

transactions. Thus, the parties and the tribunal can break the question of value into its component parts, raise questions about the assumptions and information used in the parties' analyses, and, by focusing on the important differences in those analyses, can narrow the differences between the parties. The DCF method, then, is a powerful analytical tool that affords a tribunal significant flexibility in carrying out its own analysis based on the evidence and in reaching a reasoned judgment without necessarily being limited to choosing between the positions of the parties.

At a juncture in international arbitration in which the economic sophistication of those involved in the process is increasing along with access to the tools necessary to carry out DCF analyses, there is every reason to expect that tribunals, whatever legal standards they may be applying, will increasingly turn to the DCF method—even if only as a first step in the analysis—in order to determine the economic value of expropriated income-producing property.

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The Prospects for International Arbitration: Disputes Between States and Private Enterprises

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1. INTRODUCTION

Nowadays many business contracts are made by and between States, subdivisions of States and State enterprises on the one hand and foreign private enterprises on the other hand. The private enterprises involved in such contracts are, for the greater part, Western European, American and Japanese business entities. The States involved are mainly developing countries and during the last decennia also communist countries, since in these countries the economic system is, to a large extent, controlled by the government.

The main incentive for executing business contracts on the part of States, including State-controlled entities, is the acquisition of know-how, experience, managerial and technical capabilities as well as foreign capital. The main reasons for executing business contracts on the part of private enterprises are extension of their market, low production costs caused by relatively low labour expenses, tax and other facilities granted by the host States and the supply of natural resources.

The said business contracts may have different characteristics, such as turn-key projects, different kinds of contracts relating to the exploration and exploitation of natural resources and, in particular, joint venture contracts with respect to all kinds of business activities. In this connection attention should be drawn to the numerous joint ventures made between State controlled entities of developing countries and private enterprises from the economically advanced parts of the world. The necessity of close co-operation with foreign private enterprises was emphasized *expressis verbis* during the congress of the communist party of the People's Republic of China, held in October 1987, for the purpose of improving the domestic economy as well as for the purpose of exporting Chinese products abroad.¹ Furthermore it deserves consideration that recently the USSR has made specific legislation with respect to joint ventures with foreign private enterprises, in particular to acquire high-technology from the western world.²

Taking into account that co-operation agreements between States and private enterprises often have a long-term character, three substantial questions arise, viz.:

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¹ South China Sunday Morning Post (Hong Kong) 1 November 1987, Sunday Spectrum, p. 3.

² Decree on joint enterprises with western and developing countries of 13 January 1987, 26 I.L.M. (1987) p. 749.

- (i) the settlement of disputes arising from or connected with the co-operation agreement;
- (ii) the impact of *acta iure imperii* of the host State, in particular of its national legislation, on existing co-operation agreements; and
- (iii) the adjustment of the co-operation agreement in the event of a substantial change of circumstances which materially affects the rights and obligations of the parties involved.

2. SETTLEMENT OF DISPUTES BY INTERNATIONAL ARBITRATION

First of all it deserves consideration that not any and all disputes which may arise as a result of co-operation and investment agreements require a specific provision in so far as the settlement thereof is concerned. Certain matters are completely governed by the laws of the host State, such as labour contracts between a joint stock company—set up by the parties—and its employees and the rights and duties of such joint stock company under municipal law, and therefore disputes arising with respect to these matters have to be submitted to the competent courts of the host State. However, the interpretation and implementation of the contractual obligations between the State, including State-controlled entities, and foreign private enterprises are entirely different matters. As regards the aforesaid obligations it is of substantial importance to provide in the contract itself specific clauses concerning the law governing the contractual relationship and the settlement of disputes arising thereunder or connected therewith. If such clauses are not inserted in the contract, the laws of the host State are most likely to govern the contract and the local courts competent to deal with possible disputes, because of the close connection between the business activities in question and the host State.

However, in general, foreign private enterprises are most reluctant to submit their possible disputes with a State or State-controlled enterprises to the courts of the State involved, since they often do not expect a completely impartial attitude towards such disputes of the local courts. In addition foreign private enterprises are in general not familiar with the local laws, in particular not with those governing legal proceedings. States or State-controlled entities are even less willing to submit their disputes with foreign private enterprises to the courts of the State where these enterprises are based. Reasons of prestige and the conception of State immunity, in addition to considerations similar to those referred to above, often underlie a negative attitude of the State and State-controlled entities.

Another approach may be to entrust the settlement of disputes to the courts of a neutral country. Against this alternative the following objections may be raised:

- (i) it may be difficult for the parties involved to agree on the selection of the neutral

- (iii) the contracting parties are often not familiar with the laws applied by the courts of the neutral country and therefore the nature and scope of such court decisions may lead to unexpected results.

An alternative means of settling disputes consists of conciliation and international arbitration, nowadays frequently referred to with respect to disputes arising from international business transactions between private parties themselves. The advantages inherent in this kind of arbitration as compared to submission of the same type of disputes of national courts are *inter alia* the following:

- (i) the parties involved are in a position to directly influence the composition of the arbitral tribunal and therefore may have more confidence in such a tribunal than in State courts);
- (ii) the parties are in a position to appoint arbitrators who are familiar with and experienced in a particular kind of dispute;
- (iii) the rules governing arbitration are less rigid and formalistic and therefore may contribute to a settlement in a more peaceful climate;
- (iv) arbitration proceedings are, in general, less time-consuming, since the arbitral award is to be considered as final and binding and therefore legal proceedings in several instances can be circumvented;
- (v) submission of international business disputes to arbitration rather than submission of the same to national courts creates, or at least enlarges, the possibility of applying rules and usages specifically attuned to international business transactions, i.e. the *lex mercatoria*;³
- (vi) arbitral awards can often be enforced easier in a country other than the seat of the arbitral tribunal than a court decision, since quite a number of States, including both industrialized States and developing countries, are at present parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;⁴
- (vii) apart from arbitration as a means of settlement of disputes arising from international business transactions, arbitration is of increasing importance for the purpose of filling gaps in or modifying of international business contracts to changed circumstances, being tasks which are not always permitted to national courts.⁵

Now the question arises as to whether the above considerations concerning arbitration as a means of settlement of disputes arising from international business transactions between private enterprises also hold good *mutatis mutandis* for similar transactions between States and private enterprises.

Before dealing with this intriguing matter it is necessary to raise the question as to

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whether applying by analogy international arbitration to business transactions between States and foreign private enterprises is, as such, not contrary to the conception of State sovereignty. For a better understanding of this question it is essential to distinguish between *acta iure imperii* and *acta iure gestionis*. *Acta iure imperii* are to be considered as policy decisions emanating from a State acting in its capacity of sovereign State, such as promulgation and enforcement of legislation, whereas activities of States qualify as *acta iure gestionis* if and when the said activities are of such a nature that the same could be carried out by private persons, such as entering into contracts. It should be emphasized that the nature and not the purpose of the activity is decisive for the question as to whether an act of a State qualifies as *acta iure imperii* or as *acta iure gestionis*.⁶ In the event of *acta iure imperii* a State is entitled to claim immunity from jurisdiction of foreign courts, while the same claim cannot be upheld for *acta iure gestionis*, since the restrictive doctrine of immunity from jurisdiction has been accepted by the majority of States.⁷ As a result it is justified to conclude that, once a State has entered into business transactions with a foreign private enterprise, international arbitration for the purpose of settling disputes arising from the said transactions recommends itself in the same way as it does for international business transactions between private persons.

Nevertheless, it deserves consideration that international arbitration as a means of settlement of disputes resulting from international business transactions has not been accepted worldwide. It has been argued repeatedly that a private enterprise entering into commercial contracts with foreign States has to submit itself without any reservation to the jurisdiction of that State, including the jurisdiction of the courts of the State involved. This view clearly underlies the Calvo-doctrine still espoused by the majority of Latin-American States. According to the Calvo-doctrine there should be equality of treatment between nationals and foreigners and State intervention in the affairs of another State should not be permitted. As a result diplomatic protection by foreign States of their nationals in Latin-America in respect of business transactions should be excluded. Thinking along the lines of the Calvo-doctrine arbitration between States and foreign private enterprises is antithetical to the philosophy underlying this doctrine, since it grants foreign investors a legal status different from that of investors having the nationality of the host country.⁸ The Calvo-doctrine was still referred to implicitly in the Andean Foreign Investment Code as of 30 November 1976 of which Article 51 reads as follows:

"In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors."⁹

⁶ L. J. Bouchez, *The Nature and Scope of State Immunity from Jurisdiction and Execution*, X NYIL (1979), pp. 14-16.

⁷ Bouchez, *op. cit.*, *supra* footnote 6, p. 33.

⁸ S.T. Lynch, *The International Centre for the Settlement of Investment Disputes: Selected Case Studies*, *The International Trade Journal* (1982-1983), pp. 321-322.

⁹ 16 ILM (1977), p. 153.

However, national legislation as well as commercial practice in a number of Latin-American States show an increasing trend in favour of international commercial arbitration.¹⁰ In this connection it also deserves consideration that a provision similar to Article 51 of the Andean Foreign Investment Code referred to above is lacking in the Andean Code on the Treatment of Foreign Capital and on Trademarks, Patents, Licences, and Royalties adopted on 11 May 1987. Article 34 thereof contains a provision of a more neutral and flexible character, leaving the regulation of the settlement of possible disputes to the individual States and reading as follows:

"For the settlement of disputes or conflicts deriving from direct foreign investments or from the transfer of technology, Member Countries shall apply the provisions established in their local legislation."¹¹

In addition it is necessary to draw attention to Resolutions 3201 and 3281 adopted by the United Nations General Assembly in the early 1970s viz.: the Declaration of a New International Economic Order and the Charter of Economic Rights and Duties of States. In these resolutions, unlike Resolution 1803 adopted by the General Assembly of the United Nations in 1962—the Declaration on Permanent Sovereignty over Natural Resources—no reference was made to international law being a restraining factor with respect to the validity of nationalization and measures of compensation relating to nationalization. Furthermore, the records of the debates concerning the aforesaid resolutions show that the developing countries were opposed to internationalization of investment agreements, since such agreements might impose a restriction upon their right to nationalize.¹² Although it is most questionable as to whether the said resolutions have acquired any legal force, because of the opposition of the States of the industrialized world,¹³ these resolutions and the debates relating thereto showed a trend among developing countries against internationalization of investment agreements.

In this connection the question arises as to whether a negative attitude towards internationalization of investment agreements *ipso facto* entails a less favourable view on international arbitration. *Prima facie* the answer seems to be in the affirmative, since internationalization of contracts and international arbitration are to a large extent intertwined. However, even if a contract between a State and a foreign enterprise is completely governed by the municipal law of the State party to the contract, then still international arbitration for the purpose of settling disputes arising from the said contract is likely to be the only alternative for the reasons set out in the first part of this paragraph.

Now the question arises as to whether the private enterprise will be adequately protected, since the State involved acting in its capacity of sovereign may interfere by means of its legislation in its contractual relationship with the foreign private enterprise.

¹⁰ David, *op. cit.*, *supra* footnote 5, pp. 125-127.

¹¹ 27 ILM (1988), p. 986.

¹² C. Greenwood, *State Contracts in International Law. The Libyan Arbitrations*, 53 BYIL (1982), p. 56.

¹³ 17 ILM (1978), pp. 27-31.

In practice the foreign private enterprise is able to protect itself against the aforesaid kind of interference by means of inserting in its contract with the State intangibility and stabilization clauses. The scope of an intangibility clause, often inserted in contracts, is that the contractual relationship between the contracting parties cannot be modified or amended except with the consent in writing of both parties. In contradistinction to an intangibility clause a stabilization clause is attuned in particular to contracts between States and foreign private enterprises, since the nature and scope of such clause is to protect the private enterprise against modifications of the law governing the contract which adversely affect the contractual position of the private enterprise.¹⁴ The most obvious examples of State interference with contracts with private enterprises are changes of legislation pertinent to the increase of tax in general and of the government take with respect to concession agreements adversely affecting the position of foreign private enterprises under long-term contracts. It is true that without intangibility and stabilization clauses being inserted in the contract the private enterprise could still argue that the State interference would be contrary to good faith, respectively would have to be considered as abuse of rights, but the aforesaid clauses will in general strengthen the position of foreign enterprises to some extent. This holds good *a fortiori*, since binding obligations on States restricting its freedom of action as a sovereign are not that easily presumed to be present.

A most important question is whether such clauses will actually protect the foreign private enterprises by restricting the freedom of action of the State. As it appears from the judgement of the Permanent Court of International Justice in the *Wimbledon* case the State's capacity to enter into binding obligations by entering into treaties is an attribute of State sovereignty rather than a restriction upon its sovereignty.¹⁵ The same view was upheld in the arbitral awards in the *Aramco* case¹⁶ as well as in *Sapphire v. NIOC*¹⁷ in so far as binding obligations arising from contracts are concerned.

The intangibility and stabilization clauses have also been at issue in the *Libyan Oil* arbitrations. These arbitrations deal with the legal effects of such clauses with respect to nationalization of concessions granted to foreign companies. In the concession agreements the following clauses were laid down:

"The Government of Libya will take all steps necessary to ensure that the Company enjoys all the rights conferred by the concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.

This concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the regulations in force on the date of execution of the agreement of

¹⁴ P. Weil, *Les clauses de stabilisation ou d'intangibilité insérées dans les accords de développement économique. Mélanges offerts à Charles Rousseau*, (1974), pp. 301 et seq.; J. F. Lalive, *Contracts entre états ou entreprises étatiques et entreprises privées*, 3 *Recueil des cours de l'Académie de Droit International* (1983), pp. 56-61; A. Z. El Chant, *Protection of Investment in the Context of Petroleum Agreements*, 4 *Recueil des cours de l'Académie de Droit International* (1987), pp. 117-121 and pp. 150 et seq.

¹⁵ PCIJ (1928) Ser. A, No. 1, p. 25.

¹⁶ 27 I.L.R. p. 168 and p. 212.

¹⁷ 35 I.L.R. p. 173.

amendment by which this paragraph 2 was incorporated into this concession agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent."¹⁸

The three arbitrations involved are *BP v. Libya*,¹⁹ with Judge Lagergren as arbitrator, *Texaco/Calasiatic v. Libya*²⁰ with Professor Dupuy as arbitrator and *Lianco v. Libya*²¹ with Dr Mahmassani as arbitrator. In all three arbitral awards it was held that Libya was bound by the aforesaid contractual obligations. The most far-reaching effect of the aforesaid clauses is reflected in the *Texaco/Calasiatic* award in which it was held that nationalization contrary to contractual guarantee was *per se* unlawful irrespective of the issue of compensation.²² However, in the *Lianco* award it was decided that the failure to pay compensation rather than the nationalization itself was unlawful.²³ The *BP* award did not deal with this specific issue, but merely held that the actions on the part of Libya were a fundamental breach of contract. In theory there is a substantial difference between the *Texaco/Calasiatic* and *Lianco* awards in so far as the effect of stabilization clauses are concerned, but in practice both approaches result in a settlement for a certain compensation.

The foreign enterprise will argue in the event of a dispute on the nature and scope of stabilization clauses that acceptance hereof by the State was condition *sine qua non* for entering into the contract in question. In addition the foreign enterprise will invoke the principle of *pacta servanda sunt* and emphasize that its legitimate expectations resulting from the aforesaid clauses should not be frustrated by unilateral action of the State.

On the contrary it may be argued by the State that legislative measures interfering with its contract with a foreign enterprise have to be taken in the public interest in spite of a stabilization clause previously agreed upon. In support of this view the State could submit that the public interest always prevails over any private interest: an argument often put forward for the purpose of justifying nationalization of (foreign) private interests. Furthermore the State may also invoke the United Nations General Assembly Resolutions referred to above, in particular the Declaration on Permanent Sovereignty over Natural Resources, which contrary to the other resolutions has been espoused by both industrialized and developing countries.

Therefore it is to be submitted that acceptance of the aforesaid clauses in contracts may result in a deadlock situation between the State invoking its public interest and its freedom of action relating thereto on the one hand and the foreign enterprise referring to its legitimate expectations and the principle of *pacta servanda sunt* on the other hand. Does this mean that if it comes to terms stabilization clauses will not have any legal consequences because of the "stronger" position of the State acting as a sovereign?

¹⁸ 17 ILM (1978), p. 5.

¹⁹ 53 I.L.R. p. 297.

²⁰ 17 ILM (1978), p. 3.

²¹ 20 ILM (1981), p. 1.

²² 17 ILM (1978), p. 27.

²³ 20 ILM (1981), p. 168.

The answer to this question is most likely to be in the affirmative, if and when a dispute on the implementation of the said clauses will be submitted to the courts of the contracting State. If, on the contrary, the same dispute will be submitted to international arbitration, the private enterprise stands a much better chance that its interest will be taken into account more seriously. In this event the question remains how to balance the interests of the parties which by their very nature seem to be irreconcilable!

In the opinion of Judge Jiménez de Aréchaga and others, a State is permitted to take nationalization measures affecting a foreign private enterprise, even if the State in question has contractually agreed with that enterprise not to do so. In support of his view he refers to the United Nations General Assembly Resolutions mentioned briefly above, in particular to the Declaration on Permanent Sovereignty of Natural Resources by virtue of which—in his opinion—rules of traditional international law on this matter have been outlived. However, in his opinion this does not mean that stabilization clauses have no significance whatsoever. If a State acting in its sovereign capacity violates its contractual commitment not to nationalize the foreign company's property such action itself is allowed, but it simultaneously creates a special right to compensation which is more far-reaching than in the event such stabilization clause was not agreed upon. Such right to compensation may also encompass prospective gains (*lucrum cessans*) which would have been made by the foreign enterprise if the original contract would have been implemented.²⁴

A similar view underlies the arbitral award in the case of *Kuwait v. Aminoil* of 24 March 1982. The matter submitted to the arbitral tribunal had a bearing on nationalization by Kuwait of a concession granted to Aminoil before the agreed concession period of 60 years had elapsed. As regards the relationship between the right of nationalization of Kuwait and the stabilization clauses agreed between the parties, paragraph 95 of the award deserves special attention and reads as follows:

"No doubt contractual limitations on the State's rights to nationalize are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period. In the present case however, the existence of such a stipulation would have to be presumed as being covered by the general language of the stabilization clauses, and over the whole period of an especially long concession since it extended to 60 years. A limitation on the sovereign rights of the State is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of a legal right to eventual compensation."²⁵

Therefore, it is justified to draw the following conclusions with respect to stabilization clauses:

²⁴ E. Jiménez de Aréchaga, *International Law in the Past Third of a Century*, I *Recueil des cours de l'Académie de Droit International* (1978), p. 307; El Chiani, *op. cit.*, supra footnote 14, pp. 165–166; A. S. Kosheri, *Le régime juridique créé par les accords de participation dans le domaine pétrolier*, 4 *Recueil des cours de l'Académie de Droit International* (1975), p. 335.

²⁵ 21 ILM (1982), p. 1023.

- (i) these clauses should be formulated in an unambiguous way and most specifically;
- (ii) it is unlikely that these clauses will actually preclude the State party under all circumstances from taking any measures contrary to the said clauses in particular if and when the State party's interference is based on its public interest;
- (iii) nevertheless these clauses will strengthen the legal position of private enterprises with respect to claims to compensation in the event the State party to the contract is acting contrary to the said clauses; and
- (iv) stabilization clauses should always be combined with international arbitration in order to ensure that such clauses should be seriously taken into account and to prevent that the actual effect of the said clauses will be reduced in practice to nil.

3. ARBITRATION AS A MEANS OF ADJUSTMENT OF CONTRACTS

As regards arbitration as a means of adjustment of contracts it is essential to distinguish between two different situations, viz.:

- (i) not any and all information necessary to complete all contractual details were available at the time of execution of the contract; and
- (ii) a fundamental change of circumstances resulting in a substantial change of the initial balance between the parties' obligations.

In the first mentioned situation it is necessary to fill the gaps existing in the original contract or to specify some general terms and conditions agreed between the parties in the original contract in more detail. The second situation referred to above has a bearing on "hardship clauses" often inserted in long-term contracts in order to cope with fundamental changes of circumstances affecting substantially the initially agreed juridical relationship between the parties.

The nature and scope of a hardship clause is to revise the original contract at the request of one of the parties, if and when the basis on which the original contract was made has been changed in such a manner that by virtue of such change the balance between the obligations of the parties has been disturbed significantly and as a result one of the parties suffers unjustified hardship.²⁶

There are many varieties of such hardship clauses. Sometimes such clauses are formulated in general terms, but often such clauses refer to particular external circumstances affecting the basis on which the original contract was made. To the extent possible it deserves consideration to refer in a hardship clause to specific change of circumstances in order to avoid any misunderstanding between the parties as to whether the said clause applies.²⁷

In drafting hardship clauses it is, however, not only sufficient to refer to hardship as a reason for adjustment of the original contract but also to provide for the legal

²⁶ B. Oppetit, *L'adaptation des contrats internationaux aux changements de circonstances, la clause de "hardship"*, *Clinet* (1974), pp. 257–271.

²⁷ *Chambre de Commerce Internationale: Adaption des contrats, publication No. 326* (1978).

consequences resulting from invoking hardship as well as for a clear mechanism relating to effecting the adjustment envisaged. Therefore it recommends itself to refer in a hardship clause *inter alia* to: continuation of the original contract after one of the parties has invoked hardship; the dates on which hardship may be invoked; the effective date of adjustment of the original contract which normally coincides with the date on which hardship has been invoked, provided that later on it will be established that hardship was present; the obligation to renegotiate the original contract between the parties for the purpose of examining as to whether the terms and conditions justifying hardship will be present and if so, to discuss what extent the contract needs to be adjusted; the period for the aforesaid renegotiations should not be opened but be restricted to a certain period of time.

However, in filling gaps in an existing agreement as well as in the event of renegotiations relating to adjustment of the contractual relationship resulting from a hardship clause, the parties may fail to reach agreement. Consequently, it deserves consideration to draw up as part of the hardship clause a provision pertinent to a deadlock caused by failure to reach agreement during the renegotiations. Here again, international arbitration recommends itself rather than conciliation or a court decision, since conciliation as such does not lead to a binding decision and national courts are not always allowed to adjust contracts.²⁸

4. STATE PARTICIPATION IN INTERNATIONAL BUSINESS TRANSACTIONS

As stated in the introductory part of this paper, contracts may be made between foreign private enterprises on the one part and States, their sub-divisions or State enterprises on the other part. In practice international business transactions with foreign private enterprises are often made by State enterprises rather than by the State itself. In countries with a strictly governmentally controlled economic system, like the socialist countries and many developing countries, often only specific State enterprises are entitled to be in charge of entering into international business transactions. State enterprises can be defined in general terms as enterprises predominantly owned or controlled by a State or by its institutions with or without separate legal personality.²⁹

Assuming that a State enterprise has no separate legal personality, then it may be presumed that a business transaction between the said enterprise and the foreign private enterprise is in essence a contractual relationship between the State and the foreign private enterprise. As stated previously, a State may act in two capacities: as a trader and as a sovereign. As a result a State may frustrate the implementation of its contractual relationship with a foreign enterprise through policy acts of the State acting as a sovereign.

For example, a State has made a contract with a foreign company for the

²⁸ David, *op. cit.*, *supra* footnote 5, p. 25.

²⁹ K.-H. Böckstiegel, *Arbitration and State Enterprises* (1984), p. 14.

exploration and exploitation of crude oil within its territory and the foreign company is entitled to a remuneration for its activities consisting of payment in kind (production sharing agreement) to be freely exported by the foreign company.³⁰ In spite of the said contract the State in its capacity of sovereign prohibits the export of crude oil by the foreign company.

Now the question arises as to whether the foreign petroleum company can successfully dispute such export prohibition. For the purpose of answering this question, account has to be taken of the nature and scope of the contractual relationship between the parties as well as of the reasons underlying the State's export prohibition. Supposing that the export prohibition is part of a general policy of the State in question and not an *ad hoc* decision against the foreign petroleum company, it may be argued that the general interest of the State should prevail over the particular interest of the foreign company, be it on certain terms and conditions such as payment of reasonable compensation. If, however, a State acting as a sovereign frustrates the implementation of the contract merely or primarily because the foreign company was unwilling to accept terms and conditions unilaterally imposed by the State, the foreign company could dispute the export prohibition being contrary to the principles of *pacta sunt servanda* and good faith and/or on the basis of *abus de droit*. This holds good *a fortiori* if and when the contractual relationship is not governed solely by the laws of the State and if international arbitration has been agreed upon by the contracting parties. In this connection stabilization clauses may also play an important role.

An even more complicated situation arises, if the State enterprise having made a business transaction with a foreign company has separate legal personality.³¹ Assuming that the State acting as sovereign interferes with the contractual relationship of its State enterprise then the State enterprise could invoke *force majeure* for the purpose of justifying non-implementation of the contract or part hereof. In this situation the legal position of a State enterprise should in principle not be different from a private enterprise not being able to fulfill its contractual obligations due to governmental interference.

However, there may be a substantial difference between a State enterprise and a private enterprise invoking *force majeure vis-à-vis* its foreign contracting party, because of governmental interference with a contractual relationship. First of all the State enterprise often has been authorized by its governmental authorities to enter into certain business transactions. Furthermore, contracts with a foreign party are most of the time subject to approval by the State authorities. In addition the board of a State enterprise may in general influence more effectively its governmental authorities to use ways and means for the purpose of interfering with a contractual relationship with others than a private enterprise is able to do.

In this connection, however, it is necessary to distinguish between two different kinds of State enterprise, viz.:

³⁰ El Chati, *op. cit.*, *supra* footnote 14, p. 53.

³¹ Böckstiegel, *op. cit.*, *supra* footnote 29, pp. 34 *et seq.*

- (i) enterprises having their own responsibility and decision-making power with respect to their business activities; and
- (ii) enterprises which need the formal approval or authorization of governmental authorities for entering into international business transactions.

Examples of the first category are found in western Europe and are, in the way they are conducting their business, to be assimilated to private enterprises. The second category has a bearing on those State enterprises which in operating their business are fully, or at least to a large extent, dependent on their governmental authorities. This is frequently the position of State enterprises being part of a centrally planned economic system embodied in socialist countries as well as in many developing countries.

Taking into account the *foresaid distinction* between two different kinds of State enterprises, it is difficult to uphold the view that a State enterprise is always able to successfully invoke *force majeure* in the event of governmental interference with its contractual relationship with foreigners. In the event that the contract has been approved by the State authorities the State itself is deemed to be bound by the said contract. This implies that acts of State, including any *ad hoc* legislation, specifically interfering with a contract made by a State enterprise of the second category referred to above are not deemed to be solid grounds for invoking *force majeure*. However, an entirely different situation may arise if the acts of State, including its legislation, are of a general nature, but affect simultaneously the contractual relationship of the State enterprise with a foreign company. In such event the State enterprise may invoke State interference as *force majeure*.³²

As a result the question arises as to whether in the last mentioned situation the implementation of the contract made by the State enterprise with a foreigner has to be overruled by the public interest of the State and if so, to what extent. The answer will be most likely in the affirmative, if the local court has to weigh (non-)implementation of contractual obligations against the national public interest. If, however, the same question will be submitted to international arbitration the international public interest is also deemed to play an important role. Reference to the international public interest does not mean that any State interference with contracts made by and between State enterprises and foreigners is to be rejected *ipso facto*, but that rules of international public law relating to, for example, the protection of foreign investments have to be taken into account in the same way as if the State itself was the contracting party of the foreign enterprise.

Finally some observations have to be made with respect to contracts between States or State enterprises and foreign private companies, in particular in so far as investment contracts are concerned.

It is often more difficult to evaluate the risks inherent in foreign investments than those relating to domestic investments. In dealing with States or State enterprises, most of the time the investments take place in countries with a centrally planned

³² Böckstiegel, *op. cit.*, *supra* footnote 29, p. 47.

economy. This means that authorities of the host State are directly and/or indirectly involved in contracts with foreign companies. The foreign investor should know beforehand the legal consequences of the laws governing the contract and the said laws should not be solely the laws of the host country, at least not without referring to international standards. For the purpose of maintaining the originally agreed equilibrium between the obligations of the parties it recommends itself to insert intangible and stabilization clauses combined with a hardship clause—dealt with above—in the contract. It is true that intangible and stabilization clauses as such do not preclude the host State from changing its overall policy and thereby affecting also the interests of the foreign investor, but such clauses will at least reduce to some extent the negative effects on the foreign investor. As a matter of fact it is also a long-term interest of the host State to come to terms with the foreign investor, even if the change of its overall policy does not allow for implementation of the original contract.

Considering the complexity of international business transactions between private enterprises and States or State enterprises, it is essential that any and all disputes arising therefrom will be submitted to an impartial and independent institution. Therefore international arbitration rather than the local courts or national arbitration in accordance with the laws of the host State recommends itself for the purpose of settling disputes.

5. ARBITRATION *AD HOC* AND INSTITUTIONALIZED ARBITRATION

Arbitration may be agreed upon between the parties after a specific dispute has arisen or categorically with respect to any and all disputes which may arise or may be connected with their contractual relationship. The latter approach is nowadays often reflected in international business contracts in which a specific clause providing for arbitration with respect to future disputes arising from the contractual relationship is inserted (*clause compromissoire*).

Arbitration may have *ad hoc* character which means that the arbitration itself is organized *ad hoc* by the parties. However, nowadays frequently the parties to international business contracts refer to arbitration organized and administered by arbitration centres, in this paper referred to as institutionalized arbitration.

In the event of *ad hoc* arbitration, the parties themselves either have to elaborate the rules governing the arbitration or to refer to existing arbitration rules.³³ In this connection it deserves consideration that in present-day practice repeatedly reference has been made to the Uncitral Arbitration Rules. However, it is also possible to refer to the rules of an arbitration centre, without entrusting such centre with the administration of the arbitration. A difference between *ad hoc* arbitration and institutionalized arbitration is that a complete set of arbitration rules of the arbitration centre in general will apply to the arbitration in question. This means that the

³³ R. Luzzato, *International Commercial Arbitration and the Municipal Law of States*, 4 *Revue des cours de l'Académie de Droit International* (1977), pp. 49 et seq.

arbitration rules of the centre governing matters such as the composition of the arbitral tribunal, the arbitral proceedings and the form and effect of the arbitral award shall apply and the centre itself will be in charge of supervising the implementation of its arbitration rules. Therefore it is to be submitted that another difference between *ad hoc* arbitration and institutionalized arbitration is that in the latter case there is an institution supervising the implementation of the arbitration rules agreed upon, whereas such institution is lacking in the former case.

There are numerous arbitration centres varying from national arbitration institutions to international arbitration institutions.³⁴ Although international centres are designed in particular to deal with the settlement of disputes arising from international business transactions, some national arbitration centres are well reputed in dealing with disputes arising from international business transactions, such as the Stockholm Chamber of Commerce Arbitration in so far as East-West trade is concerned. Some national arbitration institutions like the London Court of International Arbitration have attuned their rules and facilities in such a manner to the needs and requirements of international trade, that it is difficult to distinguish in this respect such a national institution from international institutions.³⁵

Well known international arbitration centres are the International Chamber of Commerce (ICC), the Inter-American Commercial Arbitration Commission (IACAC), and the International Centre for the Settlement of Investment Disputes (ICSID). As regards the ICC it is to be observed that this centre is only involved in lending services with respect to the administration of international trade disputes. The scope of services of ICSID is in principle restricted to the administration of disputes arising from investments to which a member State on the one part and a national of another member State on the other part, are parties. It is true that ICSID may lend its services beyond the aforesaid scope, but in this event the award is not to be considered as an ICSID award.³⁶

As previously observed, international business transactions with foreign enterprises can be made by the States themselves or by State enterprises. If the object of the transaction with a foreign enterprise is the exploration and exploitation of natural resources or the construction of public works, the State itself or some governmental sub-division of that State will usually be the other contracting party. In this connection specific problems may arise on the part of the State to accept international arbitration, because the State may take the position that matters like exploration and exploitation of natural resources are not deemed to be a commercial matter and therefore to be submitted to the jurisdiction of its national courts rather than to international arbitration. In the event of other matters, however, such as joint ventures, granting of licences and transfer of know-how the counterpart of the foreign private enterprise will usually be a State enterprise.

³⁴ David, *op. cit.*, *supra* footnote 5, pp. 47-53.

³⁵ G. Aksent, *International Arbitration—Its Time Has Arrived!*, 14 *Case Western Reserve Journal of International Law* (1982), p. 250.

³⁶ For such cases a special set of rules has been drawn up; see A. Broches, *L'évolution du CIRDI*, *Revue de l'Arbitrage* (1979), pp. 323 *et. seq.*

The aforesaid distinction between States and State enterprises is most relevant for the kind of arbitration on which the parties involved are able to agree. State enterprises are in principle not unwilling to submit disputes arising from their contracts with foreign nationals to international arbitration administered by some neutral centre. In support of this view reference can be made to the Stockholm and Zurich Chamber of Commerce arbitration in East-West trade. States, however, are less inclined to do so in so far as private arbitration centres are concerned. Except for the ICSID arbitration, nowadays accepted by a large number of States, States in general seem to prefer *ad hoc* arbitration with foreign enterprises, excluding any involvement of arbitration centres.³⁷

6. RULES OF PROCEDURAL LAW

As regards the rules of law governing the composition of the arbitral tribunal and the arbitral proceedings in the event of international commercial arbitration attention should be drawn to three different approaches, viz.:

- (i) the arbitration will be subject to the procedural rules of the State in whose territory the arbitration will take place (the territorial principle); and
- (ii) the arbitration will be subject to the procedural rules chosen by the parties (the principle of contractual autonomy);
- (iii) a combination of the two above-mentioned approaches.

First of all it deserves consideration to deal briefly with international conventions and other international instruments in which reference is made to arbitral proceedings.

Article 2 of the Geneva Protocol on Arbitration Clauses of 24 September 1923 contained the following provision: "the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place." This means, in fact, that the principle of contractual autonomy and the territorial principle simultaneously apply. However, the choice of the parties is ultimately decisive, since it is up to the parties to decide where the arbitration should take place and therefore to decide on the municipal law applicable to the arbitration proceedings. It is also obvious from the wording of the above Article 2 that it is possible to refer to procedural rules other than those of the *lex loci arbitri* and that the parties are not free to derogate from the mandatory rules of the *lex loci arbitri*. Therefore, it is to be submitted that under the Geneva Protocol the freedom of choice of the parties as to the rules applying to the arbitral procedure is at least restricted to some extent.

Although the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 does not deal directly with the law applying

³⁷ D. F. Vagts, *Dispute-Resolution Mechanisms in International Business*, 3 *Recueil des cours de l'Académie de Droit International* (1987), p. 83; M. Dubisson, *La négociation d'une clause de règlement des litiges*, 7 *Droit et Pratique du Commerce International* (1981), p. 77.



to arbitral proceedings, Article V of this Convention refers to the arbitral procedure. Pursuant to Article V, paragraph 1(d), the recognition and enforcement of the arbitral award may *inter alia* be refused if so requested by the party against whom it is invoked and if the said party is able to prove that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in the accordance with the law of the country where the arbitration took place." The meaning of the aforesaid provision is, in the opinion of the present writer, twofold:

- (i) the principle of contractual autonomy is the leading principle and only if the parties (or the arbitrators) fail to make provisions for some aspects of the arbitration procedure the *lex loci arbitri* is decisive;
- (ii) the parties are entirely free to choose the rules governing the arbitration proceedings, such as the rules of arbitration centres and the Uncitral Arbitration Rules without referring to any municipal law.³⁸

The principle of contractual autonomy is clearly reflected in the European Convention on International Commercial Arbitration of 21 April 1961, in particular in Article IV in so far as the organization of the arbitration is concerned. The most significant element of Article IV is that the parties are entirely free to lay down the procedure to be followed by the arbitrator. Furthermore Article IV provides for a machinery for the purpose of conducting arbitration proceedings in the event one of the parties is unwilling to co-operate or if the parties, respectively the arbitrators, have not established the rules of procedure. Finally it is worth noting that with respect to the arbitral procedure no reference has been made to the rules of municipal law and that as a result the arbitral procedure has been "internationalized" in a true sense.

A similar view is reflected in Article 11 of the 1975 version of the ICC Rules on Conciliation and Arbitration, reading as follows:

"The rules governing the proceedings before the arbitrator shall be those resulting from these Rules, and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, whether or not reference is made thereby to a municipal procedural law to be applied in the arbitration."

Furthermore, Article 15 of the Uncitral Arbitration Rules contains the *guiding principle* that, subject to the said Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate.

As regards the law governing the arbitral procedure a variety of views has been expressed in arbitral awards dealing with disputes between States and foreign enterprises. In the *Aramco* case of 1955 between Saudi Arabia and the Arabian American Oil Co. (Aramco) the arbitral tribunal held that in the event that one of the parties is a sovereign State the arbitral proceedings should be governed by international law and not by any particular legal system. The reasoning underlying the said view reads as follows:

—*David, *op. cit.*, supra footnote 5, pp. 309-310

"Considering the jurisdictional immunity of foreign States, recognized by International Law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a party could be subject to the Law of another State. Any interference by the latter State would constitute an infringement of the prerogatives of the State which is a Party to the arbitration. This would render illusory the award given in such circumstances. For these reasons, the Tribunal finds that the Law of Geneva cannot be applied to the present arbitration.

It follows that the arbitration, as such, can only be governed by International Law, since the Parties have clearly expressed their common intention that it should not be governed by the Law of Saudi Arabia, and since there is no ground for the application of the American Law of the other Party. This is not only because the seat of the Tribunal is not in the United States, but also because of the complete equality of the Parties in the proceedings before the arbitrators."³⁹

As a result the arbitral tribunal held that the Draft Convention on Arbitral Procedure adopted by the International Law Commission in 1955 should be applied by analogy.

A completely different view was embodied in the arbitral award of 1963 in *Sapphire International Petroleum Ltd. v. The National Iranian Oil Co.*⁴⁰ Judge Cavin considered that a specific procedural law should apply to the proceedings; that the parties are free to elect domicile for the arbitration; that if they had agreed to confer upon the arbitrator to choose the seat of the tribunal they had impliedly submitted themselves to the procedural law of the State selected as the place of arbitration; and that, even if the aforesaid interpretation of the will of the parties was disregarded, the rule is that, in the absence of agreement between the parties, the arbitration is subject to the judicial sovereignty of the State where the arbitration takes place.⁴¹ However, it deserves consideration that in the *Sapphire* arbitration not a State, but a State enterprise was a party to the arbitration. In *BP v. Libyan Arab Republic* (1973/1974) the sole arbitrator, Judge Lagergren, held that the arbitration was subject to the law of the seat of arbitration, i.e. Danish law. The arbitrator did not share the view that the application of municipal procedural law to the said international arbitration would infringe upon prerogatives of a State party by virtue of its sovereign status. Therefore the arbitrator disagreed with the *Aramco* arbitral award to the extent that he did not accept a plea for sovereign immunity in the event of an arbitration provision in an agreement conducted between a State acting *iure gestionis* and a foreign company. In the arbitrator's opinion the parties, by providing for arbitration as an exclusive mechanism for resolving contractual disputes, must be presumed to have intended to create an effective remedy. For pragmatic reasons rather than as a matter of principle the arbitrator held that the proceedings were governed by Danish law.⁴² In support of his view he referred to the following arguments:

- (i) the effectiveness of an arbitral award that lacks nationality—which may be if the law of the arbitration is international law—generally is smaller than that of an award founded on the procedural law of specific legal system;

³⁹ 27 ILR, pp. 155-156.

⁴⁰ 35 ILR, p. 136.

⁴¹ 35 ILR, p. 169; see also *Almy Trading Co. v. Greece* (1954) 23 ILR, p. 633.

⁴² Greenwood, *op. cit.*, supra footnote 12, p. 36.

- (ii) the arbitrator has in the present case full authority to determine the procedural law of the arbitration, but even then the attachment to a developed legal system is both convenient and constructive; and
- (iii) arbitration tribunals enjoy a wide scope of freedom and independence under Danish law.⁴³

In *Texaco/Calasiatic v. Libya* (1977) the sole arbitrator, Professor Dupuy, endorsed the reasons underlying the *Aramco* award referred to above and therefore held that the arbitration proceedings were subject to international law. In addition the arbitrator emphasized the difference between the *Sapphire* arbitration and the present case by considering that in the *Sapphire* arbitration no sovereign State was involved. Furthermore, the arbitrator considered that from the practical point of view, it is not unreasonable to think that an arbitral award connected with a national legal system may perhaps be easier to enforce, but that this is a consideration relating to enforcement not within the jurisdiction of the arbitrator in this case. Taking into account that the parties had given the arbitrator power to determine the place of arbitration and the rules of procedure, the arbitrator reasoned—in line with Article 28 of the Deeds of Concession expressing the will of the parties—that the arbitration shall be governed by the Rules of Procedure drawn up by the arbitrator to the exclusion of the local law.⁴⁴

Dr Mahmassani, being the sole arbitrator in the dispute between Libyan American Oil Company (Liamco) and the Libyan Arab Republic (1977), took the same position as Professor Dupuy in holding that "it is an accepted principle of international law that the arbitral rules of procedure shall be determined by the agreement of the parties, or in default of such agreement, by decision of the Arbitral Tribunal, independently of the local law of the seat of the arbitration."⁴⁵ In support of this view the arbitrator relied on international conventions as well as the *Aramco* and *Sapphire* cases, which as shown above represent two opposing views. Furthermore the arbitrator held that in his procedure the arbitrator shall be guided as much as possible by the general principles contained in the Draft Convention on Arbitral Procedure elaborated by the International Law Commission of the United Nations in 1958.

The above problems relating to procedural law governing international arbitration between State and foreign enterprises do not hold good in so far as arbitration proceedings under the auspices of ICSID are concerned, since the Washington Convention regulates the procedural aspects of arbitration *in extenso*. It also provides for adequate rules for the purpose of effectively organizing and conducting proceedings if and when one of the parties does not co-operate.

Returning to the principles relating to procedural law referred to in the beginning of this paragraph 6 the following comments can be made:

⁴³ 53 ILR, p. 309.

⁴⁴ 17 ILM (1978), pp. 5-9; for the text of Article 28 of the Deeds of Concession see *supra* footnote 18 and accompanying text.

⁴⁵ 20 ILM (1981), p. 42.

- (i) The principle of contractual autonomy should always be respected and in the event the parties to the dispute have not selected the place of arbitration and/or referred to the procedural rules to be applied, the arbitrators should fill this gap themselves.
 - (ii) In selecting the place of arbitration and the procedural rules with respect to international arbitration the parties as well as the arbitrators should be careful in order to prevent as much as possible that mandatory rules of the municipal law of the State where the arbitration will take place will thwart the arbitration proceedings agreed between the parties or determined by the arbitrators.⁴⁶
 - (iii) The aforesaid Conventions as well as other international instruments such as the Uncitral Arbitration Rules and ICC Arbitration Rules have shown an evolution towards reducing the effect of the *lex loci arbitri* on the arbitration proceedings in the event of international commercial arbitration in general.
 - (iv) The need and necessity to exclude the interference of the *lex loci arbitri* with the rules of procedural law chosen by the parties or arbitrators holds good a fortiori in the event a State is a party to a dispute with a private enterprise submitted to international arbitration.
 - (v) In support of the view that the *lex loci arbitri* should have no real impact on the procedural rules governing international arbitration, attention should be drawn to:
 - (a) The place of arbitration is often located in a country which as such has no connection whatsoever with the parties involved and the object of arbitration and has been selected for reasons of neutrality and/or convenience because arbitration tribunals enjoy a wide scope of freedom and independence under the *lex loci arbitri*; these are the reasons why, for example, the Stockholm Chamber of Commerce Arbitration plays an important role in East-West trade.
 - (b) The national laws on arbitration are often mainly attuned to disputes of a domestic character. In this connection it is worth noting that in some modern arbitration laws specific provisions have been laid down to create a regime for international commercial arbitration different from that applying to domestic arbitration. In the new French Code of Civil Procedure of 12 May 1981, for example, a special set of rules was laid down for international arbitration of which Article 1494 reads as follows:

"The arbitral agreement may, directly or by reference to arbitration rules, determine the procedure to be followed in the examination of the case; it may also submit the matter to some procedural law which it shall determine. If the agreement is silent the arbitrator determines the procedure, as far as is needed, either directly or by reference to a law or to some arbitration rules."⁴⁷
- * In this connection reference should be made to the arbitral award rendered between SEE and Yugoslavia in Lausanne. This award was regarded as null and void by a Swiss Court, since the award was made contrary to the law of the canton of Vaud then in force, i.e. because it had not been rendered by an odd number of arbitrators.
- ⁴⁷ Decree No. 81-500 of 12 May 1981, the English translation is borrowed from David, *op. cit.*, *supra* footnote 5, p. 307.

As it appears from the aforesaid provision, maximum freedom is given to the parties and the arbitrators to determine the rules of procedural law, and even any reference to French procedural law in the event that the arbitration takes place in France, is lacking. Another example illustrating a regime more liberal for international arbitration than for national arbitration is the English Arbitration Act of 1979. As a result of this Act, under English law the right of appeal to the courts from the decisions of arbitrators on point of law can be excluded at any time in the event of *non-domestic* arbitration, except "special category" arbitrations.⁴⁸ This brings English arbitration law in line with arbitration laws in many other countries to the extent that arbitral awards are final and binding and not subject to appeal to the English courts.

- (vi) The freedom of the parties and/or the arbitrators to determine the procedural rules of international arbitration does not mean that this freedom is not subject to any restriction. It is obvious that some fundamental principles governing arbitral proceedings recognized by the municipal law of States should be respected.⁴⁹ In this connection reference should be made to the most fundamental principle "that the parties are treated with equality and that at any stage of proceedings each party is given a full opportunity of presenting its case."⁵⁰

7. RULES OF SUBSTANTIVE LAW

The Permanent Court of International Justice in the *Serbian Loans* case (1929) held *inter alia* that "any contract which is not a contract between States in their capacity as subjects of international law is based on municipal law of some country. The question as to which this law is, forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws."⁵¹ Thinking along the lines of this decision the same principle is most likely to apply to contracts between States and foreign enterprises. However, the question arises as to whether the aforesaid view still holds good in present-day practice.

In this connection attention should be drawn to the resolution of the *Institut de Droit International* adopted in Athens in September 1979 dealing with the law applicable to contracts between a State and a foreign private person.⁵²

According to Article 1 thereof, contracts between a State and a foreign private

⁴⁸ D. M. Day, *The Law of International Trade* (1981), pp. 164-165. An arbitration is domestic if neither party to it is a national of or normally resident in another country, or if no corporation involved is incorporated in or controlled from another country. Other arbitrations are non-domestic. Non-domestic arbitrations can be subdivided into "special category" arbitrations and others. The "special category" are arbitrations involving questions or claims within the Admiralty jurisdiction of the High Court, disputes on contracts of insurance and disputes on commodity contracts. In these arbitrations appeal may be excluded if either the agreement to do so is made after the arbitration has begun or if the arbitration is concerned with a contract expressed to be governed by a foreign law.

⁴⁹ David, *op. cit.*, *supra* footnote 5, p. 307.

⁵⁰ See Article 15 paragraph 1 of the UNCITRAL Arbitration Rules.

⁵¹ PCIJ Series A, No. 20.

⁵² 58 (II) *Annuaire de l'Institut de Droit International* (1979), p. 192.

person are subject to the rules of law chosen by the parties and in the absence of such choice subject to the rules of law with which the contract is most closely connected. Here again the contractual autonomy of the parties has been emphasized as the guiding principle.

It is of particular interest, however, that in Article 2 of the said resolution, reference has been made to a number of alternatives relating to the law(s) governing contracts between States and foreign private persons, viz.: the municipal law of one or more States, the principles of law common to the municipal law of the parties involved, the general principles of law, the principles of law applied to international economic relations, international law or a combination of the aforesaid sources of law. Before dealing with the aforesaid different sources of law it is worth noting that in a period of half a century there has been an important evolution as to the law applicable to contracts between States and private persons. The view that not only the municipal law of a particular State should govern the aforesaid kinds of contracts has been shown by modern international practice.

As regards the municipal law of one or more States it is necessary to distinguish between three categories, viz.: the law of the State party to the contract, the law of the State of the private enterprise party to the contract and the law of a third State. In general the State party to the contract will insist on applying its own law to the contract and certainly will not be willing to accept the law of the private party or any other municipal law to govern the contract.

Although many States are, in principle, not in favour of internationalizing a contract with a foreign enterprise by accepting that rules or principles of law other than those laid down in their own law will govern the contract, international practice has shown that often a combination of national law of the State involved and other rules and principles apply.

In this connection attention should be drawn to some examples resulting in some kind of internationalization of contracts between States and foreign enterprises. In an agreement between Kuwait and the American Independent Oil Company (Aminoil) of 1973 the following provision was laid down:

"The parties base their relations with regard to the agreements between them on the principle of goodwill and good faith. Taking account of the different nationalities of the parties, the agreements between them shall be given effect, and must be interpreted and applied, in conformity with the principles common to the laws of Kuwait and the State of New York, United States of America, and in the absence of such common principles, then in conformity with the principles of law normally recognized by civilized States in general, including those which have been applied by international tribunals."⁵³

Here it is interesting to note that a combination of different sources of law—an alternative also referred to by the *Institut de Droit International*—are governing the contract. The same holds good for the choice of law-clause inserted in concessions granted by Libya having been subject of arbitration and referred to previously.⁵⁴

⁵³ 21 ILM (1982), p. 100.

⁵⁴ See Section 2, *supra*.

Another example of internationalizing the substantive rules of law to be applied by the arbitral tribunal is laid down in Article V of the Declaration concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran of 19 January 1981, reading as follows:

"The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."⁵⁵

The aforesaid examples show a trend in modern practice of "internationalizing" or "delocalizing" the substantive rules of law governing contracts between States and foreign enterprises or to be applied in the event of settlement of disputes between States and foreign enterprises. As a result, principles and rules of law derived from sources other than the municipal law of the State involved, apply to the relationship between the said State and the foreign enterprise, including the settlement of disputes relating thereto.

As regards the principles and rules of law mentioned in Article 2 of the aforesaid resolution of the *Institut de Droit International* two comments should be made, viz.:

- (i) the general principles of law, the principles applied to international economic relations and international law are to a certain extent overlapping one another, and
- (ii) no specific reference was made to transnational law as the law governing international business transactions and the usages of the trade applicable.⁵⁶

As observed in paragraph 6 of this paper in respect of the procedural law to be applied by arbitrators the autonomy of the parties is also the leading principle governing the rules of substantive law to be applied. This principle is clearly reflected *inter alia* in Article 33, paragraph 1, of the Uncitral Arbitration Rules, Article 13, paragraph 3, of the ICC Rules of Arbitration (1988), Article VII the European Convention on International Commercial Arbitration and Article 42, paragraph 1, of the ICSID Convention.

A more complex situation arises, if and when, in the event of a dispute, the parties have not designated the law applicable to the substance. This may occur in practice, because the parties could not reach agreement on rules of substantive law or consciously avoided this difficult matter in order not to spoil their deal. Assuming that the parties have agreed on an arbitration clause, then, in the absence of any reference to rules of substantive law to be applied, the arbitrators themselves have to determine such rules.

In this event, the European Convention, the ICC Arbitration Rules and the Uncitral Arbitration Rules provide that the arbitrators shall apply the law determined by the conflict of laws rules deemed applicable. Application of conflict of laws rules means that the municipal law most closely connected with the object of the contract

⁵⁵ 20 ILM (1981), p. 232.

⁵⁶ In the opinion of Lalive the *Institut de Droit International*, by not referring to transnational law, has missed the opportunity to an epoch-making contribution; see Lalive, *op. cit.*, *supra* toomote 14, p. 53.

will prevail, rather than general principles of law or international law. In this connection the choice of the place of arbitration is again most important, since the choice of this place in its turn will determine which conflict of laws rules are applicable and therefore affect the substantive law to be applied. In some countries, like England, the chosen place of arbitration will be considered a strong indication that the law of the same country shall also be the substantive law. In practice, however, the conflict of laws rules will, in the event of disputes between States and foreign enterprises, often (but not always) result in applying the law of the State involved because of the closeness of connection of the contract giving rise to the dispute with the State in question.⁵⁷

Article 33, paragraph 3, of the Uncitral Arbitration Rules and Article VII of the European Convention contain a provision of an internationalizing scope to the extent that in all cases the arbitral tribunal shall take into account the usages of the trade applicable to the transaction.

The ICSID Arbitration Rules dealing with the absence of agreement between the parties as to the substantive law to be applied are fundamentally different from the European Convention, ICC Arbitration Rules and Uncitral Arbitration Rules to the extent that in the former no reference is made to the appropriate conflict of laws rules. On the contrary, pursuant to Article 42 of the ICSID Arbitration Rules, in the absence of agreement between the parties on the substantive law rules to be applied, the arbitral tribunal shall apply the law of the contracting State party to the dispute, including its rules on conflict of laws, and such rules of international law as may be applicable. Therefore the ICSID Rules are different from other rules on arbitration, since the ICSID Rules refer directly to the municipal law of the contracting State and international law. In practice, however, applying of the appropriate conflict of laws rule of a third State—for example of the *lex loci arbitri*—often may coincide with applying the law of the State party to the dispute because of the most close connection with that State. The reason why in the ICSID Rules reference is made to international law is that States with respect to foreign investments are also directly bound by rules of international law governing this subject. This is particularly important when the municipal law of the State involved violates rules of international law.⁵⁸

Finally, it deserves consideration that in all of the arbitration rules referred to above, the arbitrators are entitled to decide as *amiable compositeurs*, if the parties have agreed *expressis verbis* to give them such powers.⁵⁹ Once such powers have been

⁵⁷ In this connection reference should be made to Article 4, paragraph 1, of the EC Convention on the law applicable to contractual obligations of 19 June 1980 (80/934 EEC) not yet entered into force, reading as follows: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may, by way of exception, be governed by the law of that other country."

⁵⁸ A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Applicable Law and Default Procedure*, in *International Arbitration. Liber Amicorum for Martin Domke* (1967), p. 15.

⁵⁹ See Article 33, paragraph 2, of the Uncitral Arbitration Rules; Article VII, paragraph 2, of the European Convention on International Commercial Arbitration; Article 13, paragraph 1, of the International Chamber of Commerce Arbitration Rules and Article 42, paragraph 3, of the International Centre for Settlement of Investment Disputes.

granted, the arbitrators have the maximum freedom as to the application of rules of substantive law. However, here again a complication may be caused by the selection of the place of arbitration, since under the laws of several States arbitrators are not allowed to decide an *amiable compositeurs*. A decision as *amiable compositeurs* not being allowed under the law of the place of arbitration, will unavoidably result in an arbitral award which is contrary to mandatory rules of the law of the seat of arbitration.

8. REMEDIES AGAINST AND ENFORCEMENT OF ARBITRAL AWARDS

There exists a close relationship between setting aside and enforcement of an arbitral award, since the reasons for both setting aside and refusal of enforcement of an arbitral award are to a large extent the same.⁶⁰

The aforesaid relationship is clearly shown in the New York Convention and the European Convention in which it is stated that setting aside of an award constitutes a ground for refusal of recognition or enforcement, be it on certain conditions. The main reasons for setting aside arbitral awards can be summarized as follows:

- (i) the award was based on an arbitration agreement which was not valid or was wrongly interpreted by the arbitrators;
- (ii) the arbitral tribunal was not properly constituted or the award was not rendered in time under the laws and rules applicable;
- (iii) the arbitral procedure was not properly conducted; and
- (iv) the award itself was vicious, since it was not made in the proper form or the decision was *ultra petita* or *infra petita*, or the award was contrary to public policy.

The aforesaid grounds also underly Article V, paragraph 1, of the New York Convention and Article IX of the European Convention which are, generally speaking, similar. However, it deserves consideration that according to the European Convention only the grounds specifically mentioned and no other reasons justify under this Convention setting aside of an award. If an award is set aside in a State for grounds other than those enumerated in the said Convention, this is deemed to be a refusal of the exequatur, but the award itself remains unaffected in other States which then still may grant an exequatur.

According to both Conventions, setting aside proceedings are deemed to take place in the State in which or under the law of which the award has been made.

However, the main difference between the New York Convention and the European Convention is that the effect of a court decision setting aside an award is in the European Convention restricted to contracting States, whereas such restrictions is lacking in the New York Convention.

Finally, the European Convention provides that in the event that the States involved are contracting parties to the New York Convention as well as to the European Convention, the rules on setting aside of awards laid down in the latter should always prevail.

⁶⁰ See Article IX of the European Convention and Article V, paragraph 1, of the New York Convention.

Pursuant to Article 52 of the ICSID Arbitration Rules, annulment of the award may be requested for the following reasons:

- (i) that the tribunal was not properly constituted;
- (ii) that the tribunal has manifestly exceeded its powers;
- (iii) that there was corruption on the part of a member of the tribunal;
- (iv) that there has been a serious departure from a fundamental rule of procedure; or
- (v) that the award has failed to state the reasons on which the award is based.

Before dealing with some aspects of enforcement of arbitral awards, attention should be drawn to the preliminary question as to whether the New York Convention on the Recognition and Enforcement of Arbitral Awards and the European Convention on International Commercial Arbitration also apply to arbitration of disputes between States and foreign private persons.

The text of Article 1, paragraph 1, of the New York Convention refers to "arbitral awards arising out of differences between persons, whether physical or legal". From this wording itself it is not clear whether also States are included in the term "legal person". However, Article 1, paragraph 2, of the Convention indirectly deals with state-controlled entities being involved in arbitration, since here reference is made to arbitral awards rendered by "permanent arbitral bodies". The reason for inserting this paragraph was to cover, under the domain of the Convention, also arbitration of disputes between State entities of the Member States of Comecon involved in international trade, which are to be submitted to permanent arbitral institutions referred to as "arbitration courts."⁶¹ In addition the *travaux préparatoires* of the Convention show that the term "legal persons" mentioned in Article 1, paragraph 1, also includes State enterprises, State sub-divisions and States themselves.⁶²

However, the conception of State requires further qualification, since a State may act in two capacities: *iure gestionis* and *iure imperii*. Only if a State acts *iure gestionis* the Convention applies and not in the event of arbitration between States acting *iure imperii*, unless in the arbitration agreement between the States involved a specific provision is made that the New York Convention applies.⁶³ Moreover, it is to be submitted that a State is not entitled to plead immunity from jurisdiction, once it has agreed to submit a dispute with a foreign enterprise to arbitration (waiver of immunity).

As regards the scope of the New York Convention, in particular in respect of the recognition and enforcement of an arbitral award in which a State has been involved and the matter of sovereign immunity, attention should be focused on the judgements of the Court of Appeal at The Hague and the Supreme Court of The Netherlands in *Société Européenne d'Etudes et d'Entreprises (SEEE) v. Yugoslavia*. The President of the District Court of Rotterdam had denied recognition and enforcement of an arbitral

⁶¹ David, *op. cit.*, *supra* footnote 5, pp. 124-125; Luzatto, *op. cit.*, *supra* footnote 33, pp. 74-75.

⁶² L. Capelli-Perciballi, *The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity*, Int. Lawyer (1978), p. 198.

⁶³ Capelli-Perciballi, *op. cit.*, *supra* footnote 62, p. 199, note 10.

award rendered between SEEE and Yugoslavia in Lausanne on the ground of sovereign immunity of Yugoslavia. The Court of Appeal, however, annulled the decree of the President of the District Court on 8 September 1972 on, *inter alia*, the following grounds:

"The Convention which, pursuant to Article 1, paragraph (1), applies to arbitral awards arising out of differences between persons, whether physical or legal, has not excluded from among such persons States or other so-called public law entities; furthermore, the legislative history of the Convention leads to the conclusion that the legal persons referred to in this Article 1, paragraph (1), include such public law entities if they perform private acts; but apart from the question whether Yugoslavia is entitled to immunity from jurisdiction and execution in the present case on the basis of these considerations, Yugoslavia cannot successfully plead immunity from jurisdiction or execution for the following reasons:

For a State can plead immunity from the jurisdiction of another State only in respect of purely governmental acts (*acta jure imperii*) and not in respect of other acts often grouped together under the term *acta jure gestionis*. The conclusion of a private agreement for the construction of a railroad by SEEE against payment and delivery of materials is not a purely governmental act if a State performs that act."⁶⁴

On 26 October 1973 the Supreme Court of The Netherlands confirmed the views of the Court of Appeal and held *inter alia*:

"... it is possible to observe in international treaty practice, doctrine and local case law a tendency to limit the cases in which a State can invoke immunity before a foreign court; this development has notably been caused in part by the fact that the governments of many countries have increased their activities in a sector of social relations which is governed by private law, and, in connection therewith, have entered into transactions with private individuals on a basis of equality; in such cases, it appears to be reasonable to grant to the party dealing with the State the same measure of protection under the law as when such party would have dealt with a private individual; on the ground of these considerations, it must be assumed that the immunity from jurisdiction to which a foreign State is entitled under current international law does not extend to cases in which a State has acted in a manner as meant above;

(...)

the request for permission of enforcement of the award in question could only then be considered to conflict with the immunity from execution to which a foreign State is entitled under international law if it had to be decided that international law opposes every execution of foreign State assets situated in the territory of another State; however, such rule of international law does not exist; consequently, the ground cannot lead to cassation, whatever may be the meaning of the Court of Appeal's reasoning to this point."⁶⁵

The main target of the European Convention was to improve the law on arbitration for the purpose of facilitating commercial relations between western and eastern Europe. Therefore, there is no doubt that the term "physical and legal persons" borrowed from the New York Convention should be interpreted as including States and State-controlled entities.

However, there is an essential difference between the New York and European Conventions with respect to arbitrations to which States or State-controlled entities are a party. Under the New York Convention States are allowed to make a reservation

⁶⁴ 14 ILM (1975), p. 72; See also *Société v. Etat Héliénique*, 79 Clunet (1952), p. 245.

⁶⁵ 14 ILM (1975), pp. 75-76.

by virtue of which they are entitled to limit their undertaking to disputes arising from legal relations, whether contractual or not, which by their national laws are regarded as commercial matters. This reservation may reduce the effect of the enforcement of awards, in particular because in this way contracts made by public bodies with foreign private enterprises relating to investments and exploitation of natural resources may not be considered as commercial matters.⁶⁶ This obstacle is eliminated by the European Convention, since the Convention does not allow for such or a similar reservation.

One of the substantial advantages inherent in arbitration as compared with court litigation is that because of the New York Convention and the European Convention arbitral awards are enforceable in many States, whereas the same conclusion does not in general hold good for foreign court judgments. The general rule is that court judgments are only enforceable under another jurisdiction, if and when the States involved have agreed *expressis verbis* on such enforcement. Apart from bilateral treaties on the subject, attention should be drawn to the 1968 EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applying between the Member States of the EEC as well as to the practice of the Scandinavian countries.

As regards the question which arbitral awards are covered by the New York Convention, it is of interest to refer briefly to the history of the Convention.⁶⁷ Two proposals underlay the Convention, viz.: the ICC draft and the ECOSOC draft. The classical conception distinguishing between national and foreign arbitral awards was reflected in the ECOSOC draft, whereas the ICC draft was more innovative by introducing a new set of rules relating to international arbitration. In the ICC approach the national law of arbitration would apply to national arbitration and a new set of international rules would govern international arbitration, being defined as arbitration concerned with disputes arising from and/or connected with commercial relations between parties of different nationalities or involving performance in different countries.

Unfortunately the New York Convention has not endorsed the views reflected in the ICC draft and stuck to the classical distinction between national and foreign arbitral awards. It is worth noting, however, that pursuant to Article I of the Convention the provisions thereof apply when an award is rendered "in the territory of a State other than the State where the recognition and enforcement of such awards are sought" and does not require the parties to be nationals of different States. In addition, the Convention applies "to arbitral awards not considered as domestic awards in the State where the recognition and enforcement is sought". It deserves consideration that no reference was made to awards rendered "in the territory of another contracting State". *Prima facie* this seems to mean that the "nationality" of the arbitral award is irrelevant. However, under the Convention it is allowed to make the

⁶⁶ A. J. van den Berg, *The New York Arbitration Convention* (1981), pp. 6-8, 51-54.

⁶⁷ David, *op.cit.* supra footnote 5, pp. 145 *et seq.*

reservation that the obligations of the Convention only hold good if the award is rendered in the territory of another *contracting* State. Many States, parties to the Convention, have made the said reservation and therefore the "nationality" of the award becomes again relevant. As a result certain awards do not come under the domain of the Convention, viz.: awards rendered in the territory of a State not bound by the Convention to the extent the aforesaid reservation has been made and awards rendered in the territory of the contracting State where recognition and enforcement of such awards are sought but which are considered as domestic awards by such State.

As stated previously, Article V of the New York Convention deals with the grounds on which the recognition and enforcement of an arbitral award can be refused. One of these grounds is referred to in Article V, paragraph 1 (e), reading as follows: "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which or under the law of which, the award was made". With regard to this provision it should be observed that—in contradistinction to the 1927 Geneva Convention—the aforesaid provision does not require that the award has become enforceable. Accordingly there is no necessity for an exequatur being granted in the State where the award has been made before requesting the award to be recognized and enforced in another country. This means, in practice, that an award is binding once it has been rendered, unless the party against whom the recognition and enforcement has been invoked is able to prove the non-binding character on the grounds mentioned in the aforesaid Article V, paragraph 1 (e).

Now we have to discuss the difficult problem as to whether an arbitral award made in the territory of a State party to the New York Convention, but which is not governed by the arbitral proceedings of the *lex loci arbitri*, still qualifies for recognition under the New York Convention. Here two interpretations are possible, viz.:

- (i) the Convention applies categorically to any and all arbitral awards rendered in the territory of another (contracting) State; or
- (ii) the Convention applies only to the arbitral awards rendered in the territory of another (contracting) State which are considered as national arbitral awards, excluding international arbitral awards or awards resulting from an arbitration which is not governed by national procedural law of that State.

Here again, attention should be drawn to the Dutch Court decision relating to *SEEE v. Yugoslavia* referred to previously. By decree of 8 September 1972 the Court of Appeal at The Hague dismissed the request for recognition and enforcement of the arbitral award made in Lausanne, primarily, on the ground that the award was not an award within the meaning of Article 516 of the Code of Civil Procedure of Vaud and therefore not an arbitral award "made, as intended by the Convention, in the territory of a Contracting State other than The Netherlands."⁶⁸ Subsequently the Supreme Court of the Netherlands rejected the aforesaid reasoning of the Court of Appeal in its judgment of 26 October 1973 and held *inter alia*:

⁶⁸ 14 ILM (1975), p. 72.

"... neither the text nor the history of the Convention produces an indication that, apart from a plea of the impediments specified in Article V, paragraph (1), of the Convention, the competent authority of the country where recognition and enforcement is sought of an arbitral award made in the territory of another State will have to examine before rendering its decision what connection there is between that award and the law of the country where it was made or any other country and, failing such connection, would be permitted to refuse recognition and enforcement;

(...)

accordingly, by refusing recognition and enforcement of the 'document signed by Messrs. Ripert and Panchaud on July 2, 1956' submitted to the Court of Appeal as an arbitral award... on the ground that the *Tribunal Cantonal de Vaud* did not recognize that document as an arbitral award within the meaning of Article 516 CPC of Vaud, the Court of Appeal has applied improper arguments in reaching its decision."⁶⁹

As a result the Supreme Court annulled the contested decree of the Court of Appeal and referred the case back to the Court of Appeal of The Hague. Upon remand from the Supreme Court, the Court of Appeal at The Hague, in its decision of 25 October 1974, persisted in refusing to recognize the 1956 arbitral award, but on the basis of another ground, viz.: the award was contrary to Dutch public policy.⁷⁰ Again appeal was taken to the Dutch Supreme Court. The Supreme Court, in its decision of 7 November 1975, first of all referred to its 1973 judgment when dealing with Article V, paragraph 1 of the New York Convention, quoted above.

Subsequently the Supreme Court referred to the decisions of the Cantonal Tribunal of Vaud of 12 February 1957 and of the Swiss Federal Tribunal of 18 September 1957, in which it was held that the arbitral award did not constitute an award within the meaning of Article 516 of the Code of Civil Procedure of Vaud. As a result of these decisions the award did not qualify for annulment as requested by Yugoslavia on the ground that the arbitral tribunal was not constituted in accordance with the law of the Canton of Vaud. In addition the decisions of the aforesaid Swiss Courts denied the enforcement of the award in Switzerland. Therefore the Supreme Court held that the decisions by the Swiss Courts "should be considered as equivalent, in the present case, to the circumstance mentioned in Article V(1)(e) of the New York Convention, namely that the relevant authority made it impossible to enforce the award by setting it aside. Since it was not stated and does not appear that the decision was made under the law of any other country, the judgment by the Vaud Cantonal Tribunal had the same effect as an annulment."⁷¹

The decisions of the Dutch Supreme Court of 1973 and 1975 are somewhat confusing. According to the 1973 decision an international arbitral award may qualify for recognition and enforcement pursuant to the New York Convention if the award is made in the territory of another (contracting) State. The 1975 decision is, however, different to the extent that awards made in a country according to rules of procedural law other than the *lex loci arbitri* or of any other municipal law, do not qualify for recognition and enforcement under the New York Convention.

⁶⁹ 14 ILM (1975), p. 77.

⁷⁰ 1 Yearbook Commercial Arbitration (1976), p. 196.

⁷¹ *Nederlandse Jurisprudentie* (1975) no. 274; 1 Yearbook Commercial Arbitration (1976), p. 196.

Another example illustrating the aforesaid tension existing between "national" and "international" arbitral awards with respect to setting aside proceedings and enforcement proceedings is the arbitral award rendered in *General National Maritime Transport Co. (GNMTC) v. Gotaverken Arendal A.B.*

Pursuant to the award, GNMTC had to take delivery of three oil tankers ordered from the Swedish shipyard, Gotaverken, at a certain price. The arbitral tribunal had its seat in Paris and the arbitration was administered by the ICC. GNMTC attacked the award on manifold grounds before the Paris Court of Appeal for the purpose of setting aside the award. However, this Court held, on 21 February 1980, that the award was not a French but an "international" award and that therefore the Court had no jurisdiction to grant the requested relief of setting the award aside.⁷²

However, in the meantime the Supreme Court of Sweden held, on 13 August 1979, the same award to be enforceable in Sweden, since the award, when rendered, must be deemed to have become binding on the parties. Reference was also made to Section 5 of the Swedish Act on Foreign Arbitration Agreements and Awards providing that "an arbitral award shall be considered as 'foreign' if it was given abroad" and that "in applying this Act, an arbitral award shall be considered as given in the State where the arbitration proceedings have taken place." Although the aforesaid law did not provide *expressis verbis* that a foreign award has the nationality of the seat of the arbitration, there is no doubt that this was the assumption on which the Supreme Court proceeded.⁷³ It is again most confusing that, in the event of an international arbitration award rendered in Paris a French court decided that the award does not partake of the French nationality, whereas the same award was enforced in Sweden as a French award. The aforesaid clearly illustrates the serious problems which may arise in connection with international arbitrations in so far as the relationship between the *lex loci arbitri*, setting aside proceedings and the enforcement of the award abroad is concerned.

As stated previously, it deserves consideration to select the seat of the arbitration in such a manner that the *lex loci arbitri* would not unnecessarily interfere with the arbitral proceedings. However, by "delocalizing" or "internationalizing" the arbitral proceedings in applying, for example, the arbitral procedural rules of international arbitration centres, there is the risk that the arbitral award is deemed not to partake of the nationality of the place of arbitration. Accordingly, it may be impossible to institute successfully setting aside proceedings in the State of the seat of arbitration as well as to institute enforcement proceedings under the New York Convention in another State, because it is an "international award" rather than a "foreign award". Or to put it another way, "internationalization" or "delocalization" of the arbitration proceedings "may deprive the parties of the benefit of the liberal provisions of multilateral conventions regarding the recognition and enforcement of "foreign", as opposed to "international" awards."⁷⁴

⁷² J. G. Wetter, *The Legal Framework of International Arbitral Tribunals—Tentative Markings*, in H. Smit, N. M. Galston and S. L. Levitsky, eds. *International Contracts*, (Columbia University 1981), pp. 288–289.

⁷³ *Ibid.*, p. 290.

⁷⁴ G. R. Delaume, *State Contracts and Transnational Arbitration*, 75 AJIL (1981), p. 813.

This is also one of the reasons why Judge Lagergren in the case of *BP v. Libya* held that the said arbitration was subject to Danish law, since an award rendered under the procedural law rules of a specific municipal law would probably be easier to enforce than an award which is of an "international" character and therefore lacked "nationality".⁷⁵

In the arbitration between *Liamco and Libya* substantial damage was awarded to *Liamco* for breach of an oil concession by *Libya*. As a result of this award *Liamco* instituted enforcement proceedings in France, Sweden, Switzerland and the United States. It is worth noting that in none of these countries enforcement was refused because the award was not made under the *lex loci arbitri*, being *Geneva*. However, only the court in Sweden held that the award could be enforced,⁷⁶ whereas in the other three countries the enforcement was refused for different reasons: in France attachment of *Libyan* assets failed on the ground of sovereign immunity;⁷⁷ in Switzerland the Federal Supreme Court held that the award was enforceable but the attachments of *Libyan* assets were cancelled because there was no sufficient nexus of the legal relationship at stake with Switzerland;⁷⁸ in the United States the District Court for the District of Columbia dismissed the claim of *Liamco* on the basis of the Act of State doctrine.⁷⁹

The aforesaid judgments on enforcement actions by *Liamco* clearly show that in practice, apart from the question discussed above relating to the enforcement of "international" arbitral awards, many other problems may arise as to actual enforcement in States other than those where the award was made, in particular in so far as attachment of assets are concerned.

As regards the relationship between enforcement of arbitral awards and the conception of State immunity, the following observations have to be made:

- (i) once a State in its dealings with a foreign enterprise has accepted international arbitration, a plea for immunity from jurisdiction is deemed to fail;
- (ii) denial or waiver of immunity from jurisdiction does not imply *ipso facto* denial or waiver of immunity from execution;
- (iii) immunity from execution is a much more controversial subject than immunity from jurisdiction, since the restrictive doctrine of sovereign immunity nowadays accepted by most of the States has mainly or primarily a bearing on immunity from jurisdiction, whereas the practice of States relating to immunity from execution is far from uniform; and
- (iv) immunity from execution has to be respected in any event for State property used for public purposes (*res publica publicis usibus destinata*).⁸⁰

⁷⁵ See text following footnote 41, *supra*.

⁷⁶ 20 ILM (1981), p. 893.

⁷⁷ 106 Clunet (1979), p. 857.

⁷⁸ 20 ILM (1981), p. 151.

⁷⁹ This court decision was criticised by the United States Government in a brief as *amicus curiae* submitted to the Court of Appeal, see 20 ILM (1981), p. 161.

⁸⁰ See X NYIL (1979), pp. 3–292.

Finally, it has to be submitted that the recognition and enforcement of ICSID awards is rather simple, since each party is bound to comply with the terms of the award. This means that pursuant to Article 54 of the World Bank Convention, the State parties are bound to enforce an ICSID award in their territory "as if it were a final judgment of a court" of the State involved. For recognition of an ICSID award in the territory of another contracting State the party seeking recognition has to furnish to the competent court of authority designated by such State a copy of the award certified by the secretary-general. Execution of the award is a matter entirely governed by the rules of procedural law in force in the State where execution is sought.

9. FINAL CONSIDERATIONS

International arbitration is of growing importance with respect to international business transactions between enterprises of different nationality. The main reasons for the present-day trend towards international arbitration are:

- (i) the parties involved are in general reluctant to submit their possible disputes to national courts, in particular to the jurisdiction of the State of which the other party has the nationality or its domicile;
- (ii) the parties have in general more confidence in international arbitration, because they are in a position to select the arbitrators;
- (iii) the arbitral proceedings are in general more flexible than court proceedings usually are;
- (iv) in the event of international arbitration the arbitrators are more inclined than national courts to apply rules and principles of law which are attuned to international business transactions;
- (v) arbitration may also play an important role as to the adjustment of international contracts, whereas national courts often are not allowed to do so; and
- (vi) arbitral awards in general can be more easily enforced than court decisions, because of the wide acceptance of the New York Convention.

The aforesaid considerations also hold good for States and State enterprises involved in international business transactions. In this connection it deserves consideration:

- (i) that the State involved often will insist on the jurisdiction of its own court with respect to international business transactions to which the State itself is a party, but for the foreign private enterprise the said jurisdiction is not always acceptable;
- (ii) that the State as a party to an international business transaction usually is unwilling to accept the jurisdiction of the national courts of other States;
- (iii) that in practice State enterprises most of the time are in favour of international arbitration for the same reasons that hold good for private enterprises.

Apart from the ICSID arbitration, States are in general more inclined to submit their disputes with foreign enterprises to *ad hoc* arbitration rather than to institutionalized

arbitration. State enterprises, on the contrary, are often willing to submit their disputes to arbitration administered by either international arbitration centres or national arbitration centres which apply specific regulations dealing with the settlement of disputes arising from international transactions.

The autonomy of the will of the parties to a dispute is decisive for the rules of procedural law and substantive law to be applied by the arbitral tribunal. If the parties have failed to make provisions relating to the rules of the law to be applied by the arbitral tribunals the arbitrators are free to determine the said rules, taking into account the nature and scope of the contractual relationship between the parties and of the international business transaction itself.

In selecting the place of arbitration the parties or the arbitrators should be most careful in order to prevent substantial interference of rules of mandatory procedural law of the *lex loci arbitri* with the proceedings of the arbitral tribunal.

In drawing up of international contracts between States and State enterprises on the one hand and foreign private enterprises on the other hand, there is a trend to "internationalize" or "delocalize" the contract, by applying (also) rules of substantive law other than rules of municipal law of the State involved. The same holds good with respect to rules of procedural law by applying procedural rules other than those of the *lex loci arbitri*, such as in particular the Uncitral Arbitration Rules.

The New York Convention as well as the European Convention are deemed to apply also to States and State-controlled entities being parties to a dispute (to be) submitted to arbitration. However, one of the obstacles to overcome in practice is that an award made in the territory of a contracting State on the basis of procedural rules other than procedural rules of municipal law of that State or any other State may result in two kinds of problems: it may be difficult to institute proceedings for the purpose of setting aside the award in the territory where the award is rendered, since the local law does not apply, and for the same reason it may be held in the State where the enforcement is sought that there is no award binding on the parties and therefore not enforceable under the New York Convention.

The aforesaid question could have been avoided if, as referred to previously, the approach of the ICC dealt with in drafting the New York Convention would have been embodied in this Convention. Then the scope of the said Convention would have been enlarged, since "international arbitral awards"—as opposed to "foreign arbitral awards"—inherent in international commercial arbitration would have been the leading principle underlying the New York Convention. This means that arbitral awards, rendered in the one State on the basis of rules and principles other than municipal law, could be enforced in another State.

Finally it should be noted that the enforcement of arbitral awards may be jeopardized by immunity from execution invoked by a State with respect to its assets located in the State where enforcement is sought. Unlike the restrictive doctrine at present widely accepted with regard to immunity from jurisdiction, such uniform regime is still lacking in respect to immunity from execution, since the local rules

governing execution of foreign State property vary from one legal system to the other.

After having summarized briefly the most crucial issues dealt with in my paper I wish to make some additional comments.

1. There is no doubt that many other aspects of international arbitration between States and foreign enterprises could have been dealt with in my paper and that the items referred to in my paper could have been discussed in more detail. However, I tried to cover some of the main issues relating to international commercial arbitration in general and between States and foreign enterprises in particular.
2. Furthermore I restricted myself to international arbitration arising from or connected with the particular individual relationship between a State and a foreign enterprise, leaving aside Mixed Claims Commissions and Mixed Arbitral Tribunals which have been in charge of the settlement of a multitude of claims arising within a specific context.
Mixed Claims Commissions and Mixed Arbitral Tribunals are bodies established on the basis of international agreements between two States involved for the purpose of settling claims between themselves, between the nationals of the one State and the other State as well as between their nationals.
3. Mixed Claims Commissions as a means of institutionalized settlement of disputes have been developed during the 19th century in particular with respect to claims for damage suffered by foreigners caused by internal disturbances and civil war. The composition of these commissions was most of the time structured in such a manner that each of the State parties appointed one member and by mutual consultation appointed a third member, being not a citizen of one of the States involved. The rules of law to be applied by the said commissions were referred to in the constitutive agreement between the States. As regards the rules of substantive law, reference was often made to "the law of nations" or to "justice and equity" or to a combination thereof. Taking into account the large number of claims to be settled, the Mixed Claims Commissions, as an institutionalized kind of settlement of disputes, have proven to be adequate and efficient.
4. In many respects Mixed Arbitral Tribunals are similar to the Mixed Claims Commissions referred to above. Pursuant to the Peace Treaties of Versailles, Saint Germain, Neuilly, Trianon and Lausanne, concluded after the First World War, a number of Mixed Arbitral Tribunals were established. These arbitral tribunals dealt with claims for damage against the Central Powers for war measures, claims for damage against "new States" for their post-war measures and claims between individuals blocked through the war. The number of claims decided by the arbitral tribunals was unprecedented: the Franco-German arbitral tribunal dealt with more than 20,000 cases, the Anglo-German and German-Italian arbitral tribunal each rendered awards in about 10,000 cases.

The composition of the arbitral tribunals was the same as that of the Mixed Claims Commissions. The law to be applied was partly laid down in the peace treaties themselves and partly in the national laws to be chosen by the tribunals according to the relevant conflict of laws rules.

5. However, there is one significant difference between Mixed Claims Commissions on the one hand and Mixed Arbitral Tribunals on the other hand: in the event of Mixed Claims Commissions private parties usually had no direct access to the Commissions and as a result were not in a position to present their case themselves and to be represented by their own counsel, whereas private parties had direct access to Mixed Arbitral Tribunals. Such direct access has also been granted to private parties to the Iran-United States Tribunal, except in the case of claims of less than \$250,000.
6. In the event of serious disruption of the relations between two States, causing grave damage to a substantial number of their nationals, a Mixed Arbitral Tribunal for the purpose of settling claims is to be considered as the most obvious solution. In support of this view the following arguments can be put forward:
 - (i) there is no other international institution available to deal directly with such claims;
 - (ii) there may be serious doubt in many cases as to whether the municipal courts of the States involved have jurisdiction to deal with such claims; and
 - (iii) the enforcement of the awards of the tribunal can be secured by making specific provisions relating thereto in the agreements underlying the establishment of the tribunal.
7. As regards the individual business relationship between States and foreign parties there are, in practice, two alternatives:
 - (i) either the relationship will be governed exclusively by the laws of the State concerned including the settlement of disputes resulting therefrom by its municipal courts; or
 - (ii) the business relationship as such, or part thereof, will be governed by rules other than municipal law of the State involved combined with international arbitration. It is self-evident that the ultimate result will depend on the bargaining power of the parties involved.

However, taking into account the growing importance of international commercial arbitration with respect to international dealings between private parties—including international transactions between private parties and State enterprises—and the fact that international transactions between foreign private parties and States are in many respects similar to international transactions between private parties, it is to be expected that international arbitration will continue to play an important role between States and State enterprises on the one hand and foreign private parties on the other.