Discovery—i.e. the duty of a party to make available to the others all pertinent information for the judgment of the case which is in its possession or over which it has control—is rarely ordered. We shall return to this question when dealing specifically with requests to produce documents in Ch.6.4.3.2 (paras 652–653).

564 These few general characteristics relate to "classical" commercial arbitrations. It should be kept in mind that there are many types of arbitrations. In certain fields (shipping, insurance, commodity of raw materials, sports-related disputes, etc.) particular practices have developed which might diverge to a large extent from those described above.

6.2.2 Commencement of the proceedings, *lis pendens* and interruption of the statute of limitations

Bibliography:

General Works: Berger, pp.375–380; Bucher, pp.67–69 paras 183–187; Derains and Schwartz, pp.41–54; Fouchard, Gaillard and Goldman, paras 1212–1220; Hascher, pp.82–87; Huys and Keutgen, pp.237–238 para.346; IPRG-Volken, pp.1999–2006 para.1-43 *ad* Art.181; Jolidon, pp.218–229 *ad* Art.13; KSP-Vogt, pp.1497–1501 *ad* Art.181; Lalive, Poudret and Reymond, pp.345–348 *ad* PILS, Art.181; Linsmeau, p.121 paras 229–231; Raeschke-Kessler and Berger, pp.137–140 paras 570–586; Redfern and Hunter, pp.178–182 paras 4–03 to 11; Rüede and Hadenfeldt, pp.216–221 § 31; Russell, pp.178–187 paras 5–001–039; Schlosser, pp.463–472 paras 603–628; Stein, Jonas and Schlosser, pp.524–525 *ad* ZPO, § 1044; Walter, Bosch and Brönnimann, pp.122–124.

Specific Studies: W. Bosch, *Rechtskraft und Rechtshängigkeit im Schiedsverfahren*, Tübingen 1991; G. Hauck, *"Schiedshängigkeit" und Verjährungsunterbrechung nach § 220 BGB*, Tübingen 1996; O. Sandrock, *Internationale Schiedsgerichtsbarkeit und Verjährung nach deutschem Recht—Einige geklärte und einige noch ungeklärte Streitfragen, in: Liber Amicorum* Karl-Heinz Böckstiegel, pp.671–696; V.V. Veeder, Towards a Possible Solution: Limitation, Interest and Assignment in London and Paris, ICCA Congress Series No.7, pp.268–293.

565 It is important to determine the commencement of the arbitral proceedings for several reasons.[164] First, this allows verification that the parties have complied with any time-limits for commencing the arbitral proceedings.[165] It can also determine the moment from which the matter is "pending" before the arbitrators from the point of view of a possible stay of—court or arbitral—proceedings subsequently brought by the same parties concerning the same subject matter.[166] We examined above the prerequisites of stay.[167] In France, the "*saisine*" of the arbitral tribunal is important for determining the jurisdiction of the judge competent to order a provisional payment of the disputed claim ("*référé provision*"). Finally, the commencement of the arbitral proceedings can have the effect of interrupting the statute of limitations where the applicable law—in

[164] Hauck, *op. cit.*, p.163; Lalive, Poudret and Reymond, p.346, para.1 *ad* PILS, Art.181; Mustill and Boyd, pp.169–170; Sandrock, *op. cit.*, p.686.
[165] Lalive, Poudret and Reymond, p.346, para.1 *ad* PILS, Art.181; Sandrock, *op. cit.*, p.686.
[166] Lalive, Poudret and Reymond, p.346, para.1 *ad* PILS, Art.181; KSP-Vogt, p.1500, para.14 *ad* PILS, Art.81; Sandrock, *op. cit.*, p.686.
[167] Ch.5.4, paras 488–521.

principle that applicable to the merits[168]—has such effect.[169] We shall examine this question in more detail below.

A number of arbitration laws make the commencement of arbitral proceedings **566** dependent on the receipt of the request for arbitration from the claimant. "Request for arbitration" means the first document issued from the claimant with the aim of commencing proceedings. It does not necessarily correspond to the filing of prayers for relief[170] or to the quantification of the claim.

Inspired by Art.21 of the UNCITRAL Model Law, this solution has been adopted in Germany (§ 1044, first sentence ZPO) and the Netherlands (WBR, Art.1025(2)). Dutch law furthermore requires that a copy of the request be addressed to any arbitrators named in the arbitration agreement or any third parties entrusted with the task of appointing them. In Belgium, Italy and Sweden, the legislature has enacted the additional requirement that the request for arbitration must name the arbitrator appointed by the claimant (where the latter has the choice) for the arbitral proceedings to be pending (CJB, Art.1683(1) and (2), Art.2652 of the Italian Civil Code and SU, Art.19(2)).

In Switzerland, PILS, Art.181 distinguishes between whether the arbitrators are named in the arbitration agreement or not. If not, this article provides that the arbitral proceedings are pending from the moment when "one of the parties initiates the procedure for the constitution of the arbitral tribunal". This text suggests that the commencement of arbitral proceedings depends exclusively on the commencing of the procedure for appointing the arbitrators, without it being necessary to address a proper request for arbitration to the opposing party. In reality, several authors submit that the claimant must in any event specify the subject matter of the dispute within the framework of the constitution proceedings if it wishes to benefit from the effects of PILS, Art.181.[171] The constitution of the arbitral tribunal depends primarily on the arbitration agreement and the chosen arbitration rules. In the absence of an agreement in this respect, constitution proceedings commence at the moment when the claimant applies to the court for assistance pursuant to PILS, Art.179(2).[172]

Where the name of the arbitrator appears in the arbitration agreement, the arbitral proceedings are deemed pending from the moment that one of the parties "seizes" it (PILS, Art.181). The German text of PILS, Art.181 specifies that such "seizure" is triggered by the filing of prayers for relief (*Rechtsbegehren*). The majority of authors deem this prerequsisite fulfilled provided the party indicates "the subject matter of the dispute or the list of questions to be decided"[173]; a

[168] Berger, p.375.
[169] Lalive, Poudret and Reymond, p.346, para.1 *ad* PILS, Art.181; IPRG-Volken, p.2000, para.7 *ad* PILS, Art.181.
[170] See Ch.6.2.3.
[171] Bucher, p.68, para.184; Lalive, Poudret and Reymond, p.348, para.3 *ad* PILS, Art.181; Rüede and Hadenfeldt, p.221, § 31 IV 4.
[172] Bucher, p.68, para.184; KSP-Vogt, p.1499, para.8 *ad* Art.181; Lalive, Poudret and Reymond, pp.347–348, para.3 *ad* PILS, Art.181.
[173] Lalive, Poudret and Reymond, p.347, para.2 *ad* PILS, Art.181; similarly IPRG-Volken, p.2004, paras 31–33 *ad* Art.181; KSP-Vogt, p.1499, para.11 *ad* Art.181.

detailed brief[174] or an indication of the precise amounts claimed are not necessary.

PILS, Art.181 was inspired by Art.13(1) of the Concordat which establishes very similar principles with regard to the commencement of arbitral proceedings. However, Art.13(2) adds that: "where the arbitration rules chosen by the parties or the arbitration agreement provide for conciliation proceedings, the initiation of such proceedings shall be assimilated to the commencement of the arbitral proceedings." Although this is not clear from PILS, Art.181 we are of the opinion that this rule also applies in international arbitration in cases where preliminary conciliation proceedings are mandatory for the parties.[175]

In England, ss.14(3)–(5) of the Arbitration Act 1996 make the same distinction as Swiss law so that the commencement of arbitral proceedings varies depending on whether the arbitrators are named or not in the arbitration agreement. The English solution, however, differs from all the other laws examined above in that the commencement of arbitral proceedings begins already once the claimant "requires" the respondent to proceed.

Section 14(3) of the Arbitration Act 1996 provides that where the arbitrator or arbitrators are named in the arbitration agreement the proceedings have commenced when the claimant "serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated." Where they are not named, ss.14(4) and (5) fix the beginning of the proceedings at the point where the claimant invites the other party to nominate its arbitrator or to consent to the appointment of a sole arbitrator, or invites a third party to constitute the arbitral tribunal.[176] In any event, it seems that the claimant must indicate at least summarily the subject matter of the dispute (as the law says "in that matter").

567 In France, the courts seem to have examined the question of the commencement of arbitral proceedings above all in connection with the jurisdiction of the so-called *juge des référés* to order provisional payment (*"provision"*) in arbitration cases.[177] We shall see that such power is conferred on the judge only until the arbitral tribunal has been seized.[178] In this context, the notion of "seizure" of an arbitral tribunal has been defined in a number of different ways[179] but appears in any event to imply that an arbitral tribunal has been "constituted".[180] It is consequently not suitable for determining the moment from which the arbitral proceedings are "pending" (not least because it allows the respondent

[174] Lalive, Poudret and Reymond, p.347, para.2 *ad* PILS, Art.181.
[175] Bucher, p.68, para.184. See Rüede and Hadenfeldt, p.221 § 31 IV 4 b bb) (apparently not of the same opinion although they refer to Bucher).
[176] Merkin, p.53 *ad* s.14.
[177] See Besson, pp.212–214, paras 345–346.
[178] Ch.6.3.2.2, para.613.
[179] de Boisséson, p.691, para.723; Gaudemet-Tallon, Rev. arb. 1990, p.645; Hory, Rev. arb. 1996, pp.202–203.

to delay such moment by opposing or complicating the constitution proceedings).[181] Putting aside the case where a judge orders a *provision*, we believe that arbitral proceedings should be deemed commenced when the claimant seizes the arbitrators or, if they are not yet designated, initiates proceedings for the constitution of the arbitral tribunal. However, the *Cour de Cassation* confirmed in connection with insolvency proceedings that the arbitration is pending when the arbitral tribunal is constituted and can be seized of the case, i.e. after the acceptance of their mission by all arbitrators.[181a]

An examination of the various national laws hence reveals that the commencement of arbitral proceedings is not governed by uniform criteria and consequently does not necessarily always begin at the same time.

Does their autonomy allow the parties to replace legal criteria by their own **568** definition of the commencement of arbitral proceedings? A number of laws allow this, i.e. in Germany (ZPO, § 1044, first sentence), England (Arbitration Act 1996, s.14(1)), the Netherlands (WBR, Art.1025(3)) and Sweden (SU, Art.19(2)). Other laws are less clear on this point and seem to impose on the parties the criteria on which the commencement of arbitral proceedings depends. In Switzerland, CIA, Art.13, governing the commencement of arbitral proceedings in domestic arbitration, is on the list of mandatory provisions listed in CIA, Art.1(3). Even where the criteria governing the commencement of arbitral proceedings are mandatory the modalities primarily depend on the arbitration agreement. Thus, the manner of "seizing" the arbitral tribunal or "beginning the constitution proceedings" is determined by rules chosen by the parties.[182] From this point of view, the consequences of a mandatory definition of the commencement of arbitral proceedings do not seriously restrict the parties' autonomy.[183]

Several sets of arbitration rules contain a specific provision regarding the moment when the arbitral proceedings are deemed to have commenced. The majority has adopted the criterion of receipt of the request for arbitration by the respondent or the arbitral institution to which it is addressed.[184]

Under a number of laws, the commencement of arbitral proceedings also has **569** the effect of interrupting the statute of limitations of the claims raised in the arbitral proceedings. This is the case in Italy, where the same criteria apply for the interruption of the statute of limitations (Art.2943 of the Italian Civil Code) and the commencement of arbitral proceedings (Art.2652 of the Italian Civil Code). In Belgium, authors recognise that notification in the meaning of CJB, Art.1683 has the effect of interrupting the statute of limitations.[185] The French courts have decided similarly that the seizure of an arbitral institution which is "in conformity with the arbitration agreement and is made in the form provided

[181] Ch.5.4.4, para.507; Besson, pp.212–214, para.346.
[181a] Cas., *Rambour et al. v Frabaltex*, Rev. arb. 2005, p.975.
[182] Lalive, Poudret and Reymond, p.347, para.3 *ad* PILS, Art.181; IPRG-Volken, p.2004, para.34 *ad* PILS, Art.181.
[183] See Jolidon, p.220.
[184] ICC Rules, Art.4.2; LCIA Rules, Art.1.2; Swiss Rules, Art.3.2.
[185] Huys and Keutgen, p.237, para.346; Linsmeau, p.121, para.231.

for by the rules", has the effect of interrupting the statute of limitations.[186] The same solution seems to have been adopted in Sweden.[187] Such effect, however, implies that the law applicable to the merits of the disputes (which usually determines the statute of limitation) coincides with that of the country of the seat of the arbitration. Otherwise, the criteria governing the commencement of arbitral proceedings and the interruption of the statute of limitations can differ.

English law avoids this inconvenience. Section 13 of the Arbitration Act 1996 provides mandatorily that an arbitral tribunal sitting in England must conform to the Limitation Acts which apply before the English courts. In addition, s.14 of the Arbitration Act 1996 governing the beginning of the arbitral proceedings specifies that the proceedings are deemed commenced not only in the meaning of the Arbitration Act, but also as far as the statute of limitations is concerned (" . . . for the purposes of this Part and for the purposes of the Limitation Acts"). It results from this approach that in the event of arbitration in England the commencing of the arbitral proceedings and the interruption of the statute of limitations depend exclusively on the criteria established in s.14 of the Arbitration Act 1996, even if English law is not applicable to the merits of the dispute.[188]

By contrast, Swiss law does not assimilate the interruption of the statute of limitations to the commencement of arbitral proceedings, for the former depends exclusively on substantive law (CO, Art.135). It is true that arbitral proceedings are similar to court proceedings as far as the statute of limitations is concerned (CO, Art.135(2)), but the interruptive effect takes place at the moment of the "filing of the claim" (*Ouverture d'action/Klageerhebung*), which is a substantive law concept.[189] Accordingly, the claimant must comply with the requirements of substantive law in order to interrupt the statute of limitations.

In Germany, the interruption of the statute of limitations appears, like in Switzerland, to depend exclusively on substantive law criteria.[190] As the white paper of the German government regarding ZPO, § 1044 (commencement of arbitral proceedings) shows, this provision does not affect the rules contained in BGB, § 220 on the interruption of the statute of limitation.[191] Certain authors have, however, contested this interpretation and submitted that the interruption of the statue of limitation now depends exclusively on the criteria set out in ZPO, § 1044.[192] The practical consequences of this controversy become manifest

[186] Cas., Rev. arb. 1987, p.387.
[187] Jarvin, p.53.
[188] This does not mean that the law applicable to the merits of the dispute is without bearing on the statute of limitation. In particular, s.1 of the Foreign Limitation Periods Act 1984 subjects limitation periods to the *lex causae*, Arbitration Law, para.11.3; Reymond, Rev. arb. 1997, pp.62–63; Veeder, *op. cit.*, pp.278–280.
[189] ATF 33 II 306 c.2; TC VS RSJ 1979, p.133; Jolidon, pp.222–229; Lalive, Poudret and Reymond, p.346, para.1 *ad* PILS, Art.181; KPS-Vogt, p.1500, para.18 *ad* Art.181; Walter, Bosch and Brönnimann, p.123; see also Fouchard, Gaillard, Goldman, para.1216.
[190] Raeschke-Kessler and Berger, p.138, para.574; Schwab and Walter, pp.136–137 Ch.16, para.5.
[191] Bundesregierung, pp.47–48 *ad* § 1047.
[192] Sandrock, *op. cit.*, p.682 (with references) and pp.687–688.

where the arbitrators are not named in the arbitration agreement.[193] Pursuant to BGB, § 220(2) the statute of limitations is interrupted when the claimant has taken the steps necessary to constitute the arbitral tribunal, which implies the nomination of its arbitrator.[194] Under ZPO, § 1044, on the other hand, it is not necessary that the arbitrator be nominated; the receipt of the request for arbitration is sufficient. In view of this uncertainty, it is advisable to appoint the arbitrator when the limitation period is a concern for the claimant at the time of the filing of the request for arbitration.

In view of the possible divergences between the law governing the commencement of arbitral proceedings and the substantive law governing the interruption of the statute of limitations it is prudent to verify that a request for arbitration will satisfy the requirements for both, at least where there is a danger of a deadline elapsing. As Mustill and Boyd have written,[195] "when enquiring whether sufficient steps have been taken to set an arbitration in motion, the answer may depend on the reason why the question is being asked". This recommendation remains important, except under English law!

Where the law applicable to the statute of limitations recognises the principle of autonomy on this point, the question arises as to whether the aforementioned provisions of arbitral rules concerning the commencement of the arbitral proceedings also govern the interruption of the statute of limitations. Sandrock is of the opinion that it does[196] as far as Art.4.2 of the ICC Rules is concerned—notably because this provision purports to govern the beginning of the arbitral proceedings "for all purposes"—as well as for Art.3 of the UNCITRAL Rules and Art.6 of the DIS Rules.

In view of its practical importance we would mention in conclusion a difficult issue in Swiss law concerning the validation of a freezing order obtained in advance of arbitral proceedings. Article 279(1) of the Swiss Federal Statute on Debt Collection and Bankruptcy provides that "a creditor who has obtained a freezing order without beforehand filing debt collection proceedings or a court claim must file either debt collection proceedings or a court claim within 10 days of receiving the protocol [of the freezing order]." If the creditor files debt collection proceedings and the debtor raises an objection, the creditor must again adhere to a time-limit of 10 days for filing his court claim (LP, Art.279(2)). The effects of the freezing order elapse if the time-limit of 10 days is not respected. 570

Where the matter must be brought before an arbitral tribunal the members of which have not been appointed at the moment the freezing order is made, the creditor must not only request the constitution of the arbitral tribunal within 10 days, but *must also* bring its claim within 10 days of the tribunal having been constituted.[197] It is irrelevant whether the chosen arbitral rules provide for longer

[193] Berger (First Experiences), pp.36–37.
[194] Berger (First Experiences), pp.36–37.
[195] Mustill and Boyd, p.169.
[196] Sandrock, *op. cit.*, pp.678–681; apparently of the same opinion Derains and Schwartz, p.43.
[197] ATF 101 III 58, c.2; ATF 112 III 120, c.2.

time-limits for filing such claim.[198] This means that the party which has obtained a freezing order in Switzerland must take special care to adhere to the time-limits contained in the Statute on Debt Collection and Bankruptcy so as not to lose the benefit of this conservatory measure. It cannot confine itself to following either the principles of PILS, Art.181 or even time-limits contained in the arbitration rules chosen by the parties or established by the arbitrators.

6.2.3 Prayers for relief or claims

Bibliography:

General Works: Craig, Park and Paulsson, pp.277–278 § 15.02; Craig, Park and Paulsson, (Annotated Guide), pp.121–122; Derains and Schwartz, pp.69–72 and pp.266–270; Fouchard, Gaillard and Goldman, para.1218; Huys and Keutgen, pp.260–261 paras 381–382; KSP-Schneider, pp.1528–1529 paras 79–83 *ad* Art.182; Rüede and Hadenfeldt, pp.217–218 § 31 III and 257–258 § 35 III; Russell, pp.221–222 paras 5–148; Schlosser, pp.498–500 para.671; Schwab and Walter, pp.144–145 Ch.16 paras 29 and 30.

Specific Studies: Y. Derains, Amendments to the Claims and New Claims: Where to Draw the Line? *in*: Arbitral Procedure at the Dawn of the New Millenium, *op. cit. ad* Ch.6.1, pp.67–72; P.-Y. Gunter, *Les conclusions et les chefs de demande dans l'arbitrage international, résumé du colloque du 6 mars 1995 à Paris*, ASA Bul. 1995, pp.32–41; F. Lefèvre and J.D.M. Lew, The Scope and Contents of the Request for Arbitration in a Comparative Perspective, *in*: Arbitral Procedure at the Dawn of the New Millenium, *op. cit. ad* Ch.6.1, pp.13–30 and pp.33–40; F. Perret, *Les conclusions et les chefs de demande dans l'arbitrage international*, ASA Bul. 1996, pp.7–20 (cited ASA Bul.); *id.*, *Les conclusions et leur cause juridique au regard de la règle ne eat judex ultra petita partium, Etudes* Pierre Lalive. pp.595–605 (cited: *Etudes* Lalive); P. Level, *op. cit. ad* Ch.3.4.2; E. Silva-Romero, Brief Report on Counterclaims and Cross-Claims: The ICC Perspective, *in*: Arbitral Procedure at the Dawn of the New Millenium, *op. cit. ad* Ch.6.1, pp.75–81; Wiegand, *op. cit.* in Ch.6.1; M. Wirth, *Rechtsbegehren in internationalen Schiedsverfahren—wie bestimmet müssen sie sein?*, in Festschrift Franz Kellerhals, pp.145–158.

571 According to the terminology followed here the word "claim" or "prayers for relief" (*chefs de demande*, *Rechtsbegehren* or *Anträge*) means "the precise indication of what the party wishes to obtain in the judgment".[199] This concept corresponds to that of "*prétention*" pursuant to NCPC, Arts 4–6.[200] It is generally recognised that a prayer for relief does not include its underlying legal ground (or "*causa*")—i.e. the legal rules invoked in support of the claim before the arbitral tribunal.[201] It follows that an arbitral tribunal does not decide *ultra petita* if it upholds a party's claim for different legal grounds than those invoked.[202] It has been held that this would only be otherwise if the party has manifested its clear intention of binding its claim to specific legal grounds ("it is requested that the arbitral tribunal order the respondent to pay US$1 million due

[198] ATF 112 III 120, c.2.
[199] Perret, *op. cit.* (ASA Bul.), p.7.
[200] Perret, *op. cit.* (ASA Bul.), p.8.
[201] Swiss Federal Tribunal, ASA Bul. 1995, pp.217, 220 c.1a; Perret, *op. cit.* (ASA Bul.), pp.8–9; Ch.9.5.5.3, para.807.
[202] Swiss Federal Tribunal, ASA Bul. 1995, pp.217, 220 c.1a); Swiss Federal Tribunal, ASA Bul. 2001, p.531, c.5c: an award granting damages (which were not claimed) instead of the requested payment in fulfillement of a bank guarantee is not *ultra petita*; ATF 122 III 492, ASA Bul. 2002, p.258, c.2 c bb); Wiegand, *op. cit.*, pp.133–137.

to respondent's violation of the non-competition clause binding the parties").[203] This conception has been criticised by Perret,[204] but is in our opinion justified since a claimant who qualifies his claim legally is deemed to have waived any other legal grounds.

The exact determination of the parties' claims before the arbitral tribunal can 572 play an important role in the event of an application to set aside the award. All the laws considered here allow at least the partial setting aside of an award which is *ultra petita*.[205] This ground can also be invoked in support of an application to resist recognition and enforcement of a foreign award pursuant to Art.V(1)(c) of the New York Convention.[206]

According to the case law of the Swiss Federal Tribunal, an undefined prayer for relief is not without effects and prevents an action for setting aside the award based on a breach of the principle *ultra petita* if the other party has not raised a specific objection in that respect.[206a] In this case, the only prayer for relief which could cover the decision made by the arbitral tribunal was the following undefined claim: "Awarding to Claimant such other and further relief as the Arbitral Tribunal may determine is just and appropriate under the law". The Swiss Federal Tribunal dismissed a challenge of the award based on the breach of the principle *ultra petita* (PILS, Art.190(2)(c)) because the defendant party did not object specifically to such an undefined prayer for relief in the course of the arbitration. The party against which such undefined prayer for relief is made should object and request the arbitral tribunal to invite the other party to make it more specific. Contrary to this case law, Wirth[206b] is of the opinion that prayers for relief should be precise, not only in domestic court procedures, but also in international arbitration. He further submits that the arbitral tribunal has a duty to invite the parties, even on its own initiative, to make their prayers for relief more specific.

Another issue is whether the claimant can seek a mere declaration of its entitlement from the arbitral tribunal. It is usually recognised that it must justify an "actual interest" to do so.[206c] However, we note that most arbitral tribunals adopt a flexible approach and rarely dismiss in practice a claim for a declaration for lack of sufficient interest. In particular, the strict limitations of Swiss substantive law concerning a declaratory judgement—which is unavailable if a claim for damages is possible[206d]—are often disregarded by arbitral tribunals. Even if this approach does not comply with the applicable substantive law, it is

[203] ATF 122 III 492 = ASA Bul. 2002, p.258, c.2 c bb). See also the decisions of the Swiss Federal Tribunal and of the Paris *Cour d'appel* analysed and criticised by Perret, *op. cit.* (*Etudes* Lalive), particulary pp.602–603 and (ASA Bul.), pp.12–14; in addition see Ch.9.5.3.3, para.807.
[204] Perret, *op. cit.* (*Etudes* Lalive) and (ASA Bul.), particularly pp.12–16.
[205] Ch.9.5.3.3, paras 801–807.
[206] Ch.10.5.3.3, para.913.
[206a] Swiss Federal Tribunal, ASA Bul. 2002, p.493, c.3b, criticised by Besson, ASA Bul. 2003, pp.479–480 and by Wirth, *op. cit.*, pp.151–52.
[206b] Wirth, *op. cit.*, pp.157–158, Ch.3.
[206c] ICC Award No.9617, JDI 2005, pp.1291, 1292–1293.
[206d] ATF 120 II 144.

in most cases not possible to challenge the award on this ground (see Ch.9.5.8).

It is frequent that during the arbitral proceedings claims are expanded or modified or that the respondent files counterclaims. We shall now concentrate on these two questions.

573 Some laws and arbitration rules contain a specific rule concerning the widening of claims during the course of the proceedings. Inspired by Art.23(2) of the UNCITRAL Model Law, ZPO, § 1046(2) allows the parties to amend or supplement their claims during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it without sufficient justification. It is regrettable that the arbitral tribunal's decision depends exclusively on whether the amendment is timely or not, since there are other criteria which could also be taken into consideration. SU, Art.23(3) and (4) escapes this criticism because it allows the arbitrators to take into consideration both lateness and "all other circumstances" in assessing the admissibility of amended or supplemented claims. The same applies to "new" ones. We note that both in Germany and Sweden the principle of party autonomy is reserved.

Clarifying Art.23(2) of the Model Law, Art.20.1 of the UNCITRAL Rules and Art.20.1 of the Swiss Rules provide that the parties can amend or supplement their claims ("claims" is unfortunately translated to "*requête*" in the French version) unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.[207] Article 44 of the WIPO Rules contains a very similar rule.

In ICC arbitration, the filing of new prayers for relief during the course of the arbitral proceedings raised particular problems due to the unfortunate wording of Art.16 of the 1988 version of the rules, which provided that "new claims" must remain within "the limits fixed by the terms of reference provided for in Art.13" or that they are specified "in a rider to that document". This gave rise to controversies and practical difficulties.[208] The new ICC Rules of 1998 modified this provision to avoid the situation whereby a party can oppose the filing of new claims, even without a legitimate reason, after the signing or ratification of the terms of reference. Henceforth the arbitral tribunal has the power to authorise either of the parties to file new claims which fall outside the limits of the terms of reference. It shall thereby take into consideration "the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances" (Art.19 of the ICC Rules). It is regrettable that this rule does not provide more precise objective criteria, in particular connexity between the original

[207] This provision of the UNCITRAL Rules is criticised by Fouchard, Gaillard and Goldman, para.1218; see ASA Bul. 2004, p.766, c.4, where the claim was increased in application of this provision of the UNCITRAL Rules from 7 to 36 millions on the basis of a different legal provision.

[208] Arnaldez, *op. cit. ad* Ch.6.2.4, pp.25–31; Craig, Park and Paulsson, p.278 para.15.02; Fouchard, Gaillard and Goldman, para.1233.

claims and the additional ones and the foreseeable impact of their filing on the conduct and duration of the proceedings.

Article 19 of the ICC Rules is not revolutionary. It confirms the principle that new claims after the terms of reference have entered into force are generally prohibited unless the arbitral tribunal specifically allows them.[209] As under the previous rules,[210] this provision determines what is a "new" claim by reference to the "limits of the Terms of Reference", which means the prayers for relief contained in that document, i.e. the subject matter of the dispute, and not the legal basis for the claim. However, the former difficulties are mitigated by the power now granted to the arbitral tribunal to authorise the filing of "new" claims.[211] Without entering in detail into the numerous awards and opinions on this subject[212] we would merely indicate that a "claim" is not "new" simply because it is based on new arguments or new legal grounds.[213] The same applies to an increase in the amount of the claim, at least according to the majority opinion.[214] On the other hand, the question of whether set-off claims are "new" is subject to different approaches depending on the nature of the set-off defence.[215] A different form of relief changes the subject matter in dispute and should be characterised as a new claim.[215a]

In the absence of a specific rule in the law or the arbitration rules the arbitral tribunal can decide to admit new or amended claims based on its power to conduct the arbitral proceedings.[216] The mandatory procedural principles, in particular the right to be heard, and the principle of equal treatment, are evidently applicable and can limit the power of the arbitrators. If the parties have submitted to a national code of civil procedure,[217] the arbitrators must apply the criteria established therein.

To avoid disputes over the admissibility of new claims, certain authors consider that the arbitrators should indicate in advance the moment from which such claims are no longer admitted.[218] However, such indication risks being interpreted as an open door to file new claims before the deadline, even claims which have no connection with the original ones.

[209] Derains and Schwartz, pp.267–268.

[210] Fouchard, Gaillard and Goldman, para.1233 of the English version.

[211] Craig, Park and Paulsson, p.278 para.15.02.

[212] See notably Arnaldez, *op. cit. ad* Ch.6.2.4, pp.25–31; Derains and Schwartz, pp.268–269 with references; Fouchard, Gaillard and Goldman, para.1233 with references.

[213] Craig, Park and Paulsson, p.278 para.15.02; Fouchard, Gaillard and Goldman, para.1233 with references.

[214] Reiner, *op. cit. ad* Ch.6.2.4, pp.68–69; Craig, Park and Paulsson, p.279 para.15.02; Derains and Schwartz, p.269; Fouchard, Gaillard and Goldman, para.1233, are more restrictive.

[215] Derains and Schwartz, p.269; Reiner, *op. cit. ad* Ch.6.2.4, pp.69–70.

[215a] See Derains and Schwartz, p.269, giving the example—without approving it—of a change in the currency of the relief, which was treated by "some arbitrators" as an inadmissible new claim. In our opinion, the determination of the applicable currency does not affect the subject matter of the dispute and, therefore, a change in the currency should not be treated as a "new" claim.

[216] KSP-Schneider, p.1529 para.82 *ad* 182; Rüede and Hadenfeldt, p.217.

[217] As to whether such a choice is useful see Ch.6.1.2.2, para.529.

[218] Fouchard, Gaillard and Goldman, para.1218.

574 Despite its practical importance, the question of the admissibility of counterclaims before an arbitral tribunal is only explicitly mentioned in German and Swedish law and in Art.23(1) of the UNCITRAL Model Law from which they are derived. German law refers to the provisions applicable to the request for arbitration (ZPO, § 1046(3)). In our opinion, the result is that there is no particular limitation on counterclaims (based on the same arbitration agreement as the principal claims) provided they are filed with the statement of defence.[219] Subsequently the principles governing the new claims or amendments to the principal claims apply. Swedish law is more restrictive in that it always subjects the admissibility of counterclaims to the criteria applicable to new claims (SU, Art.23(3)). Agreements to the contrary are reserved both under German and Swedish law.

The arbitration rules considered here contain no restrictions on the admissibility of counterclaims raised in the statement of defence.[220] At a later stage, the principles governing the new claims or amendments to the principal claims apply also to counterclaims.[221] The admissibility of counterclaims may be limited by rules choosen by the parties to govern the arbitral proceedings.[222] If, for example, they choose the Swiss Act on Federal Civil Procedure, they limit the power of the arbitral tribunal to admit counterclaims to those which "are legally connected with the principal claim" (Art.31).[223]

In the absence of a particular rule in the *lex arbitrii*, the arbitration rules or the chosen procedural rules, the arbitral tribunal may freely determine the admissibility of counterclaims by virtue of its power to determine the arbitral proceedings.[224] The counterclaims must fall under an arbitration agreement between the parties,[225] albeit not necessarily that upon which the jurisdiction of the arbitral tribunal over the principal claims is based.[226] In the latter case the admissibility of the counterclaim presupposes that the modalities of arbitration pursuant to both agreements are compatible.

The arbitral tribunal is free to determine whether it proposes to make the admissibility of counterclaims dependent on the existence of a sufficient "connection" or "connexity". According to Fouchard, Gaillard and Goldman,[227]

[219] See Schwab and Walter, p.145, Ch.16, para.31, who require a "connection" with the principal claim although no such condition is mentioned in the text of the law, but recognise that such connection is given if the counterclaim is based on the same arbitration agreement as the principal claim.

[220] ICC Rules, Art.5.5; LCIA Rules, Art.2.1(b); UNCITRAL Rules, Art.19.3; Swiss Rules, Art.3.9; WIPO Rules, Art.11.

[221] See ICC Rules, Art.19. UNCITRAL Rules, Art.19.3, however, provides a specific rule for counterclaims, which was not adopted in the Swiss Rules.

[222] As to whether such a choice is opportune see Ch.6.1.2.2, para.529.

[223] Rüede and Hadenfeldt, p.257.

[224] Fouchard, Gaillard and Goldman, para.1222; Lalive, Poudret and Reymond, p.382, para.7 *ad* PILS, Art.186.

[225] Raeschke-Kessler and Berger, p.166, para.699.

[226] Lalive, Poudret and Reymond, p.382, para.7 *ad* PILS, Art.186.

[227] Fouchard, Gaillard and Goldman, para.1222

such a connection is not necessary where a counterclaim "is based on the same arbitration agreement" as the principal claim.

The admissibility of counterclaims should not be confused with the power of the arbitral tribunal to take a plea of set-off into consideration. We refer in this respect to Ch.3.6.3 (paras 317–325).

Furthermore, the admissibility of counterclaims is distinct from the issue of whether a respondent may file a cross-claim against another respondent in the same arbitration. Under the traditional approach followed by the ICC Court, such cross-claim was not permissible, but the recent trend favors more flexibility and allows the arbitral tribunal to rule on the admissibility of the cross-claim.[227a]

6.2.4 Terms of reference

Bibliography:

General Works: Berger, pp.398–406; Craig, Park and Paulsson, pp.273–293 § 15; Craig, Park and Paulsson (Annotated Guide), pp.115–118; Derains and Schwartz, pp.250–266; Fouchard, Gaillard and Goldman paras 1228–1237; Reiner (1998), pp.41–44.

Specific Studies: J.J. Arnaldez, *L'acte déterminant la mission de l'arbitre, in: Etudes* Pierre Bellet, pp.1–31; F. Kellerhals and B. Berger, *Terms of Reference, Ihre Bedeutung für das Schiedsverfahren, Recht* 2002, pp.24–36; P.M. Patocchi and H. Frey-Brentano, The Provisional Timetable in International Arbitration, *Liber Amicorum* Robert Briner, pp.575–599; A. Reiner, *The Term of Reference*, ICC Bul. 1996 vol. 7/2, pp.60–73; P. Sanders, The Terms of Reference *in* ICC Arbitration, *Liber Amicorum* Robert Briner, pp.693–706; M.E. Schneider, *The Term of Reference, in: The New 1998 ICC Rules of Arbitration*, ICC Bull., Special Supplement 1997, pp.26–37.

575 The Terms of Reference ("*Acte de mission*") are an institution peculiar to the ICC rules which have been adopted by the CEPANI Rules.[228] However, it is not unusual for arbitral tribunals to establish in the beginning of the arbitration a document, sometimes labelled constitutional order, containing the same information as the ICC Terms of Reference. The purpose of the Terms of Reference was originally to obtain the parties' submission to an agreement to arbitrate ("*compromis d'arbitrage*") at a time when the validity of arbitration clauses applicable to future disputes was less widely recognised than today.[229] Over the years its role has gradually developed. Today the terms of reference are essentially a document defining the framework of the dispute, drawing the parties' attention to the principal questions at issue[230] and determining certain particular aspects of the arbitral proceedings. Article 18 of the ICC Rules provides that the terms of reference shall in particular indicate the full names and descriptions of the parties and arbitrators, a summary of the parties' respective claims and of the relief sought by each party, a list of the issues to be resolved, the place of the arbitration and particulars of the applicable procedural rules.

[227a] Hanotiau, *op. cit.* ad. Ch.3.4.2 (Joinder), pp.197–198.

[228] Fouchard, Gaillard and Goldman, para.1229. See ICC Rules, Art.18 and CEPANI Rules, Art.15.

[229] Derains and Schwartz, p.247.

[230] In more detail Fouchard, Gaillard and Goldman, paras 1231–1234

We shall not return here to the question of whether terms of reference are opportune or to the effects of the document in ICC arbitration. These topics have been the object of numerous articles and are not the main focus in a work on comparative arbitration law.[231]

576 We shall limit ourselves here to the legal nature of the terms of reference. As Fouchard, Gaillard and Goldman have pointed out,[232] it is helpful to distinguish whether or not the parties have signed the document in accordance with Art.18.2 of the ICC Rules. If they have signed without any reservation, the terms of reference are a real agreement and a submission to arbitrate with respect to the issues dealt with therein.[233] As the *Sofidif*[234] case illustrated, they bind the arbitrators and their violation may, according to the majority of arbitration laws, constitute a ground for setting aside the award.[235] The terms of reference may extend the scope of the original arbitration agreement and may modify or supplement it in certain respects, for example by determining the seat, the language of the proceedings or the scope of future challenge proceedings against the award if the law of the seat thus allows.[236] In our opinion, the signing of terms of reference does not have the effect of restricting the scope of the arbitration agreement unless the parties expressly so provide.[237] In addition, adherence to terms of reference does not necessarily imply recognition of the arbitrators' jurisdiction, but the respondent should include this point in the list of disputed issues.[238]

In the absence of an agreement between the parties as to the contents of the terms of reference the latter are approved by the ICC International Court of arbitration pursuant to Art.18.3 of the ICC Rules. In such case, the terms of reference neither modify the parties' contractual agreements nor constitute an

[231] Arnaldez, *op. cit.*, pp.15–18; Craig, Park and Paulsson, pp.273–276 § 15.01; Derains and Schwartz, pp.248–249; Fouchard, Gaillard and Goldman, paras 1231–1234; Reiner, *op. cit.*, paras 61–62; Sanders, *op. cit.*, suggesting to replace Art.18 of the ICC Rules by a provision on preparatory meetings.

[232] Fouchard, Gaillard and Goldman, paras 1235–1236.

[233] Paris, *Kis France*, Rev. arb. 1987, p.498; Fouchard, Gaillard and Goldman, para.1236; Derains and Schwartz, p.248, fn.143. The question is however controversial: see Craig, Park and Paulsson, pp.291–293 § 15.05. The English courts do not seem to attribute any effect whatsoever to terms of reference with respect to the jurisdiction of the arbitrators (see Craig, Park and Paulsson, p.292 § 15.05, with reference to CA, *Dalmia v National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223).

[234] Paris, Rev. arb. 1987, p.359 and Cas., Rev. arb. 1989, p.481, with a note by Jarrosson. On this case, see Ch.8.1.1, para.725; Craig, Park and Paulsson, pp.287–289 § 15.05; Fouchard, Gaillard and Goldman, para.1236.

[235] Ch.9.5.5.3, para.804.

[236] Craig, Park and Paulsson, p.293 § 15.05; Derains and Schwartz, pp.257–258; Fouchard, Gaillard and Goldman, para.1236; see *LaPine Technology Corp. v Kyocera Corp.*, 130 F. 3d 884 (9th Cir. 1997) on the question of the extension of grounds for appeal against the award in the United States.

[237] See Fouchard, Gaillard and Goldman, para.1236.

[238] Paris, *Arab Republic of Egypt*, Rev. arb. 1986, p.75, confirmed by the *Cour de cassation*, Rev. arb. 1987, p.469, with a note by Leboulanger; Craig, Park and Paulsson, p.291 para.15.05; Fouchard, Gaillard and Goldman, para.1236; Kaplan and Berger, *op. cit.*, p.26.

arbitration agreement.[239] It only has the effects specifically provided for by the ICC Rules, in particular that of restricting the possibility of filing "new claims" pursuant to Art.19 of the ICC Rules.[240]

6.2.5 Particular procedural problems

Bibliography:

General Works: Berger, pp.386–398; Fouchard, Gaillard and Goldman, paras 1238–1256; Huys and Keutgen, pp.246–247 paras 358–362; IPRG-Vischer, pp.2009 and 2010 para.6–13 *ad* Art.182; KSP-Schneider, pp.1526–1534 paras 73–95 *ad* Art.182; Lalive, Poudret and Reymond, pp.356–359 paras 14–17 *ad* PILS, Art.182; Linsmeau, pp.124–126 paras 239–244; Rüede and Hadenfeldt, pp.214–216 § 30 and pp.222–229 § 32.

In this section we shall briefly address a number of particular procedural problems which may arise during the arbitral proceedings. 577

6.2.5.1 Counsel to the parties

The laws considered here do not restrict the persons who may act as counsel to the parties before the arbitral tribunal and in particular do not provide for a monopoly of attorneys at law.[241] However, CJB, Art.1694(4) subjects the representation of a party by a person who is not an attorney to the approval of the arbitral tribunal and prohibits representation by a so-called *agent d'affaires*. 578

It is not a requirement that counsel must have an office in or be a national of the country of the seat of the arbitration. While restrictions of this type have not completely disappeared, they do not affect the European states considered here.[242] On the other hand, restrictions contained in internal procedural law may apply before the judicial authorities, notably in case of challenge of the award or at the enforcement stage.

6.2.5.2 Language of the proceedings

None of the arbitration laws considered here imposes a particular language for written briefs or arbitral hearings. The parties are free to determine this question, failing which the arbitrators must do so.[243] A number of arbitration rules give 579

[239] See OLG Cologne, YCA 1996, pp.535, 536–536, Ger. 44, concerning the particular case where the terms of reference had been signed by the parties on separate documents which had never been "exchanged" but only returned to the arbitrator. The court held that the formal requirements of Art.II(2) of the New York Convention had not been fulfilled.

[240] Fouchard, Gaillard and Goldman, para.1237.

[241] s.36 of the Arbitration Act 1996; WBR, Art.1038 (1) and (2); Cas., Rev. arb. 1979, p.487; Fouchard, Gaillard and Goldman, para.1241; see Handbook, Ch.IV 6.

[242] See D. Rivkin, Restrictions on Foreign Counsel in International Arbitration, YCA 1991, pp.402–412; Redfern and Hunter, pp.282–283, para.6–35.

[243] ZPO, § 1045 (1); UNCITRAL Model Law, Art.22(1).

particular weight to the language of the arbitration agreement in determining the language of the arbitral proceedings.[244]

It should be pointed out again that the autonomy only applies before the arbitrators and that in the event of court intervention the parties must respect the official language of the forum, which can entail considerable translation costs.[245]

6.2.5.3 Seat of the arbitration and venue of hearings

580 We saw in Ch.2 that the "seat of the arbitration" is a legal concept which does not necessarily imply that the arbitral proceedings are conducted in the country of the seat. Several laws and sets of arbitration rules explicitly allow the arbitrators to conduct the proceedings, to hear witnesses or to hold meetings at any other place; some provide that they must first obtain the approval of the parties or consult with them.[246]

6.2.5.4 Stay of the arbitral proceedings

Bibliography:

General Works: Delvolvé, Rouche and Pointon, pp.108–110 paras 199–203; Huys and Keutgen, pp.258 paras 378–379; Jolidon, pp.194–195 para.4 *ad* Art.9, p.247 para.32 *ad* Art.16, p.288 para.35 *ad* Art.20 and pp.301–302 para.43 *ad* Art.21; Lalive, Poudret and Reymond, p.359 para.17 *ad* PILS, Art.182; Mustill and Boyd, pp.152–153; Raeschke-Kessler and Berger, pp.164–166 paras 689–695; Schlosser, pp.492–493 para.663; Schwab and Walter, pp.151–152 Ch.16 paras 48–52.

Particular Studies: R. Budin, *La suspension dans l'arbitrage international,* Rev. arb. 1986, pp.415–424; L. Lévy and A.V. Schlaepfer, *La suspension d'instance dans l'arbitrage international, Les Cahiers de l'arbitrage* No.2001/2, Gaz. Pal. 14–15 Nov 2001, pp.18–26; D. Poncet and A. Macaluso, *La suspension de la procédure arbitrale comme dépendant du pénal: un bref état des lieux, in Festschrift* Franz Kellerhals, pp.65–73.

581 The arbitral proceedings may be affected by various incidents which impede their smooth conduct. In certain cases such incidents can justify a stay of the arbitral proceedings—i.e. their "interruption" in the meaning of NCPC, Art.369 *et seq.* NCPC—for a certain time until the obstacle has been removed.

Despite its practical importance the question of the stay of the arbitral proceedings hardly attracted the attention of authors until recently.[247] The laws and arbitration rules rarely contain explicit provisions governing this question. We shall examine these below.

[244] WIPO Rules, Art.40(a); LCIA Rules, Art.17, which distinguishes between the "initial" language—that of the arbitration agreement—and the language of the arbitration as determined by the arbitrators; Art.17.1 Swiss Rules does not provide any criteria.

[245] We would point out that in practice the courts sometimes waive the translation of documents which it is capable of understanding albeit they are in a foreign language. Thus, the Swiss Federal Tribunal does not generally request the translation of documents or awards in English within the framework of an action for setting aside the award.

[246] See Ch.2.4, para.134.

In the absence of an express rule in the law or the arbitration rules, the stay of the arbitral proceedings is a procedural question which the arbitral tribunal is at liberty to determine in the absence of an agreement between the parties.[248] The decision to stay is essentially a question of efficiency and of weighing the interests between the necessity of continuing the arbitration rapidly and the risk of unnecessary operations and costs or, worse, of conflicting decisions. Stay is one of the solutions to this problem, but in the majority of cases it is not mandatory. The decision to stay is in principle made in the form of a procedural order which can be revoked, and not in a proper award.[249] We shall see however that the courts have sometimes departed from this principle and assimilated a decision to stay to a proper award in order to review.[250] However, when the stay is discretionary, the Swiss Federal Tribunal held that it could not review the arbitral tribunal's decision.[250a]

The question of the stay of the arbitral proceedings is generally raised where an action for setting aside has been lodged against a preliminary award, where an arbitrator has been challenged, where connected proceedings over which the arbitral tribunal does not have jurisdiction are pending, or where one of the parties is declared bankrupt.

We shall examine the first of these cases in detail in Ch.9.4 paras 781–784. **582** Here it shall suffice to point out that challenge proceedings against a preliminary award concerning the jurisdiction of the arbitral tribunal does not automatically entail a stay of the arbitral proceedings. The Swiss Federal Tribunal has held that this remains the case even if the appeal stays the enforcement of the preliminary award:

> "[The appellant] submits that the stay of the effects of the decision concerning the jurisdiction of the arbitral tribunal (Art.8 CIA) entails automatically the stay of the arbitral proceedings. The intercantonal Concordat on arbitration contains no such rule. While Art.8 Concordat obliges the arbitrators to render a decision on their own jurisdiction, it does not oblige them to do so in a separate award but leaves them the choice [. . .]. In view of this there is in principle no reason, save the question of efficiency, why they should not proceed on the merits despite the fact that an appeal is pending against the decision concerning their jurisdiction. This would also be the case if the appeal were suspending the enforcement of the decision on jurisdiction: although the decision on jurisdiction would be without effect, this would not prevent the arbitrators from proceeding on the merits despite the appeal. This does not lead to unacceptable results because even if the arbitral tribunal rendered an award before the court had decided the appeal, the effects of the award could be set aside if the appeal were

[248] Lalive, Poudret and Reymond, p.359, para.17 *ad* PILS, Art.182; Lévy and Schlaepfer, *op. cit.*, p.21; Schwab and Walter, pp.150–151 Ch.16, para.47.

[249] See Lévy and Schlaepfer, *op. cit.*, pp.24–25.

[250] Ch.8.1.2, paras 729 and 730; Ch.9.3, para.778. Paris, Rev. arb. 2001, p.606.

[250a] ASA Bul. 2004, p.782, c.3.2.

allowed. Thus, the decision whether or not to stay the arbitral proceedings is reserved to the arbitrators and depends on considerations of procedural economy and usefulness".[251]

This case, decided unter the Concordat, is still a valid precedent.

Similarly, under the majority of laws challenge proceedings against an arbitrator do not entail the automatic stay of the arbitral proceedings.[252] Thus, Art.13(3) of the UNCITRAL Model Law provides that pending the outcome of the decision of the court on the challenge "the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award". This rule is not, however, followed in Belgium (CJB, Art.1691(1)) or in France in domestic arbitration.[253] In the two latter cases, the challenge of an arbitrator before the courts stays the arbitration. In international arbitration, a stay is within the discretion of the arbitrators, and the court is not empowered to order such a stay.[253a]

583 The question of a stay also arises in the case of connected penal or civil proceedings. Belgian law seems to provide for an automatic stay of the arbitral proceedings without restriction in the case of connected penal proceedings in application of the rule "*le criminel tient le civil en l'état*".[254] The Swiss Federal Tribunal has expressly rejected the application of this rule in international arbitration[255] and held that the arbitrator only has "the discretion to stay the proceedings pending the outcome of the other proceedings with a view to resolving a preliminary issue". In France, automatic stay is only provided for in the event that the authenticity of notarised documents is disputed in domestic arbitration.[256] Like in Switzerland, "*le criminel tient le civil en état*" does not apply in international arbitration.[257] However, this principle applies in court proceedings relating to arbitration. In case of enforcement of an international award in France, the Paris *Cour d'appel* decided to stay the proceedings pending

[251] ATF 109 Ia 81 c.2c.

[252] ZPO, § 1037(3); WBR, Art.103(1); Berger, pp.284–285; ATF 128 III 234 = ASA Bul. 2002, p.337, c.3 b bb; Bucher, p.67, para.81; Budin, *op. cit.*, p.420; Jolidon, p.288, para.35 *ad* Art.20 and pp.301–302, para.43 *ad* Art.21; Lévy and Schlaepfer, *op. cit.*, p.23.

[253] See NCPC, Art.346(1) the applicability of which to arbitration seems to be generally recognised; Moreau, Rev. arb. 1978, p.326; Robert and Moreau, p.121, para.145; see Gaillard, ICCA Congress Series no.5, p.139; *contra*, Derains, Rev. arb. 2005, p.1042. TGI Paris, *LV Finance Group v ICC*, Rev. arb. 2005, p.1037, with a note by Derains.

[253a] TGI Paris, *LV Finance Group v. ICC*, Rev. arb. 2005, p.1037, with a note by Derains.

[254] Huys and Keutgen, p.258, paras 378–379; see similarly CJB, Art.1696(4) and (6) concerning the authenticity of a document.

[255] ATF 119 II 386 = ASA Bul. 1994, p.248, c.1 b and c.

[256] NCPC, Art.313, applicable by virtue of the reference in NCPC, Art.1467(2).

[257] Paris, Rev. arb. 2001, p.237 and p.584 (fourth case); Paris, Rev. arb. 2002, p.792 and p.971; Art.4(2) of the Code of Penal Procedure does not apply before the arbitral tribunal, but the latter can order a stay of the proceedings for reasons of efficiency; JDI 2002, p.1071: same solution; Fouchard, Gaillard and Goldman, para.1660; Lévy and Schlaepfer, *op. cit.*, pp.20–21; Poncet and Macaluso, *op. cit.*, pp.68–69.

the outcome of the criminal investigation in France with regard to facts having an impact on the decision of the arbitrators.[258]

In other cases, the Paris Court of Appeal and the *Cour de cassation* confirmed that the principle "*le criminal tient le civil en état*" applies to court proceedings, in particular challenge procedures against the award, but they made it clear that the applicant should establish that the outcome of the criminal procedure has a direct impact on the grounds for challenging the award (and not only on the decision made by the arbitral tribunal).[259] The *Cour de cassation* further held that this principle only applies if the criminal procedure takes place in France.[260]

In Italy, the new Art.819bis(1) of ICCP imposes on the arbitrators a duty to stay the arbitral proceedings when the claimant's claims are related to criminal proceedings and when they were brought after the intervention of the claimant as a party in the criminal proceedings or after the issuance of the judgement of first instance by the penal court (Art.75(3) of the Code of Criminal Procedure); the arbitration is stayed until the final judgement by the penal court.

Where civil proceedings involve preliminary issues which are not within the jurisdiction of the arbitral tribunal, the latter has the discretion to stay the arbitration.[261] If the arbitral proceedings are continued, the arbitral tribunal may determine such preliminary issues even if they are outside of its jurisction.[262]

In Italy, the power of the arbitrators to decide preliminary issues on the merits was restricted under the law in force prior to the reform of 2006. Today, ICCP 2006, Art.819 provides that they shall decide without *res judicata* effect all issues which are relevant for the determination of the dispute, even if the preliminary issues relate to matters that may not be the subject of an arbitration agreement. However, if such issues have by law to be decided with *res judicata* effect, the arbitrators shall suspend the arbitral proceedings (ICCP 2006, Art.819bis(1) no.2).

In England, it used to be admissible to apply to the courts for a stay of the arbitral proceedings[263] if proceedings concerning connected or preliminary questions were pending before a judge. In our opinion, this possibility should no longer exist under the new law, which makes it clear that the English courts have no powers to intervene in arbitral proceedings outside of the cases expressly provided for by the Arbitration Act 1996 (s.1(c)).[264]

A particular case which we already examined in detail in Ch.5 concerns the possible application of *lis pendens* rules where a court and an arbitral tribunal are

[258] Paris, *SA Thomson CSF* (second case), Rev. arb. 2001, pp.583, 585, with a note by Racine; Cas., Rev. arb. 2006, p.103.

[259] Paris, *Diallo v Andrieu*, Rev. arb. 2003, p.543; Cas., *Omenex v Hugon*, Rev. arb. 2006, p.103, with a note by Racine; see already, Paris, Rev. arb. 2002, p.971 (2nd case).

[260] Rev. arb. 2006, p.103.

[261] ATF 119 II 386 c.b and c; Paris, Rev. arb. 1994, p.515, with a note by Jarrosson; Lévy and Schlaepfer, *op. cit.*, pp.22–23.

[262] IPRG-Vischer, p.1962, para.11 *ad* Art.177; Lalive, Poudret and Reymond, p.51, para.1 *ad* CIA, Art.5; See Paris, Rev. arb. 1994, p.515.

[263] CA, *The "Oranie" and the "Tunisie"* [1966] 1 Lloyd's Rep. 477; CA, *Northern R.H.A v Crouch Construction Ltd*, [1984] 1 QB 644.

[264] See Cato, p.1296, less affirmative.

both seized at the same time with a dispute concerning the validity of the (same) arbitration agreement.[265] We shall not return to that debate here.

The stay of the arbitral proceedings in the case of pending court proceedings concerning preliminary connected or even identical questions should not be confused with the extension of jurisdiction in favour of the court in the case of connection with the matter submitted to arbitration. This phenomenom, qualified in Italy as *vis attractiva*, does not lead to the stay of the arbitral proceedings but to the ineffectiveness of all or part of the arbitration agreement. It contravenes the will of the parties more directly, which is why it was repealed by the Italian legislature in 1994. French and American case law also considers that the arbitrators' jurisdiction is not excluded by a connection between the matter before them and a case pending before a court.[266]

584 The bankruptcy of a party to the arbitral proceedings is a special case which can lead to their stay. In France, the courts have held that the principle of the suspension of individual debt collection ("*poursuites individuelles*") in the event of bankruptcy is "both part of domestic and international public policy".[267] This suspension implies first that the creditor must lodge its claim in the insolvency proceedings and that the arbitral proceedings can only proceed after the verification and admission of the claim,[267a] and secondly that the arbitral tribunal can only confirm the existence of the claim but not directly order the debtor in bankruptcy to pay it.[268] Failure to observe this rule can lead to the setting aside of the award or the refusal of enforcement in France. We would however note, following Ancel, that the public policy nature of the suspension only applies to bankruptcies which are subject to French law and that a different rule is conceivable where the bankruptcy is subject to a different law.[269] The Paris *Cour d'appel* has also held that an international arbitral tribunal can examine from the

[265] Ch.5.4.5, paras 509–514.

[266] Paris, Rev. arb. 1990, p.150, with a note by Jarrosson; Cas. Rev. arb. 2002, p.919 with a note by Cohen; (" . . . the mere finding of indivisibility does not suffice as an obstacle to the arbitration agreement . . . "); *Permargo v Pemex*, 767 F. 2d 1140 (5th Cir. 1985) = YCA 1987, p.539, putting an end to the "intertwining doctrine" which allowed a Federal Court seised with various claims, some of which were subject exclusively to its jurisdiction while others were within the jurisdiction of an arbitral tribunal, to take jurisdiction over all the claims thus bypassing the arbitration agreement; similarly, in Switzerland, Th. Müller, *in:* Müller and Wirth (ed.), *Gerichtsstandsgesetz*, Zurich 2001, p.170, para.46 *ad* Art.7. See in Belgium, Huys and Keutgen, p.255, para.375; Linsmeau, pp.74–75, paras 104–108 and pp.78–79, para.113.

[267] Cas., *Thinet*, Rev. arb. 1989, p.473; Paris, *Almira Films*, Rev. arb. 1989, p.711, with a note by Idot; Cas., June 2, 2004, *Gaussin v Alstom Power Turbomachines*, and *Industry v Alstom Power Turbomachines* (2 cases), JDI 2005, p.101, with a note by Mourre; see ICC Award No.9163, JDI 2005, pp.1283, 1284–1285, referring to the concept of mandatory rules (*lois de police*) rather than to public policy.

[267a] But see ICC Award No.9163, JDI 2005, pp.1283, 1286–1287, finding that a request for arbitration can be filed against a debtor in bankruptcy even prior to the declaration of the claim to the state authorities since the arbitration can in any case only result in a declaration of the existence of the claims and not in a payment order against the debtor. This Award disregards Art.L. 621–40 (former Art.47) of the French law on insolvency proceedings.

[268] Ancel, Rev. arb. 1989, p.476 and award mentioned in n.267a.

[269] Rev. arb. 1989, pp.478–479.

point of view of international public policy the regularity of a foreign declaration of bankruptcy.[270]

In Italy, the arbitration is not only suspended but the dispute is to be referred to the bankruptcy court, which excludes the powers of the arbitrators (*vis attractiva*).[270a]

The automatic stay of the arbitral proceedings in the event of bankruptcy is also advocated by authors in the Netherlands.[271]

In other countries the duty to stay is not advocated with quite such force. Swiss authors are divided regarding the obligation to stay arbitral proceedings *ex lege* (pursuant to Art.207(1) of the Statute on Debt Collection and Bankruptcy) because of the opening of bankruptcy proceedings in Switzerland against one of the parties.[272] Like Brown-Berset and Lévy we submit that a mandatory stay pursuant to Art.207(1) of the Statute on Debt Collection and Bankruptcy is not part of public policy and that "the legislative purpose [of Art.207(1)] is fulfilled provided the arbitral tribunal gives the estate in bankruptcy the necessary time to organise its defence [. . .]'".[273] Courts and authors in Germany also steer in this direction. While excluding an automatic stay of the arbitral proceedings based on the German Bankruptcy Statute (*Konkursordnung*, "KO"),[274] they nonetheless oblige the arbitral tribunal to allow the liquidator of bankruptcy, as the successor of the bankrupt debtor, sufficient time to study the file and prepare its defence, which can imply *de facto* a stay of the proceedings or at least an extension of the deadlines set.[275] This requirement derives from the right to be heard. In England, the rules governing the stay of court proceedings are as a matter of principle applicable to the arbitral proceedings.[276] Where an individual is bankrupt, the arbitral proceedings are only stayed if the bankruptcy court so orders.[277]

Despite the existence of national rules which provide for a stay of arbitral proceedings in the event of bankruptcy, arbitrators have generally refused to stay.[278] This attitude can lead to difficulties at the recognition and enforcement stage, particularly if enforcement is sought in the country where the insolvency proceedings took place. There is a link between the stay of pending proceedings

[270] Rev. arb. 1994, p.685.

[270a] Perret, *op. cit. ad* Ch.3.7.5.3, para.5 and the references cited.

[271] Lazic, pp.252–253.

[272] Rüede and Hadenfeldt, pp.244 § 34 I 11 (Art.207 of the Debt Collection and Bankruptcy Statute applies to arbitration); *contra*, Brown-Berset and Lévy, *op. cit.* Ch.3.7.5.3, p.676; Lévy and Schlaepfer, *op. cit.*, pp.20–21.

[273] Brown-Berset and Lévy, *ibidem*; same opinion, Kaufmann-Kohler and Lévy, *op. cit. ad* Ch.3.7.5.3, pp.22–24.

[274] BGH, KTS 1966, p.246; Schwab and Walter, p.151, Ch.16, para.49.

[275] Raeschke-Kessler and Berger, p.165, para.694; Lazic, pp.302–303.

[276] E. Bailey, H. Groves and C.Smith, *Corporate Insolvency Law and Practice*, 2001, p.655 para.20.26; Lazic, p.251.

[277] Mustill and Boyd, pp.152–153; Lazic, pp.251–252 and pp.293– 295.

[278] ICC Awards No.6057, JDI 1993, p.1016, 1017; No.2139, JDI 1975, pp.929, 930; see ICC Award No.7205, JDI 1995, pp.1031, 1034 (recognising the jurisdiction of the arbitral tribunal but adding that it can only declare well-founded the claim raised against the bankrupt debtor and not order payment); Mantilla-Serrano, *op. cit. ad* Ch.3.7.5.3, pp.57–58.

the arbitral tribunal is a partial award and not a provisional award because it is not subject to amendment during the course of the proceedings.

If the respondent refuses to pay its part of the advance on arbitration costs, the claimant may, under certain circumstances, terminate the arbitration agreement,[313c] but this remedy is likely to be of no practical interest for the claimant. Furthermore, the Swiss Federal Tribunal held that the respondent's failure to pay its part of the advance on costs did not automatically entail a waiver of the arbitration agreement and that the arbitrators had jurisdiction to determine this question.[313d]

If the claimant refuses to pay the advance on costs, the arbitral tribunal can terminate the proceedings. In principle the arbitration agreement does not become obsolete[314] unless the *lex arbitrii* (CIA, Art.30(2)) or the rules chosen by the parties provide otherwise.[314a] This case is comparable to that of security for costs. The latter institution aims at imposing upon the claimant to post security for the prospective sum necessary for the respondent's defence. Section 41(6) of the Arbitration Act 1996 provides that in the event of the claimant's repeated refusal to provide such guarantee, the arbitral tribunal can render an award rejecting its claims on the merits. Contrary to what Karrer and Desax seem to submit,[315] this is simply an option which in our opinion does not prevent the arbitrators from terminating the proceedings without dealing with the merits of the claimant's claims. The same applies pursuant to other laws, which also provide that the arbitrator has a choice between dismissing the claimant's claims on the merits or terminating the proceedings without prejudice.

6.2.7 Hearings

Bibliography:

General Works: Berger, pp.420–427; Derains and Schwartz, pp.273–275; Fouchard, Gaillard and Goldman, paras 1296–1301; Redfern and Hunter, pp.315–325 paras 6–104 to 122.

594 Arbitral hearings can have various purposes: discussion of procedural questions, testimony of witnesses or experts, questioning of the parties, presentation of oral arguments, etc. We shall not dwell on the practical questions of hearings, for these hardly raise any questions which are of relevance from a comparative law point of view.[316] We would merely recall that hearings may take place

[313c] ICC Award No.9667, Rev. arb. 2002, p.1009.
[313d] ASA Bul. 2003, p.822.
[314] See Art.30.4 of the ICC Rules; Lalive, Poudret and Reymond, p.357, para.16 *ad* PILS, Art.182 (Art.30 Concordat is not applicable in international matters); IPRG-Vischer, p.2010, para.10 *ad* Art.182 *(idem); contra*, Bucher, p.70, para.195.
[314a] See Swiss Federal Tribunal, ASA Bul. 2003, p.822.
[315] Karrer and Desax, *op. cit. ad* Ch.6.3, p.351.
[316] See however the differences between national laws concerning the right to be heard "orally", Ch.6.1.3.1.2, para.548.

elsewhere than at the seat of the arbitration, and that this is quite often the case in practice.[317]

According to a recent decision of the Swiss Supreme Court, the right to be heard does not imply the necessity of establishing a transcript of the hearings,[317a] but such transcripts are usually made in practice at least for witness hearings.

It is also usual for the arbitral tribunal to be assisted by a "legal" or "administrative" secretary.[317b] The role of such secretaries has been discussed in literature.[317c] Particularly controversial is the possibility for the secretary to attend the deliberations and to prepare draft procedural orders.[317d] The drafting of the award by the secretary is even more delicate.

There are arguments supporting both approaches. In many countries, the judgments are not drafted by the judges, but by young clerks, even at the level of the Supreme Court. If the parties trust the arbitrators for the conduct of the arbitration, they should also trust that they are able to delegate preparatory works (even the drafting of the award), to efficiently check the drafts and to remain fully responsible for the final product. In terms of quality, we have seen awards poorly drafted by the chairman and good awards drafted by a secretary under the guidance and control of the arbitral tribunal! On the other hand, the mandate of the arbitrator is strictly personal and cannot be delegated to a third party. Furthermore, it is undisputable that a legal secretary, knowing the file and the facts of the case, may have an impact, sometimes important, on the outcome of the decision.

The drafting of the award by the secretary is in any case admissible if the parties know or can expect that the arbitral tribunal or the chairman will confer such a task on the secretary and if they do not raise an objection. If the secretary plays an active role in the arbitration, he or she is obviously subject to the same standards of independence and impartiality as the arbitrators, and to the same duty of confidentiality. An issue to reflect on and to improve is his or her remuneration, which is not sufficiently transparent.

6.2.8 Court support for arbitration

Bibliography:

General Works: Berger, pp.452–462; Bucher, pp.78–79 paras 220–224; Delvolvé, Rouche and Pointon, pp.81–90 paras 147–165; KSP-Berti, pp.1563–1566 *ad* Art.185; IPRG-Volken, pp.2028 and 2029 *ad* Art.185; Lalive, Poudret and Reymond, pp.375–378 *ad* PILS, Art.185; Raeschke-Kessler and Berger, pp.182–183 paras 763–771; Rüede and Hadenfeldt, pp.250–251 § 34 V; Russell, pp.322–324 para.7–01, pp.338–347 paras 7–026–051, pp.371–377 paras 7–098–110; Schlosser,

[317] Ch.2.4, para.134 and Ch.6.2.5.3, para.580.
[317a] ASA Bul. 2005, p.284, this judgment was made in the context of a domestic arbitration, but the same principle would apply in international arbitration.
[317b] See Art.15.5 of the Swiss Rules; Art.39 of the NAI Rules; Note from the Secretariat of the ICC Court concerning the Appointment of Administrative Secretaries by Arbitral Tribunals.
[317c] Th. Clay, *Le secrétaire arbitral*, Rev. arb. 2005, pp.931–957; P. Lalive, *Secrétaire de tribunaux arbitraux: le bon sens l'emporte*, ASA Bul. 1989, p.1 ff; C. Partasides, The Fourth Arbitrator?, The Role of Secretaries to Tribunals in International Arbitration, Arb. Int. 2002, p.147 ff.
[317d] *Contra*, Clay, *op. cit.* fn.317(c), p.955.

pp.445–459 paras 585–598; Schwab and Walter, pp.154–158 Ch.17; Walter, Bosch and Brönnimann, pp.173–175.

595 In their capacity as non-permanent private judges, arbitrators do not have all the attributes of public power vested in the courts, and in a number of situations support from the latter is needed to ensure the smooth conduct of the arbitral proceedings. This is in itself good reason why the notion of transnational arbitration operating without any interference from state authorities is today virtually obsolete. As Lord Mustill said in the *Ken-Ren* judgment: "Whatever view is taken regarding the correct balance of the relationship between international arbitration and national court, it is impossible to doubt that at least in some instances the intervention of the court may be not only permissible but highly beneficial".[318]

It is obvious that courts should only intervene in order to prevent a blockage of the arbitration and to ensure the efficiency of the arbitral proceedings, and not to delay them.

596 In the previous chapters we encountered a number of cases of court intervention in arbitration: joinder (which is rarely possible) of various connected arbitrations, constitution of the arbitral tribunal, challenge of arbitrators or extension of the time-limit to conduct the proceedings.[319] We shall specifically deal below with two other issues of practical importance: the jurisdiction of courts to order provisional measures and to assist in the taking of evidence.[320] Certain laws consider that there are further situations which justify court intervention and contain rules in this respect. It is these which we will study in this section.

597 The Swiss legislature was the first to enact a general rule governing court support for arbitrations, in addition to assitance regarding provisional measures and the taking of evidence. Pursuant to PILS, Art.185: "if the assistance of the judicial authorities is necessary in other cases, an application can be made to the court at the seat of the arbitral tribunal". This provision anchors a general principle allowing Swiss courts to support international arbitration.[321] Such general principle was unknown under the Concordat.

The use of the passive form ("is necessary") indicates that both interested parties and the arbitral tribunal have standing to request the intervention of the court.[322] The supporting measures which a court can order under PILS, Art.185 include the extension of the duration of the arbitrators' mandate or their removal in the event of an unjustified delay in proceeding which amounts to a denial of

[318] HL, *Coppée-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd* [1994] 2 All E.R. 449, 466.
[319] Chs 3.4.2.4 (joinder) and 4.3.3.2 (challenge) and Ch.4.6.2, para.453 (extension of the time-limit).
[320] Chs 6.3.4.1 and 6.4.4.
[321] Lalive, Poudret and Reymond, p.376, para.1 *ad* PILS, Art.185.
[322] KSP-Berti, p.1565, para.15 *ad* Art.185; Lalive, Poudret and Reymond, p.376, para.2 *ad* PILS, Art.185; Walter, Bosch and Brönnimann, pp.173–174. The latter authors however make distinctions according to the type of measure requested.

justice.[323] Some scholars also include among these measures the very theoretical case of a request to obtain information on foreign law in application of the European Convention of June 7, 1968.[324] Others submit that such request is part of the taking of evidence, so that it falls under PILS, Art.184(2).[325] Finally, we have seen that PILS, Art.185 also provides a basis for a court order (if necessary with the threat of penal sanctions) to a recalcitrant party to comply with procedural directions issued by the arbitral tribunal.[326]

The supporting role ascribed to the courts by PILS, Art.185 is only binding on Swiss courts.[327] Furthermore, the provision only applies where the arbitration has its seat in Switzerland,[328] which is regrettable. The seat also determines the jurisdiction of the court *ratione loci* by virtue of Federal law.[329]

A controversial issue is whether the court seized should apply "its own law"—as stated in PILS, Arts 183(2) and 184(2)—or whether it can order a measure under a foreign procedural law adopted by the parties or the arbitrators pursuant to PILS, Art.182.[330] In our opinion, two questions should be distinguished here. First, the admissibility of the measure, which is determined by the law governing the conduct of arbitral proceedings pursuant to PILS, Art.182, and second, the form of the court measure, which depends entirely on the *lex fori*. Thus, a court seized of a request regarding information on the contents of foreign law will decide according to the rules governing the arbitral proceedings whether it is justified to give assistance. In the affirmative it will follow the formal requirements of the *lex fori* in order to obtain the necessary information. The *lex fori* will usually be a cantonal law of procedure, which does not however mean that the Concordat can be applied to supplement PILS, Art.185.[331]

598 The new German law has extended the ambit of court support as defined by Art.27 of the UNCITRAL Model Law, which solely provides for court assistance in the taking of evidence. The German legislature adopted this provision in ZPO, § 1050, adding the possibility of applying to the courts to obtain "any other judicial measure which the arbitral tribunal does not have the power to take" ("*die Vornahme sonstiger richterlicher Handlungen, zu denen das Schiedsgericht nicht befugt ist*"). Examples of measures which can be requested under

[323] Bucher, p.78, para.221; KSP-Berti, p.1564, paras 7–9 *ad* Art.185; Lalive, Poudret and Reymond, p.378, para.5 *ad* PILS, Art.185; Walter, Bosch and Brönnimann, p.174.
[324] KSP-Berti, p.564, para.11 *ad* Art.185; Lalive, Poudret and Reymond, p.378, para.5 *ad* PILS, Art.185; Walter, Bosch and Brönnimann, p.174, the latter adding that such request can only be made by the arbitral tribunal and not by the parties.
[325] Berger, p.452; Bucher, p.78, para.219; IPRG-Volken, p.2027, para.24 *ad* Art.184.
[326] Ch.6.1.2.3, para.539.
[327] KSP-Berti, p.1564, para.4 *ad* Art.185.
[328] Ch.2.5, para.140 and KSP-Berti, p.1563, para.3 *ad* Art.185.
[329] Walter, Bosch and Brönnimann, p.175.
[330] See Bucher, p.79, para.223; Lalive, Poudret and Reymond, p.377, para.4 *ad* PILS, Art.185; Rüede and Hadenfeldt, p.250 § 34 V 2b.
[331] The Concordat only governs domestic arbitration and does not specify in detail how the cantonal courts should proceed, even in arbitration matters. In principle the procedure will be governed by cantonal procedural law, at least for the next few years until the Swiss Code of Civil Procedure enters into force.

ZPO, § 1050 include obtaining information from a public authority or authorizing officials or magistrates to testify.[332] Like in Switzerland, we submit that while the admissibility of the measure depends on the procedural rules applicable before the arbitrators, the procedural form of the court's decision is governed by the *lex fori*, i.e. the ZPO.[333] The arbitral tribunal and, with the latter's approval, each party have standing to request court intervention.

Unlike Swiss law, court jurisdiction under ZPO, § 1050 does not require that the seat of the arbitration is in Germany. In ZPO, § 1025(2) the German legislature made an exception to the connecting factor based on the seat with regard to supporting measures for arbitral proceedings. Jurisdiction *ratione loci* lies with the courts at the place where the measure must be enforced and not with those at the seat of the arbitration (ZPO, § 1062(4)).

599 In England, ss.41 and 42 of the Arbitration Act 1996 provide for an original mechanism allowing the courts to intervene so as to ensure enforcement of all procedural orders made by an arbitral tribunal. Pursuant to s.41(5) of the Arbitration Act 1996, the first step is a "peremptory order" of the arbitral tribunal to the recalcitrant party to comply with its directions within an appropriate deadline. Should the party continue to refuse, the courts may be seized pursuant to s.42 of the Arbitration Act 1996. The arbitral tribunal itself, or one of the parties with its permission, can request court intervention (s.42(2) of the Arbitration Act 1996). The court is bound by the principle of subsidiarity and shall not act unless it is satisfied that the applicant has exhausted any available arbitral process (s.42(3) of the Arbitration Act 1996).

Under ss.2(1) and (4) of the Arbitration Act 1996, English courts may intervene if the seat of the arbitration is in England, or if the seat has not yet been determined and there is an appropriate connection with England.[334]

600 While the only purpose of ss.41 and 42 of the Arbitration Act 1996 is to assist the arbitrators in their tasks, English law also provides for other cases of court intervention in arbitral proceedings the justification of which is questionable. The first concerns the determination of a preliminary point of law by the High Court during the course of the arbitral proceedings. This intervention, provided for by s.45 of the Arbitration Act 1996, is subject to restrictive conditions. Firstly, it only covers points of English law (s.82(1) of the Arbitration Act 1996). It requires a request from one of the parties and not from the arbitral tribunal itself. The other party or the arbitral tribunal must be in agreement. In the latter case, the consent of the court is also necessary and subject to strict conditions. Finally, the point raised for a preliminary ruling must be one which "substantially affects the right of one or more of the parties".

The courts' powers are not mandatory and the parties may waive them (s.45(1) of the Arbitration Act 1996). Such waiver results from an agreement between the parties to dispense the arbitral tribunal from the duty to give a reasoned award

[332] Raeschke-Kessler and Berger, p.182, para.765; Schwab and Walter, p.154–155 Ch.17, paras 2 and 3.
[333] Schwab and Walter, p.156, Ch.17, para.8 and p.157, Ch.17, para.15.
[334] Ch.2.5, para.137.

(s.45(1), second sentence, of the Arbitration Act 1996). Similarly, submission to a set of arbitration rules providing a waiver of appeal excludes in our opinion the powers of the courts under s.45 of the Arbitration Act 1996. We shall see that the parties may validly waive an appeal on a point of law under s.69 of the Arbitration Act 1996 and that the choice of arbitration rules containing a general waiver of appeals is sufficient.[335] In our opinion, it is justified to apply the same solution to the preliminary determination of a point of law by the High Court under s.45 of the Arbitration Act 1996.[336]

The second case of intervention is even more surprising for continental European lawyers. It allows English courts to extend any time limit agreed between the parties with regard to the arbitral proceedings (s.79 of the Arbitration Act). This possibility also applies to the time limits contained in the Arbitration Act 1996, i.e. those provided for by statute to apply in the absence of agreement between the parties.[337] As with rulings on preliminary points of law, the parties may waive the powers of the courts. These two examples show that certain peculiarities of English law have not completely disappeared with the entry into force of the new Arbitration Act, even though the latter was inspired by the UNCITRAL Model Law.

In the Netherlands, WBR, Art.1044 does not provide for a general mechanism **601** of court support but only allows the arbitral tribunal to apply to a court for obtaining information on foreign law in application of the European Convention of June 7, 1968. This is certainly neither the most useful nor frequent case in practice.

Other arbitration laws do not lay down a general principle of court support in favour of arbitration. At most, it can be said that the practice of the French courts and, even more so, the tendency of French scholars is to interpret very widely the powers of the president of the *Tribunal de grande instance* based on NCPC, Art.1493(2).[338] Although such powers have been extended to cases having only a slight link with "difficulties in the constitution of the arbitral tribunal" (according to the text of NCPC, Art.1493(2)), in particular the challenge or removal of an arbitrator or an extension of the time-limit for the arbitration,[339] they do not cover all forms of court intervention to assist arbitration.

We have seen above that arbitral tribunals are not assimilated to a "court or **602** tribunal of a Member State" in the meaning of Art.234 of the European Treaty and thus cannot apply to the European Court of Justice of Justice for a

[335] Ch.9.5.8, para.818.
[336] Merkin, pp.123–124 *ad* s.45; this author makes more distinctions in Arbitration Law, para.20.4(e).
[337] Russell, pp.345–346. By contrast, s.79 is not applicable to the other time-limits provided for by the Arbitration Act, for example the time-limit for an appeal pursuant to s.70(3) of the Arbitration Act 1996. In this case the Rules of the Supreme Court allow the court to extend the time-limit under certain conditions. See s.80(5) of the Arbitration Act 1996; see also Ch.9.4, para.779.
[338] TGI Paris, *La Belle Créole*, Rev. arb. 1990, p.176; Fouchard, Gaillard and Goldman, paras 865–884; B. Leurent, *L'intervention du juge*, Rev. arb. 1992, pp.303–313, spéc. 305–306.
[339] Fouchard, Gaillard and Goldman, paras 866 and 870; Leurent, Article cited in the previous footnote, p.306.