court jurisdiction.

**V.1.f. Effects of a Partial Award**

*Questions 1 and 2.* The discussion may be introduced by asking what
really becomes binding in a final and binding decision. National rules on civil procedure normally determine the force and effect of res judicata and collateral estoppel concepts; the New York Convention does not tackle these issues. One could thus raise the question of what should be res judicata when an award is rendered in international commercial arbitration.

The ratio decidendi will normally not become binding. If the same law-fact pattern yields different final decisions in litigation between different parties, one has every reason to criticize the judicial system, but in many legal systems there is no legal remedy that would establish uniformity. The question also arises which of the two decisions should set the standard. The first one, because it is the first one? One could also argue that there is probably more experience, more information, and probably more wisdom behind the second decision. (There are, of course, some differences in this respect between countries in which court decisions may form stare decisis and countries in which statutes represent the only source of authority.)

Does the logic that applies to conflicting decisions concerning the same fact pattern between different parties, also apply to a sequence of partial awards arising out of a legal relationship between the same parties? Suppose claimant (a contractor) sues for the unpaid portion of the price agreed upon in the contract, and defendant (the owner) counterclaims for damages because the building that was erected was not in conformity with the specifications. Suppose the main issue is whether an oral amendment of the specifications was actually perfected, or merely discussed and never agreed upon. The arbitrators find that there was no amendment and render a partial award denying recovery to the contractor. After this, the arbitrators take up the counterclaim and the issue of damages resulting from the non-conformity, and they become persuaded as a result of new arguments that the specifications were, indeed, validly amended and the building is, indeed, in accordance with the (new, amended) agreement of the parties.

Every arbitrator will try to avoid such an embarrassing situation. But what should the arbitrators do? Avoid partial awards? Refuse to discuss the issue of the alleged amendment during the second proceedings? Stay with the first ratio decidendi? (Even if they are persuaded that they had made a mistake?) Change the first award? (This last option may be the most just, but may not be available if the first partial award is res judicata. Perhaps the first award could be set aside, but the usual grounds for setting aside may not encompass the situation described in this hypo. Time limits might also pose a problem.)

Question 3. The problems described in the questions above suggest caution with partial awards. There are cases, however, in which one set of issues is ripe for decision, while decision regarding other issues has to be postponed for a long time, maybe for years. This was the case in the Cairo decision.
Nevertheless, if the Claimant is obviously entitled to at least a payment of parts of the amounts claimed, the tribunal should consider whether to grant a partial award. As a well-known adage states: “justice delayed is justice denied”.

The *Cairo* case shows the inadequacy of terminology that distinguishes between “partial” and “final” awards. The distinction suggested by the French author Fouchard (“partial” versus “global”) might be better at avoiding misunderstandings, but this terminology has not been adopted. Arbitration statutes and arbitration rules typically use the terms “partial” and “final”. The problem is that the contrast may be misleading. (Partial is actually not the opposite of final, because a partial award is also final as to the issues decided.)

In this case, the problem arose in an atypical context. The argument was not whether the award entitled “Partial Award” was actually conclusive (final) concerning the issues decided, but whether it was final in the sense that it concluded the arbitration process and rendered the arbitrators functus officio. It is difficult to raise arguments against the reasoning of the arbitrators cited in question 3, but the problem of terminology remains.

Students could be asked to suggest terms that would capture the difference between the two types of awards, without being misleading.

### V.2. Judicial Control Over the Award: Setting Aside

#### V.2.a. Note - Judicial Control in the Country Where the Award Is Considered to be Domestic

#### V.2.b. Domestic and Foreign Awards

**Question 1.** We believe the *Bridas* court correctly rejected ISEC’s proposed interpretation of N.Y. Convention Art. V(1)(e). The *Bridas* opinion reviews the negotiating history of the Convention and from that review concludes that the reference in V(1)(e) to “the country ... under the law of which ... [the] award was made” refers to the arbitration law governing arbitration procedure and not the substantive law applicable to the merits of the dispute. ISEC argues that its interpretation (“under the law of which” should mean the substantive law governing the merits) would ensure that a reviewing court would be familiar with the law applied to the dispute. This argument seems to presuppose that a court reviewing the award in a set aside proceeding would review whether the arbitrators correctly interpreted and applied the law applicable to the merits of the dispute.

Technically, of course, the N.Y. Convention regulates only recognition and
enforcement of foreign awards and not the setting aside of “domestic” awards. The grounds for refusing recognition and enforcement of foreign awards under the New York Convention (see Article V) certainly do not include a review of the arbitrators’ interpretation and application of the substantive law governing the merits. The grounds in Article V are mostly procedural in nature. This is also true of the arbitration law applicable in set aside proceedings under the UNCITRAL Model Law and in all of the countries where international commercial arbitration frequently takes place (e.g., France, England, Switzerland, Germany, the United States—see the Documents Supplement). Thus, modern arbitration statutes do not envision that a reviewing court in a set aside proceeding would ask whether the arbitrators correctly interpreted and applied the applicable substantive law. Hence the Bridas court seems correct in reasoning that ISEC’s proposed interpretation of N.Y. Convention V(1)(e) would seem to run counter to the spirit of the Convention and modern arbitration law.

Furthermore ISEC’s proposed interpretation would seem to run counter to the other provision in V(1)(e), recognizing the set-aside jurisdiction of the country “in which” the award was made. Because it comes first, this seems to be the preferred reference. The country in which the award is made generally supplies the framework procedural law for the arbitration (the lex arbitri)—i.e., procedural law—but not necessarily, or even very often, the substantive law applicable to the merits.

**Question 2.** This question is designed to stress for students the difference between the review process applicable in a set aside proceeding—which is not regulated by the New York Convention—and the review process applicable in a proceeding to recognize and enforce a foreign arbitral award—which is regulated by the New York Convention. Hence the “animating principle” of the New York Convention is technically not directly relevant to ISEC’s argument, because that argument goes to what should happen in a set aside proceeding. Still, as explained above under Question 1, the basic thrust of the Bridas court’s reasoning seems correct. The provisions of N.Y. Convention Article V(1)(e) are not designed to ensure that the arbitrators’ interpretation and application of the governing substantive law is reviewed on the merits by a court well situated to do so. The phrase “under the law of which” in Article V(1)(e) refers to the lex arbitri, not to the substantive law governing the merits of the dispute.

**Question 3.** In the Croatian case the arguments of the appellant and the reasoning of the court both seem to assume that the N.Y. Convention is relevant to the issue before the court. Technically, this is incorrect. The N.Y. Convention does not regulate directly which countries may exercise set-aside jurisdiction. Instead, Article V(1)(e) regulates when a set-aside judgment may properly be used as a ground to refuse recognition and enforcement of the award. A set-aside judgment may have that effect if it is rendered in a country “in which, or under the law of which … [the] award was made”. It is of course true that
indirectly Article V(1)(e) discourages a country from exercising set-aside jurisdiction unless it is the situs country or the country under whose lex arbitri the award was made. But it does not directly regulate when a country may exercise set-aside jurisdiction. That is a question for national law.

**Question 4.** The 1996 English Arbitration Act has a good solution to the problem of locating where an award is made. In section 100 (2) (b) (see Documents Supplement) it provides: “an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties”. We believe this solution should recommend itself to a judge and to a lawyer advising or drafting an arbitration clause. In the latter case, the lawyer might want to provide in the agreement that: "any award rendered under this agreement shall be deemed to have been made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties."

**Question 5.** Under N.Y. Convention Article 1, awards are foreign and fall under the convention if they are “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought …” Article 1 also provides that awards fall under the Convention if “they are not considered as domestic awards in the State where their recognition and enforcement are sought.” Under section 202 of the U.S. Federal Arbitration Act an award would not be considered domestic, and hence would fall under the Convention, if it grew out of a legal relationship involving various foreign elements (“property located abroad”, “performance … abroad”, or “some other reasonable relation with one or more foreign states”).

Note that in *Spector v. Torenberg* the award was rendered in the U.S. but it involved foreign parties. Thus, because the award was rendered in the U.S., a U.S. court could properly exercise set-aside jurisdiction. (See Federal Arbitration Act section 10 in the Documents Supplement.) But at the same time, because the award falls under the N.Y. Convention (the U.S. does not consider it domestic), there seems no reason why the winning party should not be able to seek recognition and enforcement under the Convention, without obtaining a confirmation judgment first.

In this situation, the *Spector v. Torenberg* solution seems a reasonable one. The party relying on the award is entitled to choose whether to seek confirmation (under Federal Arbitration Act section 10) or recognition and enforcement of the award (under the Convention—i.e., Federal Arbitration Act Chapter 2). By choosing recognition and enforcement, however, the party relying on the award cannot preclude the defendant from seeking to have the award set aside. Such a set-aside proceeding could be attractive to the defendant because under Federal Arbitration Act section 10 there is at least one ground (“manifest disregard of the law”) for setting an award aside that is not available for refusing recognition and enforcement under the Convention. At least this was so prior to
the 2008 U.S. Supreme Court decision in *Hall Street Associates*. There the Supreme Court seemed to question whether "manifest disregard" was truly an independent ground for setting aside an award under the Federal Arbitration Act. See infra subsection V.2.d.ii.

Decisions in the 11th Circuit, in particular the *Four Seasons* ruling, have disagreed with the 2d Circuit approach articulated in *Spector v. Torenberg* and *Toys "R" US*. As indicated above, the authors favor the 2d Circuit analysis; but students may be asked to state a preference. We find the 11th Circuit view untenable, because it would mean that whenever two foreign parties (and perhaps even one U.S. and one foreign party) choose to arbitrate in the United States, they automatically relinquish the right to subject the award to set-aside review. We believe waiver of such an important right should not be sprung upon parties who are unlikely to have expected such a consequence of agreeing to arbitrate in the U.S.

**Questions 6, 11 and 12.** We believe the parties chose Indian law to apply to the merits and for interpretation of the contract, but not as curial law (lex arbitri). The Indian Supreme Court reached a different conclusion. In paragraphs 25 and 27 of the opinion the Indian Supreme Court reasons that since the parties chose Indian law to govern the contract and since there was no "unmistakable intention to the contrary" the Court would conclude that they also intended Indian law to govern the arbitration (to provide the lex arbitri). Once Indian law provides the lex arbitri, the Court reasons, it is proper for Indian courts to take jurisdiction in a set aside proceeding.

We do not find it persuasive to conclude, as does the Indian Supreme Court, that the parties intended the Indian arbitration law to serve as the lex arbitri. The arbitration took place in London, hence under traditional notions, British arbitration law would provide the lex arbitri and British courts would have proper jurisdiction of a set aside proceeding, unless the parties expressly chose a different lex arbitri. The Indian Supreme Court discounted the location of the seat of arbitration in London, because this venue was chosen by the ICC Court of Arbitration and not the parties. But a careful reading of the contract suggests that the Court should not have dismissed so readily the relevance of the arbitration seat.

Paragraph 4 of the opinion recites provisions from the General Terms and Conditions of Contract which apparently were used as the frame for this agreement. Under those general terms, had the contract been awarded to an Indian contractor, arbitration would have been in New Delhi under the Indian arbitration law (Arbitration Act of 1940). When a foreign contractor is awarded the contract, however, the general terms provide that any arbitration is to be conducted under the rules of the ICC and "at such places as the arbitrators may determine." The intent seems to be that the arbitrators would choose a neutral
seat – once the nationality of the foreign contractor is known – and that the lex arbitri of that seat would apply. Under this understanding of the parties’ agreement the London seat would be highly relevant, indeed even decisive as indicating the parties’ choice of a lex arbitri and a set-aside jurisdiction.

**Question 7.** In *Oil & Natural Gas Commission v. Western Co. of N. America*, 74 All India Rep. S.C. 674 (1987), although the parties placed the seat in London, they also agreed that:

“The arbitration proceedings shall be held in accordance with the provisions of the Indian Arbitration Act, 1940 * * *”

Since the award was rendered against it, ONGC filed an action in the Indian courts to set the award aside. At the same time, the award creditor, Western, proceeded to seek recognition and enforcement of the award in the U.S. In reaction, the Indian lower courts enjoined Western from continuing with its enforcement action, and the Indian Supreme Court affirmed the injunction.

In claiming that “law, justice or equity” supported the injunction, the Indian Supreme Court seemed to view the issue from a distinctly Indian perspective. The arbitration took place subject to the curial law (lex arbitri) of India (and, given that the seat was in London, probably also under the lex arbitri of England), and thus under traditional notions (also recognized in N.Y. Convention Article V(1)(e)), India was justified in exercising set-aside jurisdiction. From an Indian perspective, if the Indian court sets the award aside, the award would cease to have a valid existence.

Under the N.Y. Convention, however, an enforcing court outside of India may view the issue differently. Under the Convention an award is binding and can be enforced even if it is never confirmed in a court judgment. If the award is set aside by a court in the jurisdiction where it is rendered or under whose arbitral law it was rendered (in the Western case, under Indian arbitral law), then New York Convention Article V(1)(e) allows—but does not require—an enforcing court to refuse recognition and enforcement (“recognition and enforcement of the award may be refused …” (English language version and emphasis added)). (In section V.3.c.vi. below, we take up the problem of enforcing an award that has been set aside.) Moreover, N.Y. Convention Article VI clearly gives an enforcing court discretion whether to suspend proceedings to await the result in a concurrent set-aside action in another country. It does not require suspension. Thus, “law, justice or equity” do not seem to reside solely on the Indian side of this divide.

**Question 8.** To be technically correct the Indian Supreme Court should have said that Western was seeking recognition and enforcement of the award (not confirmation) and that it was seeking this result under the N.Y. Convention
Questions 9 and 10. Given the structure of the New York Convention just discussed under Question 7, we do not believe that the Indian Supreme Court should have enjoined Western from proceeding as it did.

Questions 13 and 15. In Singer the Indian Supreme Court rules that Indian courts have proper set-aside jurisdiction in a case in which we believe only English courts should have been recognized as having that authority. We consider this an example of “overreaching”.

To what might one attribute such “overreaching”: a misguided decision of the Indian Supreme Court; the ambiguity of the 1961 Indian “Foreign Awards Act” (which was in force prior to the enactment of the 1996 Indian Arbitration Act), or the New York Convention? We believe that the fault lies to some extent with all three. The N.Y. Convention Article V(1)(e) clearly privileges both the seat of the arbitration and the country whose lex arbitri applies (by virtue of party choice). Hence if the seat is in one country, but the parties choose the lex arbitri of a different country, both countries may render set-aside decisions that will trigger the effects of Article V(1)(e). Of course the Singer case exacerbates this problem by finding Indian lex arbitri to apply where the parties seem actually to have chosen Indian law only for the merits. Footnote [33] points out that the wording of the 1961 Indian Foreign Awards Act may have contributed to the potential for overreaching by treating as domestic “any award made on an arbitration agreement governed by the law of India”. If “governed by the law of India” refers to cases in which the arbitration is in India or the parties have expressly chosen Indian lex arbitri, then there is no difficulty. But if it also applies even when the seat is outside of India as long as Indian law is the “proper law of the contract” – i.e. as in the Singer case—then there is significant potential for jurisdictional conflict.

Note that the new Indian Arbitration and Conciliation Act of 1996 has eliminated the troublesome wording of the 1961 Foreign Awards Act. Nevertheless, as explained in the text’s note on the new Indian Act, subsequent decisions of the Indian Supreme Court continued to follow the Singer approach. The 2012 Bharat Aluminium decision has finally brought the Indian law into conformity with the conventional understanding, but only prospectively.

Question 14. In Western we believe the Indian Supreme Court concluded correctly that the parties chose Indian lex arbitri and therefore that set-aside proceedings were properly initiated in India. Although we believe enjoining Western from proceeding in New York is indeed a form of overreaching, it is more understandable, since one can read N.Y. Convention Article V(1)(e) as providing that once an award is set aside in its home jurisdiction it should not be enforced elsewhere. On the other hand, given the option recognized in recent
decisions (see below in section V.3.c.vi.) of allowing recognition and enforcement of awards, even though they have been set-aside, and given the permissive, not mandatory, language of N.Y. Convention Article V(1) (English language version), the Western decision too seems to overreach.

**Questions and Comments on Indian Set Aside Jurisdiction under the 1996 Indian Arbitration and Conciliation Act**

**Questions 1 - 4.** The new Indian act clearly treats as domestic any award made in India. Part I of the new act deals with domestic awards and set aside actions. In Article 2(2) the act spells out that Part I applies “where the place of arbitration is in India”. There is no provision saying that Part I applies where the lex arbitri or the governing law of the arbitration is Indian law. At the same time, no provision of the new act says that Part I applies only where the place of arbitration is in India. Hence it seems at least possible to apply Part I (for set aside purposes) to an award made outside of India where the parties expressly choose the 1996 Indian Act as the lex arbitri.

One might possibly read the New York Convention as inconsistent with such a result—a result that allows an Indian court to apply Indian arbitration law to set aside an award made outside of India. Article I of the Convention says that the Convention applies to an award made outside the country where recognition and enforcement are sought. Thus, the Convention would apply to the award in question—at least if recognition and enforcement were sought in India. But what if the proceeding in an Indian court seeks annulment or set aside (not recognition and enforcement) of the award on the ground that the parties have expressly chosen Indian lex arbitri. The Convention does not expressly exclude this possibility. Indeed, it seems indirectly to acknowledge the legitimacy of such an approach. This is so because of the wording of Article V(1)(e) of the Convention. That subsection accords legitimacy to a set aside judgment in “the country in which, or under the law of which, that award was made” (emphasis added). The “under the law of which” provision as an alternative could only arise where a country takes jurisdiction to set aside an award made outside of its territory but under its own lex arbitri.

In sum, the 1996 Indian Act did not completely exclude a repeat of the Singer result. Our major problem with Singer, however, was its conclusion that the parties had opted for Indian lex arbitri. We would not have read the parties' agreement in Singer as choosing Indian arbitration law as the lex arbitri. In our view the parties intended to apply the lex arbitri of whichever seat (presumably a neutral seat) the ICC chose—which in Singer was the U.K. We have the same difficulty with the Bhatia decision discussed in question 4.

Several aspects of the Bhatia decision are troubling. First, the Bhatia court holds that Part I of the 1996 Act (providing for set aside) applies even to
arbitrations taking place outside of India, “unless the parties by agreement, express or implied, exclude any or all of its provisions.” It is difficult to see any justification for such a presumption. Surely the presumption should run the other way. Increasingly arbitration law in all countries is coalescing around the Model Law proposition (in Article I of the Model Law) that set aside should be available only at the seat of the arbitration. Party choice of a different lex arbitri can lead to many difficulties, including the potential for parallel proceedings to set aside (with potentially conflicting results). Such an outcome should be avoided unless the parties expressly provide for it. It should not come about because of a legal presumption.

Second, in Bhatia the Indian Supreme Court’s tendency to overreach continued, despite enactment of the 1996 Indian Arbitration and Conciliation Act. At the same time the courts in other countries, party to the New York Convention, would presumably not recognize an Indian set-aside decision in Bhatia and similar cases. New York Convention V(1)(e) authorizes refusal of recognition and enforcement where an award is set-aside “in the country in which, or under the law of which [meaning the lex arbitri], the award was made.” An Indian judgment purporting to set aside an award made outside of India and not expressly subject to Indian lex arbitri would not satisfy either of these conditions.

Question 5. The Bharat Aluminium decision is a welcome reversal of the Bhatia line of cases. Its prospective application, however, will continue to raise difficulties because, for arbitration agreements entered into prior to the 2012 Bharat Aluminium decision, the Bhatia line of cases will still apply. This means that the overreaching problem discussed in this subsection will remain a feature of Indian arbitration law for some time to come.

Question 6. The pattern of overreaching that occurs when Indian courts apply Part I of the Indian Arbitration Act of 1996 to take set aside jurisdiction of awards made outside of India is traceable to the 2002 Indian Supreme Court Bhatia decision, cited in Question 4. In the SAW Pipes decision coming the following year in 2003, the Indian Supreme Court made matters even worse. Under the Indian Act “violation of public policy” is a ground for refusing to enforce an award, both in Part I (for confirming or setting aside domestic awards) and in Part II (for recognizing and enforcing foreign awards). A breach of public policy under Part II requires violation of “international public policy”, a narrow concept referring to fundamental notions of justice and morality. SAW Pipes concludes, however, that public policy under Part I has a much broader reach. Part I “public policy” is breached if the award is “patently illegal”, which the Court said would be the case if the award conflicted with Indian law. On this interpretation, merits-based review of an award will be extensive whenever Part I applies. This means that on the many currently existing pre-2012 agreements with a seat outside of India and governed by Indian law (on the merits), Indian courts will still take set aside jurisdiction, and the merits-based review called for in SAW Pipes will also
apply. Other countries may well refuse to treat such purported set-asides as legitimate under New York Convention V(1)(e) and may choose to enforce the awards in their own courts. Thus, under current Indian Supreme Court decisions, this state of discord in international arbitration law will continue until pre-2012 arbitration agreements subject to the Bhatia line of cases no longer exist.

V.2.c. Public Policy, Fraud, and Evident Partiality as Grounds for Setting Aside

Question 1. It is pretty clear that there should be some remedy against fraud and corruption. One of the hallmarks of modern arbitration is limited judicial control over arbitral awards - but even limits have limits. In countries that follow the wording of the UNCITRAL Model Law, public policy appears to be (and has to be) the only ground that could encompass a claim for setting aside based on fraud.

Students could be directed to read Section 68(2)(g) of the English Act. (The wording of this subsection - like the wording of the U.S. Act - suggests that fraud and infringement of public policy are different things. But this is in the context of the English and American Acts.)

The 1999 Swedish Act contains the following formulation in Section 33:

“An award is invalid:
(1)........;
(2) if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system;....”

Is this a better formulation than that of the Model Law?

Question 2. The Moscow decision introduces another discussion pertaining to the range of the public policy exception. According to one opinion, in the realm of procedure, there is no need for a general clause like that of public policy, because Article 34(2)(a) of the Model Law already identifies those procedural flaws that justify setting aside; and it would be contrary to the principle of limited control to open a backdoor for the sanctioning of other procedural irregularities under the guise of public policy. In other words, the assumption is that the legislator gave an exhaustive list of procedural irregularities that may result in setting aside, and in this context, public policy becomes a concept for limited use in exceptional cases in which the outcome on the merits violates basic precepts of the lex fori.

Article 34(2)(a) really covers those procedural irregularities that are
serious enough to warrant annulment and that appear with some frequency. At the same time, it might be dangerous completely to exclude the possibility of sanctioning any other procedural defects. This would be particularly dangerous in countries in which the legislator failed to mention fraud, corruption, or misconduct of the arbitrators as reasons for setting aside.

**Questions 3 and 4.** One could argue that a more stringent standard is needed at the time of appointment of arbitrators when potential arbitrators cannot be screened out on the ground of what they have done (because they have not yet acted), but only on the ground of concerns – that is, on the ground of assumptions concerning what any person in the same position might be tempted to do. In addition to this, the elimination of those who might bring about an “appearance of bias” not only protects the parties, but also the integrity and reputation of the arbitration process. One could also argue that actual partiality and appearance of bias are two separate grounds for vacating the award.

The question can be raised whether it makes sense to investigate appearance of bias after the arbitrators have already performed their tasks. Following one line of thinking, one could say that after the award has been rendered it would be more logical to investigate whether the decision-making process was actually biased, instead of examining whether the circumstances created an appearance of bias. This may sound convincing and is apparently the position that German courts take, buttressed by the principle that the finality of awards is also a public policy goal. On the other hand, one rarely has clear-cut evidence of actual bias. The evidence is typically all circumstantial. If one needs to show actual bias, the hurdle is very high; hence it might be most difficult to prove actual bias.

In the *Spector* case we have allegations that could be qualified as allegations of actual bias ("coaching the witnesses") and allegations that substantiate an appearance of bias, or likelihood of bias (the arbitrator’s comment on Israeli policies).

One way of tackling the issue of bias or appearance of bias is through the duty of disclosure. In the *Commonwealth Coatings* case, the arbitrator failed to disclose former business ties with one of the parties.

Discussion might also focus on the proposition that a tougher standard would be appropriate for challenges before the arbitrators have acted, than in a setting aside proceeding when an award has already been rendered.

Appearance of bias is usually based on family or business ties, i.e. on the ground of presumed sympathies towards one of the parties. Partiality can also be based on animosity. It is difficult to elaborate standards of negative bias, however, and the number of cases dealing with such bias is modest.
**Question 5.** At this point we return to a problem already discussed in the subchapter on challenges. This time, the setting is different. The issue is not whether an arbitrator should be disqualified and hence prevented from acting, but whether an award should be set aside.

The question is whether the possibility of indirect bias should be considered. ("Indirect" in the sense that close ties or unfriendly attitude is not manifested directly towards one of the parties, but rather towards the country, the ethnic group, or possibly the religion of one of the parties.) Legal rules concerning neutrality and independence do not usually consider group affiliation, or attitude towards groups. Arbitral institutions, parties and appointing authorities have shown much more sensitivity with regard to the notion of indirect bias. The difficult question remains whether an award should be set aside on the ground of behavior or other evidence possibly indicating prejudice in favor of or against the community to which one of the parties belongs.

In one of the cases arbitrated by the Iran-United States Claims Tribunal, the Iranian party sought to disqualify Judge Mangard on the ground that he made an anti-Iranian statement. The argument was that after this, he "cannot be a neutral arbitrator anymore". Would you allow the challenge? Does it matter that the problem arose in a much more politicized context than that of the *Spector* case, and that the Tribunal itself was the result of a political deal between the United States and Iran? If you would allow the challenge, would you also support setting aside the award, assuming that the statement was made only after the award had already been signed?

**Question 6.** In *European Gas Turbines*, the arbitrators are not being considered as possible perpetrators, but as possible victims of fraud.

The *EGT* case can also introduce a discussion on bribery. One of the authors of this Manual had the following tantalizing experience as an arbitrator. Agent sued for his commission fees. Respondent (the principal) requested an adjustment of the fees on the ground that they were exorbitantly high. The applicable law -- and the facts of the case - justified an adjustment. The commission fee was really much too high. From the behavior of the parties - and from the circumstances - it became evident, however, that the fees were set so high, because they included a bribe. It seems that the agent advanced the bribe. The principal wanted (and got) the deal, and also wanted a free ride. Newspaper reports confirmed this hypothesis. Claimant, however, never offered this explanation, because to do so would have invited an argument that the contract was null and void. Respondent had no desire to explain anything. What would you do as an arbitrator in this situation?

In the *EGT* case, the French court was reluctant to state that the contract
was illicit (because its real object was traffic in influence and bribery); although in this case, facing the threat to be obliged to pay a high amount, one of the parties broke silence, and alleged that the contract contained in fact a mandate to bribe. The court chose to set aside the award on the ground of more tangible evidence concerning fraudulent statements of expenses. (The contract allowed, incidentally, “expenses of all nature borne by Westman in order to perform its task”. ) Suppose expenses had not played a role, the dispute was simply about a high commission fee, and all other circumstances were the same. Would you characterize the contract as illicit, in the absence of another ground for setting aside?

Within Article 1502 [now Article 1520, after the 2011 amendments to the French procedural code], only subsection 5 (international public policy) could encompass the fraud argument. If the allegation were that fraud was committed by the arbitrators, subsection 3 might also serve as a foothold.

**X (SPA) v. Y (SRL)**

**Questions 1-2.** The Federal Tribunal explains that the ordre public (public policy) concept has a “supranational” dimension and a “Swiss” dimension. It is intended to refer to universally accepted standards of morality and fundamental principles of justice, but at the same time these standards are those that someone functioning within the Swiss national culture and system of justice would perceive as of universal and fundamental significance. From this perspective it seems unlikely that a Swiss court would consider the Belgian distributor-protective law to rise to the level of ordre public. Certainly competition law provisions are more widespread in Western culture and more central to basic societal values. If competition law itself does not rise to the level of ordre public, one might say that a fortiori, the Belgian distributor-protective law would surely not do so either. As the Federal Tribunal expressly says, the concept is not aimed at “sanctioning the failure to apply, or the misapplication of, mandatory provisions in the law of a governing jurisdiction or of a third country.”

The Federal Tribunal’s discussion of the ordre public concept in the set aside context is reminiscent of the interpretation given to the same terminology appearing in New York Convention Article V(2)(b) (violation of “public policy” as a ground for refusal of recognition and enforcement of an award). In *Parsons and Whittemore*, for example—which we take up below in subsection V.3.b.—the 2d Circuit ruled that “public policy” in Article V(2)(b) referred to “the forum state’s most basic notions of morality and justice.”

**Question 3.** The facts of this hypothetical are actually those of the *Hilmarton* case referred to in the question and discussed below in subsection V.3.c.vii. In the actual case the arbitrator (in the first arbitral proceeding) refused to apply the chosen Swiss law to assess the validity of the commission contract,
ruling that Swiss public policy would defeat the parties’ choice of Swiss law and require application of the mandatory law of the place of performance—here the Algerian law— which made the contract illegal and unenforceable. At a time when in a set-aside proceeding the Swiss lex arbitri allowed review of the correctness of an arbitrator’s application of law, the Swiss courts annulled this award, on the ground that Swiss public policy did not require such a result. See footnote “u” in the *Hilmarton* case (First Cour de cassation Opinion) infra in subsection V.3.c.vi. In *Hilmarton* the Swiss courts appear to have been employing the “public policy” concept as it is used in Swiss choice of law rules as a standard for deciding whether to enforce a choice-of-law clause in a contract. This is generally a broader concept of public policy. Thus if in *Hilmarton* the Swiss courts ultimately concluded that Swiss choice-of-law public policy would not require application of the Algerian middle-man law, again a fortiori, the Algerian middle-man law would not seem likely to violate the narrower concept of public policy (fundamental notions of justice) in a set aside action under the Swiss PILA Article 190(2)(e).

One might note that the arbitrator in the first *Hilmarton* arbitral tribunal appears to have concluded that the parties’ choice of Swiss law to govern their contract allowed the arbitrator to apply Swiss choice-of-law rules (the public policy concept in Swiss choice-of-law rules) to reach a final conclusion about the applicable law. In Chapter 4, however, we noted that Model Law Article 28 expressly provides that a parties’ choice of a given state’s law as the governing law of their agreement should be presumed to refer to the substantive law of the chosen state and not that state’s choice-of-law rules. See supra subsection IV.2.b.

**V.2.d. Standard of Review**

**V.2.d.i. Judicial Deference or Lack Thereof – to Arbitrator Discretion**

**Question 1.** It is true that the Swiss Supreme Court found that the seller’s silence in response to the buyer’s 9 January fax communicated to the buyer something different from what the ICC Tribunal had found that it communicated. The question is whether this was a matter of fact, or a matter of law. The Swiss Court held that it was a matter of law. Buyer set a time-limit for a response. Seller did not respond within the time-limit (January 17th). The Swiss Court characterized this silence as a rejection of the offer. Thus, we are dealing with different interpretations of the same facts.

(The Swiss Court also stated that facts could only be revisited if there were “substantiated objections which claim that factual findings result from non-observance of procedural guarantees set by law ... or that they are incompatible
with procedural ordre public”. Procedural guarantees fixed by law are those of due process. An example of infringement of procedural ordre public is procedural fraud.)

**Question 2.** The Swiss Supreme Court relied on Article 190(2)(b) (“the tribunal has wrongly declared itself to have * * * jurisdiction”)—a particularly non-deferential standard—though limited to review of the arbitral tribunal’s jurisdiction.

It is certainly plausible to say that the Swiss court found (i) that the tribunal wrongly declared itself to have jurisdiction; and (ii) that the tribunal’s error occurred as a consequence of its misapplication of legal standards.

Nothing in the Swiss Private International Law Act, however, allows intrusive review of the merits of an arbitral tribunal’s award. By contrast, consider the provisions of Article 393 of the Swiss Code of Civil Procedure, dealing with domestic awards. That provision even allows annulment where:

“* * * the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files, or because it constitutes an obvious violation of law or equity. * * *”

This is a much more intrusive standard of review than that under the Swiss PILA, which applies to international arbitration in Switzerland (where at least one party is domiciled, habitually resident, or has its seat outside of Switzerland).

**Questions 3-4.** Jurisdiction is, of course, critical. The threshold of arbitration is meticulously defined by law, and courts are expected to observe arbitral jurisdiction both by referring the case to arbitration when a valid arbitration agreement exists, and by disallowing arbitration in the absence of an arbitration agreement that meets legal requirements. Once this threshold is passed, however, judicial control over the arbitration process is very limited. For these reasons, one could expect a less deferential standard regarding jurisdiction than regarding the merits.

It is a different question whether it makes sense to have a different standard regarding jurisdiction than with respect to due process.

**Question 5.** This is possible, but it is a dangerous proposition. Too much court scrutiny would jeopardize the efficiency of the arbitration process, but the exclusion of practically all scrutiny might be too risky. Arbitration might take unexpected turns, there is no appellate level, and it might be risky to contract out of basic safeguards like due process and even public policy. On the other hand, one could argue that such stipulations are only possible when neither of the
parties is Swiss (neither of them has either domicile, or habitual residence, or business establishment in Switzerland). In such cases it is unlikely that enforcement would take place in Switzerland. By contracting out of the right to seek setting aside in Switzerland, the losing party can still oppose recognition and enforcement in the country where this is sought, and can thus still request court scrutiny of basic precepts of due process.

**Question 6.** The main source of trouble in the *Vekoma v. Maran* case is actually the arbitration clause itself. Quite frequently the parties want to emphasize that their designing a mechanism for settling disputes does not really mean that they have opted for an adversarial instead of a friendly relationship. Therefore, they make assurances that they will first try to resolve all differences by friendly negotiations. Arbitration is posited only as a last resort in case sincere efforts to reach an amicable settlement are unsuccessful. The problem is that once it is placed within the text of an arbitration agreement, any formulation— even one that is just meant to be a friendly gesture—may become a stepping stone for various procedural gambits. If resort to arbitration is contingent upon failure of settlement, the question arises as to the point in time at which—and until when—the arbitration agreement is actually operative. (Recall that this is an issue we introduced above in Chapter 1 in connection with multi-tier clauses.)

Moreover, whereas “if-no-amicable-settlement-can-be-reached” clauses are generally problematic, those like the one in *Maran* are particularly troublesome. When can the parties be deemed to have agreed that the dispute cannot be resolved by negotiation? After the first offer has been refused? What if every offer is followed by some counteroffer? Negotiations may be kept up ad absurdum. Should the court and/or the arbitrators distinguish between meaningful and meaningless negotiations? Where is the dividing line?

Students may be invited to propose formulations that would maintain the gesture of good intentions (arbitration only if friendly negotiations were to fail) but that would not be readily open to abuse and misunderstandings.

Note also that many jurisdictions would treat the question of whether pre-arbitration procedures had been honored as an issue of “admissibility” of the claim (“procedural arbitrability” in U.S. law), which is allocated to the arbitral tribunal for final decision and not subject to judicial review. Thus, the Swiss Court’s willingness to review the issue in *Maran* is somewhat unusual. We take up this point more fully below in connection with the *BG Group* case.

**Questions 7-9.** The ICC tribunal based its jurisdiction on the assumption that Egypt became a party to the contract (and to the arbitration agreement) because the Minister of Tourism affixed his signature at the bottom of the agreement following the words “approved, agreed and ratified”. As in the *Vekoma v. Maran* case, the question arises whether the findings of the arbitrators deserve
deference. The court found that this was a matter of legal characterization of standards of jurisdiction. Courts are entitled to take a position regarding the existence of a valid arbitration agreement.

Quite a few contracts require government approval. This does not mean, of course, that the act of approval causes the government to become a party to such contracts. Is there anything that would distinguish the approval of the Egyptian Ministry of Tourism from other government approvals? Is it critical that the approval was affixed to the contract itself? (One should know that Egypt was not listed as a party to the contract in the contract itself. The contract identified the parties as only SPP and EGOTH.)

Gaillard contends that the less deferential attitude of the Paris Court of Appeals actually favors arbitration. One could argue that parties would be reluctant to enter into any arbitration agreements unless they were sure that the submission to arbitration would not be extended to areas or persons beyond the actual intent of the parties. On the other hand, there are situations when a broader interpretation is the only way to capture the original intent of the parties--these are cases in which a party uses (or abuses) technical imperfections in order to avoid the original deal.

In the case of Egypt, the Paris court was probably right. Assuming jurisdiction over a country on the ground of approval of the contract by the government might not have served the reputation and long term interests of the arbitration process.

Are the arbitrators disinterested in matters of arbitral jurisdiction? They may be motivated to have one more case (and the pertinent fees), but they are also likely to be motivated to maintain a high reputation in order to get future appointments (and pertinent fees). In other words, even if one were to leave out of consideration the influence of ethical standards and professional integrity, arbitrator self-interest would not lead unequivocally to acceptance of jurisdiction at all cost and in all cases. Still, the fact that arbitrators might be interested in the outcome of the dispute on jurisdiction is another argument in favor of meaningful court scrutiny of arbitral jurisdiction.

**Question 10.** Kompetenz-Kompetenz allows the arbitrators to assume competence themselves. Without this concept any challenge to the validity of the arbitration agreement would necessitate court intervention. This would mean that if a party does not want arbitration, or wants to gain time, all he would have to do would be to contest the validity of the arbitration agreement. If the arbitrators were not allowed to decide on their own competence, in each case courts would have to step in. Kompetenz-Kompetenz allows the arbitrators to determine for themselves whether a valid arbitration agreement exists, and to go forward, if they find that it does exist.
This does not mean, however, that the findings of the arbitrators cannot be challenged in setting aside or recognition proceedings.

**Question 11.** It is worth stressing to students that the de novo standard of review here approved by the Cour de cassation does not apply to the arbitral tribunal’s decision on the merits. It applies to the existence and validity of the arbitration agreement, one of the grounds for review listed in what is now Article 1520 of the French procedural code (1520(1): “[T]he arbitral tribunal wrongly upheld or declined jurisdiction; * * *”). The other grounds listed in Article 1520 (except for “international public policy”) are all procedural in nature and hence do not involve the merits. And as to the public policy ground, recall that the Cour de cassation has ruled in *Cytec* that the standard of review is whether there has been a “flagrant” violation of international public policy. (See supra under subsection II.2.c. following the subheading: “Note: Arbitrating Competition Law Issues and the Efficacy of the “Second Look”—Two European Rulings”)

**Question 12.** The authors believe that the two cases are distinguishable. See the discussion supra at II.1.k. in Question 7 following the *Dallah Real Estate* case. [Note that the casebook text contains a misprint in referring to II.1.g. The correct reference is to subsection II.1.k.]

*BG Group v. Argentina*

**Question 1.** The authors believe one could plausibly envision that parties negotiating an arbitration agreement would likely intend that disputes over whether a claim had been brought in time or whether required negotiations or pre-arbitration steps had been taken should be decided principally by the arbitral tribunal. Such questions would presumably only arise where the existence and validity of an arbitration agreement were either uncontested or clearly established. Otherwise an existence or validity challenge would be taken up first, because a decision of non-existence or invalidity would trump issues of “procedural arbitrability” ["admissibility"]. So it seems safe to assume that “procedural arbitrability” ["admissibility"] issues arise only in a context in which the parties have already set up a valid arbitration agreement to decide their business disputes.

Procedural arbitrability [admissibility] issues thus concern whether the claimant has presented the claim properly (in a timely manner and after complying with necessary preconditions), not whether the tribunal or a court has proper jurisdiction to decide the merits. One can thus understand the appeal of (and hence the presumed intent of the parties to achieve) an inclusive and efficient dispute resolution system, under which all merits questions and closely related “claims processing” questions are decided by one and the same tribunal—the arbitrators.
Whether a claim is timely or whether preconditions for bringing a claim have been met ("admissibility" or "procedural arbitrability" issues), while not merits based issues, are nevertheless issues that should be decided by arbitrators with finality, just as merits issues should be. An "admissibility" issue is admittedly a "threshold issue", meaning an issue the outcome of which will determine whether the tribunal will hear the merits of the claim or not. A "jurisdiction" issue is also a "threshold" issue, but it is one that asks which forum (court or tribunal) is the proper decision-making forum. Courts and commentators will sometimes refer to all "threshold" issues as "jurisdiction questions", but a distinction should be made between, on one hand, "jurisdiction proper" (meaning which forum, court or tribunal, is properly authorized to decide the merits and claims-related questions) and, on the other hand, "admissibility" (meaning whether the claimant has properly handled and presented the claim for decision on the merits). Since parties choose arbitration to prevent submitting their disputes to state courts, it makes sense to require a state court decision only on the essential issue of the authenticity and validity of the parties’ agreement to arbitrate (the existence, validity, and scope of the arbitration agreement). If that issue is decided (ultimately by courts de novo) or is not contested, then all other claims-related issues (merits and preconditions to presenting a claim) should be decided with finality by the party-authorized decision-maker, the arbitral tribunal. For a full and insightful discussion of the jurisdiction-admissibility distinction, see J. Paulsson, THE IDEA OF ARBITRATION at 82, section 3.2 ("Jurisdiction Distinguished from Admissibility").

Alternatively, we can also understand that the Court may have been motivated by pro-arbitration policy concerns that have been motivating the Court’s decisions over the last few decades. From this perspective the Court’s BG Group decision might be seen to advance the autonomy and finality of the tribunal’s award and to discourage continued and costly litigation and court interference with arbitral prerogatives. Thus, if parties opt for arbitration, they are putting themselves very largely into the hands of the arbitrators whom they select and empower.

**Question 2.** In our view the Second Circuit’s Contec and Republic of Ecuador decisions are misguided. If one accepts the First Options presumption that parties to an arbitration agreement do not even think about who (court or arbitrator) should be the principal decision maker on substantive arbitrability questions (existence, validity, and scope of the arbitration agreement), the parties’ choice of institutional rules that include a standard Kompetenz-Kompetenz clause, surely does not say anything about their intent concerning who should be the principal decision-maker on existence, validity and scope issues. The Kompetenz-Kompetenz principle is universally accepted in arbitration the world over, but it does not mean that the arbitrators are to be the final arbiters of their own jurisdiction. It only means that they are empowered to
make their own decision on jurisdiction, so that they need not adjourn to wait for court resolution of the issue. Otherwise challenging parties would have an open license to delay and obstruct arbitration by consistently raising jurisdictional objections.

But acknowledging that the tribunal should have Kompetenz-Kompetenz power has never meant that the arbitrators’ decision is final and not subject to judicial review. A teacher can drive this point home by asking whether arbitrators are likely to be entirely unbiased and objective on questions of their own jurisdiction. Of course the answer is “no”, since they benefit financially by assuming jurisdiction. So unless it’s quite clear that the parties really intended to make the arbitrators the principal arbiters of their own jurisdiction, courts should not abandon their review function at Stage 3. Surely the choice of institutional rules that merely include the universally recognized Kompetenz-Kompetenz principle, would not seem to meet the standard of clear party intent.

Although the Supreme Court does not cite the reference to the Kompetenz-Kompetenz article in the UNCITRAL Arbitration Rules for the same purpose as the Second Circuit (to shift jurisdiction from court to arbitrators on substantive arbitrability questions), it does reference the UNCITRAL Rules Kompetenz-Kompetenz Article for the closely analogous purpose of showing that the parties did not intend to shift final decisional authority back to a court from the arbitrators, where the normal intent-based presumptions would have placed it. But surely the Kompetenz-Kompetenz principle says nothing about whom the parties intended to invest with final decision-making authority on arbitrability (substantive or procedural).

**Question 3.** The deference seems rather sweeping. The Court asks only whether the arbitrators engaged in a genuine attempt to interpret the BIT, as opposed to “effectively dispens[ing] their own brand of justice”. The Court is careful to stress that it would not necessarily have interpreted the local litigation requirement the same way the arbitrators did, but it accepts that they engaged in a genuine interpretive process. No doubt it aided the case for deference that the tribunal cited the Vienna Treaty on Treaties and applied its exact language (a different interpretation would be “absurd and unreasonable”) in explaining its interpretive approach. Hence the Court concluded that U.S. courts are required to defer to the arbitrators’ interpretive conclusions.

**Questions 4-6.** The basic distinction between the *Egyptian Pyramids* case and *BG Group* is that (in the language of the U.S. Supreme Court) between substantive arbitrability and procedural arbitrability. In *Egyptian Pyramids* the issue is the *existence* of an arbitration agreement between Southern Pacific Properties and the Arab Republic of Egypt—in other words, substantive arbitrability. Had the *Egyptian Pyramids* dispute come before a U.S. court for enforcement, presumably the court would have decided de novo (just as the
Paris Court of Appeals did) whether Egypt as a state was a party to the arbitration agreement. *BG Group*, on the other hand, concerns a procedural arbitrability issue, as to which the Supreme Court requires deference.

Although, as the *Egyptian Pyramids* case makes clear, French courts apply a de novo standard of review concerning an arbitral tribunal’s jurisdiction, the Paris Court of Appeals’ *Takata-Petri* decision reaches pretty much the same result called for in *BG Group*. The terminology is of course different. The Paris Court of Appeals characterized the pre-arbitration conciliation requirement in that case as affecting the “admissibility” of the claim, not the jurisdiction of the arbitral tribunal. Thus the Paris court found no basis for any review at all under Article 1502 of the then applicable French procedure code (now Article 1520), which lists only the “jurisdiction of the tribunal” not the “admissibility of the claim” as a ground for court review. Thus it seems that “admissibility” in French practice is essentially the same as “procedural arbitrability” in the U.S. Supreme Court’s vocabulary. There is the difference of course that the Paris court seems to decline all review of “admissibility” issues, whereas the U.S. Supreme Court instructs lower courts to at least ensure that the arbitrators engaged in genuine interpretation of the arbitration agreement. Of course an award in which the arbitrators could be found to have “dispensed their own brand of justice” without attempting to interpret the arbitration agreement—calling for a U.S. court to reject the award—could presumably also be rejected by a French court on a ground other than “arbitrability” (perhaps, on the ground that “the arbitral tribunal ruled without complying with the mandate conferred upon it” (see French Code of Civil Procedure Article 1520(3)).

Both *BG Group* and *Takata-Petri* line up well with Jan Paulsson’s views expressed in his book on THE IDEA OF ARBITRATION (2013). Paulsson argues that a reviewing court should distinguish between a tribunal’s jurisdiction and admissibility of the claim. He acknowledges that the distinction can sometimes be difficult to make, but in general he claims that the issue concerns “jurisdiction” if it focuses on which forum is appropriate—court or arbitral tribunal—and “admissibility” if it focuses on the claim and how it has been handled. He argues that courts should always be the final do novo arbiters of an arbitral tribunal’s jurisdiction, but that admissibility issues should be for the arbitrators and beyond court review. Thus, his views accord well with the Paris Court of Appeals in *Takata-Petri* and are consistent with the outcome in *BG Group*.

**Question 7.** Justice Sotomayor in her consenting opinion says that she would find use of terms such as “Conditions of Consent” in a BIT to be enough to shift characterization of the local litigation precondition from one of “procedural arbitrability” to one of “substantive arbitrability”. The majority justices, however, seem unpersuaded and assert that even in the face of such a label, they might still consider a purely procedural condition to retain its character as a “procedural
arbitrability” issue. Thus, a well-advised government wanting to give the strongest weight possible to pre-arbitration local litigation or conciliation requirements might add such explicit language as: “the agreement to arbitrate shall be construed as coming into force only after the following conditions have been met” or “the sovereign states of the United Kingdom and Argentina agree to arbitrate an investment claim only if the investor first meets the following conditions * * *”. Perhaps students could suggest better language. Would the following be effective: "The parties intend that any court reviewing an arbitral award rendered under the provisions of this agreement shall do so de novo concerning any challenge to the tribunal’s jurisdiction or the admissibility of a claim.”

**Question 8.** Maran Coal involved a dispute over whether the claimant had initiated arbitration within the 30-day window allowed “after it was agreed that the difference or dispute cannot be resolved by negotiation”. The arbitral tribunal had construed this procedural precondition as having been triggered much later in the course of communications between the parties than did the reviewing Swiss Supreme Court (Federal Tribunal), deciding de novo. Thus, the Swiss Federal Tribunal found that arbitration had been initiated too late and rejected the award. The issue in Maran Coal seems clearly one of “procedural arbitrability” in the BG Group Court’s terminology or “claim admissibility” as used in French practice. Nevertheless, the Swiss Federal Tribunal reviewed the decision de novo and rejected the award. The Maran Coal approach thus clearly favors the position of host states, who are likely to be respondents in any arbitration and who are therefore likely to favor a de novo judicial review of both substantive and procedural arbitrability questions (jurisdictional and claim admissibility challenges to award enforcement). This means that in the future a host state in Argentina’s position would be well advised to negotiate for a seat in Switzerland rather than the U.S. A well advised investor, however, would presumably have the opposite preference. For a fuller discussion of the BG Group case and its implications for both commercial and investor-state arbitration, see J. Barceló, *Substantive and Procedural Arbitrability in Ad Hoc Investor-State Arbitration—BG Group v. Argentina*, in Arthur Rovine, ed., CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION—The Fordham Papers 2014 (published in 2015); published on line in Cornell Law School Legal Studies Research Paper Series, No. 14-25, http://ssrn.com/abstract=2487865.

**V.2.d.ii. Can the Parties Provide For Heightened Judicial Scrutiny of Arbitral Awards?**

**Question 1.** The Supreme Court has plainly not held that the FAA “prohibits” expanded review no matter what the source of reviewing authority, but rather, only that such review is not provided for under the FAA. On the facts of
Hall Street, either Rule 16 of the Federal Rules of Civil Procedure or Alternative Dispute Resolution Act of 1998 might have provided authority for expanded review. The Supreme Court remands for lower court consideration whether these sources of authority were available to Hall Street. On remand it seems that whether Hall Street waived reliance on these other sources of authority and how the FAA and these other sources of authority might inter-relate would be open questions.

In the opening paragraph under section IV of its opinion, the Supreme Court also gratuitously mentions that parties might be able to rely on state statutory or common law authority for expanded judicial review of arbitral awards. Although this is plainly dictum, it would seem to signal the Court’s view that the FAA would not “prohibit” such a result. But of course whether this is so or not could depend on the specific factual context of a dispute.

Questions 2-3. In the article cited in Question 3 (J. Barceló, “Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective” in P. Hay, L. Vekas, Y. Elkana & N. Dimitrijevic, eds., RESOLVING INTERNATIONAL CONFLICTS—Libor Amicorum, Tibor Varady 1-19 (CEU Press, 2009) the author argues that parties to an international commercial agreement should be able to achieve expanded judicial review in the U.S., even after Hall Street, if they place the arbitral seat in an accommodating state jurisdiction (California or New Jersey, for example); if they explicitly choose the state arbitration act as the lex arbitri; and if they expressly include in their agreement grounds for expanded review. The author notes that the same should also be possible in certain other jurisdictions, for example in Switzerland and in England, but again only if the arbitration agreement is drafted expertly. In England, for example, parties can agree to merits review of law, but not fact, questions. [Recall Carr & Ors in Chapter 2, in which the New Zealand law also follows this English approach to party-agreed merits review.]

Barceló also argues that sophisticated commercial parties might choose more extensive merits-based review as a way of encouraging arbitrators to apply the chosen law strictly and not to render a compromise award.

As mentioned in Question 3, the Barceló article notes that in a recent, wholly domestic case (but one involving interstate commerce, so that the FAA was potentially applicable) the California Supreme Court found the California arbitration act applied, explicitly rejected the Hall Street solution, and enforced a clause expressly calling for expanded judicial review. See Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334; 190 P. 3d 586 (2008) (construing the California arbitration act, drafted in language very similar to that of FAA). The article reasons that the same result should follow in an international case, if the parties place the seat in California and expressly choose the California arbitration act as the lex arbitri. The losing party in an award would then be able to file an
action in a California court seeking to set the award aside under the California law allowing expanded review. The article concludes that the respondent would be able to remove the action to federal court, hoping thereby to have the FAA apply, but also concludes that in all likelihood California state arbitration law would still govern the removed action.

**Question 4.** It is still an open question whether “manifest disregard of the law remains an available ground under FAA Chapter 1 for refusing to enforce an award.

**Question 5.** This question prompts students to review their understanding (and recall) of *First Options* and *Howsam*, taken up in Chapter 2. The question points out that where the issue is the existence or validity of the arbitration agreement (“arbitrability”), the Supreme Court has ruled that the standard of review of the arbitral tribunal’s jurisdictional conclusion in an award depends on whether the parties expressly gave the arbitrators the power to decide arbitrability. If so, then under *First Options* (concerning “substantive arbitrability”) the review is deferential (likely to be rare); if not, then the review is de novo. Under *Howsam*, concerning “procedural arbitrability” (questions, for example, of waiver and time limitations for bringing a claim) the pattern is reversed. Thus, it seems that under *Howsam* the parties can achieve de novo court review of a waiver or time limitation decision of the arbitrators by expressly providing for full de novo court review of such questions. On arbitrability questions, then, the parties’ agreement controls the level of court review—de novo or deferential. This contrasts with the *Hall Street* ruling on court review of an arbitral tribunal’s decision on the merits. Here the parties’ agreement cannot control the level of court scrutiny.

Of course one could justify the difference in treatment on the ground that the jurisdiction of the arbitral tribunal to decide the merits is an entirely different question from the tribunal’s decision on the merits. Nevertheless, in providing for court review of an arbitral award the FAA merely lists the grounds of review. Presumably review of the arbitral tribunal’s jurisdictional decision falls under FAA section 10(a) (4) (whether the arbitrators have “exceeded their powers.”) That ground could also have been the basis for allowing the parties to opt in their agreement for expanded review of the merits. The parties, for example, could include in their agreement a clause authorizing the arbitral tribunal to base an award only on a correct interpretation of the applicable law or on an objectively reasonable finding of facts. Indeed, the California Supreme Court relied on language in the California statute equivalent to FAA section 10(a)(4) in reaching a result contrary to *Hall Street*. The point is that the statutory language itself does not seem to explain the Court’s willingness to let party agreement control the level of review when the issue is arbitrability but not when the issue concerns the merits. So how can one conclude that the statutory language speaks so plainly on these issues?
**Question 6.** The majority opinion in *Hall Street* says in essence that the plain language of the statute is clear and controlling: the FAA does not allow expanded judicial review. Although the authors (perhaps with different degrees of enthusiasm and with different qualifications) may agree with the *Hall Street* result, they tend not to agree with the Court that the statute speaks so plainly for itself. That the California Supreme Court in *DIRECTV* (see Question 5 immediately above) has now reached the opposite result in construing essentially the same language, is supporting evidence for our view.

**Questions 7-8.** One possible unarticulated purpose underlying the majority’s position could be to help alleviate crowded federal court dockets. Such a purpose, however, would have to rest on a conclusion that *Hall Street* will not cause parties to opt for full court litigation in cases where they otherwise would have opted for arbitration with expanded judicial review—a judgment the Court claims it is unable to make. Another purpose could be to save parties from the danger that they would unwittingly re-introduce the delays and litigation costs associated with judicial proceedings when choosing a dispute settlement procedure (arbitration) essentially intended to avoid such delays and costs. Another could be the desire to avoid the complexities and uncertainties that would ensue from such an unconventional, hybrid procedure. This last perspective is the theme stressed in the Várady article cited in Question 7.

The main thrust of Várady’s analysis is to emphasize the dilemmas that arise no matter which way a court chooses to react to expanded review clauses. Because there are difficulties and dilemmas associated with either enforcing or rejecting such clauses, Várady notes the relative indeterminacy of the broader inquiry concerning which solution is the more favorable to arbitration. First, he notes that if the expanded review provision is struck down, the continued viability of the arbitration agreement itself is cast into doubt. Would the offending clause be severable, or, on the other hand, would it be so central to the basic agreement that without it the parties could not be said to have entered a binding agreement to arbitrate? That question has been answered in different ways by different courts.

Of course if the parties are made aware of the problem at the drafting stage, they can easily provide a solution by expressly approving or rejecting severability. If they do not do so, however, the outcome is uncertain. The *Hall Street* Court did not address severability, because it was not an issue the Court had agreed to review. The Ninth Circuit in its final *Kyocera* opinion opted for severability, but its analysis was at least partly influenced by unique features of the case, namely, that it had endured for years, that the award against Kyocera had been repeatedly upheld—even applying expanded review—and that to reject the award at the end of the day based on rejection of the review clause would have given Kyocera an undeserved windfall benefit. Even without these equitable
considerations, it seems likely that U.S. courts, given their generally pro-

arbitration stance, will opt for severability, unless something unique in the parties’

agreement stresses the importance of a particular expanded review provision.

But in any given case, if the parties fail to include an express provision on

severability, the outcome will be hard to predict.

Várady takes the analysis to a broader level by focusing on consequences

for the award within the New York Convention system. From this perspective

more uncertainty is introduced. Even if a U.S. court opts for severability, that

would not necessarily bind a foreign court asked to enforce the resulting award

under the New York Convention. A foreign court could decide for itself under

New York Convention Article V(1)(a) (concerning invalidity of the arbitration

agreement as a ground for rejecting the award) whether failure of the expanded

review clause invalidates the entire arbitration agreement and thus defeats the

award’s enforceability. Indeed, even Article V(1)(d) of the Convention

(concerning failure to follow the parties’ agreed arbitral procedure as a ground for

rejecting the award) could block enforcement, unless—as Várady notes—the

procedure of judicial review is characterized as “post arbitral procedure” rather

than an element of the party-agreed “arbitral procedure”.

A second difficulty arises if the expanded review provision is honored and

the reviewing court finds errors of fact or law. What follows next? Does the court

issue a judgment correcting the award? If so, do we now have a court judgment

for enforcement, but no longer a viable award? Or does the court remand the

case to the arbitral tribunal for further consideration—in which case would any

subsequent award introduce the famous two-awards problem, under which

courts in some countries (notably France) might enforce the first award (see

infra, section V.3.c.v. of the coursebook) and courts in other countries, the

second? The two-awards problem can arise, of course, whenever the home

jurisdiction annuls an award—for whatever reason—and a second arbitration (or

at least a second award) ensues. (See the Hilmarton case in France, infra

section V.3.c.vi, and in the U.K., infra section V.3.d.iii.) Unique difficulty related to

expanded review arises primarily whenever the reviewing court simply renders a

judgment correcting the award, rather than returning the case to the arbitrators

for their further consideration—or, in the latter case, when arbitrators simply

refuse to reconsider an award that a court has returned to them. The risk of a

court judgment replacing an award could perhaps be reduced if the parties were

to include a provision authorizing the arbitral tribunal's continued jurisdiction

whenever a reviewing court sets aside an award, either partly or completely. But

if the parties do not have such foresight at the agreement drafting stage,

problems and uncertainties will likely emerge.

The authors are thus inclined to urge caution and believe that generally

inclusion of an expanded review clause would be unwise.
V.2.e. Due Process in Setting Aside as an Issue of Human Rights

Question 1. First of all, one must not link “civil rights and obligations” with the term civil rights in the context of the “civil rights movement”. Article 6 speaks of property rights, rights in the realm of contracts and torts.

Standards of due process may very well be infringed during the litigation of property cases, and in all modern legal systems such a miscarriage of justice is a basis for an appeal (or for setting aside, in the case of arbitration). The result of the appeal or motion to set aside should be rectification. It is conceivable, of course that the appellate level may fail to perceive the infringement of due process principles and hence may fail to give relief. Does this mean that the party who was deprived of a fair hearing in his lawsuit for breach of contract can address the European Court of Human Rights? (Or, to be more precise, does this mean that whenever one party believes that he was denied a fair hearing in a property dispute, he can bring a claim before the European Court of Human Rights?) This would seriously undermine the finality of both court and arbitral decisions - and would also impose an unbearable burden on the European Court of Human Rights (ECHR). What makes the Stran case unique is that here we are not dealing with an example of imperfection in judicial decision-making; what happened here was that the state itself thwarted due process. Standards concerning the fairness of a hearing were not misapplied. They were manipulated by the state, which had authority to promulgate rules (and which was also a party to the lawsuit). It would be dangerous to understand Stran as establishing an additional avenue for redress concerning any and all due process arguments. What is unique here is not the application (or misapplication) of rules of procedure, but the promulgating of such rules in a biased manner.

The wording of the ECHR decision lends support to such a narrower reading of Article 6. The Court states: “The principle of the rules of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute” (Paragraph 49 of the opinion [2d para.]).

Question 2. In the Tribunal de grande instance case, the issue is not that of a possible additional avenue of judicial recourse, but rather of the applicability of general norms on human rights within the setting of the existing instances of judicial control.

Standards of due process set by the European Convention for the protection of Human Rights and by the International Covenant on Civil and Political Rights should, in principle, become part of the law in force in member countries. (As a matter of fact, due process rules of individual states are typically more elaborate than the principles set out in the European Convention and in the
Covenant.) In all likelihood, the procedural errors of the Paris Chamber of Commerce could have been remedied within the system of French procedural law. The reasons behind the reference to international human right standards might be the following: Arbitration does not have such an unequivocal lex fori as courts have; furthermore, the judges may have wanted to emphasize that they were handling an international case with reliance on widely accepted international standards.

If one gives Stran the interpretation suggested above in connection with question 1., one could imagine the application of Article 6 in a case in which the arbitral institution promulgates rules (manipulates the rules) in order to influence the outcome. One would also have to assume, however, that the arbitral institution itself was at least interested in the outcome (if not a party to the dispute).

Questions 3 - 5. In the Stran case, both the timing and the sequence of events indicate state interference with the process in which the state itself is one of the parties. What is critical, is that the means of this interference are beyond the reach of ordinary parties in a judicial or arbitration process. This is clearly contrary to the “equality of arms” principle espoused by the ECHR.

A different sequence of events might have made Stran’s arguments less persuasive. The timing of Law No. 1701/1978 and the postponement of the hearing before the final judicial instance by a month, during which month the legal background for decision-making was changed (changed by one of the parties to the process), created a persuasive case. It was persuasive enough to yield conclusions about inequality of arms and undue interference with the process. Normally, this is not easy to prove. Had the 1987 Law been enacted at a moment when its implications for the process were not yet clear (for example, before the award was rendered), it would have been most difficult to characterize the enactment as a manipulation of the process. Had it been enacted after the award was rendered, but before the Greek State had decided upon its course of action in the process (before annulment was sought), the outcome would have been a much closer call.

The ruling in Stran protected the integrity of the arbitration process in this given case.

One could argue that once the gates have been opened to allow scrutiny on the ground of human rights principles, such scrutiny has the potential to endanger the finality of arbitral awards. Such a risk has little practical relevance, however, if one assumes that the target of the Stran decision is the biased promulgation of rules, rather than their misapplication.
Questions 1 and 2. The Flexible decision is not an everyday occurrence. Damages and double costs are rarely awarded on the ground that the challenge to the award was frivolous. Such decisions, and the threat of such decisions, can certainly reinforce the shield around arbitral awards. If challenges are not only difficult to win but also dangerous to make, the authority and self-reliance of the arbitration process will certainly be strengthened.

Whether a frivolous challenge to an arbitral award should be treated differently from a frivolous challenge to a court decision, is not an easy question. The basic justification is the same. A possible argument in favor of some difference (based on the special function of arbitration) can be found in the decision of Judge Wood: “If courts were to undertake the kind of searching review of arbitral awards that Super Products invites here, arbitration would be transformed from a commercially useful alternative method of dispute resolution into a burdensome additional step on the march through the court system.” (4th paragraph from the end of the opinion).

Question 3. The endeavor to discourage frivolous challenges is certainly in line with pro-arbitration policies. The problem is, of course, that frivolousness is a rather elusive standard. Super Products “failed to overcome, with clear and convincing evidence, the presumption of validity that an arbitral award enjoys”. One cannot say that whenever a party fails to meet the burden of proof, the challenge can automatically be qualified as frivolous, made “for the purposes of delay or harassment, or out of sheer obstinacy”. One could perhaps explain the Flexible decision by saying that the challenge was not only insufficiently substantiated, it was outside the logic of the specific ground relied upon. The chosen statutory ground for the challenge was: “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award on the subject matter submitted was not made”. The arguments advanced by Super Products did not follow the logic of this ground for setting aside, and did not suggest that the arbitrators decided on matters not submitted to them, or that no coherent final decision was made. They argued instead, that the decision was wrong, and wanted a de novo review.

Still, a misconceived argument is not necessarily a frivolous one. One may commend the extra protection offered to the arbitration process, but there should be limits to discouraging challenges. Frivolousness must not be presumed. There should be a presumption of a challenger’s sincerity, just as there exists a presumption of an arbitral award’s validity.

Questions 4 and 5. There is no “Commercial Arbitration Association in the United States”, but the American Arbitration Association is close enough, and probably this is what the parties meant. Nevertheless, it is common ground that
the validity of the arbitration agreement is a serious threshold, and this implies rather stringent formal requirements. In this context, reliance on the fact that the arbitration agreement did not identify an existing institution can probably not be qualified as frivolous—not even if, in all likelihood, this was just an oversight, a common mistake of both parties.

But suppose, the arbitration agreement referred to the “American Arbitrators’ Association” instead of the “American Arbitration Association”? How about “U.S. Arbitration Association”? Clearly, the less significant the oversight on which the challenging party relies, the greater the chance that frivolousness will be found. Super Products’ conduct was tainted by the fact that it was Super Products who moved to compel arbitration. Assuming that it was the other way around, (and supposing that Super Products’ challenge was based on an alleged imperfection of the arbitration clause), consistency may be used as an argument against the attempt to characterize Super Products’ conduct as frivolous. (It is conceivable, however, that under certain circumstances “consistency” becomes “obstinacy”, which is another way of delineating the zone of “frivolous conduct”.)

V.3. Judicial Control over the Award: Recognition and Enforcement

V.3.a. Awards Subject to the New York Convention

V.3.a.i. An Award Rendered in the State Where Recognition or Enforcement is Sought

Questions 1 and 2. The debate that preceded the definition contained in Article I (1) of the New York Convention has become history. Positions taken in certain national laws (which had influenced the arguments) have been changed since the Convention's drafting. In particular, new statutes adopted in France (1981; amended 2011) and in Germany (1998) have abandoned the concept of tying the nationality of the award to the law governing procedure (lex arbitri). It is quite likely that today the simple territorial criterion would prevail without caveats and additional criteria. Yet we have to deal with New York Convention provisions that are the result of a compromise between positions that existed before 1958.

The question can be raised whether this compromise actually does accommodate the views of those countries that argued the procedural law applied (rather than the place of award) should be decisive. Article I(1) seems to say that all awards rendered abroad are awards covered by the Convention; and in addition, awards rendered on domestic territory may also come within the orbit of the Convention, if they are not considered domestic by the forum country. In other words, a country that decided the nationality of an award by the procedural law (lex arbitri) applied (e.g. Germany once followed this approach) was not
allowed under Article I(1) to exclude the application of the Convention regarding awards rendered abroad under German procedural law (although such awards were considered domestic, rather than foreign, in Germany). Germany was allowed, however, to treat as a foreign award an award rendered in Germany under foreign procedural law (lex arbitri). In other words, the “compromise” gave some recognition to the lex arbitri criterion only as a way of expanding (rather than restricting) the scope of the Convention.

The question also arises whether a country that considers the procedural law applied to be the decisive link could set aside an award rendered abroad but under its own procedural law (lex arbitri) - without considering the New York Convention. This is essentially the question raised in the “Europa” hypo. If an award made in Switzerland is brought to Europa for enforcement, Europa could not deny recognition and enforcement on the ground of lack of substantial evidence, because this is not among the grounds recognized by the New York Convention. Could Europa set aside the award on the same ground? Is it compatible with the New York Convention for a country to set aside an award on the ground that its own procedural law (lex arbitri) governed the arbitration? The answer is probably “yes”, especially in view of Article V(1)(e)’s provisions.

V(1)(e) makes a distinction between setting aside that may, and setting aside that may not, be a basis for refusing recognition. The aim is obviously to protect against overreaching. If setting aside in a country that did not have significant contacts with the arbitration process could prevent recognition in all 147 countries of the New York Convention (the number as of September, 2012), the basic aim of the Convention could be undermined. Therefore, Article V(1)(e) says that setting aside is only relevant if it occurs in the country in which, or under the (procedural) law of which, the award was rendered. This could be considered as defining annulments that are, and those that are not, compatible with the Convention. It follows that setting aside in a country whose procedural law (lex arbitri) was applied in the arbitral proceedings belongs to the category of "legitimate" annulments, even if the award was rendered outside that country. Setting aside, itself, is not governed by the New York Convention; it is left to national law. The Convention merely states which countries may render an annulment that will be allowed to affect recognition and enforcement of the award. In other words, setting aside in a "Convention-recognized country" is proper and compatible with the New York Convention, even if it was rendered on a ground that the Convention would not allow as a basis for refusing recognition and enforcement of the award.

(The 1961 German Act implementing the New York Convention (no longer in force) dealt with this issue explicitly. According to Article 2(2): "If an award falling under the Convention is made in another Contracting State according to German procedural law, then an action for setting this award aside can be initiated in Germany." The same implementing Act also dealt with the issue of a
possible double scrutiny of the same award in the same country. An award rendered abroad under German procedural law could have been scrutinized in Germany in a recognition and enforcement proceeding—since it was an award rendered abroad within the meaning of the Convention—and also in a setting aside action. The Act mandated consolidation of these two procedures in most cases. According to Article 2(2): "Should an action for enforcement of an arbitral award as defined in paragraph 1 be denied in accordance with Article V of the Convention, then the arbitral award is to be set aside at the same time, when one of the grounds for setting aside as given in Section 1041 ZPO is applicable." The new German arbitration law of 1998 simplifies these matters by limiting Germany's set aside jurisdiction to awards rendered within Germany.)

**Question 3.** Article I(1) of the Convention was intended as a compromise, but it is difficult to say whether it really succeeded in doing justice to both the territorial and the lex arbitri concepts. One might also note some tension between the wording of section 202 and its interpretation in *Bergesen*. Section 202 defines those awards that are deemed not to fall under the Convention, wording that hints at an intent to be restrictive. However, the interpretation given in *Bergesen* yields a broadening of coverage; it expands the application of the Convention to cases not mandated by the Convention itself. The *Bergesen* conclusion would have accorded better with section 202, which in turn would have been closer to the concepts of Article I(1) of the Convention, had section 202 been worded somewhat as follows: "In addition to awards rendered outside the U.S., the Convention also applies to awards rendered in the U.S., but which …" Yet, in spite of stylistic and conceptual inconsistencies, one cannot say that the *Bergesen* court misapplied section 202. Although the section is worded as restricting the Convention's application, the restriction is not really inhibiting. It actually permits a broad application of the Convention, and that is how the 2d Circuit reads it.

A possible line of discussion could focus on why it would be desirable to bring under the Convention's coverage awards rendered within domestic territory. Under the FAA - just as under arbitration acts of many countries - awards rendered within domestic territory may be confirmed in a domestic court (by way of a confirmation judgment), or annulled (by way of a set aside judgment). Would this situation be improved, or instead made more confusing, by allowing recognition and enforcement (and opposition to recognition and enforcement) of the same award under the New York Convention? The grounds on which recognition under the New York Convention may be denied are very similar to those under which the award may be vacated under the FAA.

In *Bergesen*, the most obvious practical advantage gained by the applicability of the New York Convention was a time limit of three years (instead of the one year period applicable to confirmation of domestic awards). The question also arises as to whether in the case of non-domestic awards
recognition and enforcement under the Convention replaces the remedies of the FAA, or coexists with them. Judge Cardamone says: “That this particular award might also have been enforced under the Federal Arbitration Act is not significant.” Further on, he states: “Since the statutes overlap in this case, Bergesen has more than one remedy available and may choose the most advantageous.” Could one infer from this language that the party seeking validation of a non-domestic award has a choice between an action under the FAA and an action under the Convention--but that he cannot proceed under both?

In *Yusuf Ahmed Alghanim v. Toys “R” Us* (126 F.3d 15), the same 2d Circuit confronted a more complicated situation. Yusuf Ahmed (from Kuwait) sought recognition under the Convention of an AAA award rendered in the U.S. Toys “R” Us cross-motioned to vacate under the FAA. Both the District Court and—upon appeal—the 2d Circuit held that the Convention and the FAA “afford overlapping coverage”, and that the fact that a petition is brought under the Convention does not foreclose a cross-motion under the standards of the FAA. This means, in practice, scrutiny in the same country under both the standards of domestic law and those of the New York Convention. (In the U.S. the two are very close, but some differences exist. Notably, the FAA has been interpreted to include “manifest disregard of law” as a possible basis for annulment. The Convention does not. Note that even in the U.S. the “manifest disregard” standard has been questioned by the U.S. Supreme Court in *Hall Street*. See infra subsection V.2.d.ii; see also Comment 4 after the *Brandeis* case infra subsection V.3.d.ii ) It is not explicitly stated, but one could infer that “overlapping coverage” in this context means that the award will be rejected if a ground for doing so exists under either the Convention or the FAA. Is *Toys “R” Us* consistent with *Bergesen*? (Note that the 2d Circuit’s *Toys “R” Us* approach has apparently not been followed in the 11th Circuit. See Question 5 after the *Singer* case in subsection V.2.b.)

What is the implication of *Toys “R” Us* regarding the time limit? If the winner in the arbitration case seeks recognition under the Convention and the loser cross-moves to vacate, we could add “manifest disregard” to the grounds of Article V of the Convention for scrutinizing the award, but what time limit should apply to the petition for recognition? Three years or one year? The time limit triggered by the request for recognition, or the time limit implied in the cross-motion for vacatur?

It is common ground that the New York Convention allows and contemplates two parallel scrutinies: one in the country where the award was rendered (in an action to vacate) and a second in other countries (in an action for recognition and enforcement). Is it advisable to allow the two within the same country? If this is allowed, a further question is whether the two scrutinies can only coexist within the same procedure (as in *Toys “R” Us*), or could one even
envisage two separate proceedings? (Certainly not a desirable prospect.) Would it not be simpler (and better) to have one procedural pathway for awards rendered abroad, and another, entirely separate, for awards rendered in the country of the forum?

**Question 4.** Had an award been rendered in London in the *Brier* case, a U.S. court probably could not have refused to consider recognition and enforcement of the award under the New York Convention. The first sentence of Article I(1) appears to be mandatory, and it says that awards made abroad fall under the Convention. (Awards made at home may also come under the Convention's coverage if they are considered to be non-domestic.) From the point of view of a U.S. court, an award rendered in London is an award made abroad.

V.3.a.ii. **Binding Awards and Awards Producing only “Obligatory Effects”**

**Question 1.** The concept of arbitrato irrituale takes us a step back in arbitration history. Before arbitration was generally recognized in national legal systems and supported by courts, it was essentially a private matter. In those earlier times, an agreement to arbitrate yielded arbitration if both parties chose to observe the agreement. If one of the parties did not honor the agreement, however, it was difficult (or impossible) to compel the reluctant party to arbitrate. Likewise, an arbitral award meant an arrangement pronounced by a trusted third party, but the winner could not attach or garnish property on the basis of this arrangement. This made sense between parties who had a well-established business relationship and a vested interest in maintaining the relationship. That interest in effect replaced the need for an executable award.

As arbitration grew in importance and became the dominant method for settling international trade disputes, it was extended to all kinds of controversies, including those in which the stakes were extremely high, the dispute was acrimonious, and the parties were determined to resort to all possible (and even impossible) procedural devices. Within this newer, wider spectrum of arbitration cases, many clearly needed greater guarantees than the bald expectation that the parties would live up to their arbitration agreement commitments. Many awards would never be enforced voluntarily were it not for the presence of a legal system ready to use force if necessary. Yet, small “friendly disputes” still exist, and for these, a “lodo irrituale” (“irritual” award) typically makes sense because of the high likelihood that the parties will honor the contractual framework. In the case that reached the Bundesgerichtshof, the parties did not behave in this expected manner.

**Question 2.** The essence of arbitrato irrituale is that the end result is essentially a binding contract, rather than a binding decision. It can be likened to situations in which the parties authorize a third party to fill in a missing element of
their contract. In an arbitrato irrituale the parties have a common understanding that they will hammer out their disputes without resorting to courts, but for the cases in which a settlement eludes them, they authorize a third party to decide the terms of a proper settlement. This arrangement then has the same authority as a settlement struck by the parties themselves. If this “irritual” award (lodo irrituale) is not honored, it provides an excellent basis for a most promising lawsuit—but probably not more than that. This character of a lodo irrituale found a quite clear expression in the arbitration agreement between Spier and Calzaturificio Tecnica. It was stated in the arbitration clause of their contract: “The parties agree to fully and diligently comply with the arbitrator’s award, as if a contractual agreement had been reached between them...”

The Spier case returned to the District Court in 1999 (S.D.N.Y. - 71 F.Supp. 2d 279), but the court once again sidestepped the nature of an irrituale award. Recognition was denied on the ground that the award had been annulled in Italy. (It was annulled because the arbitrators exceeded their powers.)

The District Court’s 1999 decision gives no answer to the question whether irrituale awards are recognizable under the Convention. If one sticks to the concept that an irrituale award is actually a contract and has only “contractual effects”, recognition would probably be out of place. (This is essentially the logic of the German Supreme Court.)

The facts of the Spier case open another interesting angle that an instructor might wish to pursue. If the irrituale award is, in practical effect, a contract, can it be set aside (as it was by the Italian court)? Can a court “set aside” a contract? The irrituale award may be conceived of as a contract that is--following the stipulations of the parties--done by a third party; and from this it might follow that it could possibly be undone (set aside) by another third party. It seems that the form or method through which this “contract” comes into being distinguishes it from ordinary contracts--but this still does not mean that it has “judgment effects”. Moreover, even an ordinary contract can be “voided” by a court on the ground of various defects in its formation.

Question 3. It is certainly plausible to assume that arbitrato irrituale falls under the New York Convention only for the purpose of requiring a contracting State to enforce the agreement to arbitrate under Article II. What is contemplated under Article II is the enforcement of a contract. Accordingly, the fact that it is “only a contract” poses no impediment. (The real problem is with the contractual nature and contractual effects of the award, because the effects of a “real” award are different. In principle, an award has the effects of a judgment in the country of its origin, and once recognized, a foreign award also has the effects of a domestic judgment; it becomes the basis for an execution proceeding. A contractual obligation cannot be directly enforced: it is merely the basis for a lawsuit.)
At the same time, one might also reason that the obligation contained in New York Convention Article II refers to enforcing an agreement to arbitrate in the classic sense of arbitration - that is, a process that yields an enforceable award. Under this logic arbitratio irrituale would not fall under the Convention, even for the purpose of enforcing the irrituale agreement.

**Question 4.** Foreign awards contemplated under the New York Convention are supposed to have “judgment effects”; they are supposed to yield consequences without further party cooperation and without further judicial pronouncement. The product is not a contractual right on which a lawsuit may be validly based, but a pronouncement that such rights are enforceable. Judicial intervention is only needed for confirmation and execution. The way the parties in Spier characterized the outcome (the parties agreed to comply with the award “as if a contractual agreement had been reached between them”) makes it less than an award with judgment effects. Unlike Article V, Article II does not contemplate judgment effects. Therefore, there is no necessary inconsistency in viewing the irrituale award as being outside the scope of the Convention, while applying Article II of the Convention with respect to arbitration agreements even if they provide for irrituale arbitration.

At the same time, one could also plausibly reason that the Convention should be read as a whole. Thus, Article II could be read as applying only to agreements that would yield an arbitral award qualifying for enforcement under Article V. Indeed, is the process truly “arbitration” if it does not yield an enforceable award?

**Question 5.** Domestically, a valid and final court decision or arbitral award is a basis for execution and can be relied upon in a number of ways. It may also be open to attack. In most countries, recognition of a foreign decision means according it the effects of a domestic decision.

The effects of a domestic decision are essentially--but not exactly--the same in different countries. The consequences of a res judicata decision in the U.S., for example, are not exactly the same in all details as the effects of a like decision in, let us say, Germany, or Hungary, or India. In this sense, one can take issue with the position of the Bundesgerichtshof, because recognition does not necessarily accord to a foreign award exactly the same effects as those that it had in its country of origin.

The argument can also be made, however, that in our case, we are not talking about specific nuances but broader concepts. The question is whether even in broad outline a foreign award that only has the effects of a contract can properly be treated in a recognizing and enforcing country as the equivalent of a domestic court judgment. This may be beyond the concept of recognition.
V.3.a.iii. Partial Awards

**Questions 1 and 2.** Fouchard is right that the terminology is misleading. The opposite of “partial” is not “final”. Partial may also be final. The question raised in *Puerto Rico Maritime Shipping* is whether partial awards are necessarily final as well.

The typical situation in which arbitrators opt for a partial award is as follows: more than one claim is presented, one or more of them can be handled quickly, and the others necessitate a longer deliberative and investigative process involving evidence that is not readily available. The arbitrators - desiring to speed up the process and not wanting to postpone the decision on all claims - may render a decision regarding those claims that are ripe for decision.

This approach is ill advised if the issues are so intertwined that the claim(s) decided in the early partial award may have a bearing on the questions postponed (in order to be handled in the final award). Separation may very well be justified if, for example, the claimant submits two claims stemming from two different contracts. Even in this case, however, rendering a partial award may be unwise if resolution of the dispute under each contract turns on the same analysis.

In the *Puerto Rico Maritime Shipping* case, there were two problems with the partial award. First, the question arose whether the claim (and award) regarding freight monies was separable from the other claims. Second, the court asked whether the partial award was clear and specific enough to be confirmable - that is, whether it put “any one issue to rest”.

The New York Convention makes no distinction between “partial” and “final” awards. It has become common ground by now, that awards dealing with one claim only (partial awards) are not necessarily excluded. Article V(1)(e) hints at a guideline; it allows refusal of recognition if “the award has not yet become binding on the parties”. One could argue that in the *Puerto Rico Maritime Shipping* case, the partial award had not become binding, because it simply did not say what exactly the parties were obligated to do. An award ordering a party to pay "such other freight monies as are or may come into its possession" is probably not definite enough to be binding without further clarification by arbitrators or judges. (Such indefiniteness, may, of course, jeopardize a final award as well.)

The question might arise as to what the result would have been had the arbitrators only awarded what Star Lines admitted. In this case one would have had a definite award for a specific sum of money settling an issue that would not need further attention; but at the same time this would have been a partial award that would have been narrower than any of the claims submitted. The New York
Convention does not provide explicit guidelines for such a case. Arguments could be advanced in both directions. Such an award could be justified on the ground that it avoids delay (and payment of interest), and separates an issue that is ripe for decision from the rest of the claim that might necessitate a longer scrutiny. Recognition of such an award could be opposed by arguing that even if the claim regarding freight monies could be separated from other claims, there should be no separation within the same claim.

**Questions 3 - 5.** One possible dividing line concerning the matters submitted to the arbitrators is the distinction between quantum debeatur and an debeatur. An an-debeatur award (an award on liability) simply says that respondent is, indeed, responsible, without specifying the amount of damages owed. Such an award makes sense, for example, in cases where the issue of liability is seriously contested, and there is a certain likelihood that the parties will do their calculations themselves, once it is clear whether a breach of contract did or did not take place and who bears responsibility if there was a breach.

Another possible pattern that justifies an an-debeatur award is the following: a series of contracts have been concluded, the behavior of the parties is the same in all of them, the question is how to characterize or assess this behavior. It makes some sense to take a position of principle in this matter, because this will pave the way for quantum-debeatur awards concerning each contract. An-debeatur awards can obviously not be enforced. Can they be recognized? In other words, can they be given res judicata effect? In *WTB v. CREI* the an-debeatur award says that CREI is liable for wrongfully terminating the contract. Suppose CREI is suing WTB before a court, and this suit is initiated after the an-debeatur award was rendered, but before the quantum-debeatur award was made. WTB could rely on the arbitration process in two ways: a) to argue that the case is res judicata, or b) to plead lis pendens, that there is an ongoing lawsuit (before arbitrators) in the same matter. Students could be invited to analyze the merits of these two alternative strategies.

The *WTB* case is different from the *Puerto Rico* case. The two would have been more similar, had the an-debeatur award been submitted for recognition. Had this been the case, then - just as in the *Puerto Rico* case - the issue would have been whether the award was binding in the sense that it made clear what the parties were bound to do or not to do. In *WTB*, the quantum-debeatur award made it absolutely clear what had to be done—CREI had to pay WTB DM 110,033.03. The question was whether the award provided sufficient background information. In other words, whether the award presented for recognition and enforcement provided the necessary elements for its evaluation and possible confirmation.
**Question 6.** The Bologna Corte di Appello gave a negative answer to this question. According to the Italian court, “Only the joint examination of the partial award and the final award can allow to ascertain whether the decision of the arbitrators is final, certain, consistent and decides all claims and issues filed by the parties. The two awards are thus inseparably united and must be considered as a whole, also from a formal point of view.” Are the requirements thus stated within the boundaries of the New York Convention? It makes sense to seek background information adequate to allow the court to verify whether the conditions specified in the New York Convention are met. Let us take an example: Article V(1)(c) states that recognition may be refused if “the award deals with a difference not contemplated by or not falling within the terms of submission to arbitration”. Suppose the quantum-debeatur award (the one submitted for recognition) does not describe the “difference” that yielded the award for one hundred thousand German Marks; it takes a short cut and only explains the calculation. In this case, one could argue that without the an-debeatur award the court could not conduct a proper inquiry under the terms of the New York Convention.

In *WTB v. CREI*, the expectations and prerequisites set by the Italian court may have gone beyond the limits set by the Convention. An award need not decide “all the claims and issues filed by the parties”, since it may be a partial award. Even if the award does not purport to be a partial award, and yet it omits some claims or issues, it would still not be easy to defeat its enforcement under the New York Convention. Students could be invited to read Article V(1)(d) and to decide whether such an incomplete award could effectively be challenged on the ground that “the arbitral procedure was not in accordance with the agreement of the parties”, or whether such a result would read V(1)(d) too broadly. The goal of checking whether the decision of the arbitrators was “certain” and “consistent” hints at reexamination of the merits, which is beyond what is permitted by the Convention. It is true, however, that a reexamination of the merits remains possible to the limited extent that a possible violation of public policy is at issue. It is conceivable that the an-debeatur award could contain information needed to establish whether the arbitrators did or did not infringe public policy.

**V.3.b. Grounds Under the Convention for Refusing Recognition and Enforcement - An Introductory Case**

**Questions 1 and 2.** *Parsons and Whittemore* gives students a useful overview of many of the grounds for refusing recognition and enforcement in N.Y. Convention Article V. It may be helpful to list and analyze separately each of the grounds relied on by Overseas, saving “manifest disregard” – the most controversial – for last.

The U.S. Second Circuit Court of Appeals is very sensitive to the spirit and
purpose of the Convention. The public policy defense, in particular, is construed narrowly to cover only cases “where enforcement would violate the forum state’s most basic notions of morality and justice.” It does not extend to actions by Americans abroad taken voluntarily in support of the general direction of American foreign policy. Had Overseas been acting in compliance with a direct order of the U.S. government, however, presumably no U.S. court would have enforced an award against it.

**Question 3.** The damages-for-loss-of-production dispute arises under Article V(1)(c) of the Convention (“The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration…”). Overseas supports its argument by pointing to the provision in the contract reciting that: “neither party shall have any liability for loss of production.” The award, nevertheless, gave substantial damages to RAKTA for loss of production.

At first blush this will seem improper to many students. The V(1)(c) ground for refusing to recognize and enforce award, however, is the award’s going beyond the scope of submission to arbitration. The contract’s limit on liability for loss of production is not a limit on the scope of arbitration. It is a limit that goes to the merits of the dispute. It concerns interpretation of the contract, and contract interpretation issues are clearly within the scope of the submission to arbitration. Hence the court seems correct in rejecting the V(1)(c) challenge to the award.

A very similar issue arises in the FCI case infra in subsection V.3.d.i. The contract excluded consequential damages, but the award based a significant part of the final monetary damages awarded to the winning party on consequential damages. The U.S. federal district court in that case also concluded that the award did not go beyond the scope of submission to arbitration. In doing so, however, the court identified the particular contract theory applied by the arbitrators to grant consequential damages despite the contract’s explicit prohibition on such damages. Should the Second Circuit Court of Appeals in Parsons and Whittemore have at least identified the theory of contract law that the arbitrators relied on (without making an independent judgment on the validity or applicability of that theory)? One might so argue, though it would not seem necessary to us as a condition to upholding the award. The reviewing court needs only to be satisfied that the arbitrators reached their result through an interpretation of the contract.

Of course in Parsons and Whittemore the parties could have excluded the issue of loss-of-production damages from the arbitration. To do so, however, the parties would have had to have provided—preferably in the arbitration clause itself—that the arbitrators were not authorized to award damages on the basis of loss of production.
Questions 4-5. In American arbitration law “manifest disregard of the law” means that the arbitrators were completely indifferent to knowing the substance of the law, or knowing it, completely disregarded it in reaching their conclusions. The test is obviously very difficult to meet for a party defending against an award. More to the point, one cannot find “manifest disregard of the law” expressly within the list of defenses to recognition and enforcement of an award included in N.Y. Convention Article V(1) and (2). Are there other grounds that closely approximate “manifest disregard of the law”.

One pattern of arbitrators acting in “manifest disregard of the law” would be a case in which they based their decision wholly on equity and fairness reasons without any reference to the applicable law. Thus in essence they would have acted as “amiables compositeurs”, without the parties having given them the authority to do so. Thus the award could probably be refused recognition and enforcement under N.Y. Convention Article V(1)(d) (“... the arbitral procedure was not in accordance with the agreement of the parties ...”) Or if the arbitrators had engaged in “despotic decision-making” completely disregarding all law, perhaps enforcement of the award would violate the enforcing country’s public policy (See Article V(2)(b)).

V.3.c. Procedural Grounds Under the Convention for Refusing Recognition and Enforcement

V.3.c.i. Burden of Proof

SA X (Belgium) v. Mr. Y (Spain)

Questions 1 - 3 and 5. Spain is a party to the N.Y. Convention and according to the Barcelona Court of Appeals decision mentioned in Comment/Question 2 in Spain a treaty takes precedence over national law. The award in this case falls under the Convention because it was a foreign award made outside Spain (in Strasbourg). Hence the Spanish Supreme Court treats Article II as overriding the public deed requirement of the Spanish Arbitration Law of 1953; it goes on to consider on its own (de novo review?) whether the arbitration agreement meets the standards of Article II of the N.Y. Convention.

Although the summary of the opinion does not mention Article IV of the Convention, presumably the Spanish Supreme Court reaches Article II through the provisions of Article IV(1)(b), which refer to Article II.

From the facts one can see that X submitted documents confirming the sale and containing conditions of the sale, including an arbitration clause calling for arbitration of disputes before the Arbitration Chamber of Strasbourg. Y was clearly a party to the sale agreement, and hence to the arbitration clause in that agreement, and since Y did not appear in the Spanish enforcement action, the
Spanish court did not have before it any issue concerning whether Y was a genuine party to the arbitration agreement. Suppose, however, that Y had appeared in the Spanish action and claimed (supported by some evidence) that Y’s signature on the sale agreement had been forged. Who would have had the burden of proof concerning the “existence” of the arbitration agreement? This is the issue taken up in the next case, Clothing Manufacturer (Ukraine) v. Textiles Manufacturer (Germany), below.

**Question 4.** Note that Article V(1) of the N.Y. Convention provides that recognition and enforcement of an award may be refused: “... only if ... [the party defending against enforcement] furnishes ... proof that [ establishes one of the grounds listed in V(1)]. In the Spanish Supreme Court case, however, the respondent, Mr. Y, did not appear in the enforcement proceedings. Thus, the court could not consider Article V(1) grounds for refusing recognition and enforcement.

On the other hand Article V(2) groups for refusing recognition and enforcement are not linked to a burden of proof requirement. (“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ...”) Hence the Spanish Supreme Court was free to consider, on its own motion, whether the grounds listed in Article V(2) (a) [non-arbitrability] or (b) [public policy] furnished a basis for refusing to enforce the award.

**Clothing Manufacturer (Ukraine) v. Textiles Manufacturer (Germany)**

**Questions 1-4.** The authors and most commentators (see Kröll Schieds, van den Berg, and Born) believe the Munich court’s interpretation of the N.Y. Convention in the Clothing Manufacturer case is mistaken. The drafters of the N.Y. Convention intended to facilitate enforcement of arbitral awards. Under Article IV an award creditor seeking recognition and enforcement of an award must present the award and the arbitration agreement, on the basis of which the award was rendered. The arbitral tribunal would not have rendered the award in favor of the award creditor unless the tribunal had been convinced that the arbitration agreement properly came into existence between the contending parties and was valid. This would seem to justify an initial presumption in favor of the award creditor. Thus, we believe the N.Y. Convention should be interpreted as requiring the award creditor to present only *prima facie* evidence of an existing and formally valid arbitration agreement. Under Art. V(1)(a) the award debtor has the burden of proving the nonexistence or the substantive or formal invalidity of the arbitration agreement.

On the face of the language in the N.Y. Convention, one can understand how a court might reach the result adopted by the Munich court. Article IV calls upon the award creditor to “supply” the arbitration agreement, whereas Article
V(1)(a) requires the award debtor to bear the burden of proving the “invalidity” of the arbitration agreement. Moreover, the “invalidity” referred to in Art. V(1)(a) in the phrase, “said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made * * *, appears to be referring to “substantive invalidity” and not “formal invalidity”. Formal validity is governed by Article II(2) of the N.Y. Convention. Thus, one might reason that the “existence” and “formal validity” of the arbitration agreement is the subject of Article IV, and there the burden seems to fall on the award creditor to “supply” the agreement and, perhaps implicitly, to prove the existence and formal validity of the arbitration agreement—the position taken by the Munich court in Clothing Manufacturer.

Nevertheless, in light especially of the pro-arbitration purpose of the N.Y. Convention, we believe the better interpretation is to place the burden of proof as to the arbitration agreement’s existence and validity (formal and substantive) on the award debtor by reference to Article V(1)(a). Note that Article V(1)(a) speaks of the “agreement referred to in Article II”, which is language that seems to invoke the formality requirements of Article II(2) as applicable to the form of the arbitration agreement. It also invokes as a ground for rejecting the award that the “parties * * * were under some incapacity”, a circumstance that would seem to concern the possible nonexistence of the agreement.

To clarify the difference between nonexistence and invalidity, imagine an arbitration agreement entered into by a party with full capacity but one that does not meet the writing requirement. Although the agreement came into existence, the party who failed to sign the agreement could claim as a defense to its enforcement that the agreement was “invalid” and hence not enforceable because it was not in writing. If, on the other hand, the non-signatory party were to proceed with the arbitration without raising an objection based on the agreement’s lack of formal validity, then the agreement would be enforceable.

Contrast that case with one in which a purported contracting party lacked capacity to enter the arbitration agreement. In that case the agreement would never have come into existence and no amount of “ratification” of the agreement by the incapable party could bring it into existence. The agreement could come into existence only if a party with capacity were to agree to its terms.

Thus, it would seem that by referring to “lack of capacity” to enter an agreement, Article V(1)(a) embraces “existence” issues as well as “validity” issues. Moreover, the term “invalidity” is sometimes used in a broad sense to include both nonexistence and invalidity issues. Since the burden of proof under V(1)(a) plainly rests on the award debtor, we believe the better interpretation would place on the award debtor the burden of proof concerning the nonexistence as well as the formal and substantive invalidity of the arbitration agreement.
agreement—the formal validity being governed by Article II(2) of the Convention and not by the “law to which the parties have subjected [the agreement] * * *.”

Thus Article IV should be interpreted to mean that the award creditor is required to “supply” to the enforcing court the award and **prima facie** evidence of the arbitration agreement on which the award was based. If the award creditor is able to present a sale contract, for example, containing an arbitration clause, that would seem to meet the prima facie standard. The award debtor would then have the burden of proving that the purported arbitration agreement never actually came into existence between the two relevant parties, or was formally or substantively invalid.

**V.3.c.ii. Validity of the Agreement and Standard of Review**

**Questions 1 and 5.** In the *ACME* case, ACME, the winning party, seeks recognition and enforcement of an award rendered in Geneva. MCP, the losing Pakistani party, defends on several grounds, including N.Y. Convention Article V(1)(a): “... the said [arbitration] agreement is not valid under the law to which the parties have subjected it ...” Note that a court in Lahore, Pakistan had previously ruled that the arbitration agreement was invalid, but it does not appear that MCP is relying on this judgment—i.e., it is not seeking recognition and enforcement of that Pakistani court judgment. The issue before the federal district court is solely the recognition and enforcement of the award.

MCP had contested the validity of the arbitration agreement before the arbitrator, who ruled that New York law governed and under that law the agreement was valid. (The arbitrator also ruled that the Supplementary Agreement, which expressly chose Pakistani law, was invalid under either Pakistani or New York law.) The degree of deference the court accords the arbitrator’s decision is striking. The court applies a “manifest disregard” standard, which requires a mere “colorable justification for the outcome reached”. Finding that there was at least such a “colorable justification” for the arbitrator’s conclusion, the court goes no further in reviewing the validity question.

We are inclined to think that this degree of deference to arbitrators under V(1)(a) is excessive—all the more so when one recalls that arbitrators may have a personal stake in upholding the validity of the arbitration agreement. Indeed, we are generally persuaded that de novo review of the validity question would be appropriate—or at the very least, review under a “reasonableness” standard. If the arbitration agreement is in fact invalid, then it is difficult to see why the arbitrators have any authority to decide anything.

Note that the question raised above in connection with *Parsons and*
Whittemore of whether “manifest disregard of the law” is a proper ground under the New York Convention for refusing recognition and enforcement of an award is a different issue from that raised in ACME. In Parsons and Whittemore the manifest-disregard-of-law question is whether a reviewing court can review the arbitrators’ interpretation and application of the law to the merits of the dispute – even on a standard as deferential as “manifest disregard of the law”. The question in ACME is different. It is whether the extremely deferential standard of “manifest disregard of the law” is appropriate for reviewing the arbitrators’ conclusions concerning the validity of the arbitration agreement.

**Question 2.** The First Options case is generally regarded as stating the rule for international, as well as domestic, arbitration in the U.S. Thus, we are inclined to see ACME as entirely inconsistent with First Options, which of course came later. Under First Options when the parties have not expressly submitted the issue of arbitrability to the arbitral tribunal for decision (which is the situation in ACME), at Stage 3, the court should decide the arbitrability question de novo.

**Question 3.** The Amsterdam court in the Pyramids case seems to use something like a reasonableness test for reviewing the arbitrators’ conclusion that Egypt was a party to the arbitration agreement. The court mentions the arbitrators' reasoning and stresses the major evidence supporting that reasoning – the Minister of Tourism’s explicit approval of the contract written at the bottom of the contract in question. The court does not seem to be offering its own, independent judgment about whether Egypt was a party to the agreement.

**Question 4.** In contrast with both the ACME (“manifest disregard of law”) and Amsterdam court (“reasonableness”) standards for reviewing the arbitrators’ decision in the Pyramids case, the Court of Appeal of Paris appears to have engaged in de novo review. It reconsiders the evidence for itself and concludes that Egypt is not a party to the agreement. True, this occurs in a set aside proceeding in Paris, and some commentators might argue that a court asked to confirm a domestic award is particularly empowered to engage in more intrusive review. There is of course no international agreement regulating the grounds for setting aside an award, but it is perhaps worth noting that the UNCITRAL Model Law uses essentially the same grounds for set aside as for recognition and enforcement proceedings. (Compare Model Law Article 34 (grounds for set aside) with Article 36 (grounds for refusing recognition and enforcement) in the Documents Supplement.)

**Question 6.** As we discussed immediately above in our responses under Questions 1 and 5, we agree that a court should apply a de novo standard in reviewing the arbitral tribunal’s jurisdiction. Hence we concur with the U.K. Supreme Court’s decision in Dallah.
V.3.c.iii. Notice of Appointment of the Arbitrator and Waivability

Questions 1, 2 and 4. The respondent (German seller) appears to rely on Article V(1)(b): “The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator ...” Of course this ground is waivable after an award has been rendered, because it must be raised by the party against whom the award is invoked in order to be considered by the enforcing court. Because Article V(2) grounds can be raised by the court, on its own motion, it would seem that these grounds cannot be waived by the parties.

That Article V(1) grounds can be waived after an award has been rendered, does not tell us whether a waiver in the arbitration agreement itself is effective. Except when the line protecting against due process violations is crossed or unconscionable overreaching by a party in a superior bargaining position is involved, it is difficult to see why a procedure agreed to by the parties in the arbitration agreement should not be enforced. The procedure used by the Copenhagen Arbitration Committee for Grain and Feedstuff Trade hardly seems unconscionable. Indeed, the Court of Appeal of Cologne expressly notes that keeping the names of the deciding arbitrators secret can strengthen the impartiality of the arbitrators and lead to more objective decision making. (See paragraph 6 of the opinion summary, p. 949.)

But has the line protecting against due process violations been crossed? The Cologne court says it has been. It is essential to German public order that the impartiality of the arbitrators deciding the case be guaranteed. But under the Copenhagen Grain and Feedstuff Trade procedure, a party never knows whether an arbitrator whose impartiality it has challenged actually served on the decision-making panel.

Question 3. Note that in paragraphs 5 and 6 of the opinion the Cologne Court does not actually rely on the public policy ground under the N.Y. Convention (Article V(2)(b)) as a basis for refusing enforcement--at least it does not cite that article. The court seems to say that German public order (public policy) would have prevented the award from being enforced under German national arbitration law. For that reason Article VII of the New York Convention does not help the claimant. It is only available to assist a claimant if an award would have been enforced under national arbitration law in the absence of the Convention. In other words, the Convention should never have the effect of preventing an award from being enforced that would have been enforced in the absence of the Convention. But here, in the absence of the Convention, German public policy would still have prevented the award from being enforced under German national arbitration law applicable to foreign awards.
It seems clear, of course, that N.Y. Convention Article V(2)(b) ("public policy") would also have provided a persuasive ground for refusing to enforce the award, especially since Article V(2)(b) refers to “the public policy of that country” (emphasis added) – in this context, Germany.

Since Article V(2) grounds can be raised independently by an enforcing court, they surely cannot be waived by agreement of the parties.

**Question 5.** The Cologne court also found that the claimant had not complied with N.Y. Convention Article IV(1)(a), because it had not presented: "The duly authenticated original award or a duly certified copy thereof ..." The claimant had presented a copy of the award, unsigned by the deciding arbitrators. The official original award would have borne the signatures of the deciding arbitrators. Furthermore, the Cologne court expressly concludes that the requirements of Article IV “cannot be modified by an agreement of the parties ...” (See paragraph 3 of the opinion summary.)

Of course, presumably the Cologne court could have been shown the original signed award “in camera” under an agreement that the names would not have been revealed by the court. Thus the Article IV(1)(a) ground appears more of a technicality than a persuasive reason for refusing enforcement of the award.

**V.3.c.iv. Scope of the Parties' Submission to Arbitration**

**Question 1.** We are inclined to agree with the Parsons-Jurden court’s use of a de novo standard of review for the scope of the parties’ submission to arbitration. The reasoning that we find most persuasive, however, is that given in the First Options case:

“On the other hand the former question—the ‘who (primarily) should decide arbitrability [scope of the arbitration clause]’ question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers... And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the ‘who should decide arbitrability’ point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide” (See 4th paragraph from the end of the opinion).

Note that the Parsons-Jurden court also relied on the presumption found in American law in favor of interpreting the scope of an arbitration clause to be as inclusive as possible: “any dispute concerning the scope of arbitral issues under the [Federal] Arbitration Act should be resolved in favor of arbitration”. (characterizing the Supreme Court’s decision in MTC Moses H. Cone). (See the
As discussed previously, validity of the arbitration agreement under Article V(1)(a) would seem another ground for which a de novo standard of review would be appropriate.

Question 2. This question points up the difficulty that arises when an enforcing court confronts an award delivered without reasons. The award in Parsons-Jurden was apparently delivered without written reasons (See the paragraph in the opinion beginning: “Proceedings with the arbiters were held in Bermuda * * *”). In such a case it would seem almost inevitable that a court would resort to de novo review, because the arbitrators have not provided any interpretation or reasoning to which the court could defer.

Question 3. The reasoning in First Options seems fully applicable to foreign, as well as domestic, awards. The touchstone is that a court should not defer to the arbitrators’ decision, if it is not reasonable to infer that the parties wanted the arbitrators to be the primary decision makers concerning the issue in question. By reverse logic it would seem that a court should defer to some extent to the arbitrators’ decision on any issue that the parties could reasonably be said to have allocated to the arbitrators as primary decision makers. Whether a party was “unable to present his case” (Article V(1) b), for example, might seem to be an issue the parties would expect the arbitrators to decide primarily—unless perhaps the issue rises to the level of a potential due process violation.

Question 4. Although under First Options a court should technically review scope issues de novo at Stage 3, the reverse presumption that First Options says applies on scope questions means that a court will almost always find a disputed issue to be included within the scope of the arbitration agreement. Since arbitrators are likely to apply a similar presumption in favor of inclusion, as a practical matter a reviewing court under First Options is very likely to uphold an award’s decision on scope issues.

Concerning existence and validity issues (“arbitrability” questions) First Options calls for a de novo standard of judicial review, whereas ACME applied an extremely deferential standard (the award is upheld as long as there is a colorable justification for its finding that the arbitration agreement was valid) and the Dutch decision (in Southern Pacific Properties) called for at least some deference to the arbitrators’ decision (seemingly a reasonableness standard). In France however, as seen in the Paris Court of Appeals decision in Southern Pacific Properties (subsection V.2.d.i.), the standard of review of arbitrability questions at Stage 3 is de novo.
V.3.c.v. Improper Composition of Arbitral Authority or Improper Arbitral Procedure

Questions 1 and 2. The Hong Kong court’s decision is technically governed by the Hong Kong Arbitration Ordinance, but that ordinance incorporates the provisions of the N.Y. Convention. Hence, when the Hong Kong court concludes that it has discretion to enforce an award, even though the arbitral authority was improperly constituted (Article V(1)(d)), it is apparently basing that interpretation on the word “may” in the Hong Kong equivalent of Article V(1) of the N.Y. Convention. Article V(1) provides that: “Recognition and enforcement of the award may be refused ... [if the respondent proves one of the grounds listed]” (emphasis added). The word “may” does seem to justify the conclusion that refusal to recognize and enforce is not required; an enforcing court has discretion to enforce the award even if the respondent proves the existence of one of the Article V(1) grounds.

The court’s specific exercise of discretion seems more questionable. The arbitration clause called for arbitration in Beijing, not Shenzhen, under the rules of the predecessor to the Chinese International Economic and Trade Arbitration Commission (CIETAC). At the time of the dispute, CIETAC had replaced its predecessor, but CIETAC maintained different lists of arbitrators for each of its three locations (Beijing, Shanghai, and Shenzhen). Thus, arbitration at Shenzhen meant in all likelihood that a different group of arbitrators would hear the case as compared with those who would sit were the seat in Peking. (The uncertainty derives from the possibility of some arbitrators appearing on both the Peking and Shenzhen lists.)

The Hong Kong court discounts the significance of the differing arbitrator lists and concludes that despite the technical variance from the arbitration agreement (seat in Shenzhen instead of Peking), the parties got essentially what they had bargained for: arbitration in China under the CIETAC rules. The authors have a lingering doubt, however, about an arbitration panel comprised of arbitrators chosen from the Shenzhen list when they should have been chosen from the Beijing list, especially when one of the parties is the Shenzhen branch of a Chinese Corporation. Does this not present at least the appearance of potential bias?

Compagnie des Bauxites de Guinee v. Hammermills, Inc.

Questions 1-3. The procedure in Article 21 of the 1988 ICC Rules requiring the arbitrators to submit the award in draft to the ICC for review before the arbitrators finally sign is clearly for the purpose of ensuring high quality in ICC awards. (Essentially the same provision is retained in the 2012 ICC Rules Article 33.) Although the ICC may alter the “form” of the award, it has no power to change the substance of the arbitrators’ award. At the same time it may “draw ... [the arbitrators’] attention to points of substance.” Hence, for example, the ICC
could alert the arbitrators that their award had not dealt with an issue listed in the Terms of Reference or that they had perhaps failed to explain what law governed the merits.

In the *Hammermills* arbitration the Article 21 procedure appears not to have been followed to the letter. The award of the costs of arbitration—which would normally include attorneys’ fees – was expressly listed in the Terms of Reference as an issue for the arbitrator to decide. Hence the correct procedure would have been for the draft award submitted to the ICC to have included the arbitrator’s award of attorneys’ fees. Had that award seemed too high or too low, the ICC would have had an opportunity to state its views to the arbitrator for his consideration.

**Question 4.** As ICC Counsel Benjamin Davis explains, the ICC itself fixes its own administrative charge, whereas the arbitrator decides upon the amount of legal fees to be awarded and which side should pay them. But of course this does not really address the relevant issue. The ICC also cannot decide the merits of the dispute, but the arbitrator must nevertheless submit to the ICC his or her resolution of the merits in draft form before signing the award. The same should apply to the arbitrator’s award of legal fees. The ICC should have an opportunity to review the arbitrator’s draft award in its entirety in order to be able to call attention to potential weaknesses in the award before the arbitrator signs.

**Questions 5 and 6.** We believe that it should be obvious that an arbitrator’s substituting a different expert for the one specifically agreed upon by the parties, without their consent, would constitute an Article V(1)(d) violation (“arbitral procedure was not in accord with the agreement of the parties ...”) We believe that in principle such an award should not be enforced. If the error were completely harmless, however, then of course there would be no reason to refuse enforcement. For example, the expert might have testified to the design defects in a piece of equipment that the arbitrators in the end decided did not cause any harm.

We would allow proof of a V(1)(d) violation (procedural variance from the parties’ agreement) to establish a prima facie case for non-enforcement and thus would shift the burden of proof to the party seeking enforcement to show that the error was truly harmless. If in the end the court concludes that there was a reasonable possibility that the error affected the outcome to the detriment of the respondent, we believe the award should not be enforced. The parties are entitled to a procedure that conforms to their agreement.

**Questions 7 and 8.** It seems to the authors that the Hong Kong court is indeed more honest than is the *Hammermills* court about the existence of a V(1)(d) error. We also agree with the Hong Kong court’s open acknowledgment that it has discretion to enforce an award, despite the existence of a V(1)(d) error. After all, as noted above, Article V(1) provides that an enforcing court “may”
Refuse to recognize and enforce an award; it does not say that the court has an obligation to do so. [At least this is so in the English language version of the Convention. In French the provision is slightly more ambiguous: (“La reconnaissance et l’exécution de la sentence ne seront refusées, ..., que si cette partie [contre laquelle la sentence est invoquée] fournit ... la preuve: ...” “Recognition and enforcement of the award will not be refused ... unless the party [against whom the award is invoked] furnishes ... proof: ... ”]

We believe that the Hammermills opinion would have been more acceptable had the court acknowledged a V(1)(d) violation and then explained that it could not see how that violation had in fact prejudiced the respondent. Even though the insurance company actually bore the cost of the legal fees, it was still appropriate to award these fees to Hammermills, especially in the light of the likely subrogation agreement in the insurance contract, under which the fees would ultimately be paid to the insurance company.

V.3.c.vi. An Award Set Aside in “the Country in Which, or Under the Law of Which, That Award Was Made”


Questions 1 and 2. The issue before the Austrian court is whether to refuse recognition and enforcement of the award because it has been set aside in Slovenia (arguably the seat of the arbitration). At stake is how to interpret N.Y. Convention Article V(1)(e) allowing refusal to recognize and enforce an award if that award has been set aside by “the competent authority of the country in which, or under the law of which, that award was made.”

Presumably the parties are each domiciled in a state party to the 1961 Geneva Convention (we know the Slovenian party is, but we don’t know the nationality of the other party) because the Austrian court concludes that the Convention applies. (See Article 1 of the 1961 Geneva Convention (included in the Documents Supplement) for its scope of application.) Under the 1961 Geneva Convention an award’s having been set aside in the country in which it was rendered will justify refusal to enforce the award (under Article V(1)(e) of the N.Y. Convention, to which Austria is also a party) only if the setting aside was done on one of the grounds listed in Article IX of the 1961 Geneva Convention. The grounds listed in Article IX of that convention are essentially those found in N.Y. Convention Article V(1)(a)-(d), but excluding Article V(2) grounds (in particular, public policy). Because the Slovenian Supreme Court set the award aside on the ground of Slovenian public policy—holding that the container contract governing the rights of the parties was invalid for violation of the anti-monopoly provision of the Yugoslav constitution, which applied at the time the contract was made, and thus that the award based on that invalid contract violated Slovenian public policy — and because violation of public policy is not one of the grounds listed in Article IX of the 1961 Geneva Convention, Austria was not allowed to
refuse recognition and enforcement of the award.

The N.Y. Convention does not require countries party to it to refuse to recognize and enforce an award set aside in the home jurisdiction, but it does give them the option to do so. Hence, the countries that have become party to the 1961 Geneva Convention have in effect agreed to exercise the discretion implied in that option to refuse to recognize and enforce awards set aside in the home jurisdiction only where the set aside judgment was based on the grounds listed in Article IX of the 1961 Geneva Convention. Thus, they have agreed to enforce an award set aside in the home jurisdiction on a non-listed ground—i.e., violation of the public policy of the home jurisdiction. Of course if the award also violates the enforcing jurisdiction’s public policy, then N.Y. Convention Article V(2)(b) provides a different ground for refusing to enforce it and the 1961 Geneva Convention does not stand in the way of that refusal. Thus, in the context of the Austrian Supreme Court decision, it is only where the award violates the public policy of the home jurisdiction (Slovenia) but not the public policy of Austria, that Austria will enforce it.

**Question 3.** At the time the Slovenian Supreme Court set aside the award—which was made in Belgrade, Yugoslavia (Serbia)—Slovenia was a separate country, no longer a constituent part of the Federal Republic of Yugoslavia. The Austrian Supreme Court also concludes that Slovenia was not even a successor state to the former Yugoslavia. If one accepts that conclusion as correct, then we find it difficult to see how the award could be said to have been set aside in the "country in which ... it was made."

Suppose Slovenia had adopted as its law the arbitration law of the Federal Republic of Yugoslavia, under which the award was made. Would that justify the conclusion that the award had been set aside in the country “under the law of which, that award was made”? We are still inclined to answer, no. The award was not made under Slovenian arbitration law, it was made under Yugoslav arbitration law, even if the letter of the law in each case is the same.

**V.3.c.vi.(b) The “Article VII” Approach to V(1)(e)—French and U.S. Practice**

**Relevance of the Enforcing State’s National Arbitration Law**

*(France)*

*Pabalk Ticaret v. Norsolor*

**Questions 1 and 3.** In *Norsolor* the French Supreme Court in civil and criminal matters (Cour de cassation) ruled that the Paris Court of Appeals had committed error by refusing to enforce an arbitral award made in Austria on the sole ground of N.Y. Convention V(1)(e)—i.e., that it had been set aside in Austria.
Instead, the French Supreme Court concluded that the Paris Court of Appeals, on its own motion, should have inquired whether the award would have been enforceable in France under French national law. If so, Article VII of the N.Y. Convention would require France to enforce the award.

We find this interpretation of Article VII persuasive. Article VII provides that the N.Y. Convention provisions shall not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law ... of the country where such award is sought to be relied upon.” The purpose of the Convention was to expand the enforceability of awards, not to narrow enforceability.

This reading of Article VII puts France in a somewhat unique position. The 2011 version of the French Code of Civil Procedure sets down in Article 1520 (formerly Article 1502) the grounds for refusing to recognize and enforce arbitral awards rendered abroad or in international arbitration (see Documents Supplement). Those grounds are actually narrower than the grounds for refusing recognition and enforcement of an award under N.Y. Convention Article V(1) and (2). In particular the French Civil Code grounds do not include any equivalent of V(1)(e) (that the award was set aside in the country in which, or under the law of which, the award was made) or V(2)(a) (that the subject matter of the difference is not capable of settlement by arbitration under the enforcing country’s law). Given the Norsolor court’s interpretation of N.Y. Convention Article VII, enforcement of foreign awards in France never actually call for an assessment of the N.Y. Convention grounds for refusing recognition and enforcement. If the award is enforceable under the French Code of Civil Procedure, then it must be enforced in France, even if there is otherwise a valid ground for refusing to enforce the award under Article V(1) or (2) of the Convention.

**Question 2.** This question is intended to cause students to compare carefully the grounds for refusing enforcement of a foreign award under the 2011 French Code of Civil Procedure Article 1520 (formerly Article 1502) and under the N.Y. Convention Article V (1) and (2). Non-arbitrable subject matter is an explicit ground under the Convention in Article V(2)(a), but is not expressly mentioned in Article 1520 of the French Code of Civil Procedure. Nevertheless, it seems to us that non-arbitrable subject matter would be included under the “international public policy” standard of French Code of Civil Procedure Article 1520 (5).

**Question 4.** The Norsolor court did not have before it the question whether France should recognize and enforce the Austrian court judgment setting aside the award and how that question would be affected by a proceeding in France to recognize the award itself. The judgment recognition issue did arise, however, in the case that follows, Chromalloy Aeroservices v. The Arab Republic of Egypt.
Relevance of the Enforcing State’s National Arbitration Law (United States)

Chromalloy Aeroservices v. The Arab Republic of Egypt

**Question 1.** The Chromalloy court reads the arbitration clause—in particular the following sentence: "The decision of the said court [of arbitration] shall be final and binding and cannot be made subject to any appeal or other recourse"—as prohibiting a set aside action. It is not unusual, however, for the applicable lex arbitri to treat as invalid any attempt in the arbitration agreement itself to waive the right to seek an annulment (set aside) of the award. For example, the Swiss Private International Law Act provides in Article 192: “if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment ...” (See Documents Supplement). By implication, if one of the parties is domiciled in Switzerland any attempt to waive the right to bring an action for annulment would be invalid.

It is curious that the Chromalloy court does not explain what law it is relying on to conclude that the sentence in question is a valid waiver of the right to seek annulment of the award. Since the seat of arbitration is in Egypt and the parties expressly provide for the applicability of Egyptian law, it would seem that Egyptian law should determine the validity of any attempt to waive the right to seek annulment of the award. Moreover, since the Egyptian court granted a set aside judgment, despite the existence of the sentence in question, it would seem reasonable to conclude that the Egyptian court found the parties’ attempt to restrict the court’s set aside jurisdiction to be invalid.

Even in the U.S. an agreement to waive the right to seek annulment or set aside of an award would be unenforceable as against public policy. The Second Circuit decision in Hoeft v. MVL Group so holds. Thus the Chromalloy court’s discussion of Egypt’s having “repudiate[d] its solemn promise to abide by the results of the arbitration” by seeking set aside in Egypt” would seem incongruous. Nevertheless, the two later cases, Baker Marine and TermoRio, excerpted below after Chromalloy, both distinguish Chromalloy on just this ground—that in Chromalloy Egypt, by moving to set aside the award, breached its promise not to seek judicial recourse against the award.

Despite the emphasis these later cases have placed on this aspect of Chromalloy, the Chromalloy court’s reasoning does not seem genuinely to turn on its conclusion that the parties had agreed not to seek annulment of the award. It seems to turn instead on the court’s interpretation of Article VII of the N.Y. Convention. That interpretation, which tracks the French interpretation in Norsolor, concludes that if the award would be enforced under American national
law (the Federal Arbitration Act) irrespective of the N.Y. Convention, then Article VII requires the U.S. to enforce the award despite the fact that the home jurisdiction, Egypt, has set the award aside.

**Questions 2-3.** Here we explore the logic of the Chromalloy court’s reliance on Article VII of the N.Y. Convention. Since “manifest disregard” of the law is a ground for refusing enforcement of an award under U.S. national law (or at least was clearly so at the time of the Chromalloy decision), the Chromalloy court’s reasoning requires an American court to test all awards set-aside in the home jurisdiction under the American “manifest disregard” standard before deciding whether to enforce them. Presumably if the award fails the “manifest disregard” test, Article VII does not require enforcement of the award and Article V(1)(e) kicks in to suggest refusal of enforcement. This last conclusion, however, is not automatic, because, as we discuss below in Question 5, all Article V grounds appear to be discretionary (recognition and enforcement “may” be refused). At the same time, any award that fails the “manifest disregard” standard, might well be thought to offend against public policy and would not be enforced for that reason (See discussion below of the Brandeis case in section V.3.d.ii.).

**Question 4** seeks to challenge the Chromalloy court’s reliance on Article VII in a more fundamental way. Presumably Article VII requires a country to enforce a foreign award only if, were it not for the N.Y. Convention, such foreign award would have been enforced in that country anyway. The N.Y. Convention deals only with foreign awards, not domestic awards. Thus, the logic of Article VII is to prevent the N.Y. Convention—designed to expand enforcement of foreign awards—from having the counterproductive effect of causing a foreign award, otherwise enforceable in a given contracting party, to be refused enforcement in that country. If that is the correct understanding of Article VII, then a country’s standards for reviewing domestic awards would not be relevant. The question is: what would be that country’s reaction to a foreign award?

The Chromalloy court draws the U.S. national standards for recognition and enforcement from section 10 of the Federal Arbitration Act (See Documents Supplement). That section provides grounds for “vacating” an award and recites that “the United States court in and for the district **wherein the award was made** . . .” (emphasis added) may order such a vacatur. Thus, section 10 appears to be dealing with domestic, not foreign, awards. The same is true of section 9 (quoted in the text of Question 3). Sections 9 and 10 (in FAA Chapter 1) appear to be dealing with domestic awards. If FAA Chapter 1 is thus limited to domestic U.S. awards, then New York Convention Article VII does not apply and there would seem to be a gap the Chromalloy court’s logic.

For Article VII to apply, we must know that in the absence of the N.Y. Convention the U.S. national law would have accorded recognition or enforcement to the foreign award in question. But to reach a conclusion on that
issue the Chromalloy court applies the American law standards in FAA Chapter 1 that are clearly applicable to domestic awards. But would those standards also be applicable in the U.S. to a foreign award were the N.Y. Convention not otherwise applicable? The Chromalloy court does not address this issue (or even seem aware of it), and the wording of Sections 9 and 10 of the FAA certainly raises doubts. If the answer is no, it seems that Article VII of the N.Y. Convention does not apply.

As we note in Question 3, it is not inconceivable that FAA Chapter 1 could be interpreted to apply to a foreign award—at least in a case where FAA Chapter 2 is not applicable. A case in point could be one where the award is rendered outside the U.S. but in a country not party to the New York Convention. The U.S. adhered to the New York Convention with the reservation that it would apply only if the award were rendered in another contracting party. If the award were made in a country not a contracting party to the New York Convention, FAA Chapter 2 would not apply. In such a case would FAA Chapter 1 apply instead? Would it be possible to interpret the district-choosing language of sections 9, 10, and 11 as only referring to venue, and not jurisdiction? Surprisingly, there seems to be little, if any, authority on this issue. We say, “surprisingly,” because the FAA functioned only with Chapter 1 from 1925 to 1972, when the U.S. became a party to the New York Convention.

Note that on the very issue of what law would apply within the U.S. for enforcement of a foreign, non-Convention award (one rendered in a country not party to the N.Y. Convention), the Restatement 3rd of the U.S. Law of International Commercial Arbitration (Tentative Draft No. 2 (April 16, 2012) expressly opts for FAA Chapter 1. See § 4-3(b)(1) (“The law applicable to recognition or enforcement of a non-Convention award is: (1) Chapter One of the Federal Arbitration Act; * * *”). At the same time, however, the Restatement 3d (Tentative Draft No. 2) also expressly rejects the Article VII approach of the Chromalloy case. See the discussion in the text below of Restatement 3d (Tentative Draft No. 2) § 4-16.

One part of the FAA Chapter 1 suggests that, when drafted, it was intended to apply to awards made outside the U.S. Sections 1 and 2 provide that an arbitration agreement in a maritime transaction or a transaction in commerce (defined to include commerce with foreign nations) is valid and must be enforced in U.S. courts. Nothing in these sections restricts their provisions to cases of arbitration within the U.S. And if a U.S. court has an obligation to send the parties to arbitration outside the U.S., presumably a U.S. court would be able to enforce the resulting award. Note that section 9 provides that an award is enforceable in any court the parties designate for that purpose. Hence, it might seem that the drafters expected a U.S. party arbitrating outside the U.S. to include a clause in the agreement designating which court in the U.S. would be appropriate for award enforcement—a provision that would plainly seem to be dealing with venue.
In contrast to the lack of clarity that prevails in U.S. law, note that the Norsolor court’s reliance on Article VII in the French context seems entirely correct. The 2011 French Code of Civil Procedure Article 1520 (formerly Article 1502) clearly applies to foreign awards brought to France for enforcement, and the grounds for refusal listed in Article 1520 are clearly narrower than those available in Article V of the N.Y. Convention.

**Question 5.** We explore here how a judge should exercise the discretion that seems inherent in the word “may” in the English language version of the Article V(1). We believe a persuasive case can be made for a court’s exercising that discretion so as to refuse recognition and enforcement under V(1)(e) whenever the award was set aside in its home jurisdiction on one of the grounds listed in N.Y. Convention Article V(1) and to enforce the set-aside award in all other cases. This is of course the solution chosen by the 1961 Geneva Convention. (See also the Paulsson article “The Case for Disregarding LSAS (Local Standard Annulments).”)

The logic of this approach would be to discourage “arbitration-hostile” set-aside law—that is, overly intrusive court review of arbitral awards under the exercise of home jurisdiction. Thus, a set-aside judgment in the home jurisdiction based on a ground other than one of those listed in N.Y. Convention Article V(1) would simply not trigger Article V(1)(e)—i.e., it would not prevent the award’s being enforced in other N.Y. Convention countries. Note that this approach would also tend to make international commercial arbitration more a-national by decreasing the deference to be paid to home jurisdiction review of the award.

Applied to the Chromalloy facts, the suggested approach would lead to the same result the Chromalloy court reached—the award would be enforced. Egypt’s articulated ground for setting aside the award—the arbitrators’ application of the wrong law, that is, its failure to apply Egyptian administrative law—appears in reality to have been a challenge to the correctness of the tribunal’s application of Egyptian administrative law. Recall that the tribunal concluded that it would reach the same result under either Egyptian civil law or administrative law. Thus, the tribunal purported to apply both Egyptian civil law and Egyptian administrative law. But incorrect application of Egyptian administrative law (the apparent basis of the Egyptian ruling) is not one of the grounds listed in Article V(1). Article V(1) grounds are mostly procedural in nature, whereas the Egyptian ground goes more to a review of the arbitrators’ exercise of their decision making authority.

The suggested approach would also not defer to a home-country set aside judgment based on public policy (a ground under Article V(2), not V(1)). Instead it would leave to the enforcing court’s judgment (under Article V)(2)(b)) whether public policy considerations would require non-enforcement of the award. This would serve as a check on a home country’s idiosyncratic resort to public policy.
to strike down an arbitral award. Again, the thrust would be to make international commercial arbitration more a-national.

Note that any country that adopts into its national law the precise Article V grounds for refusing to enforce a foreign award is unable to rely on Article VII of the N.Y. Convention as a basis for enforcing an award that has been set-aside in its home jurisdiction. That is because Article VII comes into play only if a country, acting under its national law alone, would enforce a foreign award, even if that award had been set aside in the home jurisdiction. That is the case in French law. (Whether it is truly the case in U.S. law, we discuss above in Questions 2-3.) But for a country that adopts as its national law the Article V standards, Article V(1)(e) is also a ground for refusing enforcement under its national law. Hence, such a country cannot avoid deciding when a set aside award will be enforced and when it will not. We are suggesting that an appropriate way to exercise that discretion would be to follow the 1961 Geneva Convention solution—i.e., refuse to enforce awards that have been set aside on one of the Article V(1) grounds, but not otherwise.

**Question 6.** Note that despite the discretionary character of the German language version of the New York Convention provisions on refusing recognition and enforcement, German courts have apparently held that an enforcing judge has no discretion. It seems that a German judge must refuse to enforce an award if the respondent proves one of the Article V(1) or V(2) grounds for rejecting an award.

**Question 7.** The proposal discussed above in Question 5—a court should exercise discretion and refuse to enforce annulled awards only when the ground of annulment was one of those listed in Article V(1)—could be a compromise position that would at least partially meet van den Berg’s desire for finality and at the same time not give excessive weight to idiosyncratic grounds for annulment. If, on the contrary, one assumes that there should be no discretion under V(1)(e) and that a court should always refuse to enforce an award annulled in its home jurisdiction, then it is difficult to see why Article VI allows any discretion; adjournment should be mandatory. Discretion under Article VI seems to imply discretion under Article V(1)(e)—or, at a minimum, it recognizes the Norsolor reading of Article VII, because under that reading even if the award is set aside, Article VII might require its enforcement.

Note that in *Baker Marine*, excerpted below following *Chromalloy*, the Second Circuit cites the van den Berg finality argument with approval. See footnote 2 in the *Baker Marine* decision. Note also that the D.C. Circuit in *TermoRio*, which is excerpted after *Baker Marine*, agrees with the *Baker Marine* reasoning, including its approval of the van den Berg argument.

**Question 8.** The *Chromalloy* court explains its rejection of the Egyptian judgment as based on American public policy in favor of arbitration: “A decision
by this Court to recognize the decision of the Egyptian court would violate this clear U.S. public policy." Does this mean that a U.S. court should never recognize a foreign court judgment that refuses to enforce an arbitral award? Would such a principle go too far? For example, suppose the parties have fully litigated before a foreign court an Article V(1)(d) ground for refusing enforcement of an award and the claimant has lost. We would think that an American court should recognize that judgment as dispositive of any subsequent action by the claimant in an American court seeking recognition and enforcement of the award—barring, that is, any defect in the foreign judgment, such as lack of personal jurisdiction over the defendant, that would otherwise prevent recognition of that judgment.

A better—or more fully articulated—explanation for refusing to recognize the Egyptian judgment would perhaps be that that judgment was based on an intrusive review of the arbitrators’ discretion (failure to apply the correct law) and that such interference with arbitrator discretion is in violation of American public policy favoring arbitration of disputes. The core of the reasoning—rejection of the Egyptian ground for annulling the award—is also what underlies the proposed interpretation of Article V(1)(e) discussed above under Question 5. An award annulled on one of the grounds widely recognized as legitimate (those listed in N.Y. Convention Article V(1)) should not be enforced, but an award annulled on some idiosyncratic ground not shared by other countries should not be refused enforcement. If the annulling court judgment itself were always entitled to recognition and enforcement—irrespective of the ground for annulment—this V(1)(e) policy could not be maintained. In that sense, refusal to enforce the judgment is required by U.S. public policy favoring arbitration of disputes.

NOTE: OTHER U.S. AUTHORITY UNDERCUTTING CHROMALLOY

_Baker Marine (NIG.) Ltd. v. Chevron (NIG.) Ltd._

**Questions 1-2.** The _Baker Marine_ court’s treatment of the Article VII issue is not wholly satisfying. As discussed above under Questions 2-3 following Chromalloy, Article VII seems to require a conclusion concerning whether, without considering the N.Y. Convention, the foreign award would have been enforced by applying the court’s national arbitration law. This has nothing to do with whether the parties chose that national law as the lex arbitri, which is the point the Second Circuit stresses in the indented excerpt. The question is not whether the award would have been enforceable in the U.S. had it been a home award in the U.S. The question is whether FAA Chapter 1 was available for enforcing the award, treated as a foreign award (as this award was, because the seat was in Nigeria and the parties did not choose U.S. law as the lex arbitri).

On the other hand the _Baker Marine_ facts make clear that Baker Marine’s petition to enforce the award in the U.S. was filed after the one-year statute of
limitations that applies to an FAA Chapter 1 enforcement action. Thus any claim under FAA Chapter 1 was time-barred. That means that in the posture of the *Baker Marine* case the New York Convention Article VII argument—so central to *Chromalloy*—could not even be raised. Hence, *Baker Marine* says nothing about the availability or soundness of the Article VII argument in *Chromalloy*. That would have been a persuasive ground for distinguishing *Chromalloy*, in contrast to the grounds given in footnote 3, discussed immediately below under Question 3.

**Question 3.** The Second Circuit’s attempt to distinguish *Chromalloy* in footnote 3 seems to us unsatisfactory. We fail to see the relevance of the enforcing plaintiff’s nationality or of the enforcing plaintiff’s decision to seek enforcement first in the jurisdiction that set the award aside. We are equally unpersuaded by the Second Circuit’s implicit stress on Egypt’s having not honored it’s agreement not to seek court recourse in *Chromalloy*. In *Chromalloy* *Egyptian* lex arbitri applied, and under that law (as would be the case under U.S. lex arbitri) such agreements were unenforceable.

**The ALI’s Restatement of the Law Third—The U.S. Law of International Commercial Arbitration**

**Questions 1-2.** Although at various points the draft Restatement is quite clear in its rejection of the *Chromalloy* outcome and *Chromalloy*’s reliance on N.Y. Convention Article VII for its outcome, part of the Restatement’s analysis and discussion seems to cut in the opposite direction. Section 4-3 (b)(1) is a good example. This section says that an award made outside the U.S. (a foreign award) that is NOT governed by the N.Y. Convention (although it is a foreign award), can be enforced under Chapter 1 of the FAA. An example would be an award made in a country that is not a party to the N.Y. Convention, because the U.S. has adhered to the N.Y. Convention subject to the reservation that the award’s seat must be in a N.Y. Convention country.

Now if in this case Chapter 1 applies, this must be because Chapter 1 of the FAA is in principle applicable to a foreign award. This must also mean that the language in section 10(a) (setting out the grounds for not enforcing an award) in referring to “the United States court in and for the district wherein the award was made” as the proper court must be understood as a venue provision and not a jurisdiction provision. But of course this analysis is entirely in line with the *Chromalloy* reasoning, to the effect that FAA Chapter 1 is an alternative avenue under U.S. law for enforcing a foreign award.

In the *Chromalloy* case, however, the foreign award was made in a N.Y. Convention country and was therefore clearly subject to the N.Y. Convention and hence to Chapter 2 of the FAA. Thus one form of analysis could lead to the conclusion that the foreign award in *Chromalloy* was simultaneously enforceable
under Chapter 1 or Chapter 2 of the FAA, making available to a claimant alternative procedures and theories for enforcing an award. Under this reasoning Chromalloy’s reliance on N.Y. Convention Article VII would seem correct.

Although the Restatement 3d (Tentative Draft No. 2) provides that FAA Chapter 1 applies to a foreign award not governed by the N.Y. Convention, it rejects the application of FAA Chapter 1 to a foreign award to which the Convention applies. It thus rejects the cornerstone of Chromalloy’s N.Y. Convention Article VII reasoning. (If FAA Chapter 1 does not apply to a foreign award falling under the Convention—such as the award in Chromalloy—then there exists no “more favorable domestic law” for enforcing the foreign award in question, and hence N.Y. Convention Article VII plays no role.)

The Restatement 3d reaches this result by reading Chapter 2 of the FAA, which was enacted in 1972, as causing Chapter 1 of the FAA (enacted in 1925) to lose its applicability to a foreign award falling under the Convention. Thus, only Chapter 2 would be available for such a case. But the Restatement’s reasoning in support of this interpretation does not exactly merit a standing ovation. After all, section 208 of the FAA, rather than rejecting the applicability of Chapter 1, instead says explicitly: “Chapter 1 applies to actions and proceedings * * * [brought under Chapter 2] to the extent that chapter [Chapter 1] is not in conflict with this chapter [Chapter 2] or the Convention * * *.”

But the Restatement finds a conflict. This is because—the reasoning goes—the Convention contains V(1)(e), allowing an enforcing country to refuse enforcement if the home jurisdiction (having special supervisory functions) annuls the award; whereas, Chapter 1 does not contain such a ground for refusing enforcement. But how does this difference constitute a “conflict”, especially in the light of N.Y. Convention VII, which can only have effect when under the law of the enforcing country the foreign award is more readily enforceable than under the N.Y. Convention? The policy underlying Article VII is to favor enforcement, so how can it represent a “conflict” with the Convention for the national law to allow enforcement more readily than the N.Y. Convention itself? This is the very case Article VII deals with. Article VII was added so that the N.Y. Convention would never override a national law more favorable to award enforcement than the Convention. But it is this fact—that Chapter 1 would be more favorable to enforcement than would the Convention—that the Restatement says supports its conclusion that such a result would “conflict” with the Convention. Surely the reasoning is circular.

Nevertheless, the Restatement 3d’s express rejection of Chromalloy’s Article VII reasoning and the post-Chromalloy 2d Circuit Baker Marine decision (and as we will see below, TermoRío as well) seem to suggest that the normal result in the U.S. will be refusal to enforce an award that has been set aside at the seat. The Restatement 3d (tentative draft No. 2) emphasizes, however, that a U.S. court will have discretion in such a situation. If the foreign judgment that
annuls an award is for some reason not entitled to recognition in the U.S. under rules applicable to foreign judgments—for example, because the foreign judicial system in general were deemed unreliable or because in the particular case the foreign court’s decision seemed influenced by improper factors—then that would be a reason for ignoring the annulment and enforcing the award anyway.

**V.3.c.vi.(c) The “Public Policy Discretionary” Approach to V(1)(e)—U.S. and Dutch Practice**

*TermoRio S.A. v. Electranta S.P.*

**Question 1 and 3.** In *TermoRio* the D.C. Court of Appeals had the power to overrule *Chromalloy*, which was decided by a federal district court in the D.C. Circuit, but it distinguished *Chromalloy* instead. It did so on the basis that in *Chromalloy* the parties agreed not to have recourse against the award, whereas in *TermoRio* there was no such agreement. Although both *Baker Marine* and *TermoRio* distinguish *Chromalloy* on this ground, the authors doubt that this distinction will be decisive in later cases. In at least one later case, in which the “no recourse” clause was included, the court still did not follow *Chromalloy* and in the end refused to enforce an award set aside where made. See the *Thai-Lao Lignite* decision discussed in the note below on Vacating a Prior Judgment Enforcing an Award After the Home Jurisdiction Annuls.

The *TermoRio* court did not even bring up the Article VII issue, and in fact technically could not have done so. This is because *TermoRio* fell under the Panama Convention (all parties to the arbitration agreement were nationals of countries party to the Panama Convention), not the New York Convention. The two Conventions are almost identical, except for the important distinction that the Panama Convention has no equivalent to Article VII of the New York Convention.

The upshot is that *TermoRio* says nothing about *Chromalloy*’s core reasoning—the force and effect of N.Y. Convention Article VII. Thus, it would seem that *Chromalloy*’s Article VII theory is still theoretically viable, because higher judicial authority has not formally struck it down. At the same time, both *Baker Marine* and *TermoRio* refuse to enforce an award set aside where made, and thus, in outcome at least, seem to undercut *Chromalloy*. *TermoRio*, in particular, introduces a new approach to annulled awards by emphasizing a “public policy discretionary” approach to V(1)(e).

**Question 2.** Although in the penultimate paragraph of part “D. Considerations of ‘Public Policy’” of the *TermoRio* opinion the court refers to U.S. authority concerned with recognizing and enforcing foreign judgments, the opinion should probably be read as maintaining its focus on the foreign award and not on the question of whether the foreign set aside judgment—qua judgment—should be recognized. The *TermoRio* court seems to be saying that in
principle a foreign award, set aside in the country where made, should not be enforced in the U.S. unless the grounds on which the award was set aside (and perhaps the fairness of the ensuing result) are offensive to U.S. public policy. For this purpose the court refers to public policy as elaborated in U.S. authorities dealing with recognizing and enforcing foreign court judgments, but its purpose in referring to these authorities is still to resolve the Article V(1)(e) issue of whether to enforce an award that has been set aside in the jurisdiction where made. The court recognizes that a foreign jurisdiction may have different grounds for setting aside an award than would a U.S. court dealing with a U.S. award. But the *TermoRío* court seems to say that the foreign court’s decision to set the award aside will be recognized in the U.S.—and the award will be refused enforcement—unless the grounds for the foreign set aside somehow offend against U.S. public policy.

**Question 4-5.** There are a number of grounds for challenging the *TermoRío*’s court’s failure to find public policy objections to the *TermoRío* outcome. First, the Colombian Consejo de Estado ruled that mandatory Colombian arbitration law did not allow the use of the ICC Rules, even though the parties had expressly chosen those rules. Thus, the seat’s mandatory law overrode the parties’ express procedural choice, As we discussed in Chapter 1 in connection with van den Berg’s excerpt concerning the dilemma posed by the mandatory English law rule in *Termarea* (a party choice of three arbitrators had to be interpreted as two arbitrators and an umpire), the New York Convention drafters clearly intended for the parties’ procedural agreement to outweigh any contrary mandatory procedural rule of the seat (other than, perhaps, a requirement that due process be observed). Thus the Colombian outcome offended against a basic precept of the New York Convention system—although technically the Convention did not apply to Colombia’s treatment of a home award.

In fact the Restatement 3d of U.S. International Commercial Arbitration Law (Tentative Draft No. 2, 2012) gives this very scenario (mandatory law of the seat overriding the parties’ procedural choice) as an example of a “highly extraordinary circumstance” in which a U.S. court would be justified in enforcing a foreign award even though under principles of foreign judgment enforcement the set aside judgment would normally be recognized:

“Still another circumstance in which a court may justifiably recognize or enforce an award despite a foreign set-aside judgment is one in which the set aside resulted from the tribunal’s having to choose between the parties’ designated procedure, on the one hand, and a procedure mandated by the arbitration law of the seat, on the other, when the two requirements were inconsistent.” (Restatement 3d § 4-16 Comment d)

Second, the annulment by the Colombian courts favored the interests of the Colombian government-owned respondent. This was also the pattern in
Chromalloy and seemed to be a factor in encouraging the Chromalloy court to enforce the award, even though the Egyptian courts had set it aside—at the instance, in that case, of the Egyptian government. Thus, the TermoRio outcome could be seen to raise suspicions, at least, of potential pro-government bias.

Finally, the Colombian government treatment of TermoRio and its electric power contract seems at odds with fair play. Although Electranta had contracted to purchase electric power from TermoRio, the Colombian government transferred all of Electranta’s assets and liabilities to a private company—except for Electranta’s obligations under the power purchase agreement with TermoRio. Thus Electranta was left without any assets to meet its obligations to TermoRio. The unfairness of the outcome seems parallel to that in the COMMISSA case discussed below in the Note immediately following the TermoRio decision. In COMMISSA the Mexican courts annulled an award on the basis of a statute applied retroactively and at the same time declared the award creditor could have recourse to a special tribunal, although the unusually short limitations period applicable in that tribunal had already run. In COMMISSA the U.S. court enforced the annulled award.

Despite these arguments for refusing to give force to the Colombian court’s set aside judgment, the D.C. Circuit court rejected the award. One might thus note that a feature of the “public policy discretionary” approach to Article V(1)(e) is the unpredictability of outcomes under it.

Question 6. Immediately before subsection “D. Considerations of ‘Public Policy’” in the TermoRio excerpt the court says “an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully ‘set aside’ by a competent authority in the State in which the award was made.” (Emphasis added). Such a view contrasts with that of the Cour de cassation in France which was careful to reason in its first Hilmarton opinion (below in subsection V.3.c.vii.) that in the case of an international award “the award * * * is not integrated in the legal system of [the State where made], so that it remains in existence even if set aside * * *.”

But in TermoRio are we dealing with an international award? Certainly the transaction and the arbitration are deeply rooted in the Colombian legal system. The parties are Colombian (though the claimant is a U.S.-owned Colombian company), the seat is in Colombia, the transaction is Colombian, and Colombian law governs. Perhaps one could argue that the localized nature of the transaction buttresses the TermoRio court’s theory that the set aside judgment extinguished the award. The outcome in COMMISSA (discussed above and in the Note immediately following) cuts the other way, since in COMMISSA the parties (one was U.S. owned), the transaction, the arbitral proceedings, and the applicable law were all Mexican. Nevertheless, the U.S. court enforced an award that Mexico had annulled.
NOTE—TWO DECISIONS (U.S. AND DUTCH) EXERCISING PUBLIC POLICY DISCRETION TO ENFORCE AN ANNULLED AWARD

“COMMISA”

Yukos Capital

[Before we turn to a discussion of the questions, please note that the facts recounted in the text concerning the Yukos Capital case contain a misprint. In the penultimate sentence on page 1164, the sentence reads: “The large tax assessment against Yukos Capital then led to a forced bankruptcy sale on December 19, 2004 of most of its shares of Neftegaz, * * *.” “Yokos Capital” is a misprint. The correct party is Yukos Oil. An instructor will probably want to call this error to the attention of students before they read the case summary. Otherwise, a student who reads the facts closely will be very puzzled.]

Questions 1-2. Certainly one can see the appeal of the French approach of assessing the foreign award objectively under French standards of award enforceability, as opposed to the politically sensitive, and somewhat subjective, approach of the U.S. and Dutch cases, which require the enforcing court to reach a judgment about the quality of justice dispensed in a foreign court.

Turning to “COMMISSE” and asking how a French court would have decided the case, the 1991 Gatoil decision suggests that French courts would have resisted a retroactive invalidation of the arbitration agreement. (Note that Gatoil states a principle also captured in Article 177 of the Swiss PILA, which we saw applied by the arbitrator in the Egyptian Local Authority award mentioned in Question 4 at the very end of Chapter II.) In fact, however, under the modern French approach to the validity of an international arbitration agreement, no provision of any particular national legal system applies to determine the validity on an international arbitration agreement. Recall that in the Dallah case in Chapter II we saw the current articulation of the French approach to the validity of an international arbitration agreement. French courts conceive of the agreement as being governed by transnational principles (not the national law of any particular country), so that the only question is whether an agreement to arbitrate has been formed by the “common consent of the parties”. Under that standard the “COMMISSE” arbitration agreement would surely have been valid.

Asking hypothetically whether the “COMMISSE” award would have been enforced in France helps to dramatize the difference between assessing the award under French standards of enforceability and assessing it under the U.S. approach of “public policy discretion”. In France the Mexican set aside judgment could not have been recognized or enforced, qua court judgment (see the 2005 Paris Court of Appeal Bechtel decision discussed in Question 7 at the end of subsection V.1.c.), and the award would seem to have been perfectly
enforceable, without respect to retroactivity or non-retroactivity of the Mexican rule on the arbitration agreement’s validity. As to validity, a French court would have asked only whether through their common consent the parties had agreed to arbitrate their dispute—the answer appearing to be certainly, yes. And the award does not seem vulnerable to rejection on any of the other grounds listed in the French Civil Procedure Code Article 1520. (See the Documents Supplement.)

In the U.S., on the other hand, the unfairness in the eyes of the U.S. judge of retroactivity and the absence of a realistic alternative remedy seem to have been crucial factors in the court’s decision to enforce the award. Absent these factors, the U.S. court would presumably have honored the Mexican annulment and would have refused to enforce the award. One might reasonably wonder what the U.S. outcome would have been had only one of these two “unfairness” factors been present, or if the Mexican government had not been a litigant. This point could be used to stress the unpredictability of the outcome under the public policy discretion approach.

**Question 3.** The German approach appears to construe Article V(1)(e) as essentially mandatory—unless, of course, the Geneva Convention were applicable. Hence both in “COMMISSA” and in Yukos, apparently a German court would have refused to enforce the award. To the extent that one is convinced of the unfairness of the set aside proceedings in “COMMISSA” and in Yukos this mandatory result might seem unpalatable.

**Questions 4-5.** Which approach to Article V(1)(e) is most compelling is of course likely to elicit differences of opinion. Note that Born’s approach appears to combine both the substance of the 1961 Geneva Convention Article IX provisions with the public policy discretionary approach. Thus, only if the set aside is based on one of the N.Y. Convention grounds in V(1)(a) through (d) would the set aside be honored, and moreover, even if a V(1)(a) through (d) ground is relied upon, the seat’s annulment might still not be honored if the annulment proceedings were tainted with offensive bias or unfairness. At least one of the co-authors worries that Born’s point (c) might well open the door to decisions based on politics. At the same time point (c) is not an unfamiliar guideline; it is essentially one of the standards applied in many countries to the question of when to refuse to recognize or enforce a foreign court judgment.

Note—Vacating a Prior Judgment Enforcing an Award After the Home Jurisdiction Annuls

[Please Note that the last line of the text on p. 1168 contains an error. The text reads: “HLL owned 75% of TLL’s shares * * *.” Instead, it should read: “TLL owned 75% of HLL’s shares * * *.”]

**Questions 1, 2, 3, and 6.** Although the Maylasian judgment emanated from a set-aside proceeding in the home jurisdiction and the prior U.S. federal district
court judgment enforcing the award arose in a proceeding to have a foreign award recognized and enforced, the two judgments concern the same parties and the same cause of action (to enforce an arbitral award). Thus, in principle, res judicata concepts would seem applicable. On the other hand, the provisions of Federal Rule 60(b)(5) (authorizing a court to vacate a prior judgment when that judgment was itself based on a different judgment that has since been vacated or reversed) do seem to apply. The provision does not speak of “awards”, but in this context it is hard to see why a foreign award should be treated differently from a foreign judgment. Once the foreign award has been set aside, a new situation is presented to the U.S. court—that of deciding how to apply N.Y. Convention V(1)(e).

Presumably the U.K. court will also reopen its proceedings, vacate its prior judgment of enforcement (based on issue preclusion consequences stemming from the now vacated prior U.S. judgment enforcing the award) and consider anew whether an award set aside at home should nevertheless be enforced in the U.K.

In the Putrabali dispute, the French reliance on res judicata to give priority to the first enforced award does not seem “on all fours” with the Thai-Lao case. In France the fact that the home jurisdiction has set aside an award has no effect on the French decision whether to recognize and enforce the award. Indeed, the Paris Court of Appeal opinion concerning the Chromalloy dispute discussed below in Question 2 following the Hilmarton case (in the following subsection V.3.c.vii.) makes clear that in the case of an international award (such as the awards in Hilmarton, Chromalloy, and Putrabali) annulment in the home jurisdiction does not extinguish the existence of the award, which may still be quite alive in France.

In the first U.S. district court decision in Thai-Lao, however, the recognition and enforcement proceeding was brought under FAA Chapter 2. Thus, the New York Convention Article V provisions applied, and under Article V(1)(e) once the home jurisdiction annulled the award that annulment provided a ground for non-enforcement of the award. Given the posture of the enforcement proceedings in the U.S. (relying on FAA Chapter 2), it seems reasonable for the district court to have vacated its prior judgment in order to consider how the Malaysian annulment should affect enforcement of the award.

On the other hand, that the federal district court did not even discuss the possibility that FAA Chapter 1 could have been a basis for enforcing the award (the U.S. Chromalloy theory of applying N.Y. Convention Article VII), reinforces the conclusion that the Chromalloy theory is not in robust health in the U.S. Had FAA Chapter 1 been available for enforcing the award in the U.S., then the Malaysian annulment would have been irrelevant.

**Questions 4 and 7.** Judge Wood’s second theory—that the court was
required to defer to the arbitrator’s decision on arbitrability—seems seriously flawed. Judge Wood based that theory on the parties’ choice of the UNCITRAL Rules and the Kompetenz-Kompetenz provision in those rules. As we noted above in connection with the BG Group decision, this reasoning is surely incorrect. An institutional rule acknowledging the universal principle of Kompetenz-Kompetenz does not mean that rule intends to give the arbitrators final decision making authoring concerning jurisdiction. It only means that the tribunal can decide and articulate its own view of its jurisdiction, without saying anything about who may have the final authority to decide the tribunal’s jurisdiction—the tribunal itself or a court reviewing the award. Thus, a party choice of a set of institutional rules that contains a Kompetenz-Kompetenz provision should not be interpreted as an express reversal of First Options’ presumption that a final decision on the dispute’s substantive arbitrability is for the court not the tribunal (at Stages 1 and 3).

Judge Wood’s first theory—that arbitrability [jurisdiction] is not an issue at all because the tribunal’s award of damages based in part on HLL’s expenses was simply a decision on the merits—is more intriguing. Ultimately, however, the authors have serious doubts about it. The arbitrators relied on a third-party beneficiary theory to give HLL standing in the arbitration. But this line of analysis seems to ignore separability. The third-party beneficiary theory of New York law (a third-party non-signatory of a contract who is nevertheless an intended beneficiary of the contract can be treated as a party to the contract) could have been a basis for concluding that HLL should be treated as a party to the Project Development Agreement (PDA). Given the separability doctrine, however, the arbitration clause in the PDA was a separate agreement, and it is very difficult to see how HLL could have been seen as an intended beneficiary of the arbitration clause.

Moreover, the “prior mining contracts” entered prior to the PDA did not contain an arbitration clause, but specially provided for a different form of dispute resolution. Thus, it is difficult to see how HLL could have been given standing to act as a party to the arbitration agreement. Yet the tribunal rendered the award in favor of both TLL and HLL.

But Judge Wood’s first theory seems to be based on the notion that the arbitrators interpreted the PDA as authorizing TLL, clearly a party to the arbitration agreement, to collect damages for any losses suffered by HLL and that such an interpretation went to the merits and was unreviewable. But the arbitrators plainly treated HLL as a party to the arbitration agreement and rendered the award in favor of both TLL and HLL. Thus, it does not seem particularly persuasive to argue that the arbitrators interpreted the PDA as giving TLL the right to collect for any expenses incurred by HLL. The language of the PDA reproduced in the text of the Note—while admittedly somewhat ambiguous, as noted by the Court o Appeal of Paris—on a close reading does not seem to accord with the notion that TLL was authorized to collect for expenses incurred
by HLL. Thus the authors are inclined to find the reasoning of the Court of Appeal of Paris to be the most convincing.

**Question 5.** The Malaysian court’s willingness to ignore its own statutory limitations period for bringing a set aside action is the strongest ground for raising doubts about the Malaysian court’s complete neutrality in the proceedings before it. It’s true that the parties included a “no contest” clause in the arbitration agreement and that this consideration seemed to weigh heavily in the U.S. court decisions in Chromalloy (clause present), Baker Marine (clause not present) and TermoRio (clause not present). But as we pointed out in Question 1 following Chromalloy, at least one U.S. case (Hoef v. MVL Goup, Inc.) has held that such a clause is against public policy and unenforceable in U.S. law. Thus the presence or absence of a “no contest” clause in the arbitration agreement has never seemed to the authors as being of much relevance.

It does seem important, however, that the seat was placed in Malaysia and not Laos. As between Thailand (the home country of TLL) and Laos, Malaysia would appear reasonably neutral. Had the seat been in Laos, however, the case would have much more closely resembled Chromalloy (seat in Egypt), “COMISSA” (seat in Mexico), and Yukos (seat in Russia), in all of which the award debtor was either the government or a government-owned entity and the award annulment favoring the government side was not honored. Suspicions of government bias would then have been heightened. TermoRio (seat in Colombia, yet set-aside benefitting a government owned entity still honored) points out, however, that such a factor is by no means determinative.

**V.3.c.vii. Limits of Deference—The Hilmarton Triangle and the Problem of Conflicting Awards**

**Question 1.** This question refers to the consistency of the second Cour de cassation opinion with the N.Y. Convention. This second decision refuses recognition and enforcement to the second Hilmarton arbitral award. The implicit ground for this refusal under the N. Y. Convention would seem to be Article V(2)(b), public policy. It would violate French public policy for a French court to recognize or enforce a second arbitral award in a matter on which there already exists an exequatur judgment (enforcing the first award) entitled to res judicata effect in France.

**Question 2.** The authors would read the quoted language from paragraph 5 of the Cour de cassation’s first opinion as intended more as a conceptual formulation to explain (and urge acceptance of) the decision and not as a qualification of it. In other words the Cour de cassation does not seem to be saying that in this case the international award is “not integrated in the legal system of [Switzerland]”, but that in a different international case such “integration” might be found. Rather, the court seems to be saying that in the case of international arbitration the parties’ choice of a seat for the arbitration
does not result in giving the courts of the seat decisive control over the fate of the award.

The decision of the Paris Court of Appeal in the *Chromalloy* case seems to put this point to rest. The crucial language occurs in the last quoted paragraph: “Considering finally that the award rendered in Egypt was an international award which by definition was not integrated into the legal order of that country * * *” (emphasis added). In other words, the result in *Chromalloy* (and *Hilmarton*) will apply with respect to all international awards.

We would not be inclined to characterize this outcome as producing “floating awards” uncontrolled by national law. Rather we prefer the characterization offered by Professor Gaillard to the effect that under the N.Y. Convention regime international awards are controlled by the composite of national arbitration laws potentially involved in the confirmation or recognition and enforcement of the award, and not by the law of any single country. (See E. Gaillard, The Enforcement of Awards Set Aside in the Country of Origin, 14 ICSID Review Foreign Investm. L. J. 16, 45 (1999).)

**Question 3.** The issue of how to treat a thoroughly localized award that is set aside also arises in connection with the *TermoRio* case supra in subsection V.3.c.vi. See the discussion supra in this Manual of Questions 4 following the *TermoRio* case. In this question we introduce some of the relevant French law provisions and one French case, *ASECNA v. N'Doyle*.

The language the Cour de cassation uses in its first *Hilmarton* decision leaves open the possibility that France would reach a different result from *Hilmarton* if the set-aside award arises in an arbitration wholly localized in a foreign country. In the first *Hilmarton* decision the Cour de cassation says: “[T]he award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside * * *.” (Emphasis added.) What if the arbitration were completely localized in a foreign state “X”—the parties were “X” nationals, the transaction concerned only “X” assets and legal relationships, the applicable law was that of “X”, and the seat of arbitration was in “X”? Would the award no longer be an “international” award, so that if an “X” court set it aside, it would cease to exist outside of “X”? Note that Article 1514 (formerly Article 1498) of the French Code of Civil Procedure provides: “An arbitral award shall be recognized or enforced in France if the party relying on it can prove its existence * * *.” (Emphasis added.) This seems to open the possibility that a French court would rule that an award in a wholly localized arbitration is extinguished and no longer “exists” outside the local country once it is set aside in the courts of that country.

The *ASECNA* case does not take this approach. The *ASECNA* award has many of the characteristics of an entirely local award. The claimant is a Senegalese national working in Senegal for the Senegalese branch of a
company concerned with air transport security, and the arbitration took place in Senegal. The claimant sought damages for wrongful termination of employment, a claim governed by Senegalese law. The award in favor of the Senegalese national was challenged in Senegal, but was nevertheless enforced in France. In approving enforcement of the award in France the Cour de cassation merely noted that then Article 1502 (after 2011, Article 1520) of the French Code of Civil Procedure (calling for enforcement of awards subject to limited grounds for rejection) applied because the award was rendered outside of France. This was clear because prior to the 2011 changes the heading of then Title VI of the French Code of Civil Procedure, which contained Article 1502 [and Article 1498], was worded to include awards rendered outside of France: “The Recognition, Enforcement and Challenge of Arbitral Awards Rendered Abroad or in International Arbitration.” Emphasis added.

The Cour de cassation did not discuss the localized nature of the dispute and the arbitration. Significantly, however, at the time of the award’s enforcement in France the award was subject only to a suspensive appeal in Senegal. It had not actually been set aside. Had it been set aside, the argument stemming from then Article 1498—that a wholly local Senegalese award that is set aside in Senegal ceases to exist outside Senegal for the purposes of then Article 1498 of the French Code of Civil Procedure—would have been clearly presented. How that issue will be resolved by French courts in the future remains to be seen. (Note that after 2011 the provisions with the same basic language as Article 1498 are now found in Article 1514.)

**Question 4.** Of course the possibility that a country will enforce a set-aside award (the result in Norsolor, Chromalloy, and Hilmarton) leads unavoidably to cases (like Hilmarton) in which there are two awards in the same case, one enforceable in some countries and the other, in others. This is not desirable and could be avoided by a rule giving decisive force to the outcome in the set-aside jurisdiction—or rather, giving decisive force to an annulment, since no one seems to argue for amending the N.Y. Convention to require recognition and enforcement of an award confirmed at the arbitral seat. But of course a rule prohibiting countries from enforcing set-aside awards would also have drawbacks, in particular by allowing idiosyncratic and intrusive annulments at the arbitral seat to control in all countries and by biasing the enforcement regime against enforcement (because, as just noted, only annulment and not confirmation would be binding on other countries). Thus, the two-awards phenomenon dramatizes the problem but does not shed light on the desired solution.

Although in Hilmarton France recognized the first award, that would not always be the outcome in France, the U.S., or countries party to the 1961 Geneva Convention. In France if the first, annulled award failed to meet the various tests set out in Article 1520 of the French New Code of Civil Procedure (previously Article 1502), the award would not be enforced. In the U.S. under the
Chromalloy approach, the question would be whether the award met the test set out in Section 10 of the FAA. If not, the award would not be enforced. Under the 1961 Geneva Convention the issue would be whether the ground of annulment was one of those recognized in N.Y. Convention Article V(1) (a) through (d). If so, then the enforcing country would be free not to enforce the award.

**Question 5.** Although in Hilmarton the outcome favored the French litigant, the French approach does not seem systematically biased in favor of French litigants. Note, for example, that in Norsolor the French approach operated to the detriment of the French litigant. Moreover, as noted in the second paragraph of question 5, one might reason that the French approach has the potential to damage more than aid French litigants, because it exposes losing French defendants in annulled foreign awards to enforcement of those awards in France, where French defendants are likely to have assets. But of course, one could also turn this argument around by noting that winning French defendants in annulled foreign awards could protect themselves against enforcement in France of a second less-favorable award by suing in France for recognition of the first award (the Hilmarton pattern). So, on balance, the French approach seems to be neutral as to the interests of French litigants.

What the French approach appears to favor is the relative autonomy of the arbitrators. This is because French courts apply their own standards for deciding whether to enforce a foreign award – even an annulled award – and those standards are quite deferential to the autonomy of the arbitrators.

**Question 6.** While this argument has some force, there are also counter arguments. Frequently parties choose the place of arbitration for purposes of neutrality or travel convenience without giving any thought at all to the set-aside grounds available in the lex arbitri. And if one stresses the sophistication of international deal negotiators to urge that they should be expected to know the important provisions of the lex arbitri at the place of arbitration, couldn’t one go a step further and also presume that they know that countries like France, the U.S., and parties to the 1961 Geneva Convention may well enforce an award even if courts at the chosen arbitral seat annul it.

**Questions 7 - 11.** If one focuses just on the “interests” of the annulling jurisdiction (hotel, restaurant, and local attorney services) and of the enforcing jurisdiction (the disposition of potentially significant assets), it is certainly not obvious that the former outweighs the latter. Putting the issue differently, the interest of the enforcing jurisdiction in ensuring fair treatment of assets located within its territory would seem more than adequate to justify the French approach in Hilmarton. In general, however, we do not find this “interests” based approach especially helpful.

Instead, we find more persuasive an approach that emphasizes the consequences of given rules and principles for international arbitration as an
institution. This leads us to favor adopting the 1961 Geneva Convention solution as a general guide for discretionary refusal to enforce an annulled award. In other words, we believe N.Y. Convention Article V(1)–including V(1)(e)–should be interpreted as merely authorizing an enforcing country to refuse recognition and enforcement on one of the listed grounds, but not as requiring such refusal. And in exercising that discretion with respect to Article V(1)(e), we believe courts should be influenced by the ground or grounds on which the annulment was based. The annulment should be respected only if based on one of the V(1) (a) through (d) grounds. This approach encourages (but does not require) international harmonization of set-aside grounds in line with the UNCITRAL Model Law, which adopts for a set-aside proceeding the same grounds provided in the N.Y. Convention Article V(1) (a) through (d) for refusing recognition and enforcement. Under this approach the first award in *Hilmarton* would be enforced, despite the Swiss set-aside judgment. As discussed in footnote [76] in the coursebook, the Swiss court annulled the first *Hilmarton* award on the ground that it was “arbitrary”, a ground then available under the Swiss Inter-cantonal Arbitration Convention (which as of January 1, 1989 has been replaced in Switzerland for international arbitrations by the Swiss Private International Law Act, which law no longer authorizes annulment on the ground of “arbitrariness”). Because “arbitrariness” is not a ground for refusing enforcement under the N.Y. Convention Article V(1) (a) through (d), the Swiss annulment in *Hilmarton* would not prevent enforcement in a country following the “1961 Geneva Convention” approach discussed in the previous paragraph.

Note that in France this “1961 Geneva Convention” approach would not come into play because in France N.Y. Convention Article VII overrides the application of Article V(1)(e). The “most favorable law” aspect of Article VII means that even if France could refuse recognition and enforcement under one of the Article V grounds, it would nevertheless be required to enforce the award if the award were independently enforceable as a foreign award under French national arbitration law. And since French national arbitration law provides a narrower scope for rejecting foreign awards than does the New York Convention—and, in particular, does not include a ground similar to V(1)(e)–Article VII dictated the *Hilmarton* result in France. The issue of how to exercise the discretion provided for in Article V(1)–including V(1)(e)–did not arise.

The practical outcome in France, however, is very similar to the result one would reach by applying what we are calling the “1961 Geneva Convention” approach to Article V(1)(e). That is because - international public policy aside - the grounds in French national law for rejecting a foreign award (see Article 1502 of the French New Code of Civil Procedure in footnote [78] —after 2011, renumbered as Article 1520), though narrower, are roughly similar to those in N.Y. Convention Article V(1) (a) through (d). Thus, if a foreign award is set aside at the seat of arbitration on one of the Article V(1)(a) through (d) grounds, it is very likely that the award would also be rejected in France under the provisions of Article 1502 (now Article 1520) of the French Code of Civil Procedure. And if it
were annulled solely on a ground not included in N.Y. Convention Article V(1) (a) through (d), that basis of rejection would seemingly not be followed in France—unless the annulment rationale rose to the level of an international public policy violation as interpreted by French courts.

Although the two-awards problem is disconcerting, the 1961 Geneva Convention approach to V(1)(e) has some potential to ameliorate the problem. This is because it puts pressure on countries to adopt national arbitration laws that conform to the growing international consensus on the proper grounds for setting aside an award (N.Y. Convention Article V(1) (a) through (d)). To that extent the circumstances in which countries will set aside home awards and countries will refuse to enforce foreign awards will tend to coalesce. Of course international public policy and non-arbitrability grounds will still be applied by each jurisdiction according to its own national perceptions concerning these grounds. And there will never be complete uniformity in the way countries decide when to enforce and when to reject international arbitral awards.

V.3.c.viii. Parallel Set-Aside Proceedings and Anti-Suit Injunctions

Questions 1 - 2 and 5 - 6. The Gaillard book cited in Question 1 includes the views of a number of commentators on the use of anti-suit injunctions in connection with arbitration. Most of these writers oppose the practice. For further discussion see the sources cited in this manual at II.1.e.ii. (Question 8). At least one of the authors believes that an anti-suit injunction may be justified (with the emphasis on “may”) if the circumstances are sufficiently egregious in that the party against whom it is issued is manifestly acting in bad faith to impose excessive and vexatious litigation costs on the other party.

On the facts of Pertamina, however, the authors agree that the Fifth Circuit Court of Appeals acted correctly in rejecting the lower court’s anti-suit injunction. As the Fifth Circuit notes, the Indonesian set-aside proceeding - even if it resulted in an annulment - would not control the enforcement action in the United States, the award could be enforced in the United States despite the existence of an Indonesian set-aside judgment.

Moreover, this is especially the case where, as here, it seems that a set-aside judgment in Indonesia would not meet the requirements of Article V(1)(e) of the N.Y. Convention. The award was made in Switzerland and was confirmed there. As Question 6 explains, Pertamina argued that Indonesia had good set-aside jurisdiction because the award was made under the Indonesian arbitral law (i.e., Indonesian law provided the lex arbitri). The argument seems weak. The parties clearly chose Switzerland as the seat, which should raise a presumption that they intended Swiss lex arbitri to apply. They also chose Indonesian law as the substantive law of the contracts. But they did not provide expressly for
Indonesian law as the lex arbitri, and it is the lex arbitri that is meant by the phrase “under the law of which” in N.Y. Convention V(1)(e). Pertamina’s strongest argument would seem to derive from the contractual provision expressly waiving the applicability of certain sections of Indonesian arbitration law found in the Indonesian Code of Civil Procedure. Expressly waiving provisions of Indonesian arbitration law implies perhaps that the parties considered Indonesian arbitration law to govern the arbitration. One expert apparently testified that this was not the case; that the express waiver was only for the purpose of eliminating the possibility that Pertamina could invoke the waived provisions as grounds for refusing recognition and enforcement in Indonesia of an eventual award in KBC’s favor. If one accepts the proposition - as the authors do - that a choice of a lex arbitri other than that of the seat should be very clear in order to be given effect, then the waiver language in the contracts would seem inadequate. (Moreover the Fifth Circuit in Pertamina II (discussed in Question 7) noted that Pertamina itself had previously argued (before the arbitrators, in Swiss set-aside proceedings, and in other U.S. proceedings) that Switzerland was the proper set-aside jurisdiction and that the Swiss lex arbitri governed.)

On the factual variant posited in Question 2—that KBC had substantial assets in Indonesia—the appropriateness of an anti-suit injunction (and in particular of the indemnification order accompanying the contempt finding) would have raised more challenging considerations. Without such an injunction (and the corresponding indemnification order) KBC might have faced substantial fines in Indonesia (collectible there) for continuing to press its enforcement proceeding in the U.S. In such a situation the Fifth Circuit might possibly have concluded that the Indonesian injunction threatened to undercut its jurisdiction and that hence an anti-anti-suit injunction was justified. The resulting posture of the case would then have been unsettling. Perhaps the jurisdiction with the largest accumulation of relevant assets would have had the most leverage. But this is not a satisfactory basis for resolving conflicting jurisdictional claims. The authors tend to conclude that the Indonesian injunction against the U.S. enforcement action was unwarranted, especially because the N.Y. Convention contemplates (especially in Article VII) that a Convention party may actually be required by the Convention to enforce an award annulled by the home jurisdiction - and in any case, is at least allowed to do so. Whether in the face of such an inappropriate Indonesian injunction (and the ability to enforce it against local assets) the Texas court would have been justified in issuing an anti-anti-suit injunction is much less clear. The Fifth Circuit itself raises doubts about the degree to which a court of “secondary” jurisdiction should become embroiled in controversies of this kind.

Questions 3 and 4. The factual variant in Question 3 is intended to raise a pattern in which a set aside judgment in Indonesia would seriously threaten KBC’s ability to enforce the award. Still, we would not consider it appropriate for a court, especially not one exercising secondary jurisdiction, to issue an injunction barring Pertamina from seeking annulment in Indonesia. If Indonesian
courts take jurisdiction and annul the award, it would then be up to each subsequently seized enforcing jurisdiction to decide for itself (1) whether the terms of Article V(1)(e) of the N.Y. Convention are met (in particular whether the award was made under Indonesian lex arbitri), and if so, (2) whether it would exercise its discretion under Article V(1)(e) to refuse recognition and enforcement.

As the Fifth Circuit in Pertamina notes, the New York Convention seems to presuppose a system of multiple proceedings in different jurisdictions, with each jurisdiction deciding for itself whether to enforce the award. Courts exercising home (“primary”) jurisdiction are not controlled at all by the New York Convention concerning the grounds for annulment. Moreover the Convention recognizes as legitimate a set-aside judgment in either the place where the award was made or in the jurisdiction whose lex arbitri governed the arbitration. Clearly the outcome need not be the same in these two jurisdictions. (We should add, of course that express party choice of a lex arbitri different from that of the arbitration’s seat is very rare and is not to be recommended when parties draft an arbitration agreement.)

Turning to recognition and enforcement, Article V (1) of the Convention says only that an enforcing court may refuse enforcement on one of the listed grounds, not that it must do so (at least in the English language version). Since discretion is involved, one can predict different outcomes in different jurisdictions. Furthermore, under Article V(2) the New York Convention expressly calls for each enforcing jurisdiction to apply its own law on the question of non-arbitrability (V(2)(a)) or public policy (V(2)(b)), an approach that virtually guarantees different outcomes.

In sum, although the New York Convention does not deal expressly with the anti-suit injunction issue, the Convention’s structure and spirit seem to contemplate multiple proceedings in different jurisdictions (and the possibility of different outcomes) and hence to oppose this remedy. Under the New York Convention regime it is often said that no single country controls the final outcome of the arbitration-litigation process. Unless one party is acting egregiously and in manifest bad faith, we would conclude that the structure and spirit of the New York Convention should weigh heavily against the issuance of anti-suit injunctions in enforcement proceedings.

**Question 7.** The Fifth Circuit’s reliance in Pertamina II on estoppel principles to hold Pertamina to its original choice of Switzerland as the proper set aside jurisdiction seems unobjectionable. Its further assertion, however, that “the Convention permits only one [set-aside jurisdiction] in any given case” is more difficult to accept. As a matter of policy this would be a desirable outcome, but the Convention does not seem to provide for it - or at least it does not do so expressly. What, for example, would be the result were the winning party to seek confirmation at the seat and the losing party to seek set-aside in a (different)
claimed-to-be lex arbitri jurisdiction? Furthermore, suppose in each proceeding the moving party loses. It is difficult to see how this conflict could be resolved on the ground that there can be only one “primary” jurisdiction in any given case. Instead, we believe it will be up to each enforcing jurisdiction to decide how to exercise the discretion granted by Article V(1)(e) to refuse enforcement of an annulled award. Because we believe party autonomy should carry great weight, we would favor the outcome in the lex arbitri jurisdiction - but only if the parties clearly and expressly chose a lex arbitri other than that of the arbitration’s seat. If there is doubt we would favor the outcome at the arbitration’s seat. Furthermore, if the award were annulled in the jurisdiction to which we would give preference, we would still be inclined to refuse enforcement only if the annulment were based on one of the Article V(1) (a)-(d) grounds. See the discussion in questions 2. and 5. following Chromalloy supra in subsection V.3.c.vi.(b).

V.3.d. Review of the Merits under the Convention

V.3.d.i. Review of the Merits Under Article V(1) Standards

Questions 1 - 3. The FCI case shows a court’s deflection of a party’s attempt to get review of the merits at the stage of enforcing the award. IDI tries to rely on N.Y. Convention Article V(1)(c) in claiming that the arbitrators exceeded their authority because they awarded consequential damages even though the contract specifically excluded consequential damages. The court rejects this argument. The opinion explains that the arbitrators apparently relied on a “fundamental breach” doctrine in contract law to reach their result, a theory IDI says is a “pet theory of Lord Devlin’s” but not generally recognized. Presumably it helps that there is at least a theory of contract law that can explain the outcome, but strictly speaking it would not seem that the existence or articulation of such a theory would be a sine qua non to the award’s enforceability.

The question that Article V(1)(c) raises is whether the issue decided by the arbitrators was in fact one committed to the arbitrators’ decision in the arbitration agreement. It is a question of the scope of the arbitration agreement, not whether the arbitrators applied the right law or applied the law correctly. Hence it is not intended as a basis to review the arbitrators’ decision on the merits.

The arbitration clause provided that all disputes under the contract were to be submitted to arbitration, and the parties even listed the consequential damages point in the terms of reference as an issue for the arbitrators to decide. Hence it seems clear that the arbitrators were within the terms of the submission to consider and decide the consequential damages point. It is a dispute that arises under the contract. Even if the arbitrators gave no precise theory to explain how they concluded that consequential damages could properly be awarded, as long as it was clear that they did, indeed, reach their conclusion by interpretation of the contract and the application of law, the award should not be
subject to challenge under Article V(1)(c).

Recall the *Parsons and Whittemore* case above under section V.3.b. There the award based substantial damages on loss of production, even though the contract excluded damages for loss of production. The *Parsons and Whittemore* court rejected an Article V(1)(c) challenge to enforcement of the award without identifying any particular theory or legal explanation of the arbitrators’ result, except to observe that the arbitrators had obviously reached their conclusions through an interpretation of the contract.

**Questions 4 - 6.** The *FCI* court’s use of the “colorable justification” test sounds very much like the “manifest disregard of the law” test that applies under the Federal Arbitration Act to confirmation of domestic awards. At least as a theoretical matter, it seems to constitute a very deferential review of the merits of the arbitrators’ decision, one that we would not consider proper under the N.Y. Convention, and certainly not proper under Article V(1)(c). The question under V(1)(c) is whether the issue decided by the arbitrators falls within the scope of the arbitration clause, not whether the arbitrators’ award can be supported on the merits by some “colorable legal justification”. We take up in connection with the Brandeis case below the issue of whether “manifest disregard of the law” is a basis under the N.Y. Convention for rejecting an award.

There is, of course, a close connection between the “colorable justification” test and whether the arbitrators acted as “amiables compositeurs”. Presumably if there were no “colorable justification” for the result in the award, this fact would encourage the conclusion that the arbitrators acted as “amiables compositeurs” – in other words that they did not apply law at all, but instead relied on general notions of fairness and justice. But if they did proceed in this matter, then the award would seem vulnerable. Presumably it could be denied enforcement either under V(1)(c)–because a decision as “amiables compositeurs’ would have been “beyond the scope of the submission to arbitration”–or under V(1)(d)–because the arbitral procedure was not in accordance with the agreement of the parties (since the parties did not agree to the “amiables compositeurs” procedure).

**Question 7.** If the exclusion of consequential damages were found in the arbitration clause itself, the case would be stronger that the parties intended to exclude such damages from the scope of arbitration. More convincing, however, would be language in the arbitration clause saying something like the following: “All disputes arising under or relating to this contract shall be submitted to arbitration ... except for any question of the award of consequential damages. The arbitrators are not authorized to consider any claim for or to award such consequential damages.”
As we have discussed previously, when the issue is the scope of the arbitration agreement, we believe that an enforcing court should decide that question de novo without any particular deference to the arbitrators’ conclusion. We also agree with the pro-arbitration presumption on this question articulated in *First Options*: if an issue is arguably within the scope of the arbitration agreement it should be treated as included.

*Pabalk Ticaret v. Norsolor*

**Question 1.** As discussed immediately above, we believe Article V(1)(d) would have supplied a defense to enforcement of the award (“arbitral procedure was not in accordance with the agreement of the parties ...“) Again, we would not consider this a review of the merits of the award; it would be a review of the procedure. The arbitrators would have proceeded to resolve the case as would “amiables compositeurs”, even though this was not the procedure they were authorized to follow.

**Question 2.** Because the parties chose ICC arbitration, they in effect incorporated the ICC rules into their agreement, and those rules spelled out that the arbitrators could act as “amiables compositeurs” only if expressly authorized by the parties to do so. If the parties had chosen ad hoc arbitration under the UNCITRAL Rules, then the same result would have followed. (See UNCITRAL Rules Article 35(2). (“The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.”)

If the parties had chosen ad hoc arbitration with no reference to any rules, then one would generally turn to the lex arbitri of the seat of arbitration for basic framework rules applicable to the arbitration. For example, if the country where the arbitration had its seat had adopted the UNCITRAL Model Law, then Article 28(3) of that law would apply to reach the same result that we have been discussing. (“The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.”) Given how common this understanding is in institutional rules and in arbitration statutes, one might expect this to be a court’s interpretation of an ad hoc arbitration agreement even where the agreement did not incorporate a set of arbitral rules and where the applicable lex arbitri contained no specific provision on the point.

**V.3.d.ii. Review of the Merits for Manifest Disregard of the Law**

*Brandeis Intsel Limited v. Calabrian Chemicals Corp.*

**Questions 1 and 2.** Since “manifest disregard of the law” clearly involves review of the merits of an award—albeit on a very deferential standard—we believe it should not be read into the N.Y. Convention. The *Brandeis* court’s argument
that “manifest disregard of the law” is more manageable when a court is reviewing disregard of American law in domestic arbitration than when it is reviewing disregard of foreign law in foreign arbitration has a superficial appeal. On reflection, however, the appeal is limited. Even in domestic arbitration the arbitrators might be called on to apply foreign law. Moreover, the standard for “manifest disregard of the law” articulated by the Brandeis court is so attenuated (whether the “award reflects the arbitrators’ awareness of the governing statute and efforts to apply its terms to the facts as found ...”) that it would not be difficult to apply it even if the applicable law or statute were foreign to the court. The more persuasive point is that the purpose and spirit of the N.Y. Convention would be better served by construing the Article V grounds for refusing recognition and enforcement of foreign awards as exclusive.

**Question 3.** This question is designed to suggest to students that an award that actually failed the “manifest disregard of the law” test as articulated in Brandeis, would probably be vulnerable on one of the other Article V grounds. It could perhaps be considered an “amiable compositeur” decision and therefore vulnerable under V(1)(d) because the arbitrators failed to follow the parties’ agreed procedure. Or perhaps it could be considered irresponsible and despotic decision making and hence offensive to public policy under V(2)(b). Public policy is, after all, the basic foothold in Article V for engaging in merits based review of an award. It is partly for this reason that the public policy standard is so often articulated in such exacting terms: “the forum state’s most basic notions of morality and justice”. (See Parsons and Whittemore supra in Section V.3.b.)

**V.3.d.iii. Review of the Merits Under Article V(2)(b) - the Public Policy Standard**

_Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd._

**Question 1.** The Queen’s Bench Commercial Court’s treatment of the public policy standard in N.Y. Convention Article V(2)(b) seems essentially the same as that of the Parsons and Whittemore court. The public policy concept here is sometimes referred to as “international public policy”; or in the Parsons and Whittemore terminology: “the forum state’s most basic notions of morality and justice.” Because the arbitrators found no bribery, the Queen’s Bench concludes that this heightened standard inherent in Article V(2)(b) was not breached.

At the same time the Queen’s Bench appears to believe that an arbitral tribunal applying English law – rather than Swiss law – would have found the OTV-Hilmarton fee arrangement illegal and unenforceable because it violates the law of the place of performance (Algeria). This result would reflect a kind of British public policy rooted in English law, but not the “international public policy” standard intended to be applied under N.Y. Convention Article V(2)(b). The distinction resembles somewhat the venerable distinction in criminal law between...
a malum in se offense (morally wrong or inherently evil) and a malum prohibitum offense (wrong because prohibited).

**Question 2.** We assume that the Queen’s Bench would find all forms of smuggling to involve “illicit” or “contra bonae mores” behavior and hence to be violative of “international public policy.” In other words, we assume the Queen’s Bench would not enforce an award of fees based on smuggling services of any kind. Nevertheless, in Omnium it did enforce an award of fees for services rendered in Algeria in violation of an Algerian law seeking “to ensure that Algeria maintains a state monopoly on foreign trade.” The justification for the distinction does not come through with particular clarity in the opinion. Is it based on the universality of laws against smuggling as opposed to the less common form of “protectionism” reflected in the Algerian statute? Is it based on the hidden, surreptitious nature of smuggling versus the apparently open violation in *Omnium* of an apparently not-well-enforced Algerian law? Are difficult distinctions of the sort discussed in *Omnium* simply unavoidable when the outcome turns on whether “the forum’s state’s most basic notions of morality and justice are violated”? Or are the distinctions involved here simply incoherent?

**Question 3.** We believe it is fairly clear that the Omnium court would not have enforced an award for illicit “bribery” services. The court stresses that the sole arbitrator found that there was no bribery and that this was an “explicit and vital finding of fact.” On the other hand “grease” payments, if small enough, common enough, and truly never penalized, might not rise to the level of illicit or “contra bonae mores” behavior.

**Question 4.** The Queens Bench is rather clear about its unwillingness to review the merits of the second arbitrator’s finding of no bribery: “It would of course be quite wrong for this Court to entertain any attempt to go behind this explicit and vital finding of fact.” The hypothetical posed is intended to illustrate the difference in outcomes that result from intrusive, merits-based review (the outcome in the Swiss annulment of the first award applying the Inter-cantonal standard of “arbitrariness”) as opposed to review under the standards of N.Y. Convention Article V. Had the Article V standards been applied to the first award, we believe it would have been upheld. Even though the arbitrator seems to have erred in interpreting Swiss public policy to require rejection of the fee arrangement, that result itself would not have risen to the level of a violation of “international public policy” under Article V(2)(b) of the N.Y. Convention.

**Question 5.** Here we point out that despite the reluctance of courts to review the merits under the N.Y. Convention standards, the public policy concept in Article V(2)(b) nevertheless seems to authorize such a result. The Eco Swiss case is a good illustration of this point. What remains unclear, both after Eco Swiss in the EU and after Mitsubishi in the US, is how much deference a reviewing court should give to explicit findings of fact and legal conclusions of arbitrators in an area like antitrust which is suffused with public policy concerns.
Should there be a complete de novo re-litigation of the antitrust issues at the award enforcement stage, should courts merely check to ensure that the arbitrators made a good faith attempt to apply the relevant antitrust rules and principles, or should they fashion an approach somewhere in between?

V.3.e. Estoppel

**Questions 1 and 2.** Whereas estoppel issues were raised earlier in the course in Chapter 2 concerning enforcement of the arbitration agreement and the requirement of an “agreement in writing” in N.Y. Convention Article II (see subsection II.1.g.iii. “Jurisdiction by Virtue of Tacit or Post-Agreement Submission or Estoppel”), here the issue arises in connection with recognition and enforcement of the award. Van den Berg’s third solution - invoking discretion under Article V(1) and good faith principles - seems to us quite appealing. As we have already seen, Article V(1) is phrased—at least in the English language version—in permissive terms (“Recognition and enforcement of the award may be refused ...” (emphasis added)). In exercising the judge’s discretion inherent in the word “may”, it would seem that he or she would be on firm ground to resort to notions of good faith (or estoppel). Good faith, being a concept well known in both civil law and common law jurisdictions, it has the broadest appeal and the greatest potential to achieve uniformity.

The primary difficulty with this approach arises in applying it to different fact patterns. In the case in point the defendant’s lawyer raised her claim informally with one of the arbitrators, but she did not: i) raise it informally with all the arbitrators; ii) raise it formally with all the arbitrators; iii) raise it with CIETAC, Beijing by phone, fax. or in writing; iv) raise it in a formal court proceeding. Which of these steps would have been necessary to avoid an estoppel or for the defendant’s lawyer to have been found to be acting in good faith? Surely a formal court proceeding would have sufficed, but it seems unlikely that such a step would have been necessary. Opinions will differ about where the line should be drawn, but the applicability of the principle (good faith or estoppel) seems sound.

**Question 3.** The authors are inclined to agree with the German Supreme Court. It seems to us that a party who loses an award should not be forced to file for set aside in the courts of the seat. Instead the losing party should be free to defend against enforcement of the award under the standards of the New York Convention in any country other than the seat where the winning party seeks to enforce it.

**Question 4.** Even though Article V(2) is also subject to discretion (“Recognition and enforcement of an arbitral award may also be refused ... “(emphasis added)), V(2) grounds are fundamentally different from V(1) grounds. V(2) grounds can be raised by courts on their own motion. Both V(2) grounds—non-arbitrability of the subject matter and public policy—relate to public objectives that are not within the control of private parties. V(1) grounds must be
raised by the party against whom the award is sought to be enforced and can be waived by that party - hence estoppel (or good faith) can also operate against that party. V(2) grounds cannot be waived by a private party; likewise estoppel and good faith arguments would not be available against V(2) claims.