The Law Applicable to the Form and Substance of the Arbitration Clause

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I. General Overview

The basis of every arbitration is an agreement by the parties to submit their disputes to arbitration. However, this statement begs some initial fundamental questions: To what extent are parties allowed to exclude the jurisdiction of national courts? What matters can be submitted and referred to arbitration? What is the extent of the arbitration agreement and what are its limits?

These issues have been greatly liberalized in recent years. Major influences have been the New York Convention of 1958, the UNCITRAL Arbitration Rules of 1976 (which have now achieved genuine international recognition, particularly by virtue of their use in the Iran-US Claims Tribunal) and the UNCITRAL Model Law on International Commercial Arbitration (now adopted in over 30 jurisdictions). Of even greater importance is the actual practice of participants in international trade, their referral of disputes to arbitration and the practices which they have sought from arbitrators and which have developed as normal international arbitration practice. This has all influenced the modernization of many national arbitration laws over the past decade.

All these issues require further questions to be answered: According to what law, in each case, is the validity and effect of the agreement to submit disputes to arbitration to be determined? How is that law itself to be chosen and by whom, national courts or arbitrators? What procedure is to be followed in determining that law? Are conflict of law rules to be applied and if so, which? Or can the applicable law be decided by direct application?

These issues are considered in this Report.

II. Legal Environment

Whether in the form of a clause or submission, the arbitration agreement is a contractual obligation whereby the parties undertake to submit their future or current disputes to arbitration. Hence, the arbitration agreement has both a contractual and jurisdictional

page "114" character. (1) It is contractual by virtue of the parties' agreement to submit their disputes to arbitration. It is jurisdictional by virtue of the jurisdiction of the arbitration tribunal constituted following the arbitration agreement.

1. Meaning of the Arbitration Agreement

The parties' agreement to refer future or existing disputes to arbitration is evidenced by a written arbitration clause or submission. Although submission agreements are concluded from time to time, for specific existing disputes, (2) most arbitration agreements are contained in a contract provision, which forms part of a more substantive contract. This main contract sets out the parties' respective rights and obligations relating to the underlying arrangement or transaction; whereas the arbitration agreement concerns only those rights and obligations which relate to the settlement of disputes.

a. Historical Background to the Arbitration Agreement

The past suspicion of national courts towards arbitration tribunals and the arbitration process was manifest in the reluctance of many national laws to recognize and give effect to agreements to submit to arbitration. The major issue was persuading national jurisdictions that the will of the parties should prevail

over their jealous sovereignty which national courts sought to protect. This could be done to the extent allowed by the public policy of the various jurisdictions.

One way around the national law limitations on submissions to arbitration was the concession allowing parties to submit only existing, and not future, disputes to arbitration. (3) This had the effect of protecting the weaker from the stronger party, upholding the sovereignty of the national law and courts and ensuring that arbitration related to specific rather than more general disputes. (4) Art. 1493 of the French Code of Civil Procedure (CCP) refers to the arbitration agreement (*convention d'arbitrage*) which, according to the terminology of the Code, covers both the arbitration clause (*clause compromissoire*) and the submission (*compromis*). This confirms that the classic distinction, maintained for domestic arbitration, is not relevant to international arbitration. This had already been decided by the French Supreme Court in 1972, which stated that *page "115"* the arbitration clause was to be implemented and given effect to whenever it was included in an international contract. (5)

This old French law was a significant influencing factor behind the requirement for Terms of Reference under the ICC Arbitration Rules. (6) Although subjected to substantial criticism over the years, (7) the Terms of Reference have remained an essential characteristic of ICC arbitration and are currently regulated by Art. 18 of the 1998 ICC Rules. The Terms of Reference are intended, inter alia, to ensure the validity and recognition of the arbitration award to be rendered in one country and which is to be enforced in a country which may not recognize the rights of parties to submit future disputes to arbitration.

A major influence on the recognition of the right of parties to agree to arbitration for the resolution of future disputes was the Geneva Protocol on Arbitration Clauses of 1923. This provided in Art. 1:

"Each of the Contracting States recognizes the validity of an agreement *whether relating to existing or future differences between parties* subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject." (Emphasis added)

Contemporary arbitration instruments refer indifferently to arbitration clauses and submissions, which are governed by the same principles. For instance, Art. 7(1) of the UNCITRAL Model Law provides that:

" `Arbitration agreement'is an agreement by the parties to agree to submit to arbitration all or certain *disputes which have arisen or which may arise* between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be *in the form of an arbitration clause* in a contract *or in the form of a separate agreement*." (Emphasis added)

b. Distinction Between Arbitration Submission and Clause

It is for historical as well as practical reasons that the distinction between arbitration clauses (i.e., the *clause compromissoire*) and submission agreements (i.e., the *compromis*) *page "116"* still exists today. (8) In this Report, discussions relating to the arbitration clause apply generally to the arbitration submission as well.

An arbitration clause is a provision contained in a contract concerning future disputes which may arise concerning the rights and obligations of the parties under the contract. The agreement to refer future disputes between the parties to arbitration is one of the obligations thus undertaken under the agreement.

One important element in the arbitration clause is to specify the nature of the disputes covered, e.g., is it only technical or legal issues, or is it all disputes arising out of the contract? (9) The main contract is separate from the arbitration clause and may subsist after the arbitration has ended. The arbitration clause may be reused for additional or new disputes not

considered in the earlier arbitration.

By contrast, an arbitration submission deals with a specific existing dispute, the particular details of which are set out in the submission agreement. The agreement regulates every aspect of the arbitration. The whole agreement is devoted to the arbitration process: i.e., subject matter, arbitrators (who they are or how they are to be appointed), issues in dispute, procedure, arbitration rules, finality of award and enforcement. This submission agreement has only one purpose and will cease to exist when the arbitration process has been completed.

The difference between arbitration submissions and clauses has little relevance in today's practice considering the governing principles on the validity of arbitration clauses in most legal systems. Although an arbitration clause is merely one of the provisions of an agreement, it is now widely recognized as a separate and independent agreement with regard to the main agreement in which it is contained. The arbitration clause is therefore not to be affected by the invalidity of the main agreement. The ancillary but separate nature of the arbitration agreement, even in the form of an arbitration clause, is not a ground for the challenge of the jurisdiction of arbitration tribunals. Under most legal systems, the validity of arbitration agreements is ascertained following the same principles for all other contractual obligations, whether the agreement concerns disputes which either may arise in the future or have already arisen.

Although it is comparatively rare to find an agreement referring future disputes to arbitration in the absence of a main contractual agreement, it is worth mentioning the specificity of the International Center for Settlement of Investment Disputes. Art. 25(1) of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 reads as follows:

“The jurisdiction of the Centre shall extend to *any legal dispute arising directly out of an investment, between a Contracting State* (or any constituent subdivision or agency of a Contracting State designated by that State) *and a national of another Contracting State*, which the parties to the dispute consent in writing to submit to *page "117"* the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” (Emphasis added). The Convention stands as a pre-contractual framework by virtue of an international legal rule which specifically allows parties to submit their disputes to institutional arbitration.

c. The Nature of the Arbitration Agreement

The characterization of the arbitration agreement as either a clause or a submission and as an independent agreement as regards the obligations in dispute begs the fundamental question of the nature of the arbitration agreement. (10) The effect of the arbitration agreement on a national court jurisdiction is a strong argument in favour of its procedural or jurisdictional characterization. On the other hand, the arbitration agreement is a substantive contract establishing rights and obligations of the parties, albeit limited to the arbitration process.

The dual procedural and substantive nature of the arbitration agreement arises from the dual nature of arbitration itself. Arbitration is a private mechanism for the settlement of disputes. In this context, “private”implies that parties undertake a contractual obligation; “settlement of disputes”implies that jurisdiction, which is the sovereign right and privilege of States, is withdrawn from national courts.

The procedural nature of arbitration agreements might be the historical reason for applying the *locus regit actum* rule or the law of the seat of arbitration to the choice of law issue. (11) This reflects the interests of the State where the arbitration agreement was concluded and where it produces its direct effect (or where the arbitration takes place). The substantive nature of arbitration agreements points to the determination of the rules of law governing contractual agreements. Hence, the governing law of arbitration agreements is to be determined by virtue of the principles of the “proper law”of the contract.

The characterization of the arbitration agreement as

either substantive or procedural is no longer relevant or appropriate. The right and obligation to submit to arbitration is a right arising under the contract and not a matter of procedure in an arbitration which does not yet exist. Subject only to the limits of validity of the arbitration agreement and within the confines of arbitrability, there is a general international recognition of the right of parties to international transactions to submit their disputes to arbitration. This general recognition is itself a fact of international commercial practice, i.e., the lex mercatoria. It is an established principle of international arbitration laws that the law of the seat of arbitration has a limited scope compared to the lex fori of national courts. Furthermore, parties to an arbitration agreement may opt out the law of the seat of arbitration as the page "118" lex arbitri or the law applicable to the arbitration procedure (12) subject to any mandatory law at the seat of the arbitration.

2. Validity of the Arbitration Agreement

The validity of the arbitration clause has to be ascertained, even where it does not depend on the validity of the main contract. Furthermore, a distinction must be drawn between the formal validity of the arbitration agreement and its essential or substantial validity. These two questions are not necessarily governed by the same law. We look below at formal validity and essential validity (including the issue of capacity) of the arbitration agreement.

The valid and effective consent of the parties to submit their disputes to arbitration is the cornerstone of an arbitration agreement. A valid consent depends on whether the parties are entitled to submit to arbitration and as to whether the existence and scope of this consent may be established and under what circumstances such consent is to be evidenced. The following points are crucial to this issue: the formal validity of the arbitration agreement, the capacity of the parties and the substantive validity of the arbitration agreement.

a. Formal Validity

The form of an arbitration agreement is especially relevant as evidence of such agreement. Specifically, this generally refers to the need for an arbitration agreement to be in writing. Every legal system has formal requirements for an arbitration clause, the absence of which may result in the agreement not being enforceable. Today, most national laws are influenced by the requirements of international instruments, especially the 1958 New York Convention and the UNCITRAL Model Law. The ultimate purpose of an arbitration tribunal is to render an enforceable award. This may necessitate arbitrators considering, at the early stage of the arbitration or in the course of stay proceedings, the validity of the arbitration agreement.

The critical factor is the requirement of a written agreement between the parties. It does not directly affect the substantive validity of the arbitration agreement. This view is ascertained by the extensive conception of an actually “written”agreement, as confirmed by subsequent New York Convention case law, more recent international instruments such as the UNCITRAL Model Law and national statutes.

National courts generally apply the New York Convention over national law when deciding on the formal validity of arbitration agreements. The Convention requirement that a valid agreement must result “from a document signed by the parties or from an page "119" exchange of letters or telegrams” has been variously interpreted by courts. The Italian Supreme Court (13) has declared inoperative for lack of compliance with the New York Convention's formal requirements a clause that had only been included in orders coming from the plaintiff, without any explicit acceptance by the defendant of a letter or telegram. (14) Relying on both the New York Convention and the Swiss Private International Law Act (Art. 7), the Swiss *Tribunal Fédéral* recognized the formal validity of an arbitration agreement (in a bill of lading) that had only been signed by one of the parties. (15)

How formal validity is reviewed, in the first place, is well illustrated by the practice of the ICC International

Court of Arbitration. Where a party challenges the existence, validity or scope of the arbitration agreement, the ICC will generally decide that the arbitration shall proceed and refer this specific issue to be determined by the arbitration tribunal if it is prima facie satisfied that a written arbitration agreement exists. Thus, the written arbitration clause meets the prima facie requirement of formal validity for the purpose of establishing the jurisdiction of the arbitration tribunal. (16)

b. Essential Validity

The substance of an arbitration clause consists of the agreement between the parties to submit disputes arising from a determined legal relationship to the specific settlement by arbitration. There are three aspects to determining whether an arbitration agreement is substantively valid.

First, is there really an agreement between the parties to refer matters to arbitration? Second, were the parties lawfully entitled to refer such matters to arbitration, i.e., did they have the capacity to make this arbitration clause? Third, could the issues covered by the arbitration agreement be validly submitted to arbitration?

Whether an arbitration agreement was concluded is an issue of fact on which evidence will need to be deduced. Invariably, this question would be tied to that of formal validity and will not appear as an issue in itself. The wording of the arbitration agreement and the way it is arranged with respect to other contract documents can determine its validity. For example, a New York court concluded that despite reference in one contract to another *page "120"* contract to which the claimant was a party and which contained an arbitration clause, the arbitration agreement was not binding on the plaintiff because it was limited to disputes between the parties to the separate contract and did not concern "all disputes arising out of this contract". (17)

The question that needs to be answered is: What did the parties agree? In this respect, the court or arbitration tribunal will look to determine the nature of the relationship between the parties to see what agreement, if any, was concluded and will review the written documentation as well. In fact, analysis of the wording of arbitration agreements has caused diverse decisions as to their meaning and extent. (18)

Whether the parties had capacity to enter into the arbitration agreement is a fundamental issue. It frequently arises with state-owned entities and parties from certain countries. (19) Where specific types of entity are restricted from agreeing to arbitration or even to entering into specified forms of contract, resolving the issue necessitates a review of the applicable national law which governs the rights and authority of the parties themselves. In this situation the tribunal must determine the law applicable to the circumstances.

When reviewing the capacity of the parties to submit their disputes to arbitration, there are two issues on which arbitration has focused in practice: the good faith of parties who submit their disputes to arbitration and the protection of unsophisticated parties. Good faith should prevent parties to an arbitration agreement from alleging their incapacity, either at the time of or subsequent to its conclusion, to submit disputes to arbitration. The protection of unsophisticated parties ensures that the other contracting party has not taken advantage of its superior bargaining power to force the arbitration agreement on the former. (20)

The substantive validity of an arbitration agreement raises the fundamental question of whether issues within the scope of the arbitration agreement can properly be referred to arbitration, i.e., arbitrability. In determining whether the arbitration clause is essentially valid, it is necessary to consider what law governs the arbitration agreement. In deciding *page "121"* this, courts take the wording of the arbitration agreement into consideration (21) and look to the more specific and latest piece of legislation. (22)

There are, however, other legal factors that may also

be relevant to the question of arbitrability and the enforceability of the arbitration award, such as the question whether the dispute submitted to arbitration was actually arbitrable and what matters are "commercial". (23)

Cases involving allegations of fraud, misrepresentation or duress can originate doubts as to the arbitrability of these matters. However, the courts will generally leave these issues to arbitrators to consider in the first instance. When the arbitration agreement is allegedly vitiated by fraud, some courts tend to conduct a prima facie analysis to establish this under national law and also whether the underlying agreement was the product of fraud, coercion or other grounds at law or in equity for its revocation, again under national law. (24) Cases involving securities have for long now been recognized as arbitrable and courts will stay proceedings in favour of arbitration. (25)

Perhaps the remaining major exception to the limitation to the arbitrability issue is that disputes involving bankruptcy and insolvency have invariably remained in the courts. A New York court held that the effect of bankruptcy is to bring the bankrupt party under an incapacity to submit to arbitration. (26)

The substantive validity of the arbitration agreement also affects the very existence of each party's consent to submit specific disputes to arbitration. Although in principle one would presume that this issue should always be resolved in accordance with some *page "122"* national law, (27) there are now cases which have withdrawn the validity of arbitration clauses from the jurisdiction of any national law. (28)

In reality, courts, arbitrators and parties today recognize that the arbitration clause is governed by the common intent of the parties, general principles and usages of international business. (29) The common intent of the parties is to be ascertained as a matter of fact, in the same way as normal contract terms, whereas the usages of international trade are rules under which the existence of the consent is to be evidenced. These usages may be relied upon, for example, to trace an arbitration agreement through related or incorporated documents when there is no specific clause in the contract in question. This is well illustrated by one ICC case where the arbitral tribunal decided that "the autonomy of the arbitration clause, widely recognized nowadays, is justification for referring to a non-national rule deducted solely from international trade usages ...". (30) Hence, the arbitral tribunal will decide by virtue of the general concept of good faith in business and international trade usages.

Accordingly, where the parties agree to submit their disputes to arbitration, even where the wording of the clause produces a "pathological clause", the formal and substantive validity of the arbitration clause is presumed. Just as the putative pathological clause is interpreted in such a way as to favour it having a real and effective meaning, so too every arbitration clause is presumed to be valid. Both courts and arbitrators do and should strive to uphold the arbitration clause if possible.

3. Application and Effect of the Arbitration Agreement

a. Determination by National Courts or Arbitration Tribunal

The criteria for determining the applicable law is also affected by whether it is a national court or the arbitration tribunal which is to determine the issue.

In practice, a defendant in arbitration proceedings may challenge the validity of the arbitration agreement before the arbitration tribunal and/or national courts pending the arbitration proceedings. The defendant in a national court proceeding may contest the national court's jurisdiction in the light of an arbitration agreement. *page "123"*

The issue of a valid arbitration agreement will be considered and dealt with by an arbitration tribunal when it is first seized and the issue is argued before the arbitrators. It may also come to the arbitrators

once the national court has stayed its proceedings in the light of an arbitration agreement the validity of which is deemed to be determined by an arbitration tribunal. If unsuccessful before the arbitrators, the defendant may be able, once again, to involve the national court either at that stage when the jurisdiction issue has been determined, or subsequently when the arbitration award has been made.

The issue may come before a national court at three specific stages: at the time when a stay is sought; at the time when court intervention for interim relief is requested; and when an arbitration award is being challenged or proceedings for the recognition and enforcement of an award are being resisted.

The recognition and enforcement of arbitration agreements reveals both the jurisdictional and contractual nature of arbitration. The jurisdiction of the arbitration tribunal, following the direct effect of the arbitration agreement without resort to any national court, is established on the basis of the arbitration agreement. Hence, the direct effect of the arbitration agreement characterizes the jurisdictional nature of arbitration. When national courts stay proceedings on the ground that parties have undertaken the contractual obligation to submit their disputes to arbitration, they enforce the contract between the parties.

The agreement to refer matters to arbitration has two immediate effects on the rights of the parties and the authority of national courts. First, with direct effect, the arbitration clause establishes a contractual forum in which disputes between the parties are to be resolved. Second, it gives notice to national courts that the parties have agreed (to the extent allowed by law) to exclude the jurisdiction of such courts in respect of disputes within the scope of the arbitration agreement. This requires the national courts to refuse jurisdiction if one of the parties seeks to bring a dispute before such courts.

This effect of the arbitration agreement is well recognized in the international arbitration instruments. (31) The New York Convention, although concerned primarily with the enforcement of awards, recognized the essential of giving effect to the arbitration agreement. Art. II(3) provides in pertinent part:

“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, [shall] at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” (32)

The UNCITRAL Model Law contains similar language in Art. 8(1):

“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests, not later than when submitting *page "124"* his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

In both cases, the natural court has a mandatory obligation to stay proceedings in favour of arbitration, subject only to the arbitration agreement not being “null and void, inoperative or incapable of being performed”.

b. Enforcement of an Arbitration Agreement Is to Change Jurisdiction

The direct effect of the arbitration agreement is to establish a special forum for disputes between the parties and to exclude the jurisdiction of the national court that would otherwise have had jurisdiction.

This alternative jurisdiction will have the authority to resolve those disputes or types of dispute which the parties have agreed to refer to it. There is a clear contractual obligation on the parties to bring and defend their claims before the chosen arbitration forum. To bring proceedings in a national court would be a breach of that arbitration clause. By giving effect to the arbitration clause, the national court is recognizing the parties' choice of arbitration as the alternative jurisdiction. In fact, the court must refer the

matter to arbitration in accordance with the arbitration clause unless the arbitration agreement is “null and void, inoperative or incapable of being performed”or there is some other good substantial reason, e.g., public policy justification, for not enforcing it.

The arbitration clause further gives to the arbitrators powers as to how to conduct the procedure and what they can do. These powers are set out in the selected institutional or ad hoc arbitration rules or in the absence of such choice, will generally be determined by the law governing the arbitration, i.e., the lex arbitri. (33)

The effect of the international arbitration conventions and other instruments is to recognize that the will of the parties should govern the submission to arbitration and the arbitration procedure, subject to the applicable law. Not only does the arbitration agreement give jurisdiction to an arbitration tribunal, but the arbitration tribunal has jurisdiction to decide whether it may entertain the proceedings and accordingly whether the arbitration agreement is valid or not. (34)

This principle is widely recognized. For example, Art. 16(1) of the UNCITRAL Model Law provides:

“... the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.” *page "125"*

The major international arbitration rules have similar provisions. Art. 21(1) of the UNCITRAL Arbitration Rules provides:

“The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”

Art. 6(1) of the 1998 ICC Rules entitles the Court to decide

“without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself.” As a consequence of such decisions, domestic courts may decide to stay proceedings without further inquiries.

Where one of the parties commences proceedings before domestic courts, the court should stay proceedings pursuant to the indirect effect of a valid arbitration agreement. However, the courts would not necessarily consider the validity of the arbitration agreement in the light of the same principles as applied by an arbitration tribunal. The difficult task of an international arbitration tribunal is to ensure that their standards of a valid arbitration agreement meet the requirements of most of the domestic jurisdictions before which a party may either challenge the validity of the arbitration agreement or seek the enforcement of the award to be rendered.

Art. 35 of the 1998 ICC Arbitration Rules declares that, in any event: “The Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law”.

Whilst ICC arbitration tribunals are indirectly bound to apply the rules of law of the place where enforcement of the award is to be sought so as to comply with the requirements of a valid arbitration agreement under these rules, it is totally impractical to expect this to be some kind of guarantee as to effectiveness.

There is an inevitable tendency for an arbitral tribunal to determine the validity of an arbitration clause applying the same or very similar rules and analyses to a national court. This is due to several reasons. First, if the tribunal selects an applicable national law, then the rules of that law will be the same as the national court will have applied. Second, those rules may be the appropriate rules, in any event, to the

circumstances of the case. Third and most importantly, arbitrators are conscious that the award may have to be enforced by national courts. In this respect arbitrators will look to ensure the agreement was valid under the law to which the parties subjected it, or the law of the country where the award is made. (35)

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Therefore, the requirements regarding the validity of an arbitration agreement to be ascertained before an arbitration tribunal tend to overlap those to be ascertained before national courts.

c. Enforcement of Arbitration Agreement Is to Stay Court Proceedings

The indirect effect of an arbitration agreement is to exclude the dispute from the jurisdiction of national courts. The arbitration agreement removes from the national court its normal authority to consider and determine disputes between the parties. Just as a court will normally determine and uphold the contractual obligations of parties, so too will it uphold the parties' agreement to arbitrate. (36) Courts have recognized the special character and role of international arbitration so as uphold the arbitration agreement wherever possible. (37)

Accordingly, if contrary to the arbitration clause one party seeks to commence proceedings in a national court, that court should at the request of the other party decline jurisdiction and stay its proceedings. This would require the parties to refer their dispute for resolution by arbitration as they had previously agreed.

As a result of the international instruments discussed above, the duty of national courts to recognize and give effect to arbitration clauses is nowadays enshrined in most national arbitration laws. An example of this is the US Federal Arbitration Act, which provides courts with the general authority to order compulsory arbitration and to stay judicial proceedings pending arbitration. (38)

Unless the arbitration agreement is “null and void, inoperative or incapable of being performed”, a national court must refer a matter in respect of which there is an arbitration clause to be resolved by arbitration. The “inoperativeness and legal impossibility”of the page "127" arbitration agreement has been defined “in a narrow sense”rather than given a wider meaning which also covers the case in which the agreement is void or voidable. (39)

The effect of the arbitration agreement is therefore to originate a right that may be exerted negatively, rather than substantial rights and obligations, and it is also a contract that essentially has some procedural effects.

It is for this reason that the issue of the validity of the arbitration agreement is crucial: it is the condition to the valid transfer of jurisdiction from national courts to arbitration tribunals and to the enforcement of the final award. To decide whether an arbitration agreement is valid, or whether it is “null and void”, it is necessary to determine the law which should govern the arbitration agreement and according to which its validity should be measured.

The direct and indirect effects of arbitration agreements as discussed above are established principles which are generally taken for granted. They are clearly reflected in Art. 26 of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 which states:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or juridical remedies as a condition of its consent to arbitration under this Convention.”

Furthermore, the question arises when the judgment creditor of a court decision regarding the validity of an arbitration agreement seeks to enforce the said judgment before another national court. In this respect, the liberal principles set out by the New York Convention as regards the validity of an arbitration

agreement may conflict with the liberal principles of the Brussels Conventions on Jurisdiction and Enforcement of Judgments which tend to promote an efficient enforcement of court decisions, whether or not they validate arbitration agreements. (40)

III. Applicable Law

In determining how the applicable law to govern arbitration agreements is decided, one can distinguish between national legal rules and the international conventions, and actual arbitral practice. In the latter situation, the actual choice of law decisions will be made by national courts or by arbitration tribunals in different situations. *page "128"*

In many respects the answer to the question of the applicable law to govern the arbitration clause may be influenced by the circumstances in which the issue is raised. Simply, the arbitrator will have a basic predisposition to uphold the parties' agreement, whilst a national court will be concerned with upholding and applying its law and perhaps to provide its perceived protection.

In principle, the determination of the applicable law is different for the issues of formal and essential validity of the arbitration agreement. Formal validity tends to be determined by the direct application of relevant rules, without any reference to conflict rules. By contrast, the substantive validity of the arbitration agreement is governed by the law governing that agreement determined by conflict of laws rules. In reviewing the issues, there is a clear difference in the practice and approach of national courts and international arbitration.

1. Law Applicable to the Formal Validity of Arbitration Agreements

a. Legal Instruments

Most arbitration institutions recommend the use of their standard or model arbitration clauses. These are deemed to be valid references to the jurisdiction of an arbitration tribunal established under the rules of that institution. Where parties place a model or standard form arbitration clause in their contracts, they will minimize the possibility of a problem relating to the formal validity of the arbitration clause. Specially drafted arbitration clauses are more likely to give rise to uncertainty, ambiguity or formal invalidity than a standard form. The major issue concerning formal validity concerns the requirement of a "written"agreement, e.g., must the arbitration clause be in a main contract, or can it be incorporated by reference through an exchange of facsimile messages or by reference to standard terms and conditions. A more substantive issue is whether the arbitration agreement needs to be signed.

Every national arbitration law sets out what is required for a formally valid arbitration agreement. There is enormous uniformity today, with really only two variants: the requirement of writing and the additional requirement of a signature by an authorized officer of the parties. Most national laws today are influenced largely by the New York Convention and the UNCITRAL Model Law.

i. International Instruments

The New York Convention established written form as the basic requirement for a valid arbitration argument. Art. II(1) provides:

"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." *page "129"*

The term "agreement in writing"is expressly provided to include an arbitration clause or agreement "signed by the parties or contained in an exchange of letters or telegrams". This is a fairly broad and innocuous requirement for the form of the arbitration agreement. Essentially, it aims to help prove the parties'

agreement to refer their disputes to arbitration. It is noteworthy that the New York Convention does not require, per se, the written agreement to be signed or that it be in a separate document. (41)

The clear trend towards overcoming formal objections to the validity of arbitration clauses in international contracts is manifest from the wording of the UNCITRAL Model Law. This provides in Art. 7(2):

"The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communications which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and denied by another. 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 intention behind the Model Law provision is clear: to uphold the arbitration agreement provided it can be shown that there is written evidence of the parties' agreement, either as part of the main contract or in a separate document. The reference to the written submissions (pleadings) in the arbitration proceedings is an ex post facto evidence of the parties' agreement. Thus, even if the parties have not agreed in advance to submit disputes to arbitration, their active participation in the arbitration shows their intent. (42)

ii. International Arbitration Rules

The approach of the major international arbitration rules is to ignore the formal validity issue, without denying the arbitrability question or whether the principal contract which contains the arbitration clause is valid. The arbitration rules accept prima facie that the arbitration clause or agreement is valid. Hence there is little or no need to determine the applicable law to govern the arbitration clause at this stage at least.

Art. 1(1) of the UNCITRAL Arbitration Rules provides:

"Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing."
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Similarly, Art. 6(1) of the 1998 ICC Rules provides:

"Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration proceedings unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement."

Art. 1 of the American Arbitration Association International Rules provides:

"Where parties have agreed in writing to arbitration disputes under these International Arbitration Rules or have provided for arbitration of an international dispute by the American Arbitration Association without designating particular rules, the arbitration shall take place in accordance with these rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing."

The LCIA Rules contain the following provision:

"Where any agreement, submission or reference provides in whatsoever manner for arbitration under the Rules of the LCIA or the Court of the LCIA (`the LCIA Court'), the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules (`the LCIA Rules') or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration."

The Rules do not make any specific provision to determine the applicable law to govern formal validity. It would invariably be the same law as would govern

the substantive contract and would be determined in the same way.

iii. National Laws

The national laws contain requirements for the formal validity of the arbitration agreement. As already noted these normally follow the New York Convention or the UNCITRAL Model Law. This also begs the fundamental question, in every case, whether and which national laws govern the arbitration clause or agreement. Again here, the method for determining the law to govern the substantive contract would apply equally to the law to govern the validity of the arbitration agreement.

Under the English Arbitration Act of 1996 an arbitration agreement is defined as "an agreement to submit to arbitration present or future disputes (whether they are contractual or not)"(Sect. 6). The arbitration agreement must be in writing and will be considered to be in writing: "(a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing"(Sect. 5(2)).

If the parties agree to submit to arbitration, "otherwise than in writing by reference to terms which are in writing", e.g., by agreeing to contract under a standard contract, they *page "131"* make an agreement in writing. An agreement "is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party", e.g., in a minute or protocol of the meeting, "with the authority of the parties to the agreement"(Sect. 5(3) and (4)).

To overcome the absence of a written arbitration agreement causing a problem at the time of enforcement, the 1996 Arbitration Act introduced a novel provision to allow the minutes of or submissions filed in arbitration proceedings to constitute an agreement in writing. Thus Sect. 5(5) provides:

"An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged."

Under Dutch law, an arbitration agreement must be in writing. However, the written form is merely a matter of proof (*ad probationem*). Art. 1021 of the Dutch Code of Civil Procedure provides that: "... [t]he arbitration agreement shall be proven by an instrument in writing". This article further specifies that a tacit acceptance of an arbitration agreement is sufficient, e.g., a tacit acceptance of a sales confirmation that includes an arbitration clause.

French law distinguishes between an arbitration clause and a submission. (43) Art. 1443 CCP requires that an arbitration clause be in writing, including a contract or in a document to which it refers. The clause must also appoint the arbitrators or establish the basis for their appointment. A submission agreement must also be in writing, (44) describe the subject matter of the dispute and appoint the arbitrators or establish the basis for their appointment. If an arbitrator appointed in a submission agreement refuses or is unable to accept appointment, the submission agreement will be null and void (Art. 1448).

Swiss law makes no basic distinction between a submission agreement and an arbitral clause. However, the arbitration agreement must be in writing. According to Art. 178(1) of the Swiss Private International Law Act (PILA), an exchange of letters, telegrams or telexes is sufficient, provided, however, that the arbitration agreement can be evidenced by a document. Signatures of the parties are not required provided it is clear, based on all circumstances and on the document exchange, that an arbitration agreement really exists.

In the absence of a written arbitration agreement, the parties are bound if they do not raise the incompetence in limine litis, at the outset of the arbitration. The pleas of lack of jurisdiction of the arbitral tribunal must be raised prior to any defence on

the merits. (45) page "132"

Swiss law does contain provisions relating to the applicable law issue. (46) It will uphold an arbitration agreement as valid if it conforms to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the law applicable to the main contract, or to Swiss law.

b. Case Law

i. Arbitration Case Law

As indicated above, the most difficult issue is determining how arbitrators actually decide these issues. Arbitration awards are private and confidential and few are actually published. It is from those few published awards that conclusions can be drawn.

One particularly pertinent case was an ad hoc arbitration involving public and private parties, (47) where the arbitrators were Profs. Lalive, Goldman and Robert. They held that the parties could not automatically avoid the arbitration agreement and fall back on their lack of capacity to agree to submit to arbitration. That arbitration arose within the framework of agreements between State A and State B for the exploitation of natural resources. A contract was concluded between private company Z of State A and ABC, a state organization of B. The contract contained an arbitration clause providing for ad hoc arbitration and it was submitted to the law of State B. Upon termination of the contract by ABC, company Z initiated arbitration and appointed an arbitrator. ABC rejected the request for arbitration on the basis that the arbitration clause was invalid under the law of State B. However, ABC appointed an arbitrator for the purpose of determining this issue but reserved its rights.

ABC alleged that the contract was not valid as it had not been approved by ABC's council and that failing the necessary authorization, ABC's president did not have the power to sign the contract. ABC also relied on the decision of State B to renounce the exploitation of the kind of natural resources which was the object of the contract and that, since the decision directly concerned the national sovereignty of State B, the dispute could not be submitted to international arbitration. The arbitrators examined the various arguments of the parties by grouping them under three points: the validity or non-validity of the contract considered as a whole, the validity or non-validity of the arbitration agreement and the arbitrability of the dispute. The arbitration tribunal held that the initial invalidity of the contract as a whole could not be asserted against company Z, principally in view of the ratification of the contract by performance. As regards the validity of the arbitration clause, the arbitrators concluded: "... it cannot be accepted that the parties wished or simply accepted the validity and effectiveness of a contractual clause as fundamental as an arbitration clause should be subject to a sort of condition entirely within the power of one party". (48)

The tribunal refused to allow the State organization to rely on provisions of the national constitution enacted after the contract was agreed upon and which would put in page "133" question the validity of the undertaking to arbitrate. The arbitrators considered that by invoking the national sovereignty of State B in support of the argument that the dispute is not suitable for arbitration, ABC based itself on a confusion between the possession and the exercise of sovereignty. The tribunal held that it had jurisdiction to entertain the dispute and that "in any case, the Tribunal was not called upon to pronounce on the legitimacy of the decision made by State B to modify its policy concerning the exploitation of its natural resources, but only to estimate the possible financial consequences, in the circumstances of the case, on the disputed contract". (49)

In the ICC Award in Case No. 5721, (50) an arbitral tribunal decided that the autonomy of the arbitration clause, widely recognized nowadays, is justification for referring to a non-national rule deduced solely from international trade usages. (51) In this case, Mr. Z, managing director of USA Company, had signed a contract with Euro Company, on behalf of Egypt

Company, a subsidiary of USA Company. The contract provided for the application of Egyptian law and conferred the powers of amiable compositeur on the arbitrators. Euro Company started arbitration proceedings against the Egyptian Company, USA Company and Mr. Z. USA Company and Mr. Z contested the jurisdiction of the tribunal. Mr. Z and USA Company alleged that the arbitration agreement was invalid because it failed to comply with the requirement of Art. 502/3 of the Egyptian Code of Civil Procedure by not specifically including the arbitrators' names. The arbitration tribunal held that the Egyptian statutory provisions were limited to Egyptian domestic matters considering the needs of international trade. Accordingly, the arbitrators made a finding on the facts as to the common intent of the parties to be bound or not by the arbitration agreement on the basis of the usages of international trade and the principle of good faith in business. (52)

There is a similarity between this decision and the principle laid down by the French *Cour de cassation* in the 1991 *Dalico* case. (53) There a Libyan City Council and a Danish Company signed a contract expressly governed by Libyan law. The Danish Company commenced ICC arbitration proceedings on the basis of an arbitration clause by reference to annexed documents. The Libyan City Council argued that the arbitration clause was invalid under Libyan applicable law which requires arbitration agreements to be signed. The French courts dismissed the action, on the ground that:

"... by virtue of a substantive rule of the international law of arbitration, the arbitration clause is legally independent of the principal contract which contains it directly or by reference and, subject to the overriding rules of French law and international public policy, its existence and effectiveness are assessed according *page "134"* to the *common will of the parties, without it being necessary to refer to any national law*" (free translation, emphasis added).

ii. National Case Law

In *Compagnie de Navigation et Transports SA v. Mediterranean Shipping Company*, (54) the Swiss Federal Court gave effect to an arbitration clause in a bill of lading providing for "arbitration in London or such other place as the carrier in his sole discretion shall designate". The bill of lading was signed by the carrier's agent and a copy was signed by the consignee, who also signed the original bill of lading when the goods were received. When it appeared that some of the goods were missing, the insurer compensated the shipper and then sued the carrier in the Swiss courts. The carrier invoked the arbitration clause in the bill of lading and sought a stay of the Swiss court proceedings. The *Tribunal Fédéral* (on appeal) upheld the arbitration agreement on the basis of the New York Convention and Swiss law stating:

"France and Switzerland, the countries where the parties are domiciled, as well as the United Kingdom, the State in which the prevailing seat of the arbitration tribunal is located, as established under the general conditions which are reproduced on the relevant bill of lading, are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 ... the applicability of which is common ground."

The Swiss court held that it could not consider reasons for the invalidity of arbitration agreements which are not provided for by international law. It stated:

"The arbitration agreement which is invoked by the respondent is only valid if it meets the requirements of an agreement in writing under Art. II(2) of the New York Convention. On this regard one should observe that under the treaty this requirement is ... stricter than what is set by Art. 178 of the Private International Law Act. This only requires some means of communication which allow one to establish on the basis of a text that an arbitration agreement exists. Art. II(2) of the New York Convention requires the arbitration agreement to be signed by the parties or included in an exchange of letters or telegrams. True, the Federal Court assimilated a telex to a telegram; however, it is necessary that the parties have expressed in writing their intention to submit to arbitration. According to the

prevailing view, the said provision has to be interpreted with reference to the model law established by the United Nations Commission on International Trade Law, whose authors thereby intended to adapt the rules of the New York Convention to present needs without modifying them.Art. 178(1) of the Private International Law Act clearly takes inspiration from this wording (Art. 7(2) of the UNCITRAL Model Law). This text, which has taken into account the development of modern methods of communication, is also useful page "135" in the interpretation of Art. II(2) of the New York Convention. Thus, the formal requirements set by this treaty correspond in substance to those which are set by Art. 178 of the Law on Private International Law." The Swiss Federal Court concluded that the formal requirements set by the New York Convention had been complied with, upheld the arbitration agreement and ordered a stay of the Swiss court proceedings.

2. Law Applicable to the Essential Validity of Arbitration Agreements

Whilst formal validity will invariably depend on whether there was a formal arbitration agreement, for essential validity there is a clear choice of law issue at the outset. What law governs the existence of this agreement and how should that law be determined? The basic approach to this question differs for a national court and an international arbitration tribunal. However, in both cases there must be a modality for determining the law or rules given the specific issues.

Generally, the practice of national courts relies on conflict of law rules to determine the applicable law. This is because conflict rules are part of the lex fori which regulates the activities and procedures in the national court.

Arbitration tribunals by contrast have no lex fori. As a consequence, arbitration tribunals are not bound by specific conflict of laws rules. Arbitration in this respect will be primarily influenced by the rules which regulate the arbitration and which may assist or direct how the applicable law should be determined. What has transpired from practice is that arbitrators may determine the proper law of an arbitration agreement by applying a conflict of law rule which the tribunal considers appropriate in the circumstances, or directly as the tribunal considers appropriate and without reference to any conflict rules.

One should recognize at the outset that the approach to the determination of the applicable law does not differ with respect to the issue of essential validity of the arbitration agreement as to the law governing substantive rights, obligations and performance. Whilst the end result, i.e., the rules and/or national law considered applicable may vary, the methodology applied should not differ. The fact is, as discussed above, that there are two separate contracts which the arbitration tribunal will need to consider and for which an applicable law must be selected, i.e., the arbitration agreement and the substantive or main contract. It is probable that in most cases the same law will govern both issues, but there are different factors which may apply to the two situations. For example, in the case of essential validity, international public policy and mandatory law, including the question of arbitrability may be relevant, but these issues will rarely be relevant with respect to substantive issues. page "136"

a. Legal Instruments

i. International Instruments

The contemporary basis for determining the applicable law has its origins in Art. VII(1) of the European Convention on International Commercial Arbitration of 1961. This provided:

"The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contracts and trade usages."

This same language was adopted in the UNCITRAL

Arbitration Rules, Art. 33, which provides:

"

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.
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 and if the law applicable to the arbitral procedure permits such arbitration.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

" This same language was followed in Art. 13(3)-(5) of the 1975 ICC Arbitration Rules.

Arbitration practice, as discussed below, has not always followed the more formalistic methodology of these rules. Arbitrators are more pragmatic and have applied the substantive law they considered applicable in the prevailing circumstances of the case. This often means applying the law the arbitration tribunal deems or knows is appropriate, without strict application of conflict of law rules.

This situation is recognized by the 1998 ICC Arbitration Rules which entitles arbitrators simply to apply the law which they deemed applicable. Thus, Art. 17(1) of the 1998 ICC Rules provides:

"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. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate."

The traditional approach of the application of the conflict of laws system of the place of arbitration was overtaken by arbitration practice and became reflected in the European page "137" Convention, the ICC Arbitration Rules and the UNCITRAL Arbitration Rules. This practice was also superseded by arbitration practice, as arbitrators variously sought middle grounds, applying cumulative conflict rules which lead to the same substantive applicable laws. Increasingly, arbitrators avoided the conflict of laws analysis too, directly applying the substantive law they considered appropriate to the circumstances. All of these developments in actual practice have been followed in the various arbitration instruments and rules.

ii. National Laws

National laws have followed contemporary practice by aligning first with the UNCITRAL Model Law and then with what arbitrators actually do. In this respect it is essential to remember that national conflict of laws rules have increasingly peripheral relevance to international arbitration, which has no fixed place or seat. Often, the place or seat of arbitration is fortuitous and neutral and has no real connection to the parties, the arbitrators or the facts in dispute.

In essence there are two approaches. First, arbitrators must apply some conflict of law rules but have the freedom to choose the conflict rules and connecting factors they favour or think appropriate in the circumstances. Second, is the possibility of direct application of the substantive law which the arbitration tribunal considers should govern.

In French law, the freedom and flexibility of the arbitral tribunal in choice of law matters was recognized in the changes made in 1981. Art. 1496 of the French CCP provides:

"The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to the rules he deems appropriate. In all cases he shall take into account trade usages."

A similar line was followed in the Swiss Private International Law Act of 1987, where Art. 197(1) provides:

"The arbitral tribunal shall decide the dispute according

to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection." The arbitrators are left with the freedom to determine the rules of law (rather than the country) with which the substantive contract and the dispute has its closest connection.

The Netherlands Arbitration Law of 1986 avoids the direct application of conflict of laws rules. Art. 1054(2) provides:

"If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law which it considers appropriate." *page "138"*

Most recently, the Arbitration Act of 1996 has adopted the same approach in England. Sect. 46 provides in pertinent part:

"

(1) The arbitral tribunal shall decide the dispute
  (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
  (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

"

b. Arbitration Case Law

It has been suggested that "if there is no choice of law by the parties, the validity of the arbitration agreement may have to be decided both under its proper law and under the law of the place of arbitration". The opposite view leads to the choice of the system of law under which the arbitration clause is valid, when the arbitration clause is invalid under the other applicable system of law. The mere fact that the choice lies between two systems of law, under one of which the arbitration agreement would be invalid, has been considered as a "factor in favour of choosing the other". This latter view is consistent with the policy favouring the validity of arbitration clauses, especially in an international context.

This is well illustrated in ICC Case No. 6162. (55) The main contract contained an arbitration clause providing for arbitration in Geneva under the ICC Arbitration Rules by one or more arbitrators. It also provided that "Egyptian laws will be applicable". The defendant submitted that, as the arbitrators were not designated by the arbitration clause nor by separate agreement, the arbitration clause was void under Art. 502(3) of the Egyptian Law of Civil and Commercial Procedure. The tribunal rejected the defendant's challenge to the formal validity of the arbitration clause on the basis of both Art. 6(1) of the Swiss Intercantonal Arbitration Convention and Art. 178(1) of the new Swiss Private International Law Act. (56)

Therefore, the tribunal chose the law of the seat of arbitration, which had been expressly agreed upon in the arbitration clause, as the law applicable to the form of the arbitration clause, and disregarded the law governing the substantive dispute which had also been elected by the parties. The choice of the tribunal, although not expressly justified, may have been influenced by the fact that the law governing the substantive dispute would have invalidated the arbitration clause. *page "139"*

The cumulative conflict of laws approach reinforces the validity of arbitration agreements and ensures the validity of the award to be rendered in that they are in accordance with the potential governing laws of arbitration agreements when the award is to be enforced.

Accordingly, in the Interim Award in ICC Case No. 4145, (57) the arbitration tribunal decided that Sect. 11 of the agreement concluded by the parties showed in a sufficiently clear manner the parties' intention to submit their disputes resulting from the agreement to ICC arbitration. Furthermore, this conclusion would be reached by applying Swiss law as well as the law of country X (as the possible leges contractus) or Austrian law (as the lex fori).

In this case, the paramount effect of the parties' consent to arbitration is in any event confirmed by the national laws applicable in accordance with the relevant conflict rules.

The arbitration cases reviewed show no single consistent approach of arbitrators to determine the applicable law issue to govern the question of the essential validity of arbitration agreements. There is only one clear approach: arbitrators seek to validate and uphold the arbitration agreement if at all possible. The alternative conflict rules applied by arbitrators include the law of the place where the arbitration agreement was concluded, the law of the place of arbitration, the law with which the arbitration agreement has its closest connection (the proper law) and the proper law of the main contract.

i. Alternative Conflict Rules

ICC Case No. 6149 (58) provides an exhaustive list of the different conflict rules which may be relied on to determine the law applicable to the arbitration agreement. First, parties are free to choose any law to govern the arbitration clause. In the absence of such a choice, the proper law of the arbitration clause is either the law of the contract which contains the arbitration clause or the law of the seat of arbitration.

In this case, the contract between a Korean claimant and a Jordanian defendant provided for disputes to be resolved “by the laws and regulations of the [ICC] in Paris”. The defendant argued that the arbitration agreement was void under Jordanian law. The arbitral tribunal held that Jordanian law was not applicable to the arbitration agreement which it upheld as being valid and effective. In its award the tribunal reasoned as follows:

“[The] validity of international arbitration agreement depends upon *the proper law by which it is governed*. It may be disputed whether an arbitration agreement, as a matter of principle, is subject to the same proper law by which also the main contract is governed so that both, arbitration agreement and main contract, share the same proper law, or whether the proper law of the arbitration has to be determined upon its own, irrespective of the proper law of the main contract.”

In any case, the tribunal decided that Jordanian law would not govern the arbitration agreement as it was neither the law applicable to the main contract nor the proper law *page "140"* of the arbitration agreement. If the proper law of the arbitration agreement was to be determined upon its own, the law where the arbitration takes place and where the award is rendered would have been applicable in accordance with the tribunal's power to apply the law designated as the proper law by the rule of conflict which it deems appropriate in accordance with Art. 13(3) of the 1988 ICC Rules.

The tribunal tried further to justify its analysis on the basis that its conclusion is also supported by Art. V(1)(*a*) of the New York Convention. This provides that the validity of the arbitration agreement has to be determined under the law of the country where the award was made. The tribunal also considered that by referring their dispute to arbitration, the parties obviously had the intention to withdraw any jurisdiction from national courts and to subject all disputes to the exclusive jurisdiction of the ICC International Court of Arbitration. It stated:

“Such court, being an international arbitration body sitting in a State other than Jordan, is not necessarily bound by considerations of Jordanian domestic public policy at least insofar as Jordanian law is not applicable to the subject matter ... while there had been a clear intention of the parties to remove this subject matter from Jordanian domestic jurisdiction ....”

There are four main conflict rules for determining the applicable law to govern the arbitration agreement: the *locus regit actum,* the seat or the place of arbitration, the proper law of the arbitration agreement and the proper law of the substantive contract. We will consider each of them in turn.

ii. Locus Regit Actum

The *locus regit actum* rule leads arbitrators back to the first conflict of laws rule: the law of the place of contracting. This still governs the formal validity of contractual agreements together with the concurring proper law of the contract. This rule has little relevance to international arbitration.

As regards arbitration agreements, the relevance of the situs shifts from the place where the arbitration agreement is concluded to the place where the arbitration is to be held and then to the place where the arbitration award is rendered. In some respects, if the arbitration agreement is to be localized, logic points to the place where it produces its direct effect rather than to the place of its conclusion. The ultimate purpose of the arbitration agreement is to render an enforceable award. In this respect, it seems that the current trend still confers a substantial importance to the seat of arbitration, as if the arbitration agreement was finally included in the arbitration award.

iii. Law of the Seat of Arbitration

The procedural nature of the arbitration agreement also points to the lex arbitri as the governing law. In practice, the lex arbitri invariably corresponds to the law of the seat of arbitration, i.e., the lex loci arbitri. However, parties are generally entitled to opt out the law of the seat of arbitration in favour of a chosen lex arbitri. The limits of this faculty may include the governing law of arbitration agreements. The procedural nature *page "141"* of the arbitration agreement points more to the law of the place where the arbitration award is rendered, rather than the procedural rules in accordance with which it is rendered.

The provision of the New York Convention which provides for the application of the law of the seat of arbitration to the arbitration clause has been considered as “unfortunate”whenever the arbitration clause does not determine the place of arbitration. One must bear in mind that in international arbitration there is neither lex fori, nor foreign law. Furthermore, it has been argued that when the parties have not designated the law applicable to the arbitration agreement or the place of arbitration and this issue comes before a court, the solution would then appear to be the application of the conflict of laws of the forum. When an arbitration tribunal is to determine the law governing the arbitration clause in similar circumstances, it then has no other choice than to apply the conflict of law rules of the seat of arbitration if it wants to render an award enforceable under the New York Convention.

There is a strong line of authority in case law for the application of the law of the seat of arbitration, which complies with this provision of the New York Convention.

This is supported by Art. 35 of the 1998 ICC Rules of Arbitration which provides that the ICC Court and the arbitral tribunal “shall make every effort to make sure that the award is enforceable at law”. Accordingly, arbitrators are indirectly bound by the provision of the New York Convention regarding the law of the seat of arbitration.

Accordingly, for instance, in the ICC Award in Case No. 7154, (59) the tribunal held that Swiss law was deemed to govern issues for which the parties had failed to express their choice and which were not dealt with in the ICC Rules. Consequently, in the absence of an express choice, the arbitration clause was governed by Swiss law. The tribunal applied the law of the seat of arbitration in the absence of an express choice by the parties as to the law applicable to the arbitration agreement.

iv. Proper Law of the Arbitration Agreement

The applicable law of an arbitration agreement is to be determined in accordance with the principles which determine the applicable law of any ordinary contract. The fact that the arbitration clause is governed by its "proper"law is one of the effects of the legal autonomy of the arbitration clause. The supremacy of party autonomy over the territorial concept of arbitration is reflected in Art. V(1)(*a*) of the New York Convention.

In the ICC Award in Case No. 6719, (60) the tribunal looked first for the law applicable to the arbitration clause before it looked to determine the law governing the substantive agreement. In this case, the law of the seat of arbitration, i.e., Swiss law, was deemed to be the governing law of the arbitration clause (and consequently the law to determine the arbitrability of the dispute).

In practice, one may wonder whether the proper law of the arbitration clause would be deemed to be other than either the law of the main agreement in which it is contained, or the law of the seat of arbitration.
page "142"

v. Proper Law of the Contract

There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause. This position was stated by Derains in the following terms:

"The autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other as evidenced by the fact that the acceptance of the contract entails acceptance of the clause, without any other formality ...". (61)

In the ICC Award in Case No. 2626, (62) the arbitral tribunal decided that "it is commonly accepted that the choice of the law applicable to the principal contract also tacitly governs the situation of the arbitration clause, in the absence of any specific provisions".

In the ICC Award in Case No. 6379, (63) the parties had provided for the settlement of disputes arising from their agreement in accordance with the ICC Arbitration Rules. The agreement also provided for the application of Italian law. The tribunal held that as the agreement was governed by Italian law, the validity of the arbitration clause must be ascertained according to Italian law. However, the tribunal also purported to apply the provisions of the New York Convention of 1958, as part of the Italian legal rules, which prevails over Italian rules of a national origin in the Italian legal system.

In the ICC Award in Case No. 6752, (64) the arbitration tribunal quoted the provision of the contract between the parties,

"in respect to what has been expressly provided herein, reference is to be made to the laws, usages and customs of Italian law". The tribunal consequently concluded that

"this provision necessarily applies to the arbitration agreement contained in the same Article" . (65)

In the ICC Award in Case No. 6840, (66) the arbitration tribunal held that A was right to sustain that it is reasonable and natural, in the absence of any express choice of the parties, to submit the arbitration clause to the law governing the contract in which it is contained. (67)

In the Interim Award in ICC Case No. 5505, (68) the arbitration tribunal considered that parties to an international contract are likely to have in mind the problems of jurisdiction or arbitration, possibly of substantive law, but not of the law governing the arbitration *page "143"* clause itself, which is mostly thought to be governed either by the selected law or by the law of the place of arbitration. In this case, there was "no evidence that the parties might have intended or at least had reasons to submit the

arbitration clause to a specific law". (69) Accordingly, the substantive law chosen to govern the main contract was held to govern the arbitration clause as well.

It was similarly held in an Award of 5 September 1977 of the Arbitral Tribunal of the Netherlands Oils, Fat and Oilseeds Trade Association which reads that "Dutch law is applicable to the contract and, consequently, to the arbitral clause". (70)

This view had previously been characterized as a "substantive rule of international commercial law"(*une règle matérielle du droit du commerce international*), regarding the similar wording of the ICC Award in Case No. 2626. (71) However, awards rendered in Switzerland tend to choose the law of the seat of arbitration as the proper law of the arbitration clause, which is the other major trend as regards the law applicable to the substance of the arbitration clause.

IV. Conclusion

The form and substance of the arbitration clause are generally governed by the same principles as regards the applicable law whether this issue is to be entertained by arbitration tribunals or national courts. This similarity echoes the similarities between the principles set out in international conventions, domestic statutes and rules of private arbitration organizations. This mutual effort derives from the ultimate purpose of the arbitration process, that is to say, the rendering by the arbitration tribunal of an award enforceable by national courts, which explains the propensity of arbitration tribunals to abide by the minimum requirements set out by national courts. In this respect, the general tendency is to validate the arbitration agreement and to enforce the award rendered thereof. Accordingly, the standards as regards the form and substance of the arbitration clause are more lenient. The control of the form and substance of the arbitration clause seems to be merged in one minimum requirement which consists in establishing the consent of the parties to submit their disputes to arbitration.

However, this issue shows discrepancies as regards the nature of the rules applicable to the form and substance of the arbitration agreement. The leading system set out in international documents provides for the application of a governing law which is meant to be a whole body of rules of a national law. However, the tendency to favour arbitration, for instance, the minimum requirement of the consent of the parties, gives rise to material rules which may either be general principles of law as applied by national courts of different legal systems or principles of the lex mercatoria detached from any legal system. However their scope is strictly determined as regards the issue of the law applicable to the substance and form of the arbitration agreement and the application of *page "144"* national laws prevails in this field. Art. V(1)(*a*) of the New York Convention which provides that recognition and enforcement of the award may be refused on the ground that the arbitration agreement is void 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, may be the key to today's strict control of national courts and national legal systems on arbitration agreements compared to principles as regards the law and rules of law applicable to the merits. *page "145"*

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1 Ph. FOUCHARD, E. GAILLARD and B. GOLDMAN, *Traité de l'arbitrage commercial international* (1996) § 7, pp. 11-12, which refers to "*convention privée*"and "*mission juridictionnelle*".

2 Submission agreements represent a very small percentage of the number of arbitrations. Whilst none of the major institutions keep specific records, the ICC and the American Arbitration Association believe there to be an exceptionally small number of submissions to arbitration, and the LCIA advises that of the 100

arbitrations currently ongoing, all are based on an arbitration clause in a contract, and none on a submission agreement.

[3] See Matthieu de BOISSÉSON, *Le droit français de l'arbitrage*, 1st ed. (1990) pp. 19-23. See also Art. 2061 of the French Civil Code.

[4] For example, in England *Scott v. Avery* clauses, which establish the obligation to arbitrate and to abide by the arbitral award, have long been recognized as valid, since the House of Lords held that these clauses did not oust the courts' jurisdiction, but just postponed it.

[5] *Cour de cassation*, 4 July 1972, Clunet (1972) p. 843; Revue Critique de Droit International Privé (1974) p. 82; Rev. arb. (1974) p. 89.

[6] W.L. CRAIG, W.W. PARK and J. PAULSSON, *International Chamber of Commerce Arbitration*, 2nd ed. (1990) p. 252.

[7] See H. SMIT, "An inside view of the ICC court", 10 Arbitration International (1994) p. 53, and "The future of international commercial arbitration: a single transnational institution?", 25 Columbia Journal of Transnational Law (1986) p. 9 at pp. 26-27.

[8] See also arbitration agreement referred to as "ad hoc submission"in M.J. MUSTILL and S.C. BOYD, *The Law and Practice of Commercial Arbitration in England*, 2nd ed. (1989) pp. 7-8.

[9] For an analysis of different wording alternatives, see D.St.J. SUTTON, J. KENDALL and J. GILL, *Russell on Arbitration* (1997) p. 60 et seq.

[10] FOUCHARD, GAILLARD and GOLDMAN, *op. cit.*, fn. 1, § 424 pp. 237-238; MUSTILL and BOYD, *op. cit.*, fn. 8, p. 62; A. REDFERN and M. HUNTER, *Law and Practice of International Commercial Arbitration* (1991) p. 149; CRAIG, PARK and PAULSSON, *op. cit.*, fn. 6, p. 50.

[11] See REDFERN and HUNTER, *op. cit.*, fn. 10, p. 90.

[12] Art. 1 of the UNCITRAL Arbitration Rules provides, in pertinent part:

> "Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing."

[13] *Corte di Cassazione*, 28 October 1993, no. 10704 (*Robobar Ltd. v. Finncold*), A.J. van den BERG, ed., ICCA *Yearbook Commercial Arbitration* XX (1995) pp. 739-741 (hereinafter *Yearbook*).

[14] The Court also rejected the argument that the arbitration clause was accepted through performance of the contract (under Italian law), on the basis that the New York Convention overrides national law, the arbitration clause is autonomous and its

> "validity and effects are to be assessed independently from the validity and effects of the contract"

.

[15] It is worth noting that under certain US state laws an arbitration agreement had to be signed or initialled by the parties or be in bold type to show that the parties had recognized that they were excluding the jurisdiction of the courts, e.g., Texas, Montana. This is not the case for international cases where the Federal Arbitration Act applies. Hence, The US Court of Appeals (Fifth Circuit) has ruled that the qualifications applicable to arbitration agreements do not apply to arbitral clauses and therefore a signature is not required for arbitral clauses: *Sphere Drake Insurance PLC v. Marine Towing Inc.*, American Maritime Cases (1994) p. 1582.

[16] See CRAIG, PARK and PAULSSON, *op. cit.*, fn. 6, pp. 75 and 185-186.

[17] *Progressive Casualty Insurance Co. et al. v. C.A. Reaseguradora Nacional de Venezuela*, 802 Federal Supplement (1992) p. 1070 et seq.

[18] See for example, the District Court of New York in *National Development Co. v. A.M. Khashoggi*, 781 Federal Supplement (1992) p. 960 et seq.; *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*

et al., 969 Federal Reporter 2d Series (1992) p. 766 et seq.; and *Filanto SpA v. Chilewich International Corp.* (14 April 1992), 789 Federal Supplement (1992) p. 1230 et seq.

19 See REDFERN and HUNTER, *op. cit.*, fn. 10, pp. 73-74; K.-P. BERGER, *International Economic Arbitration* (1993) p. 181 et seq.

20 See the ad hoc arbitration of April 1982 (*Company Z (Republic of Xanadu) v. State Organization ABC (Republic of Utopia)), Yearbook* VIII (1983) p. 94, discussed below under III. *I.b.* i.

21 The US Supreme Court held that New York law governed the arbitration agreement, since its provisions were modelled upon the New York Insurance Law, and consequently applied New York law to conclude that the claim was not arbitrable. Decision of 10 April 1990 (*J.P. Corcoran v. Ardra Insurance Co., Ltd., R.A. Di Loreto and J.S. Di Loreto), Yearbook* XVI (1991) pp. 663-668 at p. 667.

22 The US District Court of Louisiana decided in *Japan Sun Oil Co. Ltd. v. The M/V Maasdijk et al.*, American Maritime Cases (1995) p. 726 et seq., that the US Federal Arbitration Act and not the Carriage of Goods by Sea Act ruled the validity of arbitration agreements contained in maritime bills of lading, since the former was enacted later and was more specific than the latter.

23 This was considered by the Indian Supreme Court (with reference to Sect. 2 of the Foreign Awards (Recognition & Enforcement) Act, 1961, which implements the New York Convention). It held that consultancy services for promoting a commercial transaction was a "commercial transaction". Supreme Court of India, 10 February 1994 (*R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co. and another*), Supreme Court Journal (1994, no. 1) p. 658 et seq.

24 US District Court of New Jersey, 28 April 1992 (*Jones v. Sea Tow Services Freeport New York, Inc.*), 828 Federal Supplement (1993) p. 1003 et seq. and 1 July 1992 (*J.H. Brier v. Northstar Marine, Inc. et al.*), American Maritime Cases (1993) p. 1194 et seq.

25 US Supreme Court, 17 June 1974 (*Fritz Scherk v. Alberto-Culver Co.*), 417 US 506 and 17 July 1992 (*Riley v. Kingsley Underwriting Agencies Ltd.*), 969 Federal Reporter 2d Series (1992) p. 954 et seq.

26 See the *Corcoran* decision, fn. 21.

27 Italian *Corte di Cassazione*, 15 July 1994 (*Conceria G. De Maio & F. snc v. Ditta EMAG AG*), 596 Federal Supplement 1113, where the Court assessed the validity of the arbitration clause (and also the arbitration proceedings) under the law of the place where the arbitral award was rendered (English law, in that case) to grant the winning party leave to enforce the award against an Italian company. In *Filanto SpA v. Chilewich International Corp.*, decided on 14 April 1992, 789 Federal Supplement (1992) p. 1230 et seq., the US District Court of New York decided that federal law, and not state law, applied to the contract, and that the

> "agreement in writing"

requirement present in the Arbitration Convention should be interpreted in light of, and with reference to, the substantive international law of contracts embodied in the Sale of Goods Convention, of which both countries related to the case were signatories.

28 For example, *Dunhill Personnel System Inc. v. Dunhill Temps Edmonton Ltd. et al.*, 30 September 1993.

29 Comment of Yves DERAINS in J.-J. ARNALDEZ, Y. DERAINS and D. HASCHER, *Collection of ICC Awards 1991-1995* (1997) p. 472.

30 ICC Case No. 5721, Clunet (1990) p. 1020; Yves DERAINS, *op. cit.*, fn. 29, pp. 16-17.

31 For example, Art. 1 Geneva Protocol on Arbitral Clauses 1923.

32 See also Art. 1 European Convention on International Commercial Arbitration 1961.

33 See REDFERN and HUNTER, *op. cit.*, fn. 10, p. 257 et seq.

34 See, e.g., also Art. 23 LCIA Arbitration Rules 1998; Sect. 7 English Arbitration Act 1996; Art. 178(3) Swiss Private International Law Act.

35 Art. 36(1)(a) UNCITRAL Model Law and Art. V(1)(*a*) and (*e*) New York Convention.

36 *Scherk*, fn. 25; US Supreme Court, 2 July 1985

(*Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*), 473 US 614; House of Lords, 21 January 1993 (*Channel Tunnel Group Ltd. and Another v. Balfour Beatty Construction Ltd. and Others*), AC (1993) p. 334. In that case the House of Lords held that courts have an inherent power – and not only the duty – to stay proceedings brought before them in breach of an agreement to decide disputes in some other way, such as a panel of experts (not strictly an arbitral tribunal).

37 US case law also supports this conclusion: In *Jones v. Sea Tow Services Freeport New York Inc*, fn. 24, the Court stayed the action "pending arbitration in London in accordance with the provisions of the contract between the parties".

38 Sect. 4 Federal Arbitration Act 1925. In *Japan Sun Oil, Ltd. v. The M/V Maasdijk*, fn. 22, the US District Court of Louisiana pointed out that agreements to arbitrate were heavily favoured and rigorously enforced by the US courts and that as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, especially in those agreements affecting interstate and foreign commerce. It also held, in accordance with previous case law, that arbitration should not be denied "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue...". See also *Filanto*, fn. 18 and *Brier*, fn. 24.

39 *Corte di Appello*, Genoa, 7 May 1994 (*Fincantieri – Cantieri Navali Italiani SpA and Oto Melara SpA v. Ministry of Armament, Supply, Directorate of Iraq and Republic of Iraq*), *Yearbook* XXI (1996) pp. 594-601.

40 Dominique HASCHER, "Recognition and Enforcement of Judgements on the Existence and Validity of an Arbitration Clause under the Brussels Convention", 13 Arbitration International (1997) p. 33 and Hans van HOUTTE, "May Court Judgements that Disregard Arbitration Clauses and Awards Be Enforced under the Brussels and Lugano Conventions?", 13 Arbitration International (1997) p. 85.

41 See REDFERN and HUNTER, *op. cit.*, fn. 10, p. 135.

42 This is similar to the effect of the ICC Terms of Reference. Even if parties had not made a valid arbitration agreement, by signing the Terms of Reference, they will have formally accepted there to be an agreement for the issues detailed in the Terms of Reference to be resolved by arbitration.

43 Arts. 1442 and 1447 CCP.

44 This could be in the form of a minute of the arbitrators and the parties and signed by them (Art. 1449 CCP).

45 Art. 186(2) PILA.

46 Art. 178(2) PILA.

47 See fn. 20.

48 *Ibid.*, p. 106.

49 *Ibid.*, p. 116.

50 S. JARVIN, Y. DERAINS and D. HASCHER, eds., *Collection of ICC Arbitral Awards 1986-1990* (1994) p. 401 et seq.

51 *Ibid.*, p. 409.

52 *Ibid.*, pp. 409-410.

53 26 March 1991, Rev. arb. (1991) p. 456; see FOUCHARD, GAILLARD and GOLDMAN, *op. cit.*, fn. 1, p. 246.

54 121 Arrêts du Tribunal Fédéral (1995) III, p. 40 et seq.

55 ARNALDEZ et al., *op. cit.*, fn. 29, p. 75.

56 *Ibid.*, pp. 77 and 85. The award states that as the Swiss provisions are substantive rules, only Swiss law applies to determine the formal validity of the arbitration clause. Furthermore, the defendant cannot rely on its own law to contest the formal validity of the arbitration clause.

57 ARNALDEZ et al., *op. cit.*, fn. 29, p. 53.

58 *Ibid.*, p. 56.

59 *Ibid.*, p. 555.

60 *Ibid.*, p. 567.

61 Yves DERAINS, "The ICC Arbitral Process, Choice of Law Applicable to the Contract and International Arbitration", 6 ICC International Court of

Arbitration Bulletin (1995, no. 1) pp. 16-17.

62 S. JARVIN and Y. DERAINS, *Collection of ICC Arbitral Awards 1974-1985* (1990) p. 316.

63 ARNALDEZ et al., *op. cit.*, fn. 29, p. 134.

64 *Ibid.*, p. 195.

65 *Ibid.*, p. 197.

66 *Ibid.*, p. 467.

67 *Ibid.*, p. 132.

68 JARVIN et al., *op. cit.*, fn. 50, p. 142.

69 *Ibid.*, p. 149.

70 *Yearbook* IV (1979) p. 218.

71 JARVIN and DERAINS, *op. cit.,* fn. 62, p. 316.