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Globalization of Arbitral Procedure

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I. IS ARBITRATION PROCEDURE GLOBALIZED?

Imagine attending hearings in three different arbitrations: one in Geneva, one in New York, and one in Hong Kong. All three hearings will likely involve the same hotel conference rooms, the same court reporters, the same language—English, the same types of oral submissions, witness examinations, expert presentations, and procedural arguments, and often even the same people. Does this mean that arbitral procedure is globalized[1]—that an arbitration is conducted in a uniform manner wherever it takes place, whatever national law governs? Does national law govern at all? This paper will discuss these issues.

Section II will review the legal framework of arbitration, be it found in international or national law, and its evolution over the last decades. Section III will examine current arbitration practice, seeking to determine whether an autonomous set of anational rules emerges, a sort of procedural *lex mercatoria*. Finally, Section IV will formulate a conclusion. With respect to scope, the present inquiry focuses on the procedural law or rules applied in arbitration, not on the law governing the merits of the dispute.[2] It is limited to the proceedings before the arbitrators and does not include ancillary court procedures, except to the extent that court decisions may impact the arbitrators' conduct of the arbitral proceedings.

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1. *See, e.g.*, Axel Baum, *Reconciling Anglo-Saxon and Civil Law Procedure: The Path to a Procedural Lex Arbitrationis*, *in* KARL-HEINZ BÖCKSTIEGEL & ROBERT BRINER, LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY 21-30 (2001); Christian Boris, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION 1-18 (Stefan N. Frommel & Barry A.K. Rider eds., 1999); Peter S. Caldwell, *Arbitration Procedures—Harmonization of Basic Notions—Differing Approaches*, *in* GLOBALIZATION AND HARMONIZATION OF THE BASIC NOTIONS IN INTERNATIONAL ARBITRATION 101-03 (IFCAI Conference, Hong Kong International Arbitration Centre, 1996); Bernado M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, *in* Frommel, *supra*, at 147-68; Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law—Civil Law Divide in Arbitration*, 18 ARB. INT'L 59 (2002); Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, *in* Frommel, *supra*, at 31-38; Andreas Lowenfeld, *International Arbitration as an Omelette: What Goes Into the Mix*, *in* Frommel, *supra*, at 19-30; Jan Paulsson, *Arbitration Procedures – Harmonization of Basic Notions—Differing Approaches*, *in* GLOBALIZATION AND HARMONIZATION OF THE BASIC NOTIONS IN INTERNATIONAL ARBITRATION, *supra*, at 76-87. On the procedure before an arbitral tribunal, see generally ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (3rd ed. 1999).

2. On the law governing the merits of the dispute and in particular on the *lex mercatoria*, see generally Hans van Houtte, *La modélisation substantielle*, *in* LA MONDIALISATION DU DROIT 207-36 (Eric Loquin & Catherine Kessedjian eds., 2000).

II. THE EVOLUTION OF THE LEGAL FRAMEWORK: A PARADOX

Two contrary findings arise from a review of the evolution of arbitration law over the last decades. On one hand, it is now commonly accepted that an arbitration is governed by national arbitration law of the place or seat of the arbitration, though not by local rules of civil procedure. On the other hand, such national law has less and less actual bearing on the arbitration proceedings. How does one explain this paradox?

A. *National Law at the Place of Arbitration Governs the Proceedings*

Conceptually, one can determine the law governing the arbitration proceedings according to the following two tests:

- The *subjective* test refers to the intent of the parties, and builds upon the strong contractual component of arbitration. It implies that the arbitration procedure is subject to the law chosen by the parties to govern the arbitration, regardless of the place where the arbitration takes place;
- The *objective* or *territorial* test refers to the place—in the legal meaning—or seat of the arbitration. It is based on the judicial component of arbitration and on the idea that arbitration proceedings resemble court proceedings, which are governed by the *lex fori*. Consequently, this test triggers application of the law of the place of the arbitration.

Today, the objective test prevails, primarily because it is easy to implement and provides certainty. The UNCITRAL Model Law on Commercial Arbitration has adopted this test in its Article 1(2). Many countries have adopted the Model Law with changes or adjustments ranging from practically none[3] to very important.[4] The great majority of these states have adopted the territorial test of the Model Law. Others have made adjustments to allow for a mixed approach combining the objective test (place of arbitration) with the subjective test (parties' intent).[5]

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3. For example, the Canadian (Federal) Commercial Arbitration Act, R.S.C., ch. 17 (1985), amended by ch. 17, Apr. 30, 2001, which was the first piece of legislation enacted on the basis of the Model Law, only deleted the reference to "international" arbitration.

4. *E.g.*, Law No. 9.307, of Sept. 23, 1996 (Braz.).

5. For instance, the 1994 Egyptian Arbitration Act Concerning Arbitration in Civil and Commercial Matters, in conformity with its own Article 1, Law No. 27, applies "when such an arbitration is conducted in Egypt, or when an international

Among the states adopting the Model Law's objective test, Germany deserves special mention because the evolution of the law in that country is particularly telling. Under the so-called procedural doctrine or *Verfahrenstheorie* of the old Book 10 of the German ZPO, the parties were entitled to choose an arbitration law other than that of the place of the proceedings. For instance, they could agree to arbitrate in Germany under French arbitration laws. As a result, German arbitration rules, including mandatory and *ordre public* rules, would become inapplicable and the award would be considered foreign for purposes of enforcement in Germany.[6] They could also do the reverse, with the award rendered abroad under German law being deemed German and subject to setting aside proceedings in Germany.

Pursuant to the present Paragraph 1025 ZPO, Book 10 applies if "the place of arbitration [ ] is situated in Germany." In other words, the procedural doctrine was abandoned.[7] A split between the place of arbitration and the applicable law is no longer allowed.[8] In the interest of "legal clarity,"[9] German law has thus switched from a pure intent-based test to a strict territorial one.

Many other statutes enacted over the last two decades, though not following the UNCITRAL Model Law, apply the territoriality principle as well. For instance, Chapter 12 of the Swiss Private International Law Act of 1987 applies "if the seat of the arbitration is in Switzerland."[10] Wording of similar effect is found in the English,[11] Dutch,[12] Italian,[13] and Swedish Acts,[14] to name just a few.

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commercial arbitration is conducted abroad and its parties agree to submit it to the provision of this Law."

6. *See generally* PETER SCHLOSSER, DAS RECHT DER PRIVATEN INTERNATIONALEN SCHIEDSGERICHTSBARKEIT 569 (2nd ed. 1989); Karl-Heinz Böckstiegel, *Zu den Thesen von einer "delokalisierten" internationalen Schiedsgerichtsbarkeit, in* FESTSCHRIFT OPPENHOF 4 (1985); Richard H. Kreindler & Thomas Mahlich, *A Foreign Perspective on the New German Arbitration Act*, 14 ARB. INT'L 72 (1998) (and German Supreme Court cases referred to therein); Herbert Kronke, *Internationale Schiedsverfahren nach der Reform, in* RECHT DER INTERNATIONALEN WIRTSCHAFT 260 (1998).

7. *See generally* Böckstiegel, *supra* note 6; Kreindler, *supra* note 6.

8. Kreindler, *supra* note 6, at 82-84; Karl-Heinz Böckstiegel, *An Introduction to the New German Arbitration Act based on the UNCITRAL Model Law*, 14 ARB. INT'L 19, 23 (1998).

9. Comments accompanying the draft act, Gesetzesentwurf der Bundesregierung, Drucksache 13/527431, quoted in KREINDLER, *supra* note 6, at 83.

10. Swiss Private International Law Act, 1987, art. 176(1).

11. Arbitration Act, 1996, §§ 2(1), 3 (Eng.).

12. Netherlands Arbitration Act, 1986, art. 1073(1).

13. C.P.C. art. 832 (Italy). This provision does not expressly require territoriality, but such requirement is inferred from the general system of the new rules, including in particular Article 816. *See* Gabriele Mercarelli, *La spécificité de la*

In contrast, French law is often viewed as an exception. It is different, though less so than is generally believed. Article 1494(1) of the new French Code of Civil Procedure provides that the parties may "define the procedure to be followed in the arbitral proceedings," including the selection of "a given procedural law." This rule is a restatement of well-settled case law accepting that an arbitration held in France could be submitted to foreign law and vice versa.[15] For instance, in 1980, the Paris Court of Appeal decided that it had no jurisdiction to set aside an ICC award issued in an arbitration held in France because the arbitration was not governed by French law, neither the arbitrators nor the parties having expressed such a choice.[16]

The drafters of the new arbitration statute adopted the following year did not follow the same course. On the contrary, they provided for the jurisdiction of French courts over set-aside actions directed at awards rendered in France.[17] This implies that even if a foreign municipal law is chosen to govern an arbitration, the arbitrators must comply with mandatory French rules of procedure as they are reflected in the grounds for setting aside the award.[18] In other words, even in France, the law of the place of arbitration, or of the award, submits the procedure before the arbitrators to certain minimum requirements such that the end result is identical to that in jurisdictions applying the objective or territorial test.[19]

B. *Though it Governs, National Law Has Less Influence Over Arbitral Proceedings*

Paradoxically, just as it became prevalent, national law lost much of its influence over the arbitral process. How has this decreasing impact manifested itself? What are the reasons for it? Although they do not constitute an exhaustive list, two aspects arise to greater prominence: (1) the legal fiction involved in the seat of

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réforme italienne de l'arbitrage international, *in* RECHERCHES SUR L'ARBITRAGE EN DROIT INTERNATIONAL ET COMPARÉ 224 (Laurent Gouiffés et al. eds., 1997).

14. Swedish Arbitration Act, 1999, art. 46 (and to some extent also art. 47).

15. For a description of, and citation to, the cases see MATTHIEU DE BOISSÉSON, LE DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL 653-56 (1990).

16. Phillipe Fouchard, *Note on* GNMTC v. Götaverken, 107 JOURNAL DU DROIT INTERNATIONAL 660 *passim* (1980).

17. N.C.P.C. art. 1504(1).

18. FOUCHARD, GAILLARD, GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION 1589 (E. Gaillard & J. Savage eds., 1999); DE BOISSÉSON, *supra* note 15, at 671.

19. Art. 458bis (6) and 458bis (25) of the Algerian Code of Civil Procedure, as amended by Decree No. 93-09 of Apr. 25, 1993, reproduce N.C.P.C. arts. 1494, 1504.

arbitration and (2) a growing consensus among national legal systems about general principles of arbitration procedure.

1. The Seat of Arbitration is a Legal Fiction

The place of arbitration, sometimes called the seat of arbitration, as a legal concept has become something of a fiction. There is no necessary connection between the seat of the arbitration and the physical, geographical location where the arbitral activities, primarily the hearings, are carried out. A number of considerations point to the fictional nature of the seat of the arbitration. First, it is generally accepted that hearings can be held in places other than the seat of the arbitration.[20] This is the rule under the Model Law, and under national legislation adopting it, as well as under recent non-Model Law statutes and most major institutional arbitration rules.

During the drafting of the Model Law, one member state proposed requiring a "genuine link" between the "constructive" seat of arbitration and the "actual arbitral proceedings."[21] The proposal was not pursued and the provision was adopted without such requirement. This makes sense: the constructive place is often chosen for its neutrality, i.e., a lack of connection with either party, while the actual place of the hearing may be chosen for precisely the opposite reason, because there is a link to one of the parties, e.g. the presence of certain witnesses.

Further, the physical location of the arbitral activities loses much of its weight when one considers evolutions in technology. Where does an online arbitration actually take place? "In cyberspace," would be a convenient answer, but it would be wrong. Cyberspace is a misnomer. There is no space; there are only telecommunication networks.[22] May one argue that the arbitration takes place where the participants access the networks? Though not wrong per se, this is highly impractical for legal purposes. In this context, the traditional concept of place is meaningless. If the territorial test is to stand, there is no choice but to rely on a place that is, in essence, a fiction arising either out of the parties' choice, or out of the arbitrators' decision.

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20. REDFERN & HUNTER, *supra* note 1, at 290.

21. Sixth Secretariat Note, Analytical Compilation of Government Comments, A/CN.9/263 (Mar. 19, 1985), *quoted in* HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION : LEGISLATIVE HISTORY AND COMMENTARY 602 (1989).

22. Gabrielle Kaufmann-Kohler, *Internet: mondialisation de la communication, mondialisation de la résolution des litiges?*, *in* INTERNET, WHICH COURT DECIDES? WHAT LAW APPLIES? 90-91 (K. Boele-Woelki & C. Kessedjian eds., 1998).

This phenomenon may also be observed in sports arbitration. Where did the arbitrations over disputes in the America's Cup take place? In Auckland? The answer is uncertain. The rules are silent about the place, and in only one out of 22 cases was a hearing held there. All the other cases were handled at a distance by arbitrators located in Europe and New Zealand. [23] More strikingly, the arbitrations held at the Olympic Games, wherever they take place, are always deemed to have their seat in Lausanne, the headquarters of the arbitration institution.[24] This uniform rule subjects all Olympic arbitrations to Swiss arbitration law.[25] It thus provides a stable procedural framework for all Olympic arbitrations, despite the fact that the Games move around. Here again, the place or seat is pure fiction.

The seat, fictional as it may be, is chosen by the parties, or failing that, by the arbitral tribunal. Since the choice of the seat does not necessarily refer to the geographical place of the proceedings, what purpose does it serve? Choice of the seat indirectly effects a choice of the law governing the arbitral procedure. At this juncture, the objective test comes close to the subjective one in that they produce the same end result. Rather than directly choosing the law that governs the arbitration, the parties select a seat in a given state and the arbitration law of that state will apply, by operation of law. The choice of a seat results in an indirect choice of law.

Years ago, de-localization, de-nationalization, and de-territorialization gave rise to passionate arguments, especially in the context of oil concession disputes.[26] One of the main purposes of de-

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23. *See generally* ARBITRATION IN THE AMERICA'S CUP – THE XXXI AMERICA'S CUP ARBITRATION PANEL AND ITS DECISIONS (Henry Peter ed., 2003) (pieces by John Faire, Michael Foster, Donald Manasse, Henry Peter, and David Tompkins).

24. Olympic Arbitration Rules, art. 7.1. On September 1, 2000, the New South Wales Court of Appeal, in *Raguz v. Sullivan,* rendered a decision finally upheld the choice of Lausanne as the seat for the CAS arbitrations. GABRIELLE KAUFMANN-KOHLER, ARBITRATION AT THE OLYMPICS—ISSUES OF FAST TRACK DISPUTE RESOLUTION AND SPORTS LAW 20 *passim*, 51 *passim*. (2001). As a result, it lacked jurisdiction to set aside the award, despite the fact that the arbitration was conducted entirely in Sydney. *Id.*

25. Olympic Arbitration Rules, art. 7.2.

26. On the oil concession arbitrations, see in particular Brigitte Stern, *Trois arbitrages, un même problème, trois solutions—Les nationalisations pétrolières libyennes devant l'arbitrage international*, 1980 REV. ARB. 3. On de-localization, see more generally, F.A. Mann, *Lex Facit Arbitrum, in* LIBER AMICORUM DOMKE 157 (P Sanders ed., 1967); JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 245 (1978); Jan Paulsson, *Arbitration Unbound : Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981); Jan Paulsson, *Delocalisation of International Commercial Arbitration : When and Why it Matters*, 32 INT'L & COMP. L.Q. 53 (1983); WILLIAM W. PARK, The Lex Loci Arbitri and International Commercial Arbitration, 32 INT'L & COMP. L.Q. 21 (1983); Böckstiegel, *supra* note 6, at 1 ; Jan Paulsson, *The Extent of Independence of International*

localization, as it was then discussed, was to eliminate the unintended effects of certain arbitration-hostile features of the law of the place where the arbitration was held.[27] The choice of an arbitration-friendly fictional seat fully services that purpose. Hence, the issue of de-localization becomes moot. In fact, de-localization is achieved, though indirectly, through the choice of a fictional seat.

One forum remains in which de-nationalization is not moot, but rather fully achieved: arbitration governed by the ICSID Convention. Although the seat is formally located in Washington, D.C.,[28] the law of the seat has no say over the arbitration,[29] which is exclusively governed by the ICSID Convention and Arbitration Rules.[30] Annulment proceedings are not brought in local courts either, but before ICSID panels.[31] Moreover, ICSID awards are not enforced under the New York Convention,[32] but rather in the same manner as local judgements in the member states.[33]

2. National Laws are Increasingly Harmonized, Achieving Consensus on General Principles of Arbitration Procedure

Arbitration laws are increasingly harmonized. As a result, they tend to become interchangeable. Admittedly, most of them have not yet reached this stage, but the overall trend is undisputable. If arbitration laws are truly interchangeable, which one applies becomes irrelevant. In this sense, the impact of individual national laws decreases.

Arbitration from the Law of the Situs, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 141 (Julian D.M. Lew ed., 1986); Georges R. Delaume, SEEE v. Yugoslavia: *Epitaph or Interlude*, 4 J. INT'L ARB. 25 (1987); Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629 (1989); William W. Park, *Judicial Controls in the Arbitral Process*, 5 ARB. INT'L 230 (1989); Andreas Bucher, *Zur Lokalisierung internationaler Schiedsgerichte in der Schweiz, in* FESTSCHRIFT KELLER 566 (1989). For more recent discussions of the delocalization theory, see in particular REDFERN & HUNTER, *supra* note 1, at 89 *passim*; KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 480 *passim* (1993); MARCEL STORME & FILIP DE LY, THE PLACE OF ARBITRATION 67 (1992).

27. Paulsson, *The Extent of Independence of International Arbitration from the Law of the Situs*, *supra* note 26, at 141 *passim*.

28. ICSID Convention, art. 2.

29. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1242 (2001).

30. ICSID Convention, art. 44; *see also* SCHREUER, *supra* note 29, at 1242-43.

31. ICSID Convention, art. 52; *see also* SCHREUER, *supra* note 29, at 889.

32. ICSID Convention, art. 54; *see also* SCHREUER, *supra* note 29, at 1101.

33. ICSID Convention, art. 54(1); *see also* SCHREUER, *supra* note 29, at 1127.

How has this harmonization come about? The first milestone was certainly set by the New York Convention in 1958.[34] Another major milestone was represented by the UNCITRAL Model Law.[35] Both of these instruments are true success stories. Over 130 states have decided to adhere to the New York Convention and more than 40 states or subdivisions thereof have adopted the Model Law. [36] Numerous other enactments in the 1980s and 1990s, even if they have not followed the Model Law, have steadily moved towards harmonization.[37]

What substantive results has the harmonization achieved? A comparative review of recent statutes and cases shows a consensus about two overriding principles, and yet a third appears to be emerging. Party autonomy in matters of procedure [38] and due process [39] are both well established across national arbitration regimes. The term "due process" here refers to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principe de la contradiction* and equal treatment. More recently, procedural efficiency has been increasingly advocated by scholarly writers[40] and taken into account in practice by arbitral

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34. U.N. Convention on the Recognition and Enforcement and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

35. U.N. Commission on International Trade Law [UNCITRAL] Model Law on International Commercial Arbitration of 1985, U.N. GAOR, 40th Sess., Annex I, U.N. Doc. A/40/17 (1985), *available at* http://www.uncitral.org/english/texts [hereinafter UNCITRAL Model Law].

36. A list of states having adhered to the New York Convention and of states having enacted the UNCITRAL Model Law can be found on the UNCITRAL website: http://www.uncitral.org/en-index.htm.

37. *See, e.g.,* Swiss Private International Law Act 1987, ch. 12; N.C.P.C. art 1492 *passim*; Belgian Judicial Code, art. 676 *passim*; *see generally* Arbitration Act, 1996 (Eng.); Swedish Arbitration Act, 1999.

38. Dominique Hascher, *Principes et pratique de procédure dans l'arbitrage commercial international*, 279 R.C.A.D.I. 51-193 (1999).

39. Catherine Kessedjian, *La modélisation procédurale, in* Loquin, *supra* note 2, at 248 *passim*

40. *See, e.g.*, Hascher, *supra* note 38, at 56 *passim*; Charles Jarrosson, *Qui tient les rênes de l'arbitrage? Volonté des parties et autorité de l'arbitre,* 1999 REV. ARB. 601 (Note under Paris 1st civ., May 19, 1998, *Société Torno SpA v. Société Kagumi Gumi Co Ltd.*); THOMAS CLAY, L'ARBITRE, (2001); Pierre Mayer, *Comparative Analysis of the Power of Arbitrators to Determine Procedure in Civil and Common Law Systems, in* PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 24-38, ICCA CONGRESS SERIES NO. 7 (1994); Pierre Mayer, *Le pouvoir des arbitres de régler la procédure, une analyse comparative des systèmes de civil law et de common law*, 1995 REV. ARB. 163-83. Generally on this topic, see Gabrielle Kaufmann-Kohler, *Qui contrôle l'arbitrage? Autonomie des parties, pouvoirs des arbitres et principe d'efficacité, in* MÉLANGES (Claude Reymond ed., forthcoming 2003); BERGER, *supra* note 26, at 372 n. 2.

tribunals and courts.[41] However, it has not achieved the same recognition as the first two principles. Under most arbitration laws, procedural efficiency still defers to due process and party autonomy in case of a conflict. In a few states, however, efficiency concerns do prevail over procedural autonomy.[42]

Consensus on principles does not mean agreement on details. Due process provides an illustration of this proposition. Even though there is consensus on the core principle, the exact parameters of due process may fluctuate from one legal system to another. The right to a hearing is such an example. Under the Model Law, an arbitral tribunal must hold a hearing any time one of the parties so requests.[43] In other legal systems, the tribunal may refuse to hold a hearing at its discretion, for instance because it finds that the dispute can be resolved solely on the basis of documents.[44]

III. ARBITRATION PRACTICE: DOES A PROCEDURAL *LEX MERCATORIA* EMERGE?

As discussed above,[45] among the more accepted principles in comparative law, is procedural autonomy—the freedom of parties to fashion proceedings as they see fit. Parties can make use of this

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41. Swiss case law provides a good example. *See, e.g.*, U. v. Epoux G., ATF 117 II 346 (July 1, 1991, extracts only), *also reported in* BULL. ASA 415 (1991). U.S. case law also provides examples. *See* Sheet Metal Workers Int'l Ass'n, Local 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 744 (9th Cir. 1985); Fed. Deposit Ins. Corp. v. Air Florida Sys., Inc., 822 F.2d 833, 842 (9th Cir. 1987). In the United States and in Switzerland an agreement by the parties on the procedure to be followed by the arbitral tribunal is binding on the arbitrators. However, non-compliance by the arbitrators with such procedural agreement will not lead to the annulment of the arbitral award.

42. *See, e.g.*, Swedish Arbitration Act, art. 21 (1999). *See also* Arbitration Act, 1996, § 1(a) (Eng.) (stating that "the object of arbitration is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"); § 33(b) (providing that the arbitrator is under a duty to conduct the proceedings efficiently). In spite of these provisions, English law does not allow an arbitrator to disregard a procedural agreement made by the parties for reasons of efficiency. § 34; *see* Gabrielle Kaufmann-Kohler, *supra* note 40.

43. UNCITRAL Model Law, art. 24 (1). With respect to the right to an oral hearing, the situation is as follows: (1) if the parties have agreed to a hearing, or (2) if there is no agreement and one of the parties requests a hearing, the tribunal must hold one; (3) if there is neither an agreement nor a request, the tribunal decides at its discretion; (4) if the parties have agreed not to hold a hearing, then the tribunal cannot hold a hearing. *See* art. 24; HOLTZMANN & NEUHAUS, *supra* note 21, at 672; Gerold Herrmann, *UNCITRAL Adopts Model Law on International Commercial Arbitration*, 2 ARB. INT'L 6 (1986).

44. *E.g.*, Arbitration Act, 1996, § 34 (2)(h) (Eng.); *U. v. Epoux G.*, ATF 117 II 346 (extracts only, July 1, 1991), *also reported in* BULL. ASA 415 (1991).

45. *See* discussion *supra* Section II.

freedom by making individualized arrangements or by selecting particular institutional arbitration rules. If they make no use of their autonomy, the arbitral tribunal has the power to give the procedural directions it believes appropriate. Recent national arbitration laws have broadened the autonomy of parties, provided it does not effect a violation of due process.

The freedom thus granted has allowed arbitration practice to develop a set of rules which progressively rise to the level of a standard arbitration procedure. Such standard procedure has the invaluable merit of merging different procedural cultures.[46] This comes as no surprise. International arbitration is a place where lawyers, counsel and arbitrators, trained in different legal systems, meet and work together. They have no choice but to find some common ground.

A. *Instruments of the Procedural Merger*

The instruments of the merger are manifold, but primarily include the IBA Rules on Evidence, the UNCITRAL Arbitration Rules, other institutional arbitration rules, and rules set by arbitrators.

1. IBA Rules on Evidence

First of all, the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration play an important role in shaping arbitration procedure. They provide guidelines rather than actual rules, and address such issues as document production, written witness statements and witness examinations, expert evidence, the admissibility of evidence, and privileges.[47] Drafted by a working party composed of arbitration specialists with civil-law and common-law backgrounds, the IBA Rules primarily restate and generalize practices that were already in use in international arbitration. These practices sought to achieve compromise solutions taking into account both common-law and civil-law approaches to

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46. This said, one should be wary of believing that all common-law jurisdictions, on one hand, and all civil-law jurisdictions on the other, have entirely identical systems. There are many variations. On this topic, see in particular Claude Reymond, *To What Extent is Civil Law Procedure Inquisitional?*, 8 ARB. 159, 159-64 (1989).

47. IBA Rules of Evidence, *at* http://www.asser.nl/ica/IBA%20rules-of-evid-2.pdf. On these rules, see generally IBA WORKING PARTY, COMMENTARY ON THE NEW IBA RULES OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, *at* http://www.ibanet.org/pdf/comment_rules.pdf.

evidentiary issues. As will be shown below, they have succeeded in many respects.[48]

Parties can agree on the application of the IBA Rules in the arbitration clause or later, at the outset of the arbitration itself. Even in the absence of an agreement on their application, arbitral tribunals and counsel often look to the Rules for guidance because of their transcultural nature. Hence, their influence goes beyond their formal application.

2. UNCITRAL Arbitration Rules

Another text which has contributed to the modelling of arbitral procedure is the UNCITRAL Arbitration Rules of 1976. Due to the legitimacy assumed by UNCITRAL because of its status as a U.N. agency, these rules are widely accepted even among parties from developing countries. In particular, though with a number of amendments, these Rules have been used by the Iran-U.S. Claims Tribunal, further increasing their level of acceptance. They have also been used as a model and adapted for a number of institutional rules, including the new Swiss Rules on International Arbitration, to be launched by the Swiss Chamber of Commerce on January 1, 2004.[49] A possible revision of the UNCITRAL Arbitration Rules is presently under consideration.[50] Due to the evolution of arbitration practice in the last thirty years, a revision would be welcome, bringing the Rules in line with the latest developments in arbitration law and scholarship.

3. Institutional Arbitration Rules

Institutional arbitration rules are an additional vehicle for standardization. Major European institutional arbitration rules include those produced by the International Chamber of Commerce, the London Court of International Arbitration, the Vienna and Stockholm Chambers of Commerce, and the Arbitration Center of the World Intellectual Property Organization. In the United States, the International Arbitration Rules of the American Arbitration Association are most commonly used and, in Asia, the same is true of the Rules of the Hong Kong International Arbitration Center. Even though the ICSID Convention and Arbitration Rules contain certain

48. *See supra* Section IV.

49. To be available shortly on the web at: http://www.arbitration-ch.org.

50. These considerations are at a very preliminary stage. No decision has been made and, so far, the UNCITRAL Working Program does not include any such revision.

features that differ from other sets, they still contribute to the standardization of arbitral proceedings.

4. Rules Set by Arbitrators

Finally, one should not forget the ad hoc rules set by the arbitrators at the beginning of an arbitration, or in the course of the proceedings, as procedural issues arise between the parties.[51] A review of existing practice shows that such rules are generally pragmatic[52] and seek to accommodate different procedural cultures whenever the actors come from different backgrounds.

B. *Implementation of the Globalization and Standardization of Arbitral Procedure*

1. Document Production

Document production in arbitration is one of the most remarkable examples of a merger between different civil procedure approaches.[53] U.S. pretrial discovery illustrates a typical feature of common-law litigation. As the reader is likely familiar with it, no further presentation is offered here. To a civil-law lawyer, two aspects of pretrial discovery are particularly striking. First, discovery is broad, encompassing any document which may lead to admissible evidence, even if it does not constitute evidence in and of itself. Second, there is a general duty of each party to the action to produce any relevant document, including internal documents and documents which are contrary to that party's interests.[54]

Before the Woolf Reform of Civil Procedure which took effect in 1999, English law contained similar rules with respect to document discovery.[55] The reform limited discovery, which is now called

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51. Paulsson, *supra* note 1, at 78.

52. LAURENCE CRAIG, WILLIAM W. PARK, & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION ¶ 23.04 (2000); Van Vechten Veeder, *Evidence: The Practitioner in International Commercial Arbitration*, 1 INT'L LAW FORUM 229 (1999).

53. *See generally* Gabrielle Kaufmann-Kohler & Philippe Bärtsch, *Discovery in International Arbitration: How Much is Too Much?*, SCHIEDS VZ (forthcoming Jan. 2004); W. Laurence Craig, *Common Law Principles in the Taking of Evidence, in* BEWEISERHEBUNG IN INTERNATIONALEN SCHIEDSVERFAHREN 14 *passim* (Karl-Heinz Böckstiegel ed., 2001); Sigvard Jarvin, *Die Praxis der Beweiserhebung in internationalen Schiedsverfahren – Ein einführender Beitrag zum Thema Disclosure of Documents, in* Böckstiegel, *supra,* at 86 *passim*

54. FED. R. CIV. P. 26(b)(1).

55. On disclosure and inspection of documents in England, see in particular, Lord Chancellor's Department's Practice Direction supplementing Part 31 of the New Civil Procedure Rules in England & Wales (Disclosure and Inspection), *available at*

document disclosure. The scope of admissible discovery now depends on the "track" to which a case is assigned, which in turn is dependent on the amount at stake and the complexity of the case.[56] Standard disclosure is narrower than the former discovery[57] and subject to tests of reasonableness and proportionality.[58]

Civil law systems have a very different approach. Each party produces the documents on which it intends to rely to support its case. There is no general obligation to produce any documents that may affect one's own case. Even though there exist rules of civil procedure allowing a party to request the production of documents in the possession of its opponent, such rules are used sparingly for a limited number of specified documents.

In this context, the newly enacted Paragraph 142 of the German Code of Civil Procedure deserves particular attention.[59] On its face, it introduces rather broad discovery rights and affords parties, as opposed to third parties, no protection by way of privileges. It remains to be seen how courts will apply this new rule.[60] These limited comments illustrate a more general trend: civil procedure rules applicable in court litigation move closer to one another. While

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http://www.lcd.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part31.htm. *See also* Lord Wolf, Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England & Wales, ch. 21, London, 1996.

56. REDFERN & HUNTER, *supra* note 1, at 316 n.48.

57. Commentators note, however, that in practice before the Commercial Court there will be few changes in the nature of the disclosure orders made. *See* P. Sherrinton, *Summary—The New Civil Procedure Rules in England*, *available at* http://www.prac.org/materials/1999_Singapore/Woolf.

58. *See* Civil Procedure Rules (1999) 31.7.1999.

59. § 142 ZPO reads as follows:

> (1) The Court may order that a party [to the action] or a third party produce the documents which are in its possession, and to which a party has referred. For such purpose, the Court may set a time-limit . . . . (2) Third parties are under no obligation to produce the documents if the production cannot reasonably be required from them or if the information is privileged.

(author's translation).

60. On document production in Germany, see H. Bachmaier, J. Stünker, N. Geis, N. Röttigen, V. Beck, R. Funke & E. Kenzler, Beschlussemphfehlung und Bericht des Rechtsausschusses, über die ZPO-Reform, Drucksache 14/6036, at 149, *at* http://www.jura.uni-tuebingen.de/hess/ Lehrstuhlthemen/zpo_ref3.pdf; M. GEHRLEIN, ZIVILPROZESSRECHT NACH DER ZPO-REFORM 146 (2002); Egbert Peters, *§ 142 ZPO*, in 1 MÜNCHNER KOMMENTAR ZUR ZIVILPROZESSORDNUNG (Gerhard Lüke & Alfred Walchshöfer eds., 1992) (addressing §§ 142 ZPO); Klaus Schreiber, *§§ 420-430 ZPO*, in 2 MÜNCHNER KOMMENTAR ZUR ZIVILPROZESSORDNUNG (Gerhard Lüke & Peter Wax eds., 2000); E. LEHRBUCH & K. SCHELLHAMMER, ZIVILPROZESS, GESETZ – PRAXIS – FÄLLE §§ 594-95 (1999); E.D. ESCHENFELDER, BEWEISERHEBUNG IM AUSLAND UND IHRE VERWERTUNG IM INLÄNDISCHEN ZIVILPROZESS: ZUR BEDEUTUNG DES US-AMERIKANISCHEN DISCOVERY-VERFAHRENS FÜR DAS DEUTSCHE ERKENNTNISVERFAHREN 104 (2002).

English law restricts discovery of documents, German law introduces a duty to produce them.[61]

To bridge the gap between these different traditions, international arbitration has developed a practice embracing elements drawn from both camps. The primary elements of this practice, as restated in the IBA Rules of Evidence[62] as well as in some other institutional rules, are the following:

- There is no broad U.S.-style discovery in international arbitration.[63] Incidentally, neither is there any right to court-like discovery procedures in U.S. arbitrations, as the extent of discovery is entirely within the control of the arbitrators.[64]

- It is now well-accepted, even among civil-law arbitrators, that the tribunal may grant some level of discovery.[65]

- The scope of discovery is within the discretion of the tribunal. Unless the parties expressly agreed to it, and subject to cases where the refusal to order production may constitute a breach of due process,[66] the parties are not entitled to document production.[67]

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61. On the harmonization of court procedures, see, e.g., Kessedjian, *supra* note 39, at 237-55.

62. *See* IBA WORKING PARTY, COMMENTARY ON THE NEW IBA RULES OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 47. *See also*, H. Raeschke-Kessler, *The Production of Documents in International Arbitration—A Commentary on Art. 3 of the New IBA Rules*, *in* LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY, *supra* note 1, at 641 *passim*; H. Raeschke-Kessler, *Die IBA Rules über die Beweisaunoteahme in internationalen Schiedsverfahren*, *in* BEWEISERHEBUNG IN INTERNATIONALEN SCHIEDSVERFAHREN, *supra* note 49, at 41 *passim*; Van Vechten Veeder, *Evidentiary Rules in International Commercial Arbitration: From the Tower of London to the New IBA Rules*, 65 ARB. 291 (1999).

63. GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, COMMENTARY AND MATERIALS 485 (1996); IBA WORKING PARTY, COMMENTARY ON THE NEW IBA RULES OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 47, at 5.

64. Thomas E. Carbonneau, *Darkness and Light in the Shadows of International Arbitral Adjudication*, Eleventh Sokol Colloquium (1991), *as reprinted in* THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 727-38 (3rd ed. 2002).

65. JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, DROIT COMPARÉ DE L'ARBITRAGE INTERNATIONAL 588 n.653 (2002); Paulsson, *supra* note 1, at 84; IBA Working Party, IBA WORKING PARTY, COMMENTARY ON THE NEW IBA RULES OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 47, at 5.

66. For instance, one cannot rule out that the refusal to order production of documents may, in certain circumstances, constitute a breach of a party's opportunity or right to be heard. Such right includes the right to present evidence in support of one's case. If a party lacks documents necessary to establish relevant facts for which it bears the burden of proof and such documents are demonstrably within the control of its opponent, one could reasonably argue that a refusal to grant a production request

- A tribunal will allow production of documents, provided the party requesting it makes a prima facie showing of the following requirements:[68] (1) the documents sought are identified with reasonable specificity,[69] (2) they relate to facts relevant and material to the outcome of the dispute;[70] (3) they are in the possession or control of the other party;[71] and (4) they are not protected by some privilege, for instance, attorney-client privilege, confidentiality of business secrets, or protection of sensitive governmental information.[72]

When experienced arbitrators review these requirements and exercise their discretion, they usually take account of the origins and expectations of the parties. They consider whether the parties come from jurisdictions with broad, limited, or no disclosure at all; whether they expected disclosure when they entered into the arbitration agreement, or whether they would be shocked to learn that, by agreeing to arbitrate, they had made all their documents available to their adversary.[73] This balancing test is an additional driver of the merger of the various legal systems that meet in international arbitration.

Unlike document discovery, interrogatories have not found their way into arbitration procedure and are practically never used. Depositions are rare as well.[74] They are sometimes employed when both parties request it, for instance because both are represented by U.S. counsel more familiar with litigation than with arbitration.

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may deprive the party seeking discovery from its opportunity to be heard. *See* Yves Derains, *Note*, 1997 REV. ARB. 4, 29-32 (concerning a decision rendered by the Paris Court of Appeal on Jan. 21, 1997. Even though the Paris Court of Appeal recognized the arbitral tribunal's discretionary power to order documents production, it implicitly suggested that there may be limits to such discretionary power in certain circumstances. *Id.*

67. For ICC proceedings, see YVES DERAINS & ERIC SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 261 (1998). *See generally* IBA WORKING PARTY, COMMENTARY ON THE NEW IBA RULES OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 47, at 5-6; Andrew Rogers, *Improving Procedures for Discovery and Documentary Evidence*, *in* PLANNING EFFICIENT ARBITRATION PROCEEDINGS 136, ICCA CONGRESS SERIES NO. 7 (A. J. van den Berg ed., 1996).

68. On the requirements for discovery in international arbitration, see generally Kaufmann-Kohler, *supra* note 53.

69. According to Art. 3.3 (a) of the IBA Rules, parties may ask for the production "of a narrow and specific . . . category of documents," as opposed to documents identified individually.

70. IBA Rules, art. 3.3(b).

71. Arts. 3.3(c), 3.4.

72. *See generally* Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L & COMP. L.Q. 345 (2001); *see also* BORN, *supra* note 63, at 490 *passim*

73. CRAIG ET AL., *supra* note 52, at 452.

74. ELSING & TOWNSEND, *supra* note 1, at 61.

2. Oral v. Written Proceedings

Due to the presence of the jury in common-law litigation, the emphasis is often on the oral nature of the proceedings.[75] The contrary is true in civil-law court procedures, which generally take place before a professional judge. Written submissions, including documentary evidence, are prevalent. Civil lawyers tend to believe that documents are the best evidence.[76] Thus, oral proceedings play a lesser role. Hearings are short and witnesses are not always heard.

The converging practice in arbitration again combines the two systems. Written memorials and documents carry substantial weight. Nevertheless, witnesses are generally heard. To ensure that hearings do not extend over lengthy periods of time, it is now a wide-spread practice to resort to written witness statements which stand in lieu of direct examination. The hearing is then limited to cross-examination (and possibly redirect examination) and to questions posed by the tribunal.[77]

3. Witnesses

Under civil-law procedure, the court is in control of the taking of evidence, and it is generally the judge's task to question witnesses, unlike common-law proceedings under which witness examination is conducted by counsel. In arbitration, it has become customary for many arbitrators to let counsel complete the cross-examination (there is often no direct examination), before they ask their own questions, if any remain at that point.[78]

In certain civil-law jurisdictions, it is a violation of ethical rules for an attorney to be in contact with a witness.[79] The rationale of this rule is to avoid subjecting witnesses to improper influence. In arbitration, counsel to one party may come from a jurisdiction providing such a restriction, while counsel to the other may not. If the restriction were applied, this would create an imbalance to the detriment of the first party, possibly amounting to a violation of equal treatment. Therefore, the converging practice in international arbitration is to allow counsel to meet with witnesses.[80] Contrary

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75. *See, e.g.*, CRAIG ET AL., *supra* note 52, at 18.

76. ELSING & TOWNSEND, *supra* note 1, at 62.

77. *See* CRAIG ET AL., *supra* note 52, at 28.

78. ELSING & TOWNSEND, *supra* note 1, at 63.

79. *See, e.g.*, Rules of Ethics of the Geneva, art. 13 (Switzerland) *available at* http://www.odage.ch/statuts/3emepartie/statut3mepartie.shtml.

80. *See* IBA Rules, art. 4.3 (stating that "[i]t shall not be improper for a party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses"). Also see Article 25.6 of the Swiss Rules of International Arbitration, which reads as follows: "It shall not be improper for a party, its officers,

rules of ethics are deemed limited to court litigation, and so not to cover conduct in international arbitration.[81]

4. Experts

Expert evidence is another area where the civil-law and common-law traditions differ. Following the adversarial system, parties in common-law litigation present their own experts to the court. If their evidence conflicts, the court chooses the one it finds more convincing. In civil-law procedure, the court appoints its own expert and defines that expert's task. After carrying out sometimes extensive investigations, the expert reports to the court. In practice, the court very often adopts the expert's findings as part of its decision.

Most often, in arbitration, the parties each produce their own expert opinions and testimony.[82] The arbitral tribunal, however, retains the opportunity to appoint its own expert, for instance to advise on limited issues which remain open to doubt after assessment of the parties' expert evidence.[83]

C. *Remaining Divergence*

As a result of the broad party autonomy and related arbitral powers embodied in all modern arbitration legislation and institutional rules, any possible remaining divergence is due to the legal culture and training of the actors, be they arbitrators or counsel. The foregoing discussion of the standardization of the arbitral procedure shows that these divergences have been significantly reduced. The standardization is a work in progress, and one can reasonably assume that it will proceed.

1. Adversarial v. Inquisitorial Proceedings

In spite of the ongoing standardization, some differences remain. For instance, the role of the arbitrator in bringing about a settlement is perceived very differently in different jurisdictions.[84] Further, a

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employees, legal advisors or counsel to interview witnesses, potential witnesses or expertwitnesses." (This rule will be made available on the web shortly at: http://www.arbitration-ch.org.)

81. *See, e.g.*, POUDRET & BESSON, *supra* note 64, at 591 n.660; Gaillard, *supra* note 18, nn.1277, 1285.

82. ELSING & TOWNSEND, *supra* note 1, at 64.

83. *See, e.g.*, ICC Rules, arts. 20(3)-(4); AAA International Dispute Resolution Procedures, art. 22; Swiss Rules of International Arbitration, art. 27.

84. *See* BERGER, *supra* note 26, at 582-88.

difference exists as to whether the proceedings are adversarial or inquisitorial. Moreover, the status of the law governing the merits varies from one system to the other. This article focuses on the latter two differences.

The common-law system is often described as adversarial in that the court has a passive role and the presentation of the evidence is left to the parties. By contrast, civil-law systems are regarded as inquisitorial with the judge assuming an active role in the taking of evidence, sometimes specifying the facts upon which evidence is required, and directing the parties to produce specific proof. However, this clear-cut divide between inquisitorial and adversarial concepts is an oversimplification. Important differences exist within the civil-law system. For instance, a German judge's approach would be truly inquisitorial, while French civil procedure is actually much closer to an adversarial system.[85]

With this caveat in mind, one may note that international arbitration seeks to overcome this particular division on a topic-by-topic basis. The preceding presentation sets forth the solution adopted in connection with expert or witness evidence. In spite of these solutions, practice shows that certain arbitrators tend to be proactive, while others conceive their role as a more passive one. Although this tendency may be induced by personal inclinations, it is also due to legal culture and educational background and may make a significant difference in terms of the management and "style" of the arbitration.

2. *Iura Novit Curia* or is the Substantive Law Applied by the Arbitrator a Fact?

The status of the substantive law in international arbitration is an issue on which no consensus has yet emerged. The main question is whether the parties must prove the law in the same fashion as they prove the facts, or whether the arbitral tribunal is free to establish and assess the contents of the law. In court, this question only arises with respect to foreign law. In international arbitration, it arises with respect to any law. An arbitral tribunal has no *lex fori* and hence no "foreign" law. Or differently put, it has only foreign law. Whatever the perspective, the issue is the same.

The status of foreign law, in a court context, varies from country to country, and the variations do not always coincide with the division between common-law and civil-law jurisdictions. Under English law,

85. *See generally* Reymond, *supra* note 46.

for instance, foreign law is fact that the parties must prove.[86] If they do not succeed, the court will not dismiss the claim, which would be a consistent application of the analogy to unproven facts, but still resolves the dispute by applying English law.[87] The same result prevails in French courts. The parties must prove foreign law or else French law will apply.[88]

Swiss law requires the court to establish the contents of foreign law *ex officio*.[89] In money matters, however, it may impose this duty upon the parties.[90] This is a mere possibility. Hence, in contrast to the experience of English judges, a Swiss judge always has the power to make his or her own inquiries into foreign law.

The same is true under Rule 44.1 of the U.S. Federal Rules of Civil Procedure, pursuant to which "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."[91]

In international arbitration, there appears to be no uniform practice. There may be a trend to produce the evidence of legal experts, at least when none of the members of the arbitral tribunal is familiar with the applicable law. Beyond this trend, the conceptions vary.

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86. *See* RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS – PLEADING, PROOF AND CHOICE OF LAW 60 (1998); DICEY & MORRIS ON THE CONFLICT OF LAWS 221 *passim* (Lawrence Collins ed., 13th ed. 2000).

87. Trevor C. Hartley, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, 45 INT'L & COMP. L.Q. 283 (1996).

88. After various changes in French case law (*see generally, e.g., Bisbal*, Cass. 1e civ. May 12, 1959, D. 1960, 610 *passim* ; *Companie algérienne de Crédit et de Banque v. Chemouny*, Cass. Le civ. Mar 2, 1960, 49 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 97 *passim* (1960); Cass. 1e civ. Nov. 25, 1986, 76 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 383 *passim* (1987); Cass. 1e civ. May 25, 1987, 114 JOURNAL DU DROIT INTERNATIONAL 927 *passim* (1987); *N.R. v. B.L.*, Cass. 1e civ. Oct. 11, 1988, 116 JOURNAL DU DROIT INTERNATIONAL *passim* (1989); *Schule v. Philippe*, Cass. 1e civ., Oct. 18, 1988, 116 JOURNAL DU DROIT INTERNATIONAL 349 *passim* (1989). This principle was finally established in *Coveco*, Cass. 1e civ. Dec. 4, 1990, 80 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 558 *passim* (1991) (Note by Niboyet-Hoegy).

89. Swiss Private International Law Act, 1987, art. 16(1).

90. Swiss Private International Law Act, 1987, art. 16(1) (3rd sentence). However, should the parties fail to establish the contents of the foreign law, the judge must try to establish it himself, or herself, unless doing so would impose an intolerable and disproportionate effort. For an illustration see the discussion of the decision of the Swiss Supreme Court of the May 7, 2002 case, *C. Ltd. v. Banque L.*, in 5 SEMAINE JUDICIAIRE 76 (2003).

91. For an analysis of Rule 44.1 of the Federal Rules of Civil Procedure and its application by U.S. courts, see Louise E. Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, 34 J. MAR. L. & COM. 97-118 (2003).

The English Arbitration Act of 1996 departs from the common law tradition by providing that the tribunal may decide "whether and to what extent the tribunal should itself take the initiative of ascertaining the facts and the law."[92] This may provide a satisfactory solution in terms of saving time and costs whenever the arbitrators are knowledgeable about the applicable law.[93]

In France, Fouchard, Gaillard and Goldmann find the principle *iura novit curia* inadequate in the context of arbitration and, therefore, advocate resorting to the rule which prevails in French courts.[94] Swiss arbitration law holds the contrary position.[95] A number of authors believe that resorting to the court rule, whatever it may be, is inappropriate for the purposes of arbitration. Among them, Lew suggests adopting the solution provided in Rule 44 of the Federal Rules of Civil Procedure.[96] This solution would provide flexibility, but at the same time it lacks predictability, a drawback that the arbitrators may address by issuing specific directions at the outset of a given case.

IV. CONCLUSION: TOWARDS A GLOBALIZED ARBITRATION PROCEDURE

Some believe that globalization brings about a radically new type of legal order. For others, globalization is nothing but déjà vu. Which is the case for the globalization of arbitration procedure? The globalization process of arbitration occurs primarily under the auspices of national arbitration laws, in a classical fashion. Globalization is made possible thanks to the freedom that various national legislation grants to the parties and to the arbitrators.

Does this mean that the globalization process in arbitration brings nothing new? In spite of the classical framework in which globalization evolves, the emergence of a transnational, global arbitration culture is a new phenomenon. Is it the cause or the consequence of the globalization? This question must be left for another paper; it may be both at the same time.

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92. Arbitration Act, 1996, § 34(2)(g) (Eng.).

93. BRUCE HARRIS ET AL., THE ARBITRATION ACT 1996 147 (1996).

94. Gaillard, *supra* note 18, at 692 n.1263.

95. See the decision of the Swiss Supreme Court in *Westland Helicopters Ltd v. The Arab British Helicopter Company (ABH)*, ATF 120 II 172 (April 19, 1994). For a critical commentary on this decision, see POUDRET & BESSON, *supra* note 65, at 504 n.551, 510 n.558 *passim*

96. Julian D.M. Lew, *Proof of Applicable Law in International Commercial Arbitration*, *in* FESTCHRIFT FÜR OTTO SANDROCK ZUM 70 581 *passim* (Geburtstag et al. eds., 2000).

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