

Swiss Commercial Law Series

Marc Blessing

**Impact of the Extraterritorial
Application of Mandatory Rules
of Law on International Contracts**

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Impact of the Extraterritorial
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by
Marc Blessing

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Introduction

Assume that the parties had themselves designated the law governing their contractual relationship. Or, alternatively, assume that the governing law (or rules of law¹) has (have) been determined by an arbitral tribunal: Is this then the complete answer as far as the applicable law is concerned?

The answer is: **NO**. Indeed, a substantial and growing percentage of cases is **affected by the interference of mandatory rules of law**² which claim or demand to be respected or to be applied directly, irrespective of any law or rules of law chosen by the parties or determined by the arbitral tribunal.³ Most of these rules are of a public law nature; some of them (but of course not all) may form part of a State's public policy ("*ordre public*"). Should such rules or norms be applied? This is, today, **one of the most difficult questions** with which an arbitrator may be confronted in more than fifty percent of the cases.

¹ On the topic of the determination of the applicable law or rules of law, see Marc Blessing, *Choice of Law in International Arbitration*, 14 J.Int.Arb. 2/1997, 39–65; Marc Blessing, *Regulations in Arbitration Rules on Choice of Law*, ICCA Congress Series No. 6, 1996, 391–446; most recently: Marc Blessing, *The Law Applicable to the Arbitration Clause and to Arbitrability: Academic Solutions versus Practice and "Real Life"*, being published in ICCA Congress Series No. 9 (1999).

² In the wide sense, these include mandatory rules (i) of an internal or domestic mandatory nature, and (ii) those of a foreign legal order, and (iii) those of an international character, claiming application irrespective of any law chosen or determined as applicable, and (iv) those pertaining to a truly supra-national order (such as sanctions of the UN Security Council). In general, their aim is to protest economic, social or political interests of a particular state, or a wider community, beyond the interests of individual parties.

³ There exists an abundance of scholarly writings on this topic. See hereto the selection made in the general bibliography at the end of this article.

I. Some Cases From Recent Arbitral Practice

The following are examples of problems which had to be adjudicated in recent arbitral practice:

1. Should an arbitral tribunal which has to adjudicate a contract between a French supplier and a Romanian buyer apply **Romanian exchange control regulations** which were invoked as a defense to effectuate an overdue payment, even though the parties had agreed that the contract would exclusively be governed by the Swiss substantive laws? – Held, the particular Romanian regulations were, after careful analysis, regarded to be akin to a confiscation of the foreign investor's assets. They were disregarded by the tribunal, which concluded that the administrative regulation was used, in that particular case, in a discriminating way outweighing (other motives which typically underlay such regulations, such as the state's concern to stabilise the balance of payments preventing an undesired outflow of currencies). The tribunal ruled that it should not become an instrument in such attempt and its role should not be disqualified to act as a guardian of the foreign governmental agency. Unpublished Award, 1981.
2. Should an arbitral tribunal **exonerate** the Polish importer of a metallurgical plant purchased from a German manufacturer because, in a certain **Decree issued by General Jaruzelski** in December 1981, the **import** of that plant became all of a sudden prohibited? In this context, is it material to check whether such **import restriction** was directed for the purpose of stopping only one particular project, or whether the embargo aimed at stopping all imports (as in fact was the case, due to a break-down of the Polish economy)? Is the contract, in such situations, affected by an excusable *force majeure* and, if so, what are the financial consequences flowing therefrom? – Regarding this case see Footnote 73.
3. Should an arbitral tribunal, having to consider a contract under English law, apply a **US export restriction for computer software** and computer chips, preventing sophisticated sales to a state company of the former Soviet Union? – The case did not have to

go forward; probably, the applicability of the US restrictions would have been denied by the Tribunal.

4. Should an arbitral tribunal sitting in Stockholm affirm an extraterritorial application of the **U.S. RICO Act** (Racketeer Influenced and Corrupt Organizations Act of 1970)?⁴ – Held, the applicability was denied⁵, see Footnote 68.
5. Should a tribunal apply US President Carter’s **“Iranian Assets Control Regulation”** of 14 November 1979, which operated as a freeze order addressed to a wide range of “persons subject to US jurisdiction” restraining Iranian public and private persons from withdrawing funds from American banks, their subsidiaries and branches? Or should it rather support Iran’s allegation that the American exchange control regulation was misused as an economic weapon outside the permissive scope of Article VIII Section 2 (b) IMF Agreement? – The case did not have to proceed as a consequence of the Algier’s Agreement of 19 January 1981. In the author’s view, the arbitral tribunal would most probably have reached the conclusion that the “Carter Freeze Order” would not have deserved recognition by an international arbitral tribunal.
6. More generally, how should an international tribunal look at the numerous **US trade sanctions enforced by OFAC** (Office of Foreign Assets Control of the US Department of Treasury)⁶ and other

⁴ Arbitrability of RICO claims has been affirmed by the US Supreme Court; see the well-known decision in *Shearson/American Express v. McMahon*, 107 S.Ct. 2332, at 2345 (1987). This was one of the three landmark decisions, standing in line with the earlier decision in re *Scherk v. Culver* (417 U.S. 505, 1974), where arbitrability over securities’ issues had been confirmed, and the decision in *Mitsubishi v. Soler Chrysler-Plymouth* (473 U.S. 614, 1985), where arbitrability over US antitrust issues had been affirmed (subject, however, to a “second look”, compare hereto Footnote 43 below).

⁵ For extracts of this case, see Böckstiegel, *Acts of State and Arbitration*, 1997, 149–160; see also Serge Lazareff’s article quoted in the Bibliography.

⁶ There are currently 11 OFAC Programs, each with distinct sets of restrictions. All of them prohibit or control activities of US persons, restrict economic dealings with and/or block assets of targeted foreign countries, entities or nationals. An excellent overview was provided by Karen A. Kerr, *Summary of U.S. Foreign Asset Control Regulations*, delivered at the occasion of the Vancouver IBA Conference, September 1998.

programs such as the “**Export Control Regulations**” monitored by the US Department of Commerce, the “**TAR Regulations**” restricting the sales of military goods, the “**Antiboycott Programs**” of the US Department of Commerce, the prohibitions against bribery of foreign officials by the “**Foreign Corrupt Practices Act**”, the “**Iran and Libya Sanctions Act of 1996**” and the tightening of the economic embargo against Cuba according to the so-called “**Helms Burton Act**”⁷

7. Should an Arbitral Tribunal sitting in Germany in respect of a dispute between an Italian supplier and a **Belgian distributor**, notwithstanding the choice of law in favour of the Italian substantive laws, apply the (well known) **Belgian mandatory laws protecting agents and distributors in Belgium** (by requiring a 36 months’ notice period and by providing a local *forum*)? – Held, the applicability of Belgian law was denied; see the Award in ICC Case No. 6379, 1990, discussed in ICCA Yearbook 1992, 212–220.
8. Should an arbitral tribunal which has to decide a dispute between a (formerly) Czech supplier and a Syrian State-controlled entity which had been concluded under Swiss law, consider or apply a **Syrian Legislative Decree** which **unilaterally** changed the **status** of the Syrian contract party (by directing that the party shall no longer be the State-controlled entity but only the indebted local operating company of the plant)? – Held, the application of Syrian

⁷ Since World War I the **USA** declared in total about 150 sanctions, whereof about 100 since WW II and about as much as **60** only since 1993. Sanctions thus seem to be a center part of US’s strategy. US politicians strongly seem to believe in the necessity of sanctions. Many businessmen, however, question their effectiveness. – This author would by far exceed his competence if he expressed a view as to the necessity of that great number of sanctions. Nevertheless, one thing is clear: A sanction is a sort of breakdown, a failure; it may mean isolation (*vide* Cuba), and may seriously set back the development of a country and its integration within the world-family of nations. And it may hurt the most suffering part of the population. Therefore, we all have to **strive for better solutions**. Sanctions might have been necessary in the 20th Century; for the next millennium, however, we should work on better solutions, on mutual assistance, mutual respect and integration in all fields (**rather than isolation**). **The economical integration, not the isolation, holds the key for future stability, prosperity and peace**. Sanctions should no longer be on the customary *ordre du jour*, but should essentially be reserved to UN Resolutions as a kind of *ultima ratio*. This is a personal view of the author.

law was denied, Interim Award on Jurisdiction in ICC Case No. 5977 (1988).

9. Should the arbitral tribunal accept the situation that, in the framework of a contract between a French supplier and a Libyan co-operative, the superior Libyan body simply **dissolved** the co-operative by an act of State? Was the arbitral tribunal correct to disregard that act and to decide that, in so doing, the Libyan State (or the particular authority dissolving the co-operative) made itself a party to the contract such that the arbitral procedure continued against that Libyan State party as a defendant party? – So decided in the Award in ICC Case No. 7245 (1994).
10. How should an arbitral tribunal deal with the **expropriation** of an oil drilling and oil refining facility directed through an act of State, although the relevant contract and concession was made under foreign law and with a reference to general principles of law? – See the well-known three Libyan petroleum cases.⁸
11. How should an arbitral tribunal, sitting in the United Arab Emirates, having to apply Emirates law and general principles of law in a gas delivery contract between a UAE State-controlled company and an American company, deal with the situation at the UAE Council of Ministers **prohibiting** the determination by ICC arbitration of that dispute by way of private arbitration, essentially on the rationale that arbitral jurisdiction would not be accepted in a matter concerning a State's natural resources? – The intervening Council of Ministers' decision was disregarded in an extensive 160 page ICC Award rendered on 18 January 1988 (unpublished, ICC Case No. 5331).
12. Should an arbitral tribunal be concerned with the prohibition by certain Islamic countries to pay **interest** on outstanding debts, even though the contract in question is governed by a law which

⁸ *BP Exploration Company (Libya) Ltd. v. Libyan Arab Republic, Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic and Libyan American Oil Company v. Libyan Arab Republic*, discussed in numerous reports, e.g. see Georges Delaume, *State Contracts and Transnational Arbitration*, *American Journal of International Law* 75, 1981, 784 et seq., in particular 791 et seq.

does not know such a prohibition? – The issue is complex and has been solved differently; this cannot be discussed here.⁹

13. Should an arbitral tribunal having its seat in Switzerland and sitting over a dispute between a German manufacturer/licensor and a French distributor/licensee whose contract has been made subject to Swiss law, apply the **EU Competition Laws**, in particular Article 85/86? – See the discussion in Part. V. below; see also, in a case between Italian and Belgian parties, the decision of the Swiss Federal Supreme Court in ATF 118 II 193, according to which an Arbitral Tribunal sitting in Switzerland **has to** affirm its jurisdiction to examine the contract under the tests of Articles 85/86 Treaty of Rome.
14. Should, in a similar scenario of a licence agreement between a German manufacturer and a US licensee (whose contract has been made subject to Swiss law), apply – over and above the Swiss substantive law – **the U.S. antitrust laws**? In particular, should the arbitral tribunal affirm its jurisdiction (as well as objective arbitrability) in so far as the U.S. licensee, in the framework of its counterclaim, demands treble damages on the basis of the Clayton Act? – See the Hottinger/Fisher case discussed in Footnote 40.
15. Should an arbitral tribunal sitting in The Hague exonerate the non performance by a European Subsidiary of a large US Food Company which refused to sell food products to a Venezuelan buyer on the argument that the **trade sanctions against Cuba** (according to the Helms Burton Act) might be violated, although the contract had been made under the laws of the Netherlands Antilles? – The case did not have to go forward; but most probably, the applicability of the Helms Burton Act would have been denied.

⁹ See hereto David J. Branson/Richard E. Wallace, *Awarding Interest in International Arbitration: Establishing a Uniform Approach*, Virginia Journal of International Law, Vol. 28 No. 4 (1988), 919–947; Otto Sandrock, *Verzugszinsen vor internationalen Schiedsgerichten: insbesondere Konflikte zwischen Schuld- und Währungsstatut*, Jahrbuch für die Praxis der Schiedsgerichtsbarkeit, Vol. 3, 1989, 64–99; see also most recently Klaus Peter Berger, *Der Zinsanspruch im Internationalen Wirtschaftsrecht*, *RebelsZ* Vol. 61 No. 2 (April 1997), 313–343.

16. Should a tribunal, over and above the applicable German law, directly **apply the UN Security Council's sanctions** imposed (on the basis of Art. VII of the UN Charter) against former Yugoslavia? And if so, what are the legal effects thereof?¹⁰

These are some of the situation taken from “actual life”.

¹⁰ According to the UN Charter, the Member States are bound to implement the UN sanctions in their domestic laws (in most countries, these sanctions will not be directly applicable, but will require transformation into domestic law).

II. Different Categories of Mandatory Rules

As shown in these examples,¹¹ the interfering mandatory rules may be of very different character, in two respects:

1. As to Their Origin

The interfering rules might pertain either

- (i) to the **proper law** of the contract (*lex causae*),

Such mandatory rules were long perceived as being *eo ipso* applicable whereas, in contrast, mandatory rules pertaining to another legal order were regarded as applicable under very restrictive notions only.¹² These perceptions, on both counts, have slightly changed in recent years. In respect of the first category, views are expressed that they should be **scrutinized under the same tests** as those pertaining to an extraneous legal order, for very well justified reasons. Indeed, they hardly deserve a paramount “application-worthiness” *per se*. In my view, such scrutiny – as to their **“application-worthiness”** under a rule of reason – should be made in both cases: where the parties themselves had chosen the applicable law, and also where they failed to make a choice such that the law or rules of law had to be determined by the Arbitral Tribunal.

- (ii) or to the law governing at the **place of arbitration** (*lex fori*),

¹¹ A thorough study comes from Natalie Voser, *Mandatory Rules of Law as Limitation to the Law Applicable in International Commercial Arbitration*, American Review of International Arbitration, Vol. 7 Nos. 3 and 4, 1996, 319–358; she analyses four different cases as a *point de départ* for her detailed report which also contains numerous references to scholarly writings and jurisprudence.

¹² See hereto e.g. the reported ICC Cases 1399, 1512, 3913, 4125, 4604, 5622, 6248, 6379 and the non-reported extensive Case No. 5331.

Should an arbitrator at all be concerned with mandatory rules as might be applicable at the place of arbitration (apart from the mandatory provisions as are contained in the applicable Arbitration Act, which might be very few only)? Most scholars, for good reasons, will say NO, because it is not the duty of an Arbitral Tribunal to serve as the guardian of policing norms of the host state, in clear contrast to its State courts. Indeed, I find the reasoning in the *ICC Award No 5946* (1990) **unconvincing and wrong**, where the Arbitral Tribunal sitting in Switzerland thought that it should not, for reasons of purely Swiss policy, allow a claim for exemplary damages in the amount of USD 100'000; it denied the claim *inter alia* on the argument that damages going beyond compensatory damages (and thus contain an element of punishment) should be considered contrary to Swiss public policy which, as the Tribunal thought, should be respected.¹³ – As another example, see the equally questionable decision rendered on 17/18 May 1984 by the USSR Maritime Arbitration Commission which had to deal with a bill of lading governed by the US Carriage of Goods by Sea Act of 1936, and nevertheless reached the conclusion that the COGSA did not exclude the applicability of mandatory provisions of the USSR Merchant Shipping Code (*Award No. 25, 1981*, excerpts in *ICCA Yearbook 1989*, 203–206. – In contrast hereto, see the case referred to in Footnote 40 where jurisdiction to rule on treble damages was affirmed by the Tribunal sitting in Switzerland, although the notion of exemplary or treble damages is not known in Switzerland.

(iii) or to the legal order of a **third country**,

This is the classical/typical case: public law rules of a foreign state or third country¹⁴, such as for instance **trade sanctions**, claim to be applied, or to be taken into account, **over and above** the *lex voluntatis* chosen by the parties to a particular transaction, or the

¹³ See *ICCA Yearbook 1991*, 97–118, at 113.

¹⁴ Some of these norms pertaining to the domain of public law may also constitute, and form part of, public policy (either in the sense of domestic public policy of the particular country, or of a wider notion of public policy in international affairs). Obviously, only the most fundamental public law rules will deserve to also be qualified as pertaining to public policy.

law determined as being applicable by a court or arbitral tribunal.¹⁵

- (iv) or to a **supranational order**, such as e.g.
 - resolutions of the **UN Securities Council**, or
 - **EU competition laws**, or
 - other norms pertaining to an **international public policy**, or
- (v) lastly, to the legal order governing at the potential place **where enforcement** of the award might have to be sought.

2. As to Their Policies and Cultural Values or Social Interests That Aim to Be Protected By the Mandatory Rule

As we will see later, not only the precise origin of the mandatory rules is of significance, but also, and indeed foremost, the values they aim to protect. It is therefore necessary in each case to investigate into their “*raison d’être*”, quite in the sense of looking behind the curtain. In fact:

- (i) some are aimed solely at protecting **certain monetary** interests of the State, such as **exchange control regulations**, or money-transfer restrictions, gold clauses;
- (ii) some are of a **merely policing or fiscal** nature (including customs regulations),
- (iii) whereas others aim at safeguarding certain **economical (sometimes truly vital) interests** of a state, such as **import and export** restrictions,

¹⁵ Compare hereto the reported ICC Cases Nos. 1859, 2136, 2216, 2478, 2811, 3916, 4132, 6294 and 6320, briefly described by Bernd von Hoffmann, *Internationally Mandatory Rules of Law Before Arbitral Tribunals*, at 14/15.

- (iv) some aim at the protection of the people's **welfare**, including the protection of the economically weaker party, protection of the uninformed investor in securities' dealings/stock exchange transactions and the like
- (v) some aim at serving **political or military interests**, such as some of the embargoes and boycotts against a particular country; during the Second World War and thereafter see e.g. the various US and UK Trading With the Enemy Acts,
- (vi) some aim at protecting the **environment** and **animal** welfare, e.g. restrictions on the sale of protected animals and plants
- (vii) some aim at protecting the **free and fair trade** and the functioning of an effective market, such as **competition laws**, anti-corruption statutes etc.

III. Trade Sanctions and Embargoes in Particular

1. Introductory Note

The history of sanctions is probably as old as mankind. However, it seems that the “popularity” of sanctions had never peaked as high as during the past decade. On the political level, **diplomatic** sanctions have been and are being used. On the **military** level, sanctions will mean the use of force. In the **economic** field, sanctions are used as a tool for sanctioning or enforcing a particular behaviour.¹⁶ Hereinafter, I will only deal with economic sanctions and embargoes.

Economic sanctions, in most cases, are used to serve political goals. They may emanate from one particular country (such as the USA¹⁷), or may emanate from a series of states acting in concert. Obviously, **unilateral** sanctions may not prove to be particularly effective

¹⁶ See hereto the excellent analysis provided by Frank Montag at the IBA Conference in Vancouver, September 1998, titled *Economic Sanctions in an International Legal Context and the European Union Perspective*, available at the IBA under Ref. No. VR82/C.

¹⁷ The USA have imposed over 60 trade sanctions only during the past five years. The oldest still active programme is the sanction against **North Korea**, dating back to 1950, prohibiting all exports and imports. The **Cuba** sanction of 1963 further prohibits the entry into US ports by vessels within 180 days of calling on Cuba. Sanctions against **Libya** date back to 1986. **Iran** sanctions in the aftermath of the hostage crisis were in place 1979–1981, and limited import sanctions were imposed in 1987 (expanded in 1995) in order to deter the support of terrorism. **Iraq** sanctions linked to those of the UN Security Council came into force on 2 August 1990. Specific sanctions addressed the **UNITA**, the union campaigning for the independence of Angola, with a limited arms embargo in 1997, expanded in 1998 to further import/export restrictions and a blocking regime for assets of UNITA. Limited sanctions against **Burma** were the response to large scale repression; these sanctions restrict new investments. **Sudan** sanctions as a response to the alleged support by Sudan of terrorism were decreed on 3 November 1997. Several sanctions had to do with the **Yugoslavia**, dating back to 1992 and 1994, with more recent sanctions against **Serbia** and **Montenegro**, of 9 June 1998. – There exist three sets of sanctions targeting terrorist organisations, as well as sanctions against narcotics traffickers; see hereto Karen A. Kerr, *Summary of U.S. Foreign Asset Control Regulations*, IBA paper presented in Vancouver, September 1998.

because they can easily be circumvented. Nevertheless, it is quite surprising how frequently for instance the United States, particularly in the past five years, have resorted to this tool. In contrast, **multilateral** sanctions will be the product of debated, collective political and economic goals and may receive much better international support. Embargoes and – if applied more extensively – boycotts, may be ordered against a state as a primary target, or against companies/individuals doing business with a particular state, or against certain persons (such as the legislation in some Arab countries aiming at boycotting business with persons suspected of having “zionist inclinations”).

Sanctions and embargoes may sometimes have a **specific** focus, such as embargoes on weapon, or in respect of particular raw materials (e.g. the embargo by certain Arab states against Israel following the Kippur war curtailing the oil supplies), or in respect of specific technology (e.g. during the times of the cold war, sensitive strategic goods including computer hard- and software could not be exported to the East Bloc and the Soviet Union). Where sanctions and embargoes apply generally, certain trade may be exempted for humanitarian reasons so as to allow the supply of food and medicine (e.g. in the case of Iraq).

A common feature of sanctions is the label of “**unfriendliness**”. Most of them will be issued in breach of rules of international law and in violation of the notion of free trade between states and individuals. The issue therefore does arise as to their **justification** in law:

Article 2 (4) of the **UN Charter** prohibits the use of **force**, and Article 2 (7) states the principle of **non-intervention**. The term “force” as used in Article 2 (4) remained without definition, and it was debated whether, apart from military force, also the exercising of political or economic pressure and trade boycotts would fall under the term “force”. The view was voiced that force, in its limited interpretation, would only cover a question self-defence against an armed attack and sanctions ordered by the UN Security Council, but would not also include **economic** threats. Another view, mostly voiced by developing states and parts of the former East Bloc, maintained that all forms of pressure, including those of a political and economic character, were meant to be outlawed. However, for instance the US economic sanctions directed against Nicaragua (trade embargo) was not regarded, by the International Court of Justice, as reaching to the level of a violation of the principle of non-intervention (ICJ Reports 1986, 126).

Similarly, the **removal of unilateral benefits** (which previously had been granted on a goodwill basis and not due to an international treaty obligation) would not normally be regarded as a retortion or sanction. Frank Montag, in his report, refers to the tariff benefits granted by the European Community under its Generalized System of Preferences (“GSP”), under which scheme the Community, for instance, reserves its right to withdraw benefits in whole or in part with regard to countries that engage in unacceptable forms of forced labour (e.g. in the domain of agricultural products).¹⁸

The most critical questions arise, however, in the domain of **economic coercion**. The issue will be to know whether such coercion falls under the scope and reach of the principle of non-intervention under Article 2 (7) of the UN Charter. While in 1969 the UN General Assembly had condemned the “*use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind*”¹⁹, the critical border-line question will arise to determine whether the specific purpose of a sanction was to intervene in the domestic affairs of another state. Thus, the investigation into the aims **behind** any such sanctions will be a decisive factor. For example, the USA, although not directly involved, imposed sanctions against Argentina during the dispute over the Falkland Islands in 1982. Not only military sales were suspended, but also other trade and export-import bank credits and guarantees. These unilateral sanctions were neither justified as self-defence nor as counter-measure, and were not authorized under Chapter VII of the UN Charter. Thus, those US sanctions were issued in breach of international law and lacked a justifying ground.

¹⁸ After a European Commission investigation in Burma (Myanmar) in 1997 where forced labour, coercion and violent reprisals were detected, the access to tariff preferences was temporarily withdrawn by Council Regulation No. 552/97 of 24 March 1997.

¹⁹ General Assembly Resolution No. 2131 (XX), 1965.

2. Legal Justification of Sanctions

Sanctions may become justified either on the basis of a decision of the UN Security Council, or on the basis of an admissible act of self-defence, or on the basis of a bilateral or multilateral treaty. Under Chapter VII of the UN Charter (Articles 39–51) the Security Council was given the competence to determine “*the existence of any threat to the peace, breach of the peace, or act of aggression*” and to decide on measures which may be taken for restoring international peace and security on the basis of Articles 41 and 42. All UN Member States are **bound** by decisions of the Security Council (Articles 25, 48, 49). Obligations under the UN Charter will **prevail** over conflicting obligations arising under any other international agreements. Recent examples of UN sanctions are those against Iraq (1991 until today), Libya (1992 until today), Republic of Yugoslavia/Serbia and Montenegro (1992–1995), Haiti (1993–1994). Less far-reaching sanctions were imposed against Somalia, Liberia, Angola and Rwanda (essentially in the sense of arms embargoes).

3. The Sanctions Against Libya

The UN sanctions against Libya take their origin in Libya’s failure to extradite two Libyan nationals who were suspected to be responsible for the bomb explosion on board the Pan Am aircraft over Lockerbie in 1988. In the beginning, the UN Security Council passed a non-binding Resolution No. 731 (1992) encouraging the Libyan Government to extradite the two individuals, whereupon Libya addressed itself to the International Court of Justice (“ICJ”), invoking its rights under the Montreal Convention of 1971 not to extradite these individuals. Thereafter, the UN Security Council passed the binding Resolution No. 748 (1992) imposing sanctions against Libya, whereupon the ICJ ruled that, by virtue of Articles 25 and 103 UN Charter, the Security Council’s decision taken on the basis of Chapter VII had to take precedence over Libya’s right under the Montreal Convention, and Libya’s right to the provisional measures it sought was denied by the ICJ.

On the basis of the UN Security Council sanctions, airtravels to and from Libya became banned, and the supplying, servicing and insuring

of Libyan aircraft became prohibited, coupled with an embargo regarding the shipment of arms and regarding military assistance to Libya. A compliance monitoring programme regarding these sanctions was installed so as to report on violations. The Sanctions Committee was also mandated to consider special economic problems connected to these sanctions and, occasionally, to approve special flights to or from Libya on the ground of humanitarian needs.

A further UN Security Council Resolution No. 883 (1993) tightened the regime, directing all states to **freeze** the assets of the Government or of public authorities of Libya and of any Libyan undertaking. Hence, any sales, supplies or maintenance of specified equipment used in the petro-chemical production process became forbidden. However, the Resolution did not freeze assets derived from the sale or supply of Libyan petroleum, natural gas and agriculture products, obviously because Western European States heavily depend on Libyan oil.

While UN sanctions are to be observed by all UN Member States, it is left to each member state to **transpose** those sanctions into their own national law, unless such sanctions may deploy direct and self-executing effects. For instance, the American **ILSA** is part of the US response to the above mentioned UN Security Council Resolutions.²⁰ In Switzerland, the transformation of the UN Security Council Resolutions regarding Libya led to a corresponding Regulation of the Swiss Federal Council, dated 12 January 1994 (“*Verordnung über Massnahmen gegenüber Libyen*”, SR 946.208), which is still in force today.

Similarly, the **European Union** reacted on the basis of the new **Article 228a** which had been inserted into the **EC Treaty** in 1993 which provides for a special legal basis for imposing sanctions:

“Where it is provided, in a common position or in joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or reduce, in part or

²⁰ There is a possibility to obtain **waivers** regarding the ILSA sanctions. Such waivers can be granted on an individual basis by the US President without requiring a review by the US Congress. However, there is no presidential authority to grant general or permanent waivers, neither to EU companies nor to those of other countries. Thus, ILSA waivers will remain to be case-specific and dependent on the U.S. President’s discretion.

completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.”

This provision is situated at a hybrid crossroads between politics, security policy and commerce. While the political basis itself will fall outside the competence of the European Community, the **means** for achieving the political goals will, however, vest within the power of the European Community. Article 228a was further supplemented by a new **Article 73g EC Treaty** for the more specific purpose of covering restrictions on the free movement of capital. Article 73g provides as follows:

“If, in the cases provided for in Article 228a, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 228a, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.”

While Article 228a EC Treaty provides for a wide scope of economical measures, it would, however, not serve as a basis for imposing an arms embargo. Such embargoes fall within the competence of each individual Member State. In respect of **Libya**, the European Community provided its support by adopting, on 14 April 1992, the Council Regulation No. 945/92 (OJ 1992 L 101/53), requiring Member States to prohibit the landing of Libyan aircraft and the provision of any kind of supplies or maintenance. Subsequently, the Council Regulation No. 945 became replaced by the Regulation 3274/93 (OJ 1993 L 295/1) which reflected a more general trade embargo. The further Regulation 3275/93 prohibits the servicing of claims with regard to contracts and transactions banned by the Security Council Resolutions.

4. Yugoslav Sanctions

The situation in connection with the break-up of the former Yugoslavia is quite similar in the sense that UN sanctions led to sanctions which the EU supported, acting in concert. The situation, however, is some-

how more complex because the European Community had entered, as of 1 April 1983, into a **Cooperation Agreement** with former Yugoslavia (OJ 1983 L 41/2). The Civil War broke out in June 1991. In October 1991, the European Community decided to **terminate** the Co-operation Agreement and to suspend the benefits provided thereunder for Yugoslavia with immediate effect. Furthermore, the Coal and Steel Agreement was terminated on the basis of Article 238 EC Treaty and a consenting Resolution of the European Parliament. Further trade concessions and the General Scheme of Preferences Scheme (GSP) were also cancelled.

However, subsequently, trade related provisions terminated under the 1983 Cooperation Agreement were restored for Croatia, Slovenia, Bosnia-Herzegovina and Macedonia by virtue of the EC Regulation No. 3567/91 (OJ 1991 L 342/1), and their GSP status was reinstalled.

In 1992, however, due to the deterioration of the Civil War situation, the UN Security Council adopted its Resolution No. 757, declaring an economic embargo on Serbia and Montenegro.²¹ The European Community, in response thereto, adopted its Regulation No. 1432/92 on 1 June 1992.²² When hostilities further increased during 1993, the embargo against Serbia and Montenegro was further strengthened on the basis of the UN Security Council Resolutions Nos. 942 and 943 (both 1994).

Meanwhile, Articles 228a and 73g had been incorporated within the EC Treaty and, on the basis of the wider scope and powers, broader EC sanctions were installed by virtue of the Council Regulation Nos. 2471/94 and 2472/94 (OJ 1994 L 266/1 and L 266/8); see also the Regulation regarding performance bonds No. 1733/94 (OJ 1994 L 182/1).

5. Criticism and EU Blocking Regulation As a Response

The GATT and the WTO Rules today serve as a sort of regulatory mechanism, limiting the use (or misuse) of unilateral economic sanc-

²¹ Security Council Resolution No. 757 (1992).

²² OJ 1992 L 151/43, thereafter replaced by Regulation No. 990/93).

tions. For instance, as a reaction to the Helms Burton Act, WTO panel proceedings were initiated (but later on suspended). The view was expressed that the dispute between the USA and the EU regarding the Helms Burton Act should possibly be resolved within the ambit of the OECD which is negotiating an Agreement on investment measures and could possibly form an even more appropriate form than the WTO.²³

The fact is that the European Union voiced strong criticism against the extra-territorial reach of the Helms Burton Act and ILSA. The EC Commission wrote to the US Secretary of State on 15 March 1995. Shortly thereafter, a Declaration was published on 5 April 1995 setting out the EU's concern regarding the proposed US sanction's **over-reaching extra-territorial application**.²⁴ The EU concern regarding US sanctions of that nature (including those regarding Iran and Libya) remained with little effect so that the EU, in order to defend its interests, had to resort to a **more drastic measure**, by enacting the **EU Blocking Regulation of 22 November 1996** (Council Regulation No. 2271/96, OJ 1996 L 309/1; see also the Commission Notice of 16 October 1996).

It does appear that, for the first time in its history, the EU Council of Ministers had achieved unanimity on a foreign policy measure²⁵. In this context, Patricia A. Sherman said:

²³ See hereto the IBA paper by Frank Montag, cited in Footnote 16.

²⁴ See further the Resolution on Cuba of the European Parliament, OJ 1996 C 96/294.

²⁵ This attitude is mirrored also in the EU Commission's attitude in **antitrust matters** vis-à-vis the recognition of the U.S. effects doctrine as practised and required by the U.S. antitrust enforcement agencies (an attitude criticised by Karel van Miert, the head of DG IV). The U.S. **effects doctrine** dates back to the *Alcoa* case (*United States v. Aluminum Co. Of America*, 148 F. 2d 415 2nd Cir. 1945). The **European Court** of Justice and the Court of First Instance have always shown **reluctance** to endorse the effects' doctrine and, instead, rather resorted to the **single economic unit doctrine**, for instance in the *ICI case* (Slg. 1972, 619), the *Geigy case* (Slg. 1972, 787) and the *Sandoz case* (Slg. 1972, 845), followed by the famous *Continental Can case* (Slg. 1973, 215) and by *Commercial Solvents* (Slg. 1974, 223); see also Hoffmann-La Roche (Slg. 1979, 461), United Brands (Slg. 1978, 207), Tetra Pak (Slg. 1990, II-309) and Hilti (Slg. 1991, II-1439). However, the **EU Commission** itself does apply the effects doctrine, though in a more moderate way than the U.S. authorities (see in particular the *aluminum import case* reported in OJ 1985, L 92/1; see hereto the *paper pulp cases*, where the Commission based its assessment on the effects doctrine, but the ECJ tuned that down and, instead, argued that the cartel was implemented on the territory of the EU and thus justified the jurisdiction of the EU regulatory authorities).

“It seemed – albeit briefly – as if the EU finally had determined to go beyond diplomacy and rhetoric to face down US efforts to impose its foreign policy objectives on non-US entities.”²⁶

By virtue of the Blocking Statute, natural or juridical persons were required to **inform** the Commission about any economic or financial interests that might become affected by the Helms Burton Act or by other US sanctions such as ILSA. In addition, the EU Regulation provides that no judgment of a court or tribunal, and no decision of an administrative authority located outside the Community which would give effect to those sanctions, could qualify for recognition and enforceability within the EU. Even **more drastically**, the Regulation made it illegal to comply with the Helms Burton Act or the ILSA. These provisions were further coupled with a right, given to Community nationals, to recover from the US beneficiaries (through private litigation in any Member State) the amount of damages awarded against them by any judgments or decisions based on the US sanctions (so-called “clawback provision”).

However, the EU Blocking Regulation did not really provide an effective shield against the impact of US sanctions. Rather, a “**catch 22**” situation arose, as Patricia A. Sherman described it, for EU companies and individuals caught between the conflicting requirements of US and EU laws. Thus, the need for further consultation was undeniable. Such consultations, for instance, took place when Total (the French oil company) announced that it would become the consortium leader to invest some USD 2 billion in an Iranian oil field, and where a kind of exemption or waiver under ILSA was needed for the purpose of these oil-related investments in Iran. The accommodation with such a waiver had been reached by the US and the EU in the framework of the **18 May 1998 Understanding**.

Nevertheless, the EU Blocking Regulation No. 2271/96 remains in force, but appears to have lost much of its teeth and, in any event, does not seem to provide an effective shield against the undesired effects of the US sanctions. Thus, the US compliance regime has proved to be **the stronger threat**, and companies and individuals operating on a world-

²⁶ Patricia A. Sherman, *Forgotten, But Not Gone: The EU’s Blocking Regulation, A Trap for the Unwary*, *International Business Lawyer*, Vol. 28 No. 8 (September 1998), at 341.

wide basis seem to be effectively intimidated by the severity of the US sanctions.

Is the EU Blocking Regulation therefore a “still-born child”?

I submit that it is not. Although, at the present time, it only applies (according to its Annex 1 to the Helms Burton Act and the d’Amato Act (Iran and Libya Sanctions Act of 1996)), its scope may nevertheless be extended by a Council Resolution to any other/similar sanction imposing **over-reaching extra-territorial effects**. Moreover, the EC Council Regulation must be seen as a significant **yard-stick**, or a kind of “traffic light”, for courts and arbitral tribunals when being confronted with issues triggered by such sanctions.

The European reaction, the forceful interventions of the European Community (as a Member of the WTO) when bringing action to the Dispute Settlement Body of the WTO, and when engaging in several rounds of bilateral consultations, are all **significant and serious manifestations of a disapproval**. The antagonistic views further developed in the framework of the WTO Panel proceedings, and indeed started off with a refusal of the United States to the formation of the Panel by seeking to rely on Article XXI of GATT in order to claim the Act as being “a matter of the US national security”. Nevertheless, a panel was established on 20 November 1996, but the proceedings were formerly suspended on 25 April 1997, after the USA had agreed to suspend Title III until the end of President Clinton’s term, and after providing the US President with the authority to waive the application of Title IV of the Helms Burton Act. The suspension of the WTO Panel expired on 21 April 1998. Shortly thereafter, a EU-US Summit took place in London on 18 May 1998.

The outcome of the **18 May 1998 Summit**:

At the occasion of the Summit, the EU requested from the US satisfactory **waivers** so as to do away with the **undesired extra-territorial effects** of the Helms Burton Act in the sense of a continued suspension of Title III and an Amendment regarding Title IV. In respect of ILSA, the EU demanded a waiver of its application regarding all EU Member States. At the occasion of the 18 May 1998 Summit, the resolution of the issues was shifted to the level of the broader negotiations regarding the Multilateral Agreement on Investment (“MAI”). The common denominator of the discussions was the common goal to ensure the observance of international law standards in connection with

expropriations, and the emphasis of the undesirability of investments in expropriated property in contravention of international law. At the present time, as far as I know, the matter **is still not conclusively settled** as far as Helms Burton is concerned. Obviously, the matter is highly complex, the more since the EC Council has no authority nor external or internal powers in the field of investments (which remains within the domain of each individual EU Member State).

6. Summing Up

The sketchy summary provided on economic sanctions leads to the following reflections:

- The promulgation of sanctions is an **emanation of each state's sovereignty**.
- **Political** interests are the driving force and still seem to outweigh concerns as to their admissibility under international law; international law would rather suggest that a state's **sovereign prerogatives will be limited by its boundaries**, such that the legislative acts should have no more but a **territorial** effect and application.
- However, we have seen a **flood of sanctions** (particularly emanating from the USA), coupled with a **strong claim of extra-territorial application**.
- This recent development has not been well received and has triggered **resistance**, for instance in the form of the **EU Blocking Regulation**.
- Sanctions, obviously, evidence, to some extent, the breaking-off of the normal communication lines. They clearly **evidence a failure** to come to agreeable terms. They mark a unilateral position and, as such, are not conducive to install a solution-oriented dialogue.
- As a mere observer I may express the hope that the "**sanctionitis**" will remain a tool of the 20th century, but will soon be overcome when we step into the next millennium. Again, purely from an outside observer's perspective, it does seem that sanctions, **aiming at**

isolating another state such as Cuba, **is not and should not really be the answer** to deal with problems as they arise. Rather, it would be my conviction that much more effort should go into an open dialogue so as to reduce tension and to foster the network of international trade-relationships even with countries that “did wrong” or transgressed through the acts of an ill-informed leader or government. The **1919** punishment against Germany quite inevitably led into the Second World War, and a lesson had been learned to do better after **1945**. Has the lesson, today, been forgotten?

- As a short conclusion I am tempted to say that I am not fully convinced of the need (nor of the effectiveness) of sanctions in general, and in respect of some of them in particular, and I am not so far convinced that **isolation** is the answer to coerce or bring down another government or state.
- Rather, I am (still) an optimistic believer in the peace-fostering effect of a friendly but principled **dialogue**. And one way to achieve this is to allow the ties automatically built by mutual trade and commerce to **foster a global integration** of all states (and not a global isolation of some of them); but perhaps this is idealism!

IV. Exchange Control Regulations in Particular

While the sanctions discussed above essentially serve **political** goals, exchange control regulations rather aim at supporting **economic** policy considerations. Akin to sanctions, they want to be applied as *ius cogens* over and above the contractual terms agreed by the parties. Klaus-Peter Berger, in his excellent article, characterizes them as belonging “*to the classical category of mandatory norms (règles d’application immédiate; loi de police; Eingriffsnormen)*”.²⁷

The cases cited in Berger’s article inspire the understanding that domestic courts would be overly reluctant to apply foreign exchange control regulations, on an argument that they ought to have a limited territorial scope, such that any extension beyond the territory of the enacting state would provide “*an unacceptable extra-territorial effect to them*”.²⁸

Arbitral tribunals, in contrast, having no *lex fori*, will rather tend to take a **pragmatic approach** which, according to Berger, should take “*into account the court control of the award at the seat of the arbitration or in possible enforcement fora*”. While myself agreeing to such approach, I would nevertheless wish to add that I would place the emphasis differently: In my view, the arbitral tribunal should not, in the first place, take its guidance from concerns about setting aside procedures or concerns about the enforceability of the award. Rather, the key-guidance must come from a **careful analysis** in respect of the entire framework within which these exchange control regulations are situated. Thus, questions of the following nature may be relevant:

- What was the general economic and the more specific monetary background for promulgating the particular exchange control regulation?

²⁷ Klaus-Peter Berger, *Acts of State and Arbitration: Exchange Control Regulations*, in: *Acts of State and Arbitration*, 1997, at 101.

²⁸ Berger, *loc.cit.* at 107.

- What was the intended effect thereof on domestic parties and international parties?
- What is the weight to be given to such exchange control regulation if it stands in contradiction to contractual requirements?
- Was the regulation of a general nature, or was it specific or aiming at protecting certain businesses only on a selective basis?
- How closely connected are the invoked exchange control regulations to the contract in question, or how remote are they?
- How to evaluate the impact in the case of applying the regulations and in the case of disregarding them?
- How do the economical or political values underlying the particular exchange control regulation compare to the more general opinion of the international business community, general international standards and a transnational *ordre public*?

Berger seems to reach a similar conclusion when he states that the international arbitrator will have to apply exchange control regulations if this is “*necessary to enforce generally accepted principles and values of the international community of states*”, and I entirely share his conclusion that the arbitrator “*is always called upon to enter into careful value judgments against the factual and legal background of each individual case. The necessity of this case by case approach prohibits the arbitrator from attaching a presumed (per se) positive or negative effect or legislative intention to certain groups or categories of exchange control measures*”.²⁹

The above reflections, however, do not as yet provide the key for the solution which an international arbitral tribunal may have to find when **determining the inter-partes effect and consequences** of interfering exchange control provisions. Whether or not such control may pass the above described rule of reason test, the affected party may, as a matter of fact, simply be prevented from performing its financial duty, and thus a proper contract implementation may become affected by an **impossibility of performance**, or at least by a commercial imprac-

²⁹ Berger, loc. cit. at 116.

ticability of performance. **How then should, in such a situation, the commercial and contractual solution be shaped?**

Assume the case where a party had shipped products to the Xanadu party which ought to be paid in US-Dollars, and assume further that Xanadu subsequently enacted exchange control regulations prohibiting the payment in any currency other than Xanadu Rupees which are not freely convertible? If the arbitral tribunal accepted an impossibility of payment, or accepted a force majeure-situation releasing the Xanadu party from its obligation to pay in US-Dollars, it would reach an unbearable solution to the detriment of the foreign seller. If, in contrast, the arbitral tribunal disregarded the exchange control regulations on an argument that they do not deserve to be applied, the Xanadu party might still not be able to honour its contractual payment obligation, or the terms of an award (for instance because its national bank would simply refuse to effectuate a transfer in the required US currency). In cases of this nature, parties have sometimes pleaded that, by enacting such exchange control regulations, the state (in the above example: Xanadu) made itself a contractually liable party, and would become answerable vis-à-vis the foreign seller.³⁰

Obviously, the situation is different where the exchange control regulation **had already been in place** when the particular contract was entered into by the parties. The **requirement of acting in good faith** does impose a duty on each party to disclose aspects that might materially affect a party's ability to perform its duties. Thus, if – in the above example regarding Xanadu – the foreign seller had not been aware of the fact that Xanadu had promulgated exchange control regulations prohibiting the payment in a freely convertible currency, and if the Xanadu party remained silent in this regard without appropriately directing the foreign seller's attention to such regulations, the Xanadu party would be acting in breach of a fiduciary duty, whether labelled as

³⁰ The arbitral award of 28 January 1994 rendered in ICC Case No. 7245, although in a different scenario where, by an act of state, the respondent party had been dissolved by the superior state body implemented by way of an “*réorganisation administrative*”, reached a solution in this sense: the Tribunal, in that case, unanimously ruled as follows: “*Juge que la <sc. superior administrative body of the particular state> a succédé aux droits et obligations du <local community, the named defendant in that arbitration, which became dissolved> qu'elle remplace comme partie au présent arbitrage et ce d'office et sans besoin de modification de l'acte de mission qui la lie du seul fait de la succession précitée*”.

a direct contractual duty, or an ancillary duty, or a duty coming under the concept of *culpa in contrahendo*.³¹

³¹ In accord, Berger, loc. cit. at 117/118.

V. The IMF Agreement

The basic objectives of the IMF Agreement³² are to monitor and harmonize foreign exchange policies among its member states and to stabilize their payment balances. As one of the tools to achieve such objective, **Article VIII Section 2 (b)**, requires the member states to mutually acknowledge and respect exchange control regulations, provided they are consistent with the objectives and policies of the IMF Agreement. The (more than 150) member states of the IMF have undertaken to also reflect this notion within the body of their domestic legislation. Thus, given the world-wide recognition of the IMF and its substantial economic significance, it does seem justified to accept the rationale of Article VIII Section 2 (b) as forming part of a supra-national economic legal order or *lex mercatoria*. Legal writers seem to agree very widely on this qualification and leads Klaus-Peter Berger to the following conclusion:

“Application of the provision therefore is part of the international arbitrator’s increased responsibility for the arbitral process as a whole. For these reasons, the arbitrator has to take account of Article VIII Section 2 (b) even if the conflict of laws rule of the lex arbitri gives him wide discretion in the determination of the law applicable to the substance of the dispute (voie directe)”.³³

On the other hand, exchange control regulations **of a discriminatory or confiscatory character** or exchange control regulations camouflaging economic sanctions, would not deserve protection and would not satisfy the **“application-worthiness - test”**. Thus, the scope and reach of Article VIII Section 2 (b) IMF will have to be scrutinized **in each individual case** so as to determine whether the regulations have been issued for the sole purpose of protecting the balance of payment

³² The text is reproduced in the DIS Volume 12 “Acts of State and Arbitration”, edited by Böckstiegel, 1997, at 187–208.

³³ Klaus-Peter Berger, loc. cit. at 121; see also the further references and citations therein.

and the currency reserves of the particular country. Exchange control regulations instituted for other reasons such as for instance for foreign policy reasons, or reasons of the national security will not qualify under the scrutiny made in respect of Article VIII Section 2 (b) of the IMF Agreement.

VI. Competition Laws in Particular

1. Avoidance of EU Competition Laws Through Arbitration in a Non-EU State Such as Switzerland?

Can competition laws be avoided by resorting to arbitration? This is the title of an article by Frank-Bernd Weigand.³⁴ The short answer is. **NO!**

Would **arbitration in Switzerland** (or in another Non-EU state) be the answer, i.e. the welcome “back-stage-door escape”, on the rationale that Switzerland (so far) stayed away from the EU, wherefore the EU competition law is not directly applicable in Switzerland, as it is in the EU Member States? This is the question we need to examine further.

In Switzerland, a frequently cited case is *Ampaglas v. Sofia*, a decision of the *Chambre de Recours* of the Canton of Vaud dated 28 October 1975.³⁵ In that case, the ICC Arbitrator was confronted with a request by one of the parties to submit the issue as to the validity of the underlying contract to the European Court. *Eventualiter* the party requested the Arbitrator to find that the contract was null and void under Article 85 Treaty of Rome. The Arbitrator declined to suspend the case and opined that the Treaty of Rome was to be respected by all courts as well as by arbitral tribunals, and thus affirmed his jurisdiction to scrutinize the contract under the criteria of Article 85.

In a complaint addressed to the Tribunal Cantonal Vaudois, the opposing party maintained that the Arbitrator lacked jurisdiction to consider the validity under the scrutiny of Article 85. However, the Vaud Cantonal Court rejected that complaint and held in an *obiter dictum* that, according to Swiss doctrine, arbitrability of competition law issues was by no means excluded and that, therefore, the ICC Arbitrator had jurisdiction to scrutinize the relevant contract under the notions of Articles 85/86.

This competence of an arbitral tribunal was specifically confirmed in a recent land-mark decision of the Swiss Federal Supreme Court ren-

³⁴ Frank-Bernd Weigand, *Evading EC Competition Law by Resorting to Arbitration?*, Arbitration International, 1993, 249–258.

³⁵ Published in 129 *Journal des Tribunaux*, 1981–III–71.

dered in re *G. SA v. V. SpA* on 28 April 1992 published in *ATF 118 II 193*. In that decision, the Swiss Federal Supreme Court explicitly stated that arbitral tribunals sitting in Switzerland must affirm their jurisdiction to scrutinize a contract in respect of its compatibility with the EC competition laws. The reading of the decision makes it clear that the Swiss Supreme Court not only meant an authority but indeed a duty which must be exercised by arbitral tribunals.³⁶

While the arbitral practice in Switzerland, up to the end of the 1980s, had shown a certain **reluctance** to accept the interference of antitrust laws which are **extraneous** to the *lex causae*, the situation in Switzerland has **clearly changed during the 1990s**.

Two of the cases highlighted under Section I. above involve the issue of whether an arbitral tribunal sitting for example in **Switzerland** (or any other not-as-yet EU member State) should apply (or, to the contrary, disregard) the EU (or US) antitrust laws.

In fact, the prevailing view today in Switzerland is that an arbitral tribunal having its seat in Switzerland **has to have regard** and, moreover, should directly **apply**, the relevant competition laws even if they pertain to a foreign legal order (i.e. to a legal order which is outside the law governing the contractual relationship).³⁷

³⁶ The underlying case had to do with a Cooperation- and Investment Contract between a Belgian group and various Italian companies. The purpose of the contract was to exploit mutual synergies by dividing up the marketing territories, and by certain pricing agreements. The contract was subject to Belgian law and contained an arbitration clause. The *ad hoc* arbitral tribunal sitting in Geneva rendered an interim decision *inter alia* refusing to suspend the arbitration until a decision by the EU Commission was obtained. The resultant Final Award was attacked by both parties who filed challenges to the Swiss Federal Supreme Court on the basis of Article 190 (2) PIL. The Supreme Court quashed the Award, remitting the same back to the Arbitral Tribunal, on the argument that the Tribunal failed to exercise its jurisdiction to scrutinize the relevant contract in respect of its conformity with Articles 85/86 Treaty of Rome. It is an interesting aspect that the Federal Supreme Court considered the issue as a jurisdictional issue according to Article 190 (2) b PIL, where the Supreme Court exercises a broad cognition.

³⁷ For instance, an *ad hoc* arbitral tribunal sitting in Geneva rendered an award in June 1994 in re *L. Corp. et al v. B. Inc. et al.* in which it clearly affirmed that, over and above the Swiss law (which was the proper law chosen by the parties) the contract had to be scrutinized in respect of its compatibility with Articles 85/86 Treaty of Rome.

Thus, in the Swiss international arbitration practice, it must be regarded as **well settled** that an arbitral tribunal having its seat in Switzerland:

- **will affirm its jurisdiction**, as well as the **arbitrability**, for reviewing a contract between any parties (whether they are parties of member States of the European Union or not) from the perspective of compatibility with Articles 85/86 of the Treaty of Rome³⁸, and
- will make such review being done **irrespective** of the governing law chosen by the parties or determined by the arbitral tribunal;³⁹
- will likewise affirm its jurisdiction (as well as arbitrability) to review a contractual relationship under the perspectives of the **US**

³⁸ The Swiss Federal Supreme Court, on 28 April 1992, rendered a landmark decision to this effect in re *G.SA v. V. SpA*, ATF 118 II 193; compare also the “*Labinal*” decision rendered in Paris, 19 May 1993, discussed in Rev.Arb., 1993, 645 et seq. and the “*Velero*” decision rendered in Paris, 14 October 1993, in Rev.Arb., 1994, 164 et seq. See further the extensive study by Herman Verbist, *The Application of European Community Law in ICC Arbitrations*, ICC Special Supplement, International Commercial Arbitration in Europe, 1994, 33–57 and the *Extracts from ICC Awards on Arbitration and European Community Law* published in the ICC Bulletin Vol. 5 No. 2, 1994, 44–60 and Vol. 6 No. 1, 1995, 52–71; moreover, the ICC has devoted a special volume to the topic: ICC Dossiers, Competition and Arbitration Law, 1993, with numerous articles; a most recent article comes from Yves Derains, *L’application du Droit Européen par les arbitres – Analyse de la jurisprudence*, in: *L’Arbitrage et le Droit Européen*, CEPANI (ed.), 1997, 67 et seq.

³⁹ In the ICC Case No. 7097 (1993), the arbitration clause provided that the arbitrators “shall not decide in accordance with a specific national law but pursuant to the principles of equity and justice”; however, the Arbitrators considered that the EU competition law was of a supranational nature and decided to apply it. In the ICC Case No. 7673 (1993), the underlying contract was governed by Swiss law. Nevertheless, the Arbitral Tribunal held: “It is generally agreed that under Article 187(1) PIL arbitrators must or at least may observe the international public policies of other States or of the European Communities irrespective of the substantive law applicable.”

antitrust laws and, in so doing, will affirm its jurisdiction to rule on a claim **for treble damages**;⁴⁰

- a tribunal sitting in Switzerland and which awards treble damages is **not** likely to violate public policy in the sense of Article 190 (2) lit.e of the Swiss Private International Law;⁴¹
- will even proceed to an *ex officio* examination regarding the observance of Articles 85/86 of the Treaty of Rome where the situation is such as to give rise to doubts that a particular transaction might have anti-competitive effects on the EU market (even though none of the parties may have pleaded such issues).⁴² The rationale for this is that an arbitral tribunal should not lend its assistance to parties that may deliberately have aimed to avoid the sanctions under Article 85(2). Likewise, under the **U.S. perspectives** set on the

⁴⁰ The Arbitral Tribunal sitting in Zurich in *re Adolph Hottinger GmbH (Germany) v. George Fisher Foundry Systems (USA)* (Zurich Chamber of Commerce Case No. 202/1992), of which the author was the president (a case widely reported in American articles/journals), clearly reached the conclusion, in July 1994, to **affirm its jurisdiction** to decide on a counter-claim for **treble damages** made in respect of an alleged *per se* violation under the Sherman Act. It seems important to distinguish between arbitral jurisdiction to decide on treble damages, which should clearly be affirmed, and the totally different issue whether an Award imposing the payment of treble damages would, or would not, be enforced by a national court, wherever such enforcement might be sought. The criteria are entirely **different**.

⁴¹ In accord: Roger Zäch, *Swiss International Arbitration – Civil Claims Arising From Restraints of Competition Affecting Markets Outside Switzerland*, in: *Comparative Competition Law: Approaching an International System of Antitrust Law*, 1998, 267–287, at 285.

⁴² An explicit example is *ICC Case No. 7181* (1992) where the Tribunal held: “*In view of the policy character of Article 85, the Arbitral Tribunal does however have to examine ex officio whether Article 1.6 of the Agreement is not caught by the prohibition of restrictive agreements.*” Similarly, in *ICC Case No. 7315* (1992), the Arbitrators subjected the entire contract to the scrutiny under the terms of the EC competition laws. In *ICC Case No. 7539* (1995), the duty of the arbitrators was similarly confirmed: “*Il incombe en effet aux arbitres de soulever même d’office, mais avec toute la prudence requise, l’incompatibilité d’un accord qui leur est soumis (ou de certaines clauses) avec l’article 85 du Traité de Rome.*” Yves Derains, in his article cited in footnote 38, 77, concludes “*que l’arbitre a le devoir d’appliquer le droit européen de la concurrence chaque fois que cette application correspond à un intérêt légitime, que la lex contractus soit ou ne soit pas le droit d’un Etat de l’Union Européenne.*”

basis of *Mitsubishi v. Soler*⁴³ and the threat of the “second-look-doctrine”, it is quite clear that an arbitral tribunal has a perceived **duty**, and not only a right, to examine the compatibility with U.S. antitrust laws *ex officio*, wherever a matter could have anti-competitive effects within the United States;⁴⁴

- may **suspend** the arbitral proceedings pending an examination before the EU Commission; on the other hand, neither the parties nor the arbitral tribunal may submit an issue to the European Court for a determination according to Article 177 of the Treaty of Rome⁴⁵
- may, but only after consultation with the parties, **refer** a particular issue to the Commission, asking it for a determination (whether in the form of a decision or, more likely, in the form of a comfort letter or discomfort letter), and
- may, under the scrutiny made on the basis of a **rule-of-reason - test**, recognize such a determination made by the EU Commission.⁴⁶

⁴³ 473 U.S. 614 (1985); see hereto e.g. Sigvard Jarvin, *Case Note on Mitsubishi v. Soler*, in: Arbitration of Anti-trust and Competition Issues, Swedish and International Arbitration, 1994, 66–73; Thomas E. Carbonneau, *Mitsubishi: The Folly of Quixotic Internationalism*, Arbitration International, 1986, 116–140; Andreas F. Lowenfeld, *The Mitsubishi Case: Another View*, Arbitration International, 1986, 178–190; Joseph P. Griffin, *U.S. Supreme Court Encourages Extraterritorial Application of U.S. Antitrust Laws*, International Business Lawyer, 1993, 389–393.

⁴⁴ A discussion of recent U.S. cases is contained in the study by Joel Davidow, *Recent Developments in the Extraterritorial Application of U.S. Antitrust Law*, 20 World Competition 3/1997, 5–16.

⁴⁵ This had been decided in the *North Sea Case* (CJEC 102/81 LR 1982, 1095, and in the later *Danfoss* decision, CJEC 109/88 LR 1989, 3199; see also the decision in *Commune d'Almelo*, CJEC 393/290 LR 1994, 1477; Udo Kornblum, *Private Schiedsgerichte und Art. 177 EWGV – Zur Befugnis bzw. Verpflichtung privater Schiedsgerichte, Vorabentscheidungen des EUGH einzuholen*, Jahrbuch der Schiedsgerichtsbarkeit, Vol. 2, 1988, 102–110.

⁴⁶ In the same sense see Carl Baudenbacher and Anton K. Schnyder, *Die Bedeutung des EG – Kartellrechts für Schweizer Schiedsgerichte* (1996), in particular Note 81.

In sum:

On the basis of the above, we may conclude that **Community competition rules will be applied by arbitral tribunals sitting in Switzerland quite in the same way as they would be applied if the tribunal sat in Germany or in France.**

“*The Swiss get up early and wake up late*”, as Jens Drolshammer said,⁴⁷ is probably the best expression to characterize this phenomenon.

2. Types of Competition Law Issues Submitted to Arbitral Tribunals

It may be illustrative to give an account of the manifold competition law and antitrust issues which, within the last five years, were submitted to arbitral tribunals:

(i) Issues under Article 85 (1) EC

1. Does an agreement between a **parent company and a subsidiary** fall under the scope of Article 85 (1) EC? In the same context: Is the standard practice that the French subsidiary shall not export to Switzerland nor to Germany a violation, having regard to the particular structure of the **concern** or the group of companies? What elements will constitute effective control of the parent company over its subsidiaries under the criteria of Article 85 (1) EC and, thereby, would justify a qualification as a single economic unit?
2. How to evaluate trade practices and **apparent parallelism of behaviour** of the market? When is it justified to conclude that the parallelism was triggered as a reaction to the market, when would it have to be qualified as a **conscientious concerted practice**? – This issue required extensive evidence proceedings, examinations of witnesses and detailed reports in the sense of market surveys.

⁴⁷ Jens Drolshammer, *On the Relevance of Competition Laws (EC, U.S.) in International Arbitration – Remarks from a Swiss Perspective*, ASA Special Series No. 6, 1994, 98–109, at 109 (edited by Marc Blessing).

3. When is the **trade between the Member States affected** in the framework of a contract between a Japanese producer and a Swiss distributor? Was, under the particular circumstances, a **merely potential impact** sufficient, or should the Arbitral Tribunal be impressed or guided by the allegation that the strong territorial restriction rather had a pro-competitive effect, enhancing trade and competition, and not the opposite?
4. Should an Arbitral Tribunal be guided by the *de minimis* **Notice** in a **horizontal** relationship with an involved market share of probably below 5% where, however, **cumulative restraints** were imposed on the free marketing of goods?
5. Was it a critical provision of the manufacturer to set **clear milestones to its distributor** which could only be achieved through an **aggressive** marketing of the products and through certain measures installed to keep the price at a very high level? Was the additional requirement imposed on the distributor to submit **computerized lists of concluded sales** to the manufacturer of a nature to give him indirectly the control over price? Was such an information system responding a **legitimate** goal of the manufacturer to monitor the efficiency of its world-wide distributors? Was, in the actual case, the manufacturer **exploiting a particular market power or even dominant position**, particularly through a vigorous policy to defend trade mark infringements? Was it a significant element of the case that the Japanese manufacturer had succeeded, outside the European Union, to **prohibit grey-market imports** by invoking its trade-mark whereas, as it appears, it did not pursue its threat to initiate court proceedings within EC member states seeking to avoid parallel imports (possibly on an assessment that it would not succeed, having regard to the strong views as were, in constant practice, expressed by the EC Commission and the European Court of Justice).
6. In the framework of the same case, the issue as to **discrimination** arose in the sense that the manufacturer sold the goods to distributors **on different price levels**, apparently calculating the different leverage and protecting force of its intellectual property rights. Was such behaviour legitimate, or a violation of Art. 85 (1) and 86 EC?

7. Still in the same case, the legitimacy of the manufacturer's **control** over the distributor's **General Conditions of Sale** was questioned.
8. Was it legitimate for the **US licensor of know-how** to **restrict** its licensee in one European country to manufacture **no more than a certain number of tons per year** and requiring further that the product shall **not** be sold outside the territory. The licence agreement contained **certain ancillary restraints**, all of which brought the contract very close to Article 85 (1) EC. When the European licensee requested the removal of some of the restraints, withholding a significant amount of licence fees, the American licensor initiated arbitral proceedings. However, as a reaction, the European licensee then **threatened to submit** the Licence Agreement to the European Commission. The American licensor, which had so far taken a very strong stand, all of a sudden had to fear heavy fines and had to give up most of its positions in the framework of a negotiated settlement.
9. **Tying arrangements** seem to cause frequent dissatisfaction. In a recent case, a German licensee, manufacturing products under the grant of a patent licence of an American manufacturer/licensor, was happy, as it seemed, to be able to buy certain required ancillary components from its US licensor, and thus agreed to sign, as an ancillary contract to the licence, a **separate supply contract with a minimum term of 7 years**. After 1½ years, the German licensee discovered that **substitute products** would be available on the market that would do quite the same job, but for half of the price. It, therefore, started to buy those substitute products on the **grey market** (parallel imports, in particular from France). The US licensor initiated arbitral proceedings against its German licensee under the arbitration clause which was contained in the Licence Agreement only (**but not in the separate Supply Contract**). It claimed performance under both contracts, payment of outstanding licence fees, compensatory and other damages payable by the German licensee, further orchestrated by a request for an injunction and preliminary relief. In its Defence, the German licensee raised the jurisdictional defence that the Supply Contract was not subject to arbitration, because it did not contain an arbitration clause. However, the Arbitral Tribunal, in a preliminary award, reached the con-

clusion that both contracts must be seen as forming **one single uniform transaction** (akin to the SOABI decision in ICSID Case No. ARB/82/1, ICCA Yearbook XVII/1992, 42–72, 51), but reserved for an examination on the merits whether the Supply Contract was a **prohibited tying contract**. Subsequent to the jurisdictional decision, the German licensee **threatened** to submit the two contracts to the European Commission, and to request the Commission to examine in particular four aspects:

- Was the Licence Agreement imposed on the licensee through the market strength and dominance of the US licensor?
 - Was the US licensor abusing its dominance *inter alia* by claiming exorbitant licence fees?
 - Was the US licensor abusing its market power when making the German licensee agree to sign up for a seven years Supply Contract.
 - Was the American licensor abusing intellectual property rights when requesting licensee to be paid for the full life of patent protection in Germany, even though the patent was successfully challenged in 1998?
10. In connection with the claim of a Finnish firm against the German subsidiary of a Swiss firm, the issue arose whether Claimant was entitled to address its request for arbitration not only against the German subsidiary (GmbH), **but also against the Swiss holding company** as the parent. The Swiss holding company raised the plea that it was not party to the agreement and did not sign an arbitration clause. Hence, it could not, as it argued, be sued in arbitration, and any award against it would be wholly unenforceable anywhere in the world and particularly in Switzerland. The Finnish claimant, however, argued in response that the Swiss holding company exercised control over its German subsidiary and engaged its own responsibility and liability when permitting that its German subsidiary **violated territorial and other restrictions** imposed on it. Apart from invoking an *alter ego*-situation (including arguments on the piercing the corporate veil and under the so-called (and “famous”) “group of companies doctrine”), the Finnish

Claimant also argued that the EU Commission and the ECJ, in constant practice, **had held parent companies liable for the behaviour of their subsidiaries** within the common market and, typically, imposed its sanctions and fines against the parent company under its **theory of the economic unity**. The Finnish claimant argued that an arbitral tribunal should be guided by the same notions and that **Article II of the New York Convention** on the recognition and enforcement of arbitral awards would **not be no bar to it**.

11. Occasionally, arbitral tribunals had to **determine the relevant market**, to establish **available demand side substitution and supply substitution** as well as potential competition in respect of a particular product. Issues centred around the notion of the existence of a contestable market under the perspective of the so-called **SSNIP Test** (i.e. the test whether the parties, in view of a small but significant non-transitory increase in price) would switch to readily available substitutes or to suppliers located elsewhere. The test was conducted under the perspectives of Art. 85 and Art. 86 and difficult **evidentiary questions** arose to interpret market reports and to distinguish **marginal customers** from others.
12. A frequent topic is the **permitted use of intellectual property rights and their exhaustion**. While the existence of such IP rights ground in national law, their use and exploitation falls under the scope of the control by Art. 85 EC. Most cases dealt with **parallel imports**, but the writer also had to deal with cases where an abuse of IP rights was alleged **due to its dominant position** according to Article 86 EC. In the context of such dispute, an arbitral tribunal will also have to determine **whether international exhaustion should be applied** (which is more consumer-friendly and is the solution adopted in Switzerland) or whether regional exhaustion (in the sense of an **EC-wide exhaustion**) (as per the EC Trade-mark Directive) should be applied.
13. In one particular case, the writer had to deal with the issue of the **extension of patent protection in the USA due to TRIPS** and the defence by the opposing party that such an extension would be

anti-competitive under US anti-trust laws and would give rise to treble damages in the framework of a counterclaim.

(ii) Issues under Art. 85 (2) EC

14. A particularly difficult topic for arbitral tribunals is to apply Article 85 (2) EC and to deal with **the strict sanction of nullity**. Under what perspectives would it seem appropriate to determine that the nullity was of a **partial nature only**? *Quid* in the absence of a **rescue clause**? How to deal with a situation where one party, in confidence of the validity of the agreement, had **already delivered or paid**? Is the legal sanction (indeed required by Article 85 (2)) and supported by leading scholars appropriate that, even in such a case, **no claim for restitution** can be entertained?
15. Another particularly critical issue under Article 85 (2) has arisen when the parties, after a 2½ years arbitration, reached a **private settlement** without the assistance of the Arbitral Tribunal. They then communicated the Settlement Agreement to the Tribunal asking it to **reflect the Settlement Agreement in the framework of a so-called Consent Award** (Award on Agreed Terms). The Chairman, when receiving the Settlement Agreement, immediately realized that the Agreement provided for **an unlawful co-operation violating Article 85 (1)**. – In that situation, the Chairman refused to record the Settlement Agreement (even though he jeopardized the readiness of the parties to pay for the arbitrators' fees!).

(iii) Issues under Art. 85 (3) EC

16. Under the perspectives of Article 85 (3) EC, an arbitral tribunal had to determine the **likelihood of a party to obtain an individual exemption**, had it elected to submit the contract in question to the EU Commission. The party defended itself for its omission by arguing the completion of the notification (according to Form A/B) would have involved several months of preparatory work and, in any event, it would have been extremely unlikely that the EU Commission would have rendered a decision. The other party opposed these arguments (even though it had voluntarily performed under the very same contract for more than two years before it de-

cided to unilaterally terminate the contract, and at the same time refused to pay the last instalment of royalties). The opposing party also **requested the Arbitral Tribunal to submit the Contract** to the EU Commission and to stay the proceedings, pending a determination by the Commission on the issue whether the particular contract could have been exempted. – In this case, the Tribunal clearly said that it would **not** submit the Contract to the EU Commission on its own notion nor on the request of one of the parties, but if one of the parties elected to do so itself, the Tribunal could not prevent it and would not (as was requested by the other party) issue an **injunction** prohibiting the interested party to submit the contract. After the second hearing, the parties – assisted by the Tribunal – restructured the contractual terms and the dispute became settled amicably.

17. **R & D co-operations** between the parties are a **frequent** and always difficult issue. In a recent case, the two “parents” (opposing parties in the arbitration) remained competitors despite the joint R & D venture. Thus, from that perspective, the joint development had no anti-competitive effect. However, they also determined, within the R & D Agreement, the terms of the future manufacturing, marketing and distribution of the product, virtually dividing the world-market and, in particular, **excluding** one of the parties from the EC market. The Agreement became even more critical since one party’s right to continue its own R & D programme was, as one party alleged, forbidden due to the terms of the Agreement. Several aspects of this agreement gave rise to **serious concerns**, for instance the market repartition (and strong market protection), coupled with further restrictions on individual R & D and a non-competition clause (all of which brought the Agreement close to some elements **black-listed** in Article 6 of the Block Exemption No. 418/85. However, in that particular case, the Arbitral Tribunal discarded those concerns.
18. How should an arbitral tribunal react when realizing that the two arbitrating parties (both leading industrial groups outside the EC), being in dispute over their own joint venture company held on a 50:50 basis, had in fact **not** created a **structural and concentrative joint-venture** but, in the opposite, a **non-structural co-oper-**

active joint-venture with strong activity on the EC market? While the designated Chairman of the Tribunal reflected on the impact (and realized that, if it were a structural co-operative joint-venture, the parties could take advantage of a merger control clearance according to the Regulation No. 1310/97 which, however, seemed unavailable due to the limited scope of the joint-venture as a mere distribution outlet, thus triggering the control under Article 85 (and not under the merger control), the claiming party requested a temporary suspension of the proceedings (and a suspension in respect of the proper constitution of the Arbitral Tribunal). – Shortly thereafter, the claim was withdrawn.

19. **Selective Distribution** is also an issue submitted to arbitration. In a recent case, a fashion **designer** with a world-wide brand name recognition cancelled the agreement with one of its major distributors operating a dozen or more retail stores on the argument that the looks of those stores was **not sufficiently supportive of the brand name's prestige**, an argument vigorously contested by the distributor (and owner of a chain of retail stores). The Arbitral Tribunal carried out a number of **site visits** to examine the case and to determine whether the criteria of the claiming fashion designer were **applied without discrimination**. A further issue was the legitimacy of the fashion designer's **price policy** which suggested the maintenance of high-priced products. Equally **critical**, under the perspectives of competition law, were requirements regarding **advertising and marketing**.
20. In connection with a dispute over the terms of a licence agreement, a licensee had invoked that the **provision on an exclusive grant-back obligation** was a **violative restraint**, and requested a declaratory award stating that the grant-back obligation in connection with improvements on the technology was valid **only on a non-exclusive basis and against an adequate royalty**. The licensor (claimant in the proceedings) defended the provision on the argument that the Licence Agreement, in its overall context, was favourable to the licensee, particularly through its **most favoured treatment clause**.

(iv) *Cases and Issues Under Article 86 EC*

21. In several cases, licensees disputed the terms of the Licence Agreement on the argument that the **imposition of minimum royalties and/or the calculation of percentage royalties** (including particular rebate schemes) were invalid on the argument that the licensor abusively **exploited its dominant position**. For the Tribunal, the difficult question arose whether it should (or must) sit in judgment over the “**pricing**” of the Licence Agreement which, at the time, appeared to have been quite carefully negotiated between the parties and where, at least at the time of the conclusion of the Licence Agreement, the licensee apparently **had had another option** to obtain the technology from a different source (such that its argument under the notions of the alleged “essential facilities doctrine” appeared to be rather weak). The Arbitral Tribunal indicated orally that, in its preliminary view, the arguments of the licensee were not very conclusive or convincing.
22. A further aspect of the same case was **the refusal of the licensor to supply updates** to the licenced technology due to licensee’s default in respect of the royalties. The Arbitral Tribunal, in this regard, had to deal with a request of the licensee for **preliminary relief**, whereby the Tribunal should order the licensor to make such updates available to the licensee during the arbitral proceedings. The licensee argued that it had made very substantial investments during its production lines to the particular technology and, therefore, would not be able to change or adapt the production process to a different technology. The Tribunal **analysed** these issues under a number of leading cases discussed in the United States and within the EC, including the cases *United States v. Terminal Rail Road Association*, *Otter Tail Power Co. v. United States*, *MCI v. AT&T*, *Magill*, *European Night Services*, *British Midland/Air Lingus* and others.

(v) *Applying Competition Laws “With A Distant Look”*

The above list of cases is limited to personal experience. The author could have extended the list by extracting the issues which have arisen under cases reported by the ICC etc. On purpose, this was not done.

Moreover, on purpose, no further particular details are given in respect of the above 22 cases.

In all these cases a fundamental question might be to ask whether an arbitral tribunal should directly **apply** EU competition laws (or US antitrust laws) even if it does not form part of the *lex causae* or *lex voluntatis* and whether such application should be made in quite the same way as a competition enforcement authority or court would do. The question also arises whether such competition laws should simply be **considered** which is a somehow softer approach, leaving quite a wide area of freedom.

Such (and similar) questions require reflection also in connection with sanctions, embargoes, exchange control regulations and other types of mandatory rules. For the general answers to these questions see the Chapter 9 below. However, in the framework of competition laws, the author would like to summarize the following points:

- First, although competition laws are not generally considered to form part of a transnational public policy, it is nevertheless believed that they reflect a deeply rooted notion in international commerce and trade which does in fact deserve recognition and application. Hence, there is quite a unanimity to say that competition laws cannot be disregarded and, in particular cases, would even have to be considered *ex officio*.
- Second, despite the foregoing, it is **not** this author's view that an international arbitral tribunal is the servant (or "slave") of the competition enforcement authorities. An arbitral tribunal, therefore, does not necessarily have to adopt the same approach as for instance the EU Commission or the FTC (to the extent that such a position, could at all, under the particular circumstances be anticipated).
- Certainly, this author believes that an arbitral tribunal must take care to inform itself very carefully about the reported cases and the extensive commentaries which are available. However, thereafter, having done such kind of "homework", an arbitral tribunal must sit back and reflect on the solution (or application) which does justice to the very particular parties, and which is the most appropriate under the prevailing circumstances.

- In other words, an arbitral tribunal should be freed from certain constraints under which a competition enforcement authority is working. These constraints are well known and need not be discussed here. It suffices to say that many of the leading decisions rendered by the EU Commission or the ECJ have been influenced by their own political dynamics. Moreover, decisions of the competition enforcement authorities are tied to certain precedents, and thus may also be inspired by a concern to foster a certain case law. All of these considerations are **extraneous** to an arbitral tribunal.
- Therefore, the author has expressed the view that arbitral tribunals should consider (or apply) competition laws (such as Articles 85/86 EC etc.) with a **“distant look”**, which respects **the objectively fair and the subjectively reasonable expectations** of the parties; no more, no less.

(vi) Extraterritorial Application of Competition Laws by the EU Commission and the ECJ

The question remains in what way the EU Commission itself and the ECJ have considered the issue of the extraterritorial application of competition laws. The starting point certainly is the concept that each state has the authority (and sovereignty) to enact the laws applicable on its own territory. Whether it has the authority to extend the scope and reach of its laws beyond its own territory is one of the most fundamental controversies. In the United States, court practice has developed the **“effects doctrine”** on the basis of the ALCOA case of 1945. The doctrine was applied wherever the effects were “intended”. However, in the Hartford Fire Case (1993) and in the Nippon Paper Industries Case (1997) the qualifications of the “intention” was dropped, such that one will have to conclude that US antitrust laws will be applied wherever a transaction (irrespective of its geographical origin or location) might potentially have an impact on the US market. Thus, a concentration of two Japanese manufacturers of electronic components is likely to trigger the application of the US antitrust laws.

As far as Articles 85/86 EC are concerned, we will first have to note that the legislative text itself is geared to look at the effects, irrespective of the place where the undertakings concerned are based, and irrespective of the place of the underlying agreements, decisions or concerted

practices. This can be derived from the wording in Article 85 (1) EC “... *practices which may affect trade between ...*” and the similar wording in Article 86 EC “... *in so far as it may affect trade between Member States ...*”.

In constant practice, the European Commission has **affirmed the effects doctrine**, for instance in the cases ICI, Geigy, Sandoz, Continental Can, Euroemballage Corporation, Hoffmann-LaRoche, United Brands, Tetra Pak, Hilti, Commercial Solvents and Paper Pulp. In some of these cases, the EU Commission had argued with the **single economic unity of a group of companies**, and has therefore attributed the acts and (in the Commercial Solvents Case also) the omissions of a subsidiary to its controlling parent company; thus, the commission had no hesitation to impose fines against the parent. The same approach is taken in the framework of the EC Merger Control. Recent cases such as UBS/Swiss Bank Corporation, Sandoz/Ciba-Geigy, Boeing/McDonnell Douglas, Elvia/Schweizer Rück, Nestlé/Perrier come to mind.

Interestingly, the **ECJ** has always shown a remarkable reluctance to clearly affirm the effects doctrine and has preferred to base its judgments on the **theory of the economical unity**, or on the **theory of the implementation** of an agreement or a practice. For instance, it argued that, where a certain agreement made outside the EU, is implemented within the EU, the applicability of Articles 85/86 must be affirmed.

The difference of approach between the EU Commission and the ECJ appears to be of **academic** interest only. At the end of the day, both are likely to show quite exactly the same result. **For all practical purposes, we may therefore conclude that the effects doctrine is prevailing, both in the USA and in the EU**, and that the purely territorial approach is just not the way how competition laws work.

3. Private Law Remedies versus Administrative Sanctions in Competition Matters

In an overall perspective, we need to realize, however, that – as far as competition laws are concerned – **private law remedies available through arbitration are not in the foreground of antitrust enforcement**. Burning areas such as **merger control, conscious parallelism**

and abuse of dominant position will only exceptionally enter the “arena” of arbitration. Typically, in those situations, parties will not be linked by an arbitration agreement. Likewise, in respect of Articles 85/86, there are hardly any civil actions within the European Union tried before State courts. Since 1993, the EU Commission embarked on an attempt to revitalize the civil law based remedies, by endeavouring to include state courts more intensely.

Frequently, claims submitted to arbitration are ancillary to, and filed in addition to, investigations by the EU Commission. Only the latter is e.g. authorized to impose a **fine**; its exclusive competence is reflected in Regulation No. 17/62, Article 9 (3). Indeed, the two procedures serve **different purposes**:

- The administrative investigation may result in a heavy fine, but will not result in a civil law remedy to the aggrieved party.
- Thus, the aggrieved party will need to seek recourse to arbitration or litigation in order to recover damages suffered.

The primary role of the EU Commission is certainly justified, given the fact that the competition law enforcement process is closely linked to public policy issues (frequently standing in conflict with other policies such as industrial -, small enterprises -, regional -, environmental -, social - and foreign trade policies. Moreover, competition law issues tend to imply highly complex factual situations which require broad investigative powers which are available to the enforcement agencies, but will not be available to an arbitral tribunal. Frequently, investigations will require the co-operation between national and supra-national competition law authorities.⁴⁸

In contrast, in the **United States**, the picture seems to be different in the sense that more use is made of civil law remedies in antitrust matters. The two public enforcement agencies (Federal Trade Commission and the Antitrust Division of the Department of Justice) are efficiently escorted by civil courts and, as I understand, arbitral tribunals. The latter two are given means which otherwise (in Europe) are reserved to the enforcement agencies, by having the possibility to impose the payment of **treble damages and punitive damages**.

⁴⁸ See hereto Jens Drolshammer, *ibid.*, 98–109.

4. In Switzerland: Arbitrability under the Cartel Law of 6 October 1995

As far as Switzerland is concerned, a brief reference should be made to the Cartel Law of 6 October 1995 which, by and large, mirrors the basic provisions of the EC competition law (its Article 5 essentially corresponds to Article 85; in particular, the exemptions in Article 5 (2) correspond to those in Article 85 (3) EC Treaty; Article 5 (3) prohibits horizontal agreements between actual or potential competitors; its Article 7 is an almost literal translation of Article 86 EC Treaty).

According to the new Swiss Cartel Law, competition law issues are **arbitrable**. However, in respect of the procedure, Article 15 Cartel Law requires that, where the validity of a restraint of competition is concerned, the matter must be submitted to the Swiss Supervisory Commission which may look into the matter. It is, however, unclear whether such a domestic requirement would also be applicable to an international arbitral tribunal; this has not as yet been tested.

Where it is alleged that a restraint of trade should be permissible for prevailing **public interests**, the matter will fall in the exclusive competence of the Swiss Federal Council; in that regard, jurisdiction will be removed from arbitral tribunals or State courts.

VII. Acts of State in Particular

The topic is of particular relevance in the area of intervening **Acts of State**.⁴⁹ In essence, Acts of State of an **individual character** – mostly aiming at protecting that State’s party, or freeing it from certain obligations – have in general, and for good reasons, not been well received by international arbitrators who denied their recognition. On the other hand, where acts had been of a **general nature and with a general scope of application**, moreover serving the public interest as opposed to protecting only one particular party, they had found recognition such that, in a particular case, the arbitral tribunal may **free** a party by, for example, accepting a *force majeure*-situation, provided that such situation (i) had not been foreseen, (ii) was not foreseeable and (iii) was properly notified to the aggrieved party.⁵⁰ Such *force majeure*, however, will, as a rule, only have an *ex nunc* effect, with the consequence that the work executed prior to the occurrence of the *force majeure* will have to be paid for.

⁴⁹ Reference may be made to numerous writings by Karl-Heinz Böckstiegel such as e.g. *Der Staat als Vertragspartner ausländischer Privatunternehmen*, 1971; *Arbitration and State Enterprises*, 1984; *States in the International Arbitral Process*, Arbitration International, 1986, 22 et seq.; *Public Policy and Arbitrability*, ICCA Congress Series No. 3, 1987, 177 et seq.; *Acts of State and Arbitration*, 1997.

⁵⁰ See hereto Marc Blessing / Thomas Burckhardt, *Sovereign Immunity – A Pitfall in State Arbitration*, Swiss Essays on International Arbitration, 1984, 107 et seq., and numerous cases and materials cited there, in particular *C. Czarnikow v. Rolimpex* (1978) Q.B. 176 et seq. (C.A.) and (1979) A.C. 351 et seq., referred to in Note 36, in which case an act of *force majeure* regarding the export embargo directed by the Polish government with respect to the sugar deliveries was affirmed.

VIII. Criteria to be Applied

1. The Issue Before State Courts

Before dealing with arbitration, let us first examine the issue as it presents itself to the ordinary state court judge. Can/should/must he apply foreign mandatory rules of law? The **Rome Convention**,⁵¹ in Article 7, provides the following under the heading “Mandatory Rules”:

- “1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*
- 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.”*

In **Switzerland**, Article 19 PIL (Private International Law of 18 December 1987, in force as of 1 January 1989) provides as follows:

⁵¹ For instance, Article 7 of the Rome Convention is, since 1 April 1991, applicable in **France** and in the **United Kingdom**, whereas **Germany** had expressed a reservation regarding Article 7 (which had not been transformed into German domestic law, apart from some aspects of it reflected in Articles 27 (3), 29 (1) and 30 (1) EGBGB). By comparison: The **Austrian** Private International Law of 15 June 1978 is silent regarding foreign mandatory rules of law. Section 202 (2) of the **US Second Restatement**, Conflict of Laws, provides that enforcement of performance under a contract which is illegal at the place of performance cannot be required; otherwise, the American practice seems to be very hesitant to admit an interference by foreign mandatory laws; see Eugene Scoles/Peter Hay, *Conflict of Laws*, 2nd ed., 1992, 663 et seq.

“(1) *When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to in this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law.*

(2) *In deciding whether such a provision is to be taken into consideration, one shall consider its aim and the consequences of its application, in order to reach a decision that is appropriate having regard to the Swiss conception of law.”*

According to the practice developed under this Article, **four conditions are prerequisite** for the application of Article 19:

- (i) Clear evidence that the foreign legal provision is intended to be applied to the case mandatorily (so-called “*Anwendungswille*”).
- (ii) A close connection between the case and the foreign legal provision (so-called “*enger Zusammenhang*”).
- (iii) A preponderant interest, deserving protection, of one of the parties that the foreign mandatory provision be taken into account (“*schützenswerte und offensichtlich überwiegende Interessen einer Partei*”).
- (iv) The relevant interests of the party also deserve protection pursuant to Swiss law, and the result corresponds to the Swiss conception of law (“*Normzweck und Ergebniskontrolle*”).

Provisions which are comparable with Article 19 PIL can be found in Belgium and Denmark.

Of importance is the **Bretton Woods Convention** (Article VIII 2 b(1) Convention on the International Monetary Fund IMF), which provides:

“Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.”

In proceedings before state courts, the court will certainly have to apply its own **domestic** mandatory laws, such as export or import restrictions etc.

But *quid*, about the application of **foreign** mandatory rules? Courts have traditionally been rather hostile (see the certain heritage in the doctrine, frequently headed “*Grundsatz der Nichtanwendung fremden öffentlichen Rechts*”).⁵²

The most striking evidence of this attitude is the above mentioned **EU Anti-Boycott Regulation of 22 November 1996** which may be seen as a **protest** of the EU against the US sanctions under the Iran and Libya Sanctions Act (ILSA) and the Helms Burton Act regarding Cuba (Cuban Liberty and Democratic Solidarity (Libertad) Act, Public Law 104–114, 12 March 1996, named after its chief sponsors Senator J. Helms and Representative D. Burton).⁵³

Thus, with the growing globalization, the attitude today is likely to shift to a more subtle approach; an approach which will rather **apply a rule of reason test**.

⁵² See e.g. the well-known *Sensor-case* discussed in RabelsZ 1983, 141 ss, where the Dutch courts in The Hague had to decide whether the US export restriction forbidding the export of certain high tech equipment to the former Soviet Union was to be applied against a Dutch subsidiary of a US parent company. The Dutch court refused to allow the US statute its intended extraterritorial application, making the delivery by the Dutch subsidiary possible. Similarly, US freezing orders regarding Libyan bank accounts held at English subsidiaries of US banks had been disregarded by UK courts. See hereto Bernd von Hoffmann, *Internationally Mandatory Rules of Law Before Arbitral Tribunals*, in: Acts of State and Arbitration, 1997, at 8.

⁵³ The Helms Burton Act codifies the economic embargo which dates back to the Kennedy area in 1963 and, moreover, provides for a right of US nationals to sue non-US firms trafficking in confiscated properties in Cuba (this section has been suspended by President Clinton effective 1 August 1996; on 16 July 1998, the President extended the suspension for another 6 months). The Act also prohibits the entry to the US of those who “traffic” in confiscated properties claimed by a US national. Ownership examination is conducted under a dual test, one in Cuba, one in the US, by means of a review by the Foreign Claims Settlement Commission (FCSC) who so far had dealt with some 10’000 Cuban claims, certifying about 6’000 and denying about 4’000.

2. The Issue Before Arbitral Tribunals

What is, and should be, the attitude of arbitral tribunals? Should it be the same as for state courts, or analogous, or entirely different? Should the arbitral tribunal be more reluctant to apply (or at least to take into consideration) foreign mandatory rules of law or foreign public policy rules? This is one of the most debated issues in international arbitration.⁵⁴ Bernd von Hoffmann speaks of some 50 ICC cases that have been reported⁵⁵, but this may account but for a very small percentage.

When considering the criteria, we need to **distinguish** between those applicable to **arbitrability**, and those relevant for the **substantive** decision.

3. Regarding Arbitrability

Should an arbitral tribunal decline **arbitrability** (and thereby decline its arbitral **jurisdiction**) simply because some foreign mandatory rules of law (whether of a national or supra-national nature), which proclaim to be applicable, might provide for the non-arbitrability of the dispute? Is this a kind of “arrogance” to which an arbitrator should yield? Or should one tend to assume that the mandatory character of specific rules as such would militate that they should only be administered by state courts? Indeed, the latter had been supported frequently until a good decade ago, but since has yielded to a different approach allowing a prorogation of such issues to either foreign state courts or arbitral tribunals. However, in the **USA** an ice-braking case had been the *Mitsubishi v. Soler* case in 1985 (however with the “threat” by the US court that the ultimate scrutiny would be reserved to the US courts), affirm-

⁵⁴ For a discussion see François Knoepfler, *L'Article 19 LDIP est-il adapté à l'arbitrage international?* Liber amicorum Pierre Lalive, 1993, 531–542; he **correctly** concludes that the Swiss Arbitration Act (Chapter 12 PIL) is an independent piece of legislation and that, therefore, Article 19 is not directly applicable for an international arbitrator; nevertheless, its ideas, in essence, reflect a *communis opinio* (also reflected in the Rome Convention, Article 7). See further Marc Blessing, *Objective Arbitrability – Antitrust Disputes – Intellectual Property Disputes*, ASA Special Series No. 6, March 1994, at 20.

⁵⁵ Bernd von Hoffmann, *Internationally Mandatory Rules of Law Before Arbitral Tribunals*, in Acts of State and Arbitration, DIS Vol. 12, 1997, at 12.

ing the arbitrability of US antitrust issues, and the jurisdiction of a foreign arbitral tribunal to deal with them.⁵⁶ The precedent was followed in 1989 in the field of SEC matters in *Rodriguez de Quijas v. Shearson/American Express*.⁵⁷ Similarly, in the field of arbitration clauses in bills of lading, the brake-through came in 1995.⁵⁸ In Germany, however, as Bernd von Hoffmann reports, the courts are rather “*hostile towards arbitrability of securities claims which are covered by the Stock Exchange Act*”.⁵⁹

(i) In Switzerland

In Switzerland, the prevailing view is to answer **in the negative**, in the following sense: As correctly emphasized by Robert Briner in his Report to the WIPO Forum on the Arbitration of Intellectual Property Disputes of 3/4 March 1994:

“*[In respect of arbitrability] ... the least restrictive approach should be upheld in this connection. More precisely, one should favour the opinion that an arbitrator should not be concerned with foreign mandatory rules ... when determining whether a dispute is arbitrable or not.*”⁶⁰

Likewise, the Swiss Federal Supreme Court has reached the same conclusion in the *Fincantieri-Cantieri v. Oto Melara SpA* case.⁶¹

⁵⁶ *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346 (1985); William Park, in this connection, referred to the US “second-look-doctrine”.

⁵⁷ Reported in the ICCA Yearbook 1990, at 141; 109 S.Ct. 1917 (1989).

⁵⁸ *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 115 S.Ct. 2322 (1995); ILM 1995, 1618 with note by G. Delaume.

⁵⁹ Bernd von Hoffmann, loc.cit., at 19 and cases referred to there.

⁶⁰ Robert Briner, *The Arbitrability of Intellectual Property Disputes With Particular Emphasis on the Situation in Switzerland* (WIPO Publication No. 728, 1994, at 66).

⁶¹ In that case, an Italian state-controlled company engaged the services of Melara to act as intermediary for the sale of military equipment to Iraq. Difficulties arose after 1987 when Iraq seized payments for the military equipment it had bought. Melara then commenced arbitral proceedings against the Italian company. However, the Italian company referred to the UN Security Council’s Resolution adopted in 1991 prohibiting any commercial activity with Iraq (which Resolution of course became binding law in Italy as well as in other European countries). The Swiss Federal Supreme Court, in *ATF 118 II 353* (also published in *Revue de l’Arbitrage*, 1993, 691 et seq., followed by a Note by François Knoepfler) affirmed arbitrability of the dispute.

This is, in my view, the correct decision. It is based on Article 177(1) of the Swiss Private International Law (PIL) which, in the sense of a material rule of conflict of laws, provides on objective arbitrability that “*any dispute involving financial interests can be the subject-matter of an arbitration*”. The effect of this provision is that the parties and the arbitrators are not referred to the *lex causae*, or to any other national law, in order to determine whether a claim is arbitrable. The Swiss solution has been praised as the most modern and most “arbitration-friendly” solution; it will also be adopted in the revised German Arbitration Act (§ 1030).

From the perspective of Article 177 (1) PIL, the dispute in *Fincantieri* was certainly arbitrable, and hence jurisdiction was rightly affirmed. This solution, as a consequence, has the advantage that it can be ascertained that an arbitral tribunal, by affirming arbitrability, will be able to exercise its arbitral jurisdiction and to then proceed to an examination of the substance of the claim on its merits. In Germany, the same view seems to prevail.⁶²

Thus, interfering (foreign) mandatory rules of law (in the above example a sanction expressed by the UN Security Council) are **not as such a barrier to affirm arbitrability**.⁶³ Thereafter, it will be the duty of the arbitral tribunal to determine in its decision on the merits whether the mandatory rule (or e.g. UN sanction) will affect the claim. In regard of an UN sanction, there is no doubt that an arbitral tribunal sitting in Switzerland will apply the same faithfully.

Is there a limit for affirming arbitrability? My answer would be YES: a limit must be drawn where arbitrability must be denied on

⁶² Compare also Bernd von Hoffmann, loc.cit. at 20/21.

⁶³ In ICC Case No. 6162 (1990) the Tribunal had to consider a contract between a French claimant and an Egyptian defendant. The contract provided for arbitration in Geneva and further, that Egyptian laws were to be applicable. The defendant argued that the arbitrator lacked jurisdiction because, under Egyptian law, a party was allegedly only permitted to submit a dispute to arbitration if a legal provision expressly allowed it to do so. The arbitral tribunal, however, refused to apply Egyptian law for determining the arbitrability issue, having regard to Article 177 (1) of the Swiss PIL (ICCA Yearbook 1992, at 153 et seq.). – In *ICC Case No. 6379* (1990) the arbitrator disregarded the mandatory Belgian law which claimed to be applicable in respect of the exclusive distributorship agreement between the Italian claimant and the Belgian defendant (who initiated a counter-attack against the Italian company before the Belgian courts) (see ICCA Yearbook 1992, at 212).

grounds of **public policy** in international affairs (this, however, is a very restrictive test because only a few mandatory rules, although being of a public law nature, may also qualify as forming part of international public policy).⁶⁴

Of course, once an arbitral tribunal has rendered its award, the issue of non-arbitrability according to some mandatory rules of law **might come back on the “scene”**, namely, first, in the framework of a challenge against the arbitral award on jurisdiction (arbitrability) and, second, at the ultimate stage when a party will possibly want to seek **enforcement** of the arbitral award against the opposing party. The latter may then try to resist enforcement by invoking the arbitrability defence according to Article V (2) (a) and possibly also (b) of the New York Convention of 1958. Obviously, it stands to reason that an arbitrator should not be unaware in respect of concerns regarding enforceability of “his” award. However, it would seem entirely wrong for an arbitrator to give that concern (as valid or rather speculative as it may be, given the uncertainty where enforcement will have to be sought) a weight which it does not deserve, or to give it a weight which would outweigh a legally correct decision on arbitrability.⁶⁵

I may therefore conclude that the issue of arbitrability

- should **not be impaired** by taking into account or applying any foreign **mandatory** rules of law
- should not be impaired by the arbitrator’s concern as to the **enforceability** of his award, but
- should be denied only if indeed the affirmation of arbitrability be regarded as a fundamental violation of **public policy** (as applicable in international affairs).

How would this issue be solved in other countries?

⁶⁴ See hereto Marc Blessing, *Arbitrability of Intellectual Property Disputes*, Arb.Int., 1966, 191–221, in particular at 205–207. Beyond arbitrability are e.g. matters where third parties are involved. This is the case in *erga omnes* rulings under Article 85 (3) Treaty of Rome (where exclusive jurisdiction vests with the EU Commission), or where the validity of a patent is to be determined (where the determination will mostly have to be made by the Patent Office).

(ii) *In Other Countries*

Most civil law countries, when determining arbitrability, still retain the notion (as under the “old” Swiss Concordat on Arbitration) that arbitrability will pre-suppose a right or dispute in respect of which the parties have the right to compromise, or to freely dispose thereof. This notion obviously narrows the scope of objective arbitrability and might have as an effect that mandatory rules pertaining to the *lex causae*, where deemed applicable, might prevent a tribunal from affirming arbitral jurisdiction.

4. Regarding Substance

Under what circumstances, perspectives and **tests** should an arbitral tribunal either (i) take into consideration or (ii) directly apply mandatory

⁶⁵ In response to a different opinion voiced at the Hague Conference of 4 July 1997 by Professor Cathérine Kessedjian, who said – in connection with the question whether or not an arbitrator should decide to apply a mandatory rule of law – that the prevailing concern of every arbitrator should be to see to it that his product, i.e. the award, should be **enforceable**, I had basically reacted in the following way: The hard question really boils down as follows: “*should the arbitrator, for concerns of enforceability, render a ‘wrong’ decision which however promises to be easily enforceable, or should he not rather render a ‘right’ decision the enforcement of which might, however, be less certain?*” – I would definitely be inclined to say that the arbitrator’s **prime duty** is to render a **correct decision**; the arbitrator’s conviction can not be sacrificed or “bastardized”; the concern of enforcement is a valid concern but, in the overall hierarchy, of a “lesser” value. Moreover, in most of the cases the arbitrator does not know and can not know **where** ultimately the award-creditor may or will seek **enforcement** against the award-debtor’s assets. And above all: I have seen in my practice that most **parties (companies) of standing** make it a matter of their pride to honour international awards **voluntarily** even when they have lost an important case. They correctly feel that they owe no less to their own dignity, and to the business community within which they would like to continue to operate. By contrast: business parties who became known that they do not honour arbitral awards risk to be out of business tomorrow, or may otherwise have to pay a heavy price in future (as was the case in respect of certain states and state-controlled companies which ended up to pay very high additional risk premiums in connection with new contracts and investments). I would recall here the old *dictum* of the Zurich merchants reported from the 15th century: “***Business people always meet twice in their life times***”. This is a truism which, more than ever before, seems to be of actuality for today and for the next millennium.

rules of law (over and above the law chosen by the parties themselves, or the law or rules of law which the tribunal, in the absence of a choice, had determined to be applicable)?

First, an overall guidance for any arbitral tribunal must come from a scrutiny under the notions of **transnational public policy**. The notion of “transnational public policy” was essentially fostered by Professor Pierre Lalive and has since earned world-wide support.⁶⁶ The public policy in the sense of a transnational public policy is **different** and independent from a particular state’s national or international public policy, or from a particular state’s public policy in international matters. Attempts have been made to clearly define this “animal”, but none of them would seem to be convincing. One is somehow tempted to say that this phenomenon is somehow akin to the difficulty to define an elephant: You may say that an elephant is grey and big, and yet, this definition is neither helpful nor informative. But, nevertheless, when you see an elephant, you can immediately recognize it as such.

Are the demands, requirements and yardsticks of transnational public policy indeed as easily recognizable, akin to the looks of an elephant? From my personal and quite long-standing experience I may say: **Yes**.

Berndt von Hoffmann has tried to identify some areas of consensus in this respect when he writes:

“There seems to be emerging consensus today that transnational public policy requires to enforce national prohibitions of corruption, smuggling, drug traffic, arms trade and the export of goods belonging to the cultural heritage. Also the enforcement of UN embargoes by arbitral tribunals should be based on transnational public policy. The observance of public international law is part of transnational public policy.”

Indeed, von Hoffmann touches on some of the elements, but obviously there are many more. The essence to realize here is the statement

⁶⁶ Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, ICCA Congress Series No. 3, 1987, 257–320; Marc Blessing, *The New International Arbitration Law in Switzerland – A Significant Step Towards Liberalism*, 5 J.Int.Arb. 2 1988, 54–64 and cases referred to there; in accord: Berndt von Hoffmann, *International Mandatory Rules of Law Before Arbitral Tribunals, Acts of State and Arbitration*, 22–24 and further references quoted there.

that transnational public policy is the key-word and yardstick against which to measure the claim of a national legislation to “export” its legislative prerogatives, and to impose an extra-territorial recognition of the same. Although mandatory rules of law are seen to pursue public interests and perceived in a manner to override the interests of private parties, the international arbitrator is frequently confronted with the difficult tasks to adjudicate a clash between public interests of a state and the legitimate interests of the parties.

For this purpose, it seems useful to run through a kind of check-list which reflects the leading criteria to be taken into account; I would like to identify them as follows:

In my view, the seven leading criteria are the following:

- (i) the rule in question must be a norm of **mandatory** character;
- (ii) the rule must be such as to impose itself **irrespective** of the applicable law;
- (iii) the **preconditions** regarding the application (as per the particular mandatory rule) must be given; generally, the scope of mandatory rules must be construed narrowly;
 - U.S. sanctions, for instance, show a great variety as to their definitions of blocked assets, the embargo imposed, the exempted businesses and transactions and the jurisdiction over “owned or controlled” U.S. persons; these need to be examined in detail;
 - frequently, the application *ratione personae* is critical: for instance, does a sanction only apply to the national company, or also to all of its subsidiaries around the globe?
 - and also *ratione materiae* the scope of application might trigger highly difficult problems; for instance: *quid*, in respect of the following situation: The main contract between Iraq and the German General Contractor was suspended due to the UN sanctions against Iraq. However, the German general contractor had made several subcontracts with suppliers who claimed performance of the subcontracts and/or damages. Were those also suspended, as an indirect consequence of the UN sanctions? For a parallel situation, see the Award No. 1491 of the

Milano Chamber, of 20 July 1992, published in ICCA Yearbook 1993, 80–91.

- (iv) there must be a **close connection** between the subject matter of the parties' contract and the jurisdiction area or State that had promulgated the mandatory rule or norm; as Professor Hans van Houtte correctly stated: "*Extraterritorial jurisdiction to impose economic sanctions has to be justified under the standard of international law*".⁶⁷
- (v) the rule or norm as such must appear to be "**application-worthy**", having regard to its financial or socio-economic goals and underlying policies, examined under a functional analysis, in particular:
 - the nature of the values that aim to be protected by the norm, under the so-called "**shared-values-test**": are these values of an essential character? does the norm reflect a notion pertaining to a truly transnational public policy? does it protect a fundamental principle or a universally recognized legal right?
 - the impact which the application of the interested norm will have on the particular contractual relationship;
 - the legal effects of the norm (nullity, or partial nullity; *force majeure* exception), balancing all interests at stake;
- (vi) the **result** must, in view of all circumstances, qualify as an "**appropriate result**";
- (vii) the result must, therefore, **satisfy** the scrutiny under the perspectives, the demands and the supplementing or (sometimes) corrective **notions of a truly transnational public policy**.

Obviously, the three last elements are the most important and also the most critical ones. In the end, the reflection on the "**application-worthiness**" ("*Anwendungswürdigkeit*") will **essentially** come down to a careful assessment of the "**merits**" of the norm under a kind of "**rule-of-reason test**", having regard to the protected interests and values, and having regard to its effects. In other words, the examination

⁶⁷ Hans van Houtte, *Trade Sanctions and Arbitration*, Int.Bus.Lawyer, April 1997, 166 et seq., at 168.

will amount to a determination of the **legitimacy** of the particular norm to impose itself on the parties.⁶⁸

The international arbitral practice has developed these criteria with **very subtle differentiation**.⁶⁹ In general, mandatory rules that “only” aim at protecting a State’s financial, fiscal or political interests, in most cases, have not been regarded as meeting the “application-worthiness-test”,⁷⁰ unless there exist very particular circumstances or connecting factors justifying their application.⁷¹ Academics in Switzerland and Germany will like to use the term “*Sonderanknüpfung*” (a term that does not really translate, meaning a special rule of conflict of laws justifying a special connection to an extraneous legal order); I would suggest to strike this term from the vocabulary as far as international arbitration is concerned.⁷²

⁶⁸ For instance, a “*strong and legitimate interest*” was denied in the *ICC Case No. 6329*, decided in 1991, where the arbitrators had to determine whether or not the US RICO Act deserved to be applied; see hereto Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, *Arbitration International*, Vol. 11, 1995, in particular 146–149.

⁶⁹ This author recalls to have written, in his capacity as presiding arbitrator sitting on one of the cases mentioned under Part I. above, more than 120 pages to discuss the major aspects considered by the Tribunal so as to determine the issue of the applicability and “application-worthiness” of a rule claiming a mandatory application.

⁷⁰ An example is discussed in the decision of the Swiss Federal Supreme Court in *ATF 118 II 348*, 353 in re *Banco Nacional de Cuba v. Banco Central de Chile*.

⁷¹ Regarding the applicability of exchange control regulations and in particular of Article VIII Sec. 2(b) of the IMF Agreement of 1944 see Klaus Peter Berger, *Acts of State and Arbitration*, publication by DIS (Carl Heymanns Verlag KG, 1997), edited by Karl-Heinz Böckstiegel.

⁷² The term has its justification for the purpose of scholarly writings and State court practices, but I see **no need** and no merits to use this term as far as international arbitration is concerned. In fact, the yardsticks for using a “*Sonderanknüpfung*” are not at all the same in State court proceedings and in international arbitration. The latter has developed its own criteria which, in my view, are more subtle and more differentiated than those developed in State court practices.

IX. Legal Effects

1. As to the Substance

Two situations should be distinguished:

First: the sanctions pertain to, or form part of, the *lex causae*:

Contracts concluded in violation of **already existing** mandatory laws are **null and void** according to the *lex causae*; thus, performance will be made impossible – **except in those** cases where the Arbitral Tribunal would have to reach the conclusion, in a specific case, that such mandatory laws could not be recognized (for instance if they clash with an overriding norm or public policy).

Where an **already existing contract** is affected by newly promulgated “supervening” mandatory rules, performance will become illegal, and the aggrieved party might plead a ***force majeure situation***, unless, again, those mandatory rules of law are not, in a special situation, recognized, or deemed “recognizable”, by the Arbitral Tribunal (typical examples occurred in State contracts, where the State issued a decree or regulation aiming at interfering into a particular contractual relationship for the benefit of one of its agencies).

During the existence of the *force majeure* situation, performance under a contract will normally remain in suspense. Work or services rendered in good faith up to that moment will normally have to be paid for, since *force majeure* will, unless specifically agreed otherwise, have an *ex nunc* effect only.^{73,74}

⁷³ A classic example was the arbitration case *Krupp v. Kopex*, decided by an Arbitral Tribunal sitting Zurich by an Award rendered on 9 September 1983. Krupp’s deliveries were, in the last moment before transportation by railway to Poland, affected by General Jaruzelski’s Decree issued on 21 December 1981, prohibiting all further industrial imports in a value of many billions of Dollars, essentially because of unavailability of foreign currency. Nevertheless, the industrial equipment already manufactured by Krupp had to be paid for. As a consequence, the Polish party was well advised to rather see to it that the import could nevertheless take place on the basis of a special permit, so that, for the benefit of the Polish economy, the facility could be erected for the price it anyhow had to pay to Krupp.

⁷⁴ Compare hereto Anton K. Schnyder, *Wirtschaftskollisionsrecht*, Zurich 1990, N. 310/311 and references cited there.

Once the intervening trade sanction is lifted, the contract will – at least theoretically – come to life again. However, after a certain lapse of time, the parameters of the resurrecting contract might have to be renegotiated in good faith, since the resuming of the performance might have become substantially more onerous to the aggrieved party (typically for the party that will have to resume its works). Thus, an Arbitral Tribunal might have to consider carefully the impact of such sanctions.⁷⁵ It might have to declare a contract terminated or extinct due to its suspension over a longer period of time, and determine the consequences thereof – a difficult and delicate task!

Second: where the sanctions pertain to a third legal order, or a supranational order:

The legal effects are basically the same as above. Foreign sanctions subsequently introduced might be admitted as factual or legal obstacles for the outstanding performance, on grounds of *force majeure*.

2. Mere Authority – or Duty to Apply Mandatory Rules even *ex officio*?

We have discussed the tests and yardsticks under which an arbitral tribunal may have to take into account, or directly apply, mandatory rules of law. The question remains whether a tribunal should consider the effects of mandatory rules only if and when pleaded by one of the parties as a defence, or whether it may consider to apply mandatory rules *proprio motu*, even if none of the parties raises the issue.

⁷⁵ For instance, the UN Security Council, in connection with its *Resolution No. 687/1991*, had requested the Member States to take precautions that Iraqi parties were not allowed to claim redress as a consequence of the sanctions imposed against the Iraqi State. An Arbitral Tribunal might also have to consider whether, after the lifting of the Iraqi sanctions, an Iraqi party could claim resurrection of the suspended contract, or whether it would not be more appropriate, under the circumstances, to consider the affected contract terminated, because the resuming of the performance might amount to an unbearable burden for the supplier, or might even have become impossible. In respect of Yugoslavia, the UN Security Council's Resolution No. 1022 of 22 November 1995, for instance, excluded any claims by Yugoslavian parties in respect of contracts that had been affected by the UN embargo.

A reading of Article 7 of the Rome Convention clearly inspires the understanding that a state court may give effect to mandatory rules *ex officio*. Likewise, Article 19 PIL (applicable for State courts in Switzerland) does not necessarily require a plea of one of the parties.⁷⁶

The **most clear affirmation** that a tribunal should be **authorized** – and where the facts of the case so suggest – should indeed be **obliged** to raise issues of the application of mandatory rules *ex officio* is made by many scholars **in the area of competition laws**.

⁷⁶ Monica Mächler-Erne, *Commentary ad Article 19 PIL*, N 29, in: Honsell/Vogt/Schnyder, *Internationales Privatrecht*, 1996.

X. Concluding Remarks

One of the most difficult issues in international arbitration is the **impact of mandatory rules of law** (including trade restrictions, sanctions, embargoes, exchange control regulations, UN Security Council's decisions, competition law rules) that require to be applied, or at least considered, as *ius cogens* irrespective of the applicable law. On the one hand, the international arbitrator is **not the guardian of the interests of foreign states** which sometimes show a kind of arrogance in seeking to impose their national laws, perceptions and interests on others.

On the other hand, the international arbitrator is **not** simply the **"obedient servant" of the parties**, and he is not only called upon to pass a decision in respect of the *inter-partes* contractual interests. His responsibility is not solely vis-à-vis the parties (as had too frequently be maintained), but go beyond: The arbitrator of our times, and certainly of the times to come, **has to apply a broader perspective**, a perspective which is not solely confined by the interests of the parties and will have to **take into account the general notions and requirements of the transnational public policy**. Such transnational public policy may, in individual cases, derogate the mutual intentions of the parties. For instance, an arbitral tribunal might have to take into account (or even directly apply) the antitrust laws pertaining to a third legal order, as it might have to take into account and honour sanctions of the UN Security Council, or to respect exchange control regulations enacted in conformity with Article VIII Section 2 (b) IMF Agreement – even though the parties themselves had not thought that such norms should interfere with their contractual relationship. Should the role, mission and ethics of the international arbitrator, therefore, be reconsidered? – This might be the topic for another Conference.

Basically, there is wide support for the conclusion that such **norms of a transnational public policy ought to be applied *ex officio***, even if not particularly alleged by one of the parties. On the other hand, it would certainly not be justified to expect from an arbitral tribunal to carry out *sua sponte* detailed investigations where particular "indicators" are absent. In the same sense, particular exclusion agreements made by the parties aiming at curtailing an arbitrator's authority to take

into account or apply requirements forming part of a transnational public policy cannot be regarded as valid or admissible. I can only agree to the conclusion reached by Klaus-Peter Berger:

“It cannot be argued that parties to an international arbitration may legitimately mandate their arbitrators to ignore legal rules and principles which are part of transnational public policy.”⁷⁷

The impact of mandatory rules of law must be seen as **one of the most burning issues** in international commerce and trade, as it is in the daily international arbitration practice. Legal “**positivists**” are horrified when realising that the issue of mandatory rules triggers questions such as those pertaining to a rule of reason analysis, because – as they fear – such analysis might reduce the certainty and predictability of a particular contract. But they are **wrong** as regards their conclusions on the (i) necessity, (ii) desirability, (iii) the degree of uncertainty.

First, the respect of basic notions of a transnational legal order is, today, more **necessary** than ever before. International business, business behaviour and the exercise of rights is no longer solely the affair of operating in isolation of the rest of the world. The continuously expanding globalization demands mutual respect and does require, from the arbitrator, an orientation which is not only grounded in a particular national legal system (no matter how excellent that might be), but which is well-grounded within those notions that form part of a transnational “*ordre public*” or *lex mercatoria*. Thus, the transnational public policy has become an underlying implied (or, sometimes, supplementary or corrective) legal order which is essential. **Second**, the **desirability** of such wider orientation can hardly be doubted at the present time.

Third, the **degree of uncertainty** is much narrower than sometimes feared even though, at the end of the day, the question whether or not to apply mandatory rules of law will rest on the **essentially subjective appreciation**, i.e. on the arbitral tribunal’s rule of reason test (or its test in respect of the “**application-worthiness**”, as I use to call it). As a matter of fact, a tribunal’s orientation that takes into account the elements herein discussed and the “yardsticks” of transnational public

⁷⁷ Klaus-Peter Berger, *Acts of State and Arbitration: Exchange Control Regulations*, at 124.

law must be seen and appreciated as one of the most central “protective devices”, as a kind of guarantee, or insurance policy, or “life-vest”. It does not create uncertainty or unforeseeability of law; on the contrary, it does assure that sound and carefully reflected justice is done.⁷⁸

The discussion in this report has shown that a **number of criteria** have been developed in order to determine the application of mandatory rules and, in particular, their “**application-worthiness**”, having regard to all circumstances. There is no short answer to the present topic, **and thus there is no short conclusion**. This report is but a summary, and the discussion in each individual case is one of the most demanding, challenging and responsible tasks of the today’s arbitrator. **There is no definitive answer, no “recipe for all seasons”, no “cook-book” for the solution that holds the key for all situations. Each case has its own “dynamics”, is different, and merits its own very careful examination, for which this report can only contribute a few basic reflections.**

⁷⁸ It is, therefore, the writer’s experience, and indeed also his own practice, that arbitral tribunals go to very detailed researches, evaluating numerous aspects from different perspectives, before reaching a conclusion for or against the application or the taking into account of a mandatory rule of law.

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