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EDITORIAL NOTE

The growing importance of international commercial arbitration and arbitration of investment disputes has long ago become obvious not only to legal professionals, but to the general public as well. As the importance of arbitration grew, so did the sophistication of its legal environment and the number of professionals who decided to rethink its original paradigms. Belgrade Law Review was lucky to secure a number of contributions of the leading experts in the field on some of the most controversial topics in current arbitral practice. Most of them probed the limits of arbitral decision-making and the challenges it faces in the grey areas that textbooks usually 'glide' over. We are, therefore, sure that the contributions will stir interest of experienced practitioners, scholars and students alike.

The Editoral board is particularly grateful to Vladimir Pavić, Assistant Professor and Milena Đorđević, Lecturer at the University of Belgrade Faculty of Law, and to all the organizers and sponsors of a successful *Belgrade Arbitration Conference* held on March 27, 2009 at the University of Belgrade Faculty of Law, as a number of contributions in this volume were delivered during that motivating academic event.

Editors-in-Chief

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WAIVER IN ARBITRAL PROCEEDINGS AND LIMITATIONS ON WAIVER

Focusing on waiver and on the limitations on waiver, the article starts with the principle itself, which has several articulations, including waiver. The question is raised whether it is necessary to give legislative expression to this principle, and it is noted that a growing number of legislative acts and arbitration rules devoted specific provisions to waiver (and these were typically guided by formulations adopted in UNCITRAL enactments). Attention has been devoted to the specific scope of legislative and institutional rules dealing with waiver.

The main part of the article deals with limitations on waiver, and considers this question in juxtaposition with the impact of waiver on the existence and weight of the impairment which is at issue. The (un)fairness of a stipulation or (un)fairness of disregard of a proper stipulation is influenced by waiver. The impact of an unfair stipulation may change if it is followed by waiver. What needs to be assessed is the character of a situation ensuing after waiver (or after revocation of waiver).

Key words: *Waiver – Estoppel – Preclusion – Objection – Objectionable stipulation.*

1. THE PRINCIPLE AND RELATED CONCEPTS

In its Judgment of November 18, 1960 in the Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)[1], the International Court of Justice scrutinized the validity of an arbitral award made by King Alfonso XIII in a border dispute, more than 50 years before. Nicaragua argued i.a. that the award cannot be valid, because King Alfonso never possessed the capacity of a

[1] I.C.J. Reports, 1960, 192.

sole arbitrator, and he did not observe the rules laid down by the parties to the dispute. The I.C.J. rejected objections against the award, relying first and foremost on the principle of waiver. The Court stated:

> *"No question was at any time raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction as such. Before him, the Parties followed the procedure that had been agreed upon for submitting their respective cases. Indeed, the very first occasion when the validity of the designation of the King of Spain as arbitrator was challenged was in the Note of the Foreign Minister of Nicaragua of 19 March 1912. In these circumstances the Court is unable to hold that the designation of the King of Spain as arbitrator to decide the boundary dispute between the two Parties was invalid."*[2]

In his Separate Opinion, Judge Sir Percy Spender added:

> "*Although I incline strongly to the view that the appointment was irregular, this contention of Nicaragua fails because that State is precluded by its conduct prior to and during the course of the arbitration from relying upon any irregularity in the appointment of the King as a ground to invalidate the Award.*
>
> *Having failed to challenge the competency of the King as sole arbitrator before or during the course of arbitration but, on the contrary, having invited him to make an award on the merits, Nicaragua was thereafter precluded from contesting the regularity of the appointment.*"[3]

The principle which gave (added) unassailability to the King and to his actions, has been generally recognized, and has received ample support in court practice, legislation, and scholarly writings. Let us cite just one well-known scholarly characterization by Hersch Lauterpacht: "*The absence of protest may [...] in itself become a source of legal right inasmuch as it is related to – or forms a constituent element of – estoppel or prescription. Like these two generally recognized legal principles, the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability – a requirement even more important in the international than in other spheres; it is a precept of fair dealing...*"[4]

Waiver is one of the expressions of a broadly accepted principle. Other variants are concepts like "estoppel", "preclusion", "foreclusion", or "acquiescence". The origin of these concepts is outside the realm of international commercial arbitration, and this is why details and controversies have also been shaped in a broader arena – particularly in the arena of public international law. It has been questioned how important it

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[2] *Ibid.*, 207.

[3] *Ibid.*, 219.

[4] H. Lauterpacht, "Sovereignty over Submarine Areas", *British Yearbook of International Law* 27/1950, 395–396.

is (and whether it is important at all) to make distinction between these notions. In his separate opinion in the Temple of Preah Vihear case, speaking of the principle (or doctrine) referred to by the terms of "estoppel", "preclusion", "foreclusion", or "acquiescence", Judge Alfaro stated: "*Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendus est).*"[5] The same attitude was adopted in the field of international commercial arbitration. The *Travaux préparatoires* of the UNCITRAL Model Law on International Commercial Arbitration demonstrate that while they opted for the concept of waiver, the drafters of Article 4 were aware of the fact that waiver is one of the variants of the same general concept. It is stated in the Seventh Secretariat Note that "*Where a procedural requirement, whether laid down in the model law or in the arbitration agreement, is not complied with, any party has a right to object with a view of getting the procedural defect cured. Article 4 implies a waiver of this right under certain conditions based on general principles such as "estoppel"* or *"venire contra factum proprium".*[6]

Today it is quite clear that the principle of waiver has become well established in the realm of international commercial arbitration as well. This is evidenced by legislative acts, by arbitration rules, and by ample practice. Let me cite just one persuasive example from court practice. In an American case in which recognition of an ICC award was sought before a U.S. court under the New York Convention,[7] recognition was granted with reliance on the concept of waiver. In most simple terms, the bone of contention was an expert report. Bridas (the party who later sought enforcement) strongly opposed the appointment of the expert, but ISEC (the party who later opposed enforcement) did not. During recognition proceedings, it was ISEC who raised objections on the grounds of alleged improprieties in the appointment of the expert. The court held that ISEC cannot do this, and offered a quite spirited explanation. It held that:

> *"[I]SEC cannot now seek the refuge of its adversary's arguments when, during the heat of that engagement, it stood utterly silent on the merits of the matter, lent no voice or encouragement, and by tactics and tone sought to thereby ingratiate itself with the panel.... Such cleverness is the bane of*

[5] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits Judgment I.C.J. Reports 1962, 40.

[6] Seventh Secretariat Note, Analytical Commentary on Draft Text A/CN.9/264 (25 March 1985) – in Holtzmann, Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer 1989, 208–209.

[7] International Standard Electric Corporation (ISEC) v. Bridas, 745 F. Supp. 172, judgment of August 24, 1990.

judges the world over. This is what led Hamlet as he reflected on the skull of Yorick to mock the profession so cruelly. We understand our obligation not to allow a party to impeach on later review a decision of a trial judge, or as here, an arbitral panel, where that party had full opportunity to contest it, and full notice of the vigorous argument of an adversary contesting it, and chose instead not to associate himself with the argument, and not to contest the matter.... Accordingly, we hold that no objection to the appointment procedure used in the selection and consultation of the expert on New York law was made, that any objections ISEC in fact had were waived, and ISEC will not now be heard to complain about it."[8]

Recognition of waiver reminds us that rights are actually opportunities; one may make use of them – and one may also forfeit them.

2. RECOGNITION OF WAIVER IN ARBITRATION ACTS AND INSTITUTIONAL RULES

One may raise the question whether it is, indeed, necessary to frame explicit rules that would articulate the principle of waiver (or one of its related variants). Decisions have often been based on the concept of waiver without reliance on any specific statutory norm or institutional rule. The New York Convention has no provision on waiver, yet there is an abundance of decisions under the New York Convention which are – like the ISEC v. Bridas decision cited above – relying on the principle of waiver. In the opinion of Van den Berg, a foothold for such a practice may be found in the "may" language of Article V, and this "*[p]ermissive language can be taken as a basis for those cases where a party asserts a ground for refusal contrary to good faith.*"[9] It is also clear that reliance on the "may" language is facilitated and justified by the fact that the principle of waiver is a broadly recognized epitome of the idea of good faith.

Even though an argument based on waiver can be made (and has often be made) without reliance on any specific statutory provision, there is a growing trend of regulation of waiver in both statutes and institutional rules. Such norms may clarify and specify the focus, they add to predictability, and they bring about a broader awareness. It is also clear that the argument is facilitated and endorsed by a foothold in legislative acts or institutional norms. The advantages of reliance on legislative norms are particularly manifest in set aside proceedings, if such a norm is a part of the lex arbitri. Norms on waiver in institutional rules are an effective point of reliance with regard to a challenge to the award (in either annulment or in recognition proceedings) on the ground that the procedure was not in accordance with the agreement of the parties. If the agree-

[8] 745 F. Supp. 172, 180.

[9] A. J. Van den Berg, 185.

ment of the parties (by way of choosing institutional rules) contains a rule on waiver, then a disregard of a party stipulation combined with waiver would still yield proceedings in accordance with the procedural framework set by the parties.[10]

Most contemporary formulations of the concept of waiver in international commercial arbitration have their anchor in Article 4 of the 1985 UNCITRAL Model Law, or in Article 30 of the 1976 UNCITRAL Arbitration Rules.

Article 4 of the Model Law states:

"*Waiver of right to object*

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object."

According to Article 30 of the UNCITRAL Rules:

"*Waiver of Rules*

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object."

Article 4 of the Model Law has found wide acceptance in legislation[11] just as Article 30 of the UNCITRAL Rules influenced many arbitration rules.[12]

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[10] To cite an example in which this logic was followed, I shall refer to MINMETALS GERMANY GmbH v. FERCO STEEL Ltd. (Queen's Bench Division /Commercial Court/ 19 January 1999, 1 All ER (Comm) 315, 1999). In this case, the English court rejected the objections against recognition of a Chinese award relying on waiver, and positing Article 45 of the CIETAC Rules (which speaks of waiver) as a foothold of their decision. The court stated:

"There can be no doubt that Ferco's representatives were fully aware of the arbitrators' failure to act in accordance with the Rules when they embarked upon their application to the court to revoke the award and when they participated in the resumed hearing. However, they proceeded without explicitly raising with the arbitrators their objection as to such non-compliance. By Article 45 [of the CIETAC Rules] they therefore waived their right to object to the continuing omission of the arbitrators to disclose the award. Indeed, it is difficult to envisage a more glaringly obvious waiver of procedural irregularity than that found in this case. I therefore accept the submission on behalf of Minmetals that it is no longer open to Ferco to rely on non-compliance with the Rules for the purposes of resisting enforcement of the award."

[11] Let me just cite examples from enactments in this new century. Provisions identical or comparable to that of Article 4 of the Model Law, have been adopted in Article 579 of the 2006 version of the Austrian Arbitration Act (Section IV of the Code of Civil Procedure), in Article 5 of the Bulgarian Arbitration Act as amended in 2001, in Article 5

3. ON THE SCOPE OF WAIVER IN STATUTES AND INSTITUTIONAL RULES

The wording adopted in the UNCITRAL enactments – as well as the formulations adopted in most contemporary statutory norms and institutional rules – are clearly in line with the general principle of waiver and like concepts which have been broadly adopted. It also has to be mentioned, however, that the scope of the rule in the UNCITRAL enactments is narrower and more specific. It appears to be reduced to objections – or rather to lack of objections – *within* ongoing arbitral proceedings. Hence it does not extend to waiver prior to, or after the arbitral proceedings. It follows that it does not extend, for example, to a waiver of the right to arbitrate (which is left to other explicit or implicit norms, or to general principles). An example of another explicit norm can be found in the 1999 Swedish Arbitration Act, which devotes a special section (Section 5) to waiver of the right to invoke the arbitration agreement; and at the same time, in a separate section (Section 34), it adopts a formulation similar to that of Article 4 of the Model Law devoted to waiver by failure of objecting during the arbitration proceedings. For the same reason, the wording adopted in Article 4 does not extend to post-award proceedings. This means, for example, that waiver in connection with the requirements of Article IV of the New York Convention is not within the scope of the rule of Article 4 of the Model Law. Article IV of the New York Convention obliges the party seeking recognition to submit a duly authenticated original of the award (or a duly certified copy thereof), and also to submit a certified translation of the award, if the original was not made in an official language of the country in which recognition is being sought. The party seeking recognition may fail to submit the original (or may fail to submit a proper translation) – and the party against whom recognition is being sought may fail to object. This is, indeed, a situation which may be equated with waiver – although the question arises whether this is within the domain of

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of the 2001 Croatian Arbitration Act, in Article 27 of the 2003 Japan Arbitration Act, in Article 4 of the 2006 Act on International Commercial Arbitration of the Republic of Macedonia, in Articled 43 of the 2000 Arbitration Act of the Islamic Republic of Mauritania, in paragraph 1(4) of the 2005 Norwegian Arbitration Act, in Article 1193 of the 2005 version of the Polish Arbitration Act, in Article 43 of the 2006 Serbian Arbitration Act, in Article 5 of the 2003 Spanish Arbitration Act, and in Section 8 of the 2002 Thailand Arbitration Act, Article 7 of the 2008 Slovenian arbitration Act.

[12] E.g. Article 25 of the 2008 American Arbitration Association International Rules, Article 8 of the 2005 CIETAC Rules, Article 33 of the 1998 ICC Rules of Arbitration, Articles 23.2 and 32.1 of the 1998 LCIA Rules, Article 30 of the 2004 Swiss Rules, Article 58 of the 2002 WIPO Rules, Article 35 of the 2007 Mexico City National Chamber of Commerce Arbitration Rules, Article 43 of the 2007 International Arbitration Rules of the Korean Commercial Arbitration Board, Article 16 of the 2008 Rules of the Court of Arbitration at the Hungarian Chamber of Commerce and Industry.

permissible waiver, since the authenticity of the documents submitted is a matter of public interest as well.[13] It is submitted, however, that a possible waiver with regard to the requirements of Article IV of the New York Convention is not within the scope of Article 4 of the UNCITRAL Model Law, because the contemplated lack of objection is outside the context of "proceeding with arbitration" (without stating the objection).

Speaking of the scope and purpose of Article 4 of the Model Law and of like enactments, it appears to be clear that the main focus (and main purpose) is the forging of an added chance for the survival of the award. The contemplated objection is an objection which could (and should) have been made during the arbitration proceedings, but the consequences which are in focus are consequences in post-arbitral proceedings. Objections should be made while corrections are still possible, and procedural errors should not be kept as hidden weapons, to be dragged in and brandished if the award turns out to be an unfavorable one.

The concept of waiver embodied in the UNCITRAL enactments and in norms which are in line with those enactments, contains a critically important limitation. A distinction is suggested between permissible and impermissible waivers, and only permissible waivers are effective. Waiver is only possible with regard to norms "from which the parties may derogate". This means that there are values which are protected notwithstanding party behavior, or – seen from another angle – there are infractions which cannot be healed by consent. In other words, there are limitations on waiver, and I would like to devote the following pages to those limitations.

4. LIMITATIONS ON WAIVER – IN THE LIGHT OF THE IMPACT OF WAIVER ON THE IMPAIRMENT PROPER

The essence of the institution of waiver is the loss of the right to challenge the award on the grounds of some procedural deficiency because of inconsistent behavior and/or lack of timely objection. It is common ground that the institution of waiver may indeed neutralize some deficiencies of the award, and may counteract a challenge to the award. The question is whether waiver can neutralize **any** deficiency. One could say that there is a basic understanding that waiver has limits. It is much more difficult to agree where those limits exactly lie. Article 4 of the Model Law which sets a standard says that waiver applies to provisions of the lex arbitri "from which the parties may derogate". But it is not a simple matter to identify the norms from which the parties may derogate

[13] See on this issue and on other questions related to Article IV of the New York Convention, T. Várady, *Language and Translation in International Commercial Arbitration*, T.M.C. Asser Press 2006, 162–190.

as opposed to norms from which they may not derogate. The French practice – relying on general principles rather than on the standard set by the Model Law – does not restrict waiver (*renonciation)* to procedural shortcomings within the domain of norms "*from which the parties may derogate*".[14] Nevertheless, Fouchard suggests some limitations by stating that norms belonging to the realm of international public policy (and only these norms) are beyond reach – and violations of international public policy cannot be ratified in any way.[15] (Which suggests that there are indeed exceptions, there are some violations that cannot be remedied by waiver.) Swiss practice has also confirmed a rather broad understanding of waiver, making it clear that it nevertheless has some limits. In a *dictum* the Swiss Federal Tribunal stated that waiver cannot extend to particularly severe violations (*vices particulièrement graves)* which are considered *ex officio* and which may be invoked until the end of the case. The question is, of course, when a violation is or is not "particularly severe". The Federal Tribunal cites one example of issues falling into the category of "particularly severe": the capacity of being a party to arbitration.[16]

An interesting contribution to the definition of the possible domain of waiver was offered by the European Court of Human Rights ("ECHR"). In Suovaniemi v. Finland,[17] the ECHR faced the issue whether it is possible to waive rights granted under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6(1) of the Convention is generally considered as a formulation of basic due process. The question arose whether these rights may be waived in the arbitration process. The specific issue which reached the ECHR was whether the waiver of the right to challenge an arbitrator was acceptable (on the understanding that the circumstances which raised doubts about the impartiality of the arbitrator were known to the parties). The ECHR made a distinction between "permissible" and "not permissible" waivers, stating that "*Waiver may be permissible with regard to certain rights but not with regard to certain others.*" It held in the Suovaniemi case that it was permissible to waive the right to challenge an arbitrator. The distinction made between permissible and non-permissible waivers is a conse-

[14] See a survey of French practice by L. Cadiet, "La renonciation à se prévaloir des irregularités de la procédure arbitrale", *Revue de l'arbitrage* 1/1996, 3. On page 35 Cadiet states explicitly that the French approach is broader, and it is not restricted to norms from which the parties may derogate.

[15] "Seul le grief de violation de l'ordre public international n'est, par nature, susceptible d'aucune ratification." Ph. Fouchard, E. Gaillard, B. Goldman, Traité de l'arbitrage commercial international, Paris 1996, 942.

[16] Judgment of the Federal tribunal of April 3, 2002, 4P 282/2001.

[17] Osmo Suovaniemi v. Finland, ECHR Fourth Section, Decision as to Admissibility, Application No. 31737/96, February 23, 1999.

quential one, but the guidelines offered are scarce.[18] Speaking of the contributions of the ECHR, it should be mentioned that the ECHR stated in a number of its decisions that a waiver of a right guaranteed by the Convention – insofar as it is permissible – must be established in an unequivocal manner.[19]

Dealing with the question of limitations on waiver, I would like to draw a distinction between two types of situations in which waiver might emerge. Waiver might take place by way of lack of objection against *non-application* of a proper rule, and it might also take place by way of lack of objection against *application* of an objectionable stipulation. A third situation – that of revocation of waiver – also deserves some added attention.

4.1. Lack of objection against disregard of a proper rule

The distinction between permissible and impermissible waivers remains a delicate issue. The primary purpose of court scrutiny of arbitral awards is to protect legitimate rights of the parties, which rights may have been impaired by some imperfection in the arbitral proceedings. Considering waiver as a balancing argument is not only in the interest of efficiency. The argument can be made that waiver actually has an impact on the gravity of the situation itself; it has a bearing on the weight of the actual infraction. In other words, when we are trying to establish whether the violation does or does not amount to an infringement of public policy or of "norms from which the parties may not derogate", we should not only contemplate the infringement as such. *Instead, we should consider the infringement "modified" by waiver.* The weight and character of the infringement itself may change as a consequence of waiver (which is, as a matter of fact, the key justification for the observance of waiver).

Let me try to demonstrate this on an example. If one party is invited to comment on an expert opinion and the other party is not, this may very well be qualified as a violation of due process, and the award may be set aside or refused recognition. Could waiver neutralize such a violation? It probably could. If the party who was not invited to submit his comments knows that the other party had this opportunity and receives the comments of the other party, yet raises no objection and continues to proceed, he may be deemed to have waived his right to equal treatment regarding this specific occurrence. There may be several reasons for not

[18] The ECHR mentioned some examples, saying e.g. that the right to public hearing can be waived, but it stopped short from formulating a criterion for the distinction between permissible and non-permissible waivers.

[19] See Oberschlick v. Austria, Judgment of 23 May 1991, Series A No. 204, p. 23, § 51, Pfeifer and Plankl v. Austria, Judgment of 25 February 1992, Series A, No. 227, p. 16, § 37.

raising the objection. The party who was not offered an opportunity to comment may be satisfied with the export report and has nothing to add. Or, he/she may think that the expert report is irrelevant and it is not worth commenting. Another possible hypothesis is that the party is not handling its case with proper diligence. In all of these hypotheses one may submit that some unequal treatment exists; but can we also say that the party is a victim of unequal treatment? Can a party just take note of a procedural error (and store it for use in case of emergency) instead of taking steps to protect his/her rights? It is important to note that it follows from the wording of Article 4 of the Model Law that lack of objection may only amount to waiver if the party *knew* that a violation took place. This means that in our hypo waiver could only be effective if the party who was not invited to comment on the expert opinion knew that the other party was invited (and that unequal treatment took place), but nevertheless failed to object. This concept of waiver is in line with the wording of Article V(1)(b) of the New York Convention which allows refusal of recognition if a party was "unable to present his case". One may very well argue that one cannot speak of inability to present one's case if the party concerned failed to object to impairment at a point when it was still possible to remedy such impairment – when the party still had a chance to get an appropriate opportunity to present its case.

An irregularity which would amount to a violation of due process without waiver certainly does not have to amount to a violation of due process if the party failed to object and acquiesced. The impairment is not the same, the violation is not the same. The question still remains whether there are cases in which the party knew that a violation took place and failed to object, but such waiver cannot be heeded due to public policy considerations. The range of such fact-patterns is certainly quite narrow. For example, waiver might not work with regard to the requirements of Article IV of the New York Convention. Requirements regarding the authenticity of the award and of the translation do not only pertain to the equities of the parties, but also to the rights and duties of the court. For this reason courts may – and often do – insist on the observance of the requirements of Article IV notwithstanding the behavior of the parties.[20] Could waiver also be thwarted with regard to those procedural irregularities which are identified in Article V of the New York Convention? Within the setting of the New York Convention, both observance of waiver and disregard of waiver are guided by general principles. Among the grounds set in Article V (and in national legislative acts following the same logic) those which are typically relevant from the point of view of waiver are grounds pertaining to jurisdiction, to due process, and to the

[20] In international court practice we have decisions which declined, but we have also decisions which observed the principle of waiver in connection with Article IV of the New York Convention. See T. Várady, 162–190.

observance of the applicable rules. Let me stress again, that waiver may not just “hide” an imperfection, it may change its weight, or even eliminate it. In areas covered by Article V(1) waiver will typically sanction a situation which could have been created by party agreement as well. The parties can agree on jurisdiction in an arbitration agreement, and by the same token, a party will waive its right to contest jurisdiction in post award proceedings if it accepted to arbitrate without objection in the absence of a valid arbitration agreement. Waiver will thus supersede grounds for challenge under Article V(1)(a) of the New York Convention. Likewise, the parties may agree to conduct the proceedings in any language. If the proceedings are conducted in a different language other than the one agreed upon, and both parties proceed without objection, this may very well be qualified as a functional equivalent to party agreement to conduct the proceedings in that different language – and waiver will trounce grounds for challenge under Article V(1)(b), or maybe under Article V(1)(d).

4.2. Lack of objection upon observance of objectionable stipulations

Another context in which waiver might emerge is the following: There are stipulations which are contrary to rules “from which the parties may not derogate”. It happens that after a party did sign an agreement containing such a stipulation, it raises an objection against it at the time when its implementation is on the agenda. In such cases, mandatory norms may protect the parties against the consequences of their own stipulation. It is clear that such protection should be restricted to situations which would otherwise yield serious unfairness. Does waiver have an impact on the gravity of such situations?

There are limits to what parties can agree upon. The question arises whether these limits remain the same when unfair party stipulations are confirmed by lack of objection. The motives behind limitations on party stipulations certainly have an impact on the question whether lack of objection can or cannot modify such limitations. If the limitation is inspired by the vulnerable situation of a special category of parties to contracts, the basic rationale behind the restriction will in most cases continue to exist even in the absence of timely objection by the protected party. This is exactly the type of situation which was faced in a 2006 decision of the European Court of Justice (hereinafter: “ECJ”). In Claro v. Centro Móvil Milenium, reference was made to the ECJ by a Spanish court for a preliminary ruling. The question referred for preliminary ruling was the following:

> “*May the protection of consumers under Council Directive 93/13/EC... require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term*

to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?"[21]

Thus, the relevance of waiver became the key issue in a most direct manner. The Spanish court held that the arbitration clause in a mobile telephone contract was contrary to the applicable mandatory norms on consumer protection. The question remained whether the limits imposed on possible party stipulations will remain the same after the protected party enters into arbitration, and does not raise any objection until the award was rendered. The mobile telephone company argued that allowing annulment on the grounds of the alleged illegality of the arbitration clause, even if no plea to that effect was entered within the prescribed time-limit, would be highly prejudicial to the requirement of efficiency and certainty in arbitration decisions. The ECJ did not accept this argument, and did not recognize the impact of waiver on the limitation imposed on party stipulations. The European Court ruled:

"*Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment."*[22]

The decision of the ECJ is quite clear. The question remains whether the position of the European Court will become persuasive outside its scope of authority – and whether it also applies to situations other than those in which the limitation aims to protect a vulnerable category of parties (like consumers).

There are cases which do not imply consumer protection (or protection of some other identified category of parties), in which the court nevertheless opted to disregard waiver which would have remedied an imperfect stipulation. The argument was made that the observance of such waiver would sanction a situation which is contrary to public policy or mandatory norms. For example, in an earlier (1976) case decided by the Court of Appeal in Cologne (*Oberlandesgericht Köln*),[23] the agreement of the parties provided for arbitration in Denmark under the Rules of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade. These Rules had some rather peculiar and atypical provisions. The arbitrators were to decide without an oral hearing, and no informa-

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[21] Elisa Maria Mostaza Claro v. Centro Móvil Milenium, European Court of Justice, First Chamber, Case No. C–168/05, Judgment of October 26, 2006, para. 20.

[22] Case C–168/05, para 40.

[23] Oberlandesgericht Köln 1976 – Reported in IV YCA, 258 (1979).

tion was given to the parties regarding the identity of the arbitrators. The parties did receive a list of potential arbitrators, and were allowed to protest against one or more arbitrators on the list, but these protests were considered by the President of the Arbitration Committee, and the parties were not informed whether their protests were heeded or not, nor did they learn who ended up being arbitrators. An award was rendered in favor of the Danish buyer against the German seller. The Danish buyer sought recognition in Germany, and the German seller raised a number of objections under the New York Convention. One of these objections was that the procedure of appointment of the arbitrators lacked guarantees of impartiality, and this amounted to a violation of public policy. This argument was accepted by the German court. The Cologne Court of Appeal held that the procedural means for the implementation of impartiality is the institution of challenge, and this institution can only be effective if the parties know the names of the arbitrators. In this case the mechanism of appointment was one agreed upon by the parties. Furthermore, both parties participated in the constitution of the arbitral tribunal in accordance with the rules agreed upon, and without objection. Hence, waiver represented an added argument in favor of recognition, but the court held that the arrangement effected by both contractual stipulation and conduct was contrary to mandatory principles, and recognition was denied.

I would like to refer to another decision in which the question arose whether a stipulation of the parties which yields unequal positions regarding the appointment of arbitrators, does or does not amount to waiver. The French Supreme Court held that it does not, yet it opened to door towards effective waiver at a later stage. According to the *Cour the Cassation*: "*Attendu que le principe de l'égalité des parties dans la désignation des arbitres est d'ordre public; qu'on ne peut y renoncer qu'après la naissance du litige.*"[24] In other words, if the matter at issue (like equality of the parties with respect to the designation of the arbitrators) has a public policy character, waiver may be possible, but only after the dispute already arose.

In an interesting case decided in 2005 by the Supreme Court of Austria,[25] the court investigated an arbitration agreement in the setting of Article 583(2) of the Austrian Code of Civil Procedure,[26] which allowed

[24] See Soc. BKMI et Siemens c. Soc. Dutco, Cour de Cassation (1re Ch. Civile) Jan. 7, 1992, *Revue de l'arbitrage* 1992, 470.

[25] OGH Case No. Ob41/04z of March 17, 2005, reported in *Juristische Blätter* 12/2005, 801.

[26] Article 582 applied until the adoption of the new Austrian Arbitration Act. The new 2006 Act applies to arbitration agreements concluded on or after July 1, 2006.

rescission of the arbitration agreement under certain circumstances. Among other issues, the Supreme Court of Austria considered the validity of a specific provision in the arbitration agreement. This stipulation provided that the third arbitrator would be chosen by the party-appointed arbitrators, and if they failed to agree, he/she would be appointed by the president of one of the parties. (The dispute arose between an attorney on one side, and the Vienna Bar Association – *Rechtsanwaltskammer Wien* – on the other. According to the arbitration agreement, the third arbitrator had to be appointed by the President of the *Rechtsanwaltskammer Wien* in the absence of an agreement reached between the party-appointed arbitrators.) The Supreme Court of Austria held that this arrangement regarding substitute appointment represented an infringement of the principle of equality of the parties, and amounted to a blatant violation of the principle of fair trial set in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[27] The question I would like to raise is whether we would have the same "blatant violation of the principle of fair trial" if the issue is raised in a different setting and waiver is implicated. The Supreme Court of Austria considered the validity of the stipulation in proceedings regarding the rescission of the arbitration agreement, before arbitration would have started. Let us assume that the mechanism for substitute appointment becomes an issue in setting aside proceedings after arbitration took place, and after an award was rendered... The Austrian Supreme Court held that a stipulation which allows one of the parties to make substitute appointment of the chairman amounts to a violation of Article 6 of the European Convention for the Protection of Human Rights. Suppose the imperfect mechanism yields a choice (the substitute appointment is made), thus the appointee becomes known and other party has an opportunity to submit a challenge, but fails to do so. Does the level of threat to fairness remain the same? Some differences do exist. Unlike in the case between the Danish buyer and the German seller, where the lack of opportunity for challenge persisted after the arbitrators were appointed (because their names were not disclosed), in this hypo the situation changes after the appointment has been made. What is in focus is not the unfair stipulation anymore (or a result which remains secret), but rather the unconcealed result of this stipulation which can be evaluated on its own merits. Furthermore, we do not only have consent which crafted the stipulation, but also consent (lack of objection) regarding the effect of the stipulation. A distinction can plausibly be made between cases in which the stipulation itself and its potentials are at issue (like in the actual Austrian case), and cases in which we are faced with the actual consequences of the stipulation against which no timely objection was raised.

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[27] "Die Regelung über die Besetzung des Schiedsgerichtes bei Nichteinigung durch Ernennung eines Vorsitzenden durch ein Organ einer Partei des Schiedsverfahrens verstösst eklatant gegen die Grundsätze des fair trial nach Art. 6 MRK und ist daher nach §879 ABGB nichtig." Juristische Blätter 12/2005, 803.

To take as a further example, I would like to refer to one of the rare legislative provisions regulating the content of possible arbitration agreements. According to Article 1678 of the Belgian Judicial Code:[28] "*An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators.*" One may argue that if, for example, the parties cannot stipulate that one of them will appoint one arbitrator, and the other will appoint two, then presumably this pattern will remain illegal if it is created or confirmed by conduct, that is by absence of objection. But can the two situations really be equated? The stipulation providing that one party will appoint one arbitrator while the other will appoint two, clearly opens the gate for unfair appointments and an unfair result. Does the situation remain the same after the appointments have been made – and accepted without protest? It is at least conceivable that the party who has the right to appoint two arbitrators will not abuse this entitlement, but will appoint two well-known neutral arbitrators. Waiver becomes relevant at a later point in time (in our case after, rather than before actual appointments), and it is exercised (if it is exercised) on the grounds of more information. When waiver is at issue, what is faced is not the threat of unfairness which was made possible by the stipulation, but a specific choice which may be evaluated, and which may or may not be unfair. The tacit acceptance of this choice by the other party, who opts to proceed without objection, does not yield the same impairment or jeopardy as the unfair stipulation itself. Lack of timely objection has an impact on the balance of (un) fairness, because an informed party who fails to object acts contrary to principles of good faith. Furthermore, in post-arbitral proceedings when waiver becomes an issue, the perspective is different, and one can focus on the actual consequences rather than on the potential implications of a stipulation. The potentials and the actual results of an unfair stipulation need not be the same. The distinction is not an easy one, but one may submit that party stipulations and waiver need not always have the same limitations – particularly not, when the limitation is not prompted by the need to protect a vulnerable category of parties like consumers.

4.3. The impact of revocation of waiver

If waiver has an impact on the gravity – or even on the existence – of an impairment, so does revocation of waiver. Let me explain this through an example I encountered in practice. One of the parties was from a French speaking country, the other was not. The language of arbitration was English. We had to question a number of witnesses who spoke

[28] Belgian Judicial Code, Part VI, Arbitration, adopted in 1972, latest amendments in 1998.

French only. All three members of the arbitration tribunal spoke French. (The chairman actually spoke French better than English.) Thus, looking for an opportunity to make the proceedings more efficient, we asked that non French-speaking party (the respondent) whether he needed interpretation. He stated that he did not need it. It was clear that due process implied a right to have an interpreter – it was also clear that this right was waived. The interrogation of the first witness was short. After this, the respondent addressed the tribunal, said that he apparently misjudged his linguistic abilities, and asked for an interpreter. The arbitrators were not happy with this, yet ordered a break for a couple of hours in order to get in touch with the interpreter whom the chairman had contacted in advance, but who was later informed that she was not needed. We were lucky to find her, and after a couple of hours we continued the interrogation of the witnesses with the assistance of the interpreter. Had the respondent remained silent during the interrogation of all witnesses, and had he only raised the issue in post-arbitration proceedings, we would have had a clear example of an effective waiver. It would have been not only justified, but also fair to reject the challenge to the award on the ground of lack of interpretation. But suppose the arbitrators rejected the belated claim for interpretation, and refused to heed the purported revocation of waiver. Would the situation be the same? I believe not. Waiver did exist, it was uncontroversial, but it was withdrawn at a moment when it was still possible to remedy the problem, incurring some – but not too much – inconvenience. The revocation of waiver put the issue of fairness into a new perspective, and the departure from the rule that interpretation should be provided, regained vigor. Responsibility was pushed back on the shoulders of the arbitrators. Revocation of waiver had an impact on the weight of the impairment; actually, absence of interpretation regained the attribute of an impairment.

5. A CONCLUDING REMARK

Waiver is not just a sanction for lack of diligence, or against abuse of rights. It is, as Lauterpacht says "not mere artificiality of the law". It is a critically important formant of the fairness of a situation. It is certainly true that, just as party stipulations are subject to some limitations, crafting of effects by conduct or by lack of objection should also have some limits. This is what clearly follows from the wording of Article 4 of the Model Law which recognizes and articulates the institution of waiver, but also limits its impact to norms from which the parties may derogate. The observation of waiver – as well as its limitations – is balancing use and abuse. It is important to stress that both waiver and the limitations on waiver serve the interests of fairness. In order to be able to identify and

to assess situations which deserve unconditional protection by mandatory norms, waiver (or revocation of waiver) should be factored in. What needs to be measured against mandatory norms and principles of fairness is not just the character of a stipulation (or the character of a transgression of a rule), but the character of the situation ensuing after waiver (or revocation of waiver).

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ARBITRATION OR LITIGATION? CHOICE OF FORUM AFTER THE 2005 HAGUE CONVENTIONON CHOICE OF COURT AGREEMENTS

The possibility of wide ratification of and accession to the 2005 Hague Convention on Choice of Court Agreements presents important issues for those drafting international commercial contracts. Transactions lawyers have rather easily justified the inclusion of arbitration agreements in international commercial contracts because the New York Arbitration Convention insures both compliance with the agreement to arbitrate and the recognition and enforcement of any resulting arbitral award. When the Hague Convention becomes effective in a significant number of states, choice of court clauses will be more easily enforced, and court judgments will more easily recognized in other states. Thus, the choice between arbitration and litigation will hinge on the real differences between these two dispute settlement options, and not merely on the fact that one is more easily enforced than the other. This chapter compares the choices for both private parties and states under the Hague Convention with those existing under the New York Arbitration Convention.

Key words: *Choice of forum. – Arbitration. – Hague Convention. – New York Convention. – Recognition and enforcement of judgments.*

1. INTRODUCTION

The Convention on Choice of Court Agreements was completed on June 30, 2005, as part of the Final Act of the Twentieth Session of the Hague Conference on Private International Law.[1] Like the New York Ar-

[1] The text of the Final Act of the Twentieth Session, and a documentary history of the Choice of Court Convention project, are available on the Hague Conference website at: *http://hcch.e-vision.nl/index_en.php.*

bitration Convention,[2] the Hague Convention establishes rules for enforcing private party choice of forum agreements, as well as rules for recognizing and enforcing the decisions issued by the chosen forum.

It has been rather easy for transactions lawyers to justify the inclusion of arbitration agreements in international commercial contracts, largely because the New York Convention insures both compliance with the agreement to arbitrate and the recognition and enforcement of any resulting arbitral award. If and when the Hague Convention becomes effective in a significant number of states, those who draft such contracts will find it necessary to make a more balanced choice between arbitration and litigation of potential disputes. If choice of court clauses will be as easy to enforce as arbitration agreements, and court judgments as easy to have enforced as arbitral awards, then the choice between the two types of forum will necessarily hinge on the real differences between these two dispute settlement options, and not merely on the fact that one is more easily enforced than the other.

With both the United States and the European Community having signed the Hague Convention, thereby indicating their intent to become parties to it, it is time for international commercial lawyers to consider the relative differences between arbitration and litigation more carefully.[3] It is not the purpose of this article to go into those comparisons, or to offer a conclusion regarding a preference for arbitration or for litigation. In most events, that comparison will depend on specific circumstances of the transaction involved. What I want to do here is to set the stage for that comparison by reviewing the provisions of the new Hague Convention and comparing it with the New York Convention so that lawyers will be better able to use that comparison to make informed choices between arbitration and litigation as the preferred means of dispute settlement with respect to a particular transaction.

2. THE 2005 HAGUE CONVENTION

The Hague Convention will apply to non-consumer agreements that designate a single court (or the courts of a single state) for resolution

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[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 ["New York Convention"], available at: *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html*.

[3] The United States signed the Convention on January 19, 2009, and the European Community signed on April 1, 2009. *See* Status Table available at *http://www.hcch.net/index_en.php?act=conventions.status&cid=98*.

of disputes.[4] It is designed to apply only to international agreements, excluding from its scope agreements to which "the parties are resident in the same Contracting State and . . . all other elements relevant to the dispute . . . are connected only with that State."[5]

2.1. The Three Basic Rules

The Convention sets out three basic rules:

1) Article 5 provides that the court chosen by the parties in an exclusive choice of court agreement has jurisdiction;[6]
2) Article 6 requires that, if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case;[7] and
3) Article 8 provides that a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement shall be recognized and enforced in the courts of other Contracting States.[8]

Like the New York Convention, the Hague Convention is intended to enhance predictability by insuring that party agreements will be honored, and that the results of dispute resolution in the chosen forum will be enforced. While there are many bilateral and regional agreements on the recognition and enforcement of judgments, until the Hague Convention, there existed no true global convention. Some countries, like the United States, are not a party to any treaties on the recognition and enforcement of judgments. Thus, there has been no global judgments convention to be compared with the widely adopted New York Arbitration Convention.

2.2. The Optional Fourth Rule

The Hague Convention offers an optional fourth rule by party declaration. Contracting States may declare that their courts will recognize and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement.[9] Thus, while a non-exclusive agreement would not receive the benefits of Articles 5 and 6 at the jurisdictional stage of agreement enforcement, any resulting judgment could receive the benefits of Article 8 at the judgment recognition and enforcement stage. This option recognizes that, once a judgment is ob-

[4] Hague Convention, art. 2(1)(a).

[5] *Ibid*. art. 1(2).

[6] *Ibid*. art. 5.

[7] *Ibid*. art. 6.

[8] *Ibid*. art. 8.

[9] *Ibid*. art. 22.

tained based on jurisdiction founded on the consent of the parties, there is value in the free movement of such a judgment. If enough Contracting States exercise this declaration option, it will substantially expand the recognition and enforcement benefits of the Convention.

2.3. Limitations on Scope

Article 1 provides the general limitations on Convention scope by stating that the "Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters."[10] Thus, there are three basic scope issues. In order for the Convention to apply (absent an Article 19 declaration), (1) there must be an "international case," (2) there must be an exclusive choice of court agreement, and (3) both of these must involve a "civil or commercial matter."

Paragraphs (2) and (3) of Article 1 define what is an international case for purposes of the Convention. For purposes of jurisdiction (*i.e.*, in determining whether to enforce the choice of court agreement), "a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State."[11] Thus, a case is international unless it is wholly domestic. For purposes of recognition and enforcement of a resulting judgment, the rule is very simple: "a case is international where recognition or enforcement of a foreign judgment is sought."[12]

Contracting States have two methods of modifying the international case definition. Under Article 19, a Contracting State may limit the jurisdictional rules by declaring

> that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.[13]

This allows states to avoid cases unrelated to their own judicial system in any way. On the other hand, those states wanting to develop magnet forums (just like arbitral institutions want to develop business), need not exercise this declaration and can otherwise develop their laws and courts to encourage broader use of their courts.

A Contracting State may limit the recognition and enforcement rules under Article 20, by declaring

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[10] *Ibid*. art. 1(1).

[11] *Ibid*. art. 1(2).

[12] *Ibid*. art. 1(3).

[13] *Ibid*. art. 19.

> that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.[14]

This option gives a state a second look at incoming judgments, but allows non-recognition only when the case is entirely domestic to the recognizing state.

> Under Article 3(a), a choice of court agreement is exclusive if it is an agreement that is concluded by two or more parties that meets the requirements of paragraph *c)* and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.[15]

Thus, such an agreement may not designate optional courts in differing states, even if all other courts are excluded. To the extent a choice of court agreement is not clear, however, paragraph (b) of Article 3 provides that

> a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.[16]

The remainder of Article 3 provides certain formality requirements for the choice of court agreement,[17] and sets forth the rule, common in arbitration, that the choice of forum clause "shall be treated as an agreement independent of the other terms of the contract," and that the "validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid."[18]

Article 2 provides further limitations on the scope of the Convention. In paragraph (1), there are exclusions based on the type of agreement, providing that neither contracts with consumers nor employment agreements shall be within the scope of the Convention.[19] Paragraph (2) then follows with a list of matters that are outside the scope of the convention. This list begins with matters for which national laws often claim exclusive jurisdiction for local courts (disputes dealing with issues of personal status and legal capacity of natural persons,[20] maintenance obliga-

[14] *Ibid*. art. 20.

[15] *Ibid*. art. 3(a).

[16] *Ibid*. art. 3(b).

[17] *Ibid*. art. 3(c).

[18] *Ibid*. art. 3(d).

[19] *Ibid*. art. 2(1).

[20] *Ibid*. art. 2(2)(a).

tions and other family law matters,[21] wills and succession,[22] insolvency proceedings,[23] rights in rem in immovable property,[24] internal corporate matters,[25] validity of intellectual property rights (other than copyright and related rights),[26] and infringement of intellectual property rights[27]), and continues with matters often subject to existing international legal regimes or ancillary to the main thrust of the Convention (carriage of passengers and goods,[28] certain maritime matters,[29] antitrust cases,[30] liability for nuclear damage,[31] claims for personal injury to natural persons,[32] and non-contractual tort claims for damage to tangible property[33]). States may add to this list for their courts by making a declaration pursuant to Article 21. Such a declaration, however, will have reciprocal effect, and shall thus apply as well in the courts of other Contracting States, preventing enforcement of agreements choosing the courts of the declaring state in disputes involving such matters.[34]

Avoidance of misuse of the Article 2(2) exclusions to frustrate valid consent to jurisdiction in a chosen court is addressed in Article 2(3) and Article 10 through the existence of special rules for cases in which excluded subject matter is raised only in preliminary questions not the main object of the proceedings, otherwise allowing the Convention to operate effectively in such circumstances.[35]

3. COMPARISONS WITH THE NEW YORK CONVENTION

3.1. General Respect for Party Autonomy in Choice of Forum

Both of the New York and Hague Conventions bring with them a focus on party autonomy. While most twenty-first century lawyers regard

[21] *Ibid*. art. 2(2)(b)-(c).

[22] *Ibid*. art. 2(2)(d).

[23] *Ibid* art. 2(2)(e).

[24] *Ibid*. art. 2(2)(l).

[25] *Ibid*. art. 2(2)(m).

[26] *Ibid*. art. 2(2)(n).

[27] *Ibid*. art. 2(2)(o).

[28] *Ibid*. art. 2(2)(f).

[29] *Ibid*. art. 2(2)(g).

[30] *Ibid*. art. 2(2)(h).

[31] *Ibid*. art. 2(2)(i).

[32] *Ibid*. art. 2(2)(j).

[33] *Ibid*. art. 2(2)(k).

[34] *Ibid*. art. 21(2)(b).

[35] Further discussion of these provisions, *see* R. A. Brand, P. M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements*, 2008, 71–77.

party autonomy as a fundamental starting point for all transnational commercial relationships, the ability of private parties to select their forum for dispute resolution is historically a relatively recent development. In arbitration, the focus on party choice for dispute resolution was locked in for disputes in the United States by the Federal Arbitration Act in 1925.[36] This was followed internationally with the 1958 New York Convention, with ratifications and accessions growing throughout the twentieth century as the wall of resistence to arbitration fell.

Party autonomy in choice of court is a more recent development, with courts traditionally being jealous of private party decisions to go to the courts of other states. In the United States, for example, until the latter half of the twentieth century, it was common for courts to hold that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."[37] This approach ended in the United States with the 1972 Supreme Court decision in *Bremen v. Zapata*,[38] in which the court upheld a clause between a German firm and a U.S. company, in a contract for towing an oil rig from the United States to Italy, which provided for litigation in the United Kingdom. Noting that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts,"[39] the Court added that forum

[36] 9 U.S.Code §§ 1–14, first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by Congress in October of 1988 and renumbered on December 1, 1990 (PLS 669 and 702); Chapter 3 was added on August 15, 1990 (PL 101–369); and Section 10 was amended on November 15, 1990.

[37] Carbon Black Export, Inc. v. The Monrose, 254 F.2d 297, 300–301 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959). It has been said that this position rested on the rationale that "(1) the parties cannot by agreement in the contract alter the jurisdiction of the courts, and (2) such contractual stipulations are violative of public policy." V. Nanda, *The Law of Transnational Business Transactions*, 1986, § 8.02[1][a]. Some commentators considered significant the distinction between conferring and ousting jurisdiction ("prorogation" versus "derogation" in civil law terms). However, it was also suggested that "[t]he real issue . . . is not whether the parties can by agreement 'confer' or 'oust' jurisdiction, but whether the selected or ousted court will exercise its own jurisdiction in such a way as to give effect to the intention of the parties." G. Delaume, *Transnational Contracts*, 1986, § 6.01. *Compare* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) ("No one seriously contends in this case that the forum-selection clause 'ousted' the District Court of jurisdiction over [the plaintiff's] action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.").

[38] M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

[39] 407 U.S. at 9.

selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances."[40] While the *Bremen* case resulted from admiralty jurisdiction, subsequent cases extended this deference to party choice of forum broadly, even to consumer contracts.[41]

In Europe, respect for party autonomy in commercial relations is found in Article 23 of the Brussels I Regulation, which provides for the enforcement of agreements selecting the courts of EU Member States when at least one party is domiciled in a Member State.[42] While this respect for party autonomy is not provided for in insurance, consumer, and employment contracts,[43] in other civil and commercial matters it is now a basic principle of European law.

3.2. Party Autonomy in the New York and Hague Conventions

Whether the Hague Convention will provide a level playing field for choice of court and arbitration agreements will depend on both the balance of rules that will be applicable to private party transactions and the ways in which Contracting States may choose to affect the application of those rules.

3.2.1. The Perspective of the Parties

For the private party, there are some important differences between the New York and Hague Conventions. These differences include nuances in the limitations on party autonomy contained in each instrument.

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[40] 407 U.S. at 10.

[41] *See, e.g.*, Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991).

[42] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. E.U. L 12/1, 16 January 2001:

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

[43] *Ibid*. arts. 8–14, 15–17, and 18–21, respectively.

Article II(3) of the New York Convention requires that parties to an arbitration agreement be refereed to arbitration, unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed."[44] This rule of substantive validity follows the requirement in Article II(1) that there be consent ("an agreement"), and the formal validity requirement ("in writing," "signed by the parties or contained in an exchange of letters or telegrams") in Article II(2). The Convention does not, however, provide guidance in determining the law applicable to the Article II(3) question of substantive validity. This is left to the rules of private international law of the forum seised with the matter.[45]

The Hague Convention differs from the New York Convention by inserting the substantive validity issue in three separate articles, and in providing an autonomous Convention choice of law rule for purposes of this determination. Article 5(1) requires that a court chosen in an exclusive choice of court agreement take jurisdiction "unless the agreement is null and void under the law of that State."[46] Article 6(a) requires that any other court in a Contracting State "suspend or dismiss proceedings . . . unless . . . the agreement is null and void under the law of the State of the chosen court."[47] Once a judgment is issued by the chosen court, Article 9(a) provides that a court in another Contracting State may refuse recognition and enforcement if "the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid."[48] Together, these three provisions incorporate a single source of applicable law for making the determination of substantive validity of the choice of court agreement. This has two effects for purposes of party autonomy. First, it limits party autonomy by acknowledging that there are laws that prevent the validity of certain types of agreements or agreements by certain types of parties. Second, it tempers those limits by allowing the parties to the choice of court agreement to select the law of a state whose rules liberally uphold choice of court agreements. Whether this will create the effect of offshore jurisdictions that support what other states would consider to be misuse of choice of court agreements remains to be seen, but it does allow for that possibility. The same possibility does not exist under Article II of the New York Convention because, with no autonomous choice of law rule, each court may use its own rules of private international law to determine the law applicable to the issue of substantive validity.

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[44] New York Convention, art. II(3).

[45] The New York Convention does provide autonomous choice of law rules for specific determinations required in Article 5(1)(a) and 5(2)(a) at the award recognition and enforcement stage.

[46] Hague Convention, art. 5(1).

[47] *Ibid*. art. 6(a).

[48] *Ibid*. art. 9(a).

The substantive validity rule (allowing nonrecognition of an arbitration agreement if it is “null and void, inoperative or incapable of being performed”) is the only limitation on the requirement of recognition and enforcement of an otherwise formally valid agreement to arbitrate under Article II of the New York Convention. The Hague Convention provides additional limits on party autonomy at this jurisdictional stage, however, in the form of Article 6 grounds on which a court not chosen may refuse to suspend or dismiss proceedings in favor of the chosen court. These grounds include lack of party capacity,[49] “manifest injustice” or violations of public policy resulting from giving effect to the agreement,[50] situations where “the agreement cannot reasonably be performed,”[51] and situations where “the chosen court has decided not to hear the case.”[52] Thus, at least at an academic level, the Hague Convention provides more limitations on party autonomy at the jurisdictional stage when the question is the recognition and enforcement of the *agreement* on choice of forum. Whether this will develop as a meaningful difference in the choice between an agreement to arbitrate and a choice of court agreement remains to be seen.

A third set of limitations on party autonomy, found in both the New York and Hague Conventions, comes into play at the stage of recognition and enforcement of an award or judgment resulting from jurisdiction under the applicable choice of forum clause. In the New York Convention, Article III provides for the obligation to recognize and enforce an arbitral award, and Article V provides bases for exceptions to this obligation. In the Hague Convention, the obligation to recognize and enforce a judgment is found in Article 8, and the exceptions are found in Article 9. The comparison between the two sets of bases for nonrecognition can be summarized as follows:

New York Convention	**Hague Convention**
Rule (Article III):	**Rule (Article 8):**
Arbitral awards will be recognized and enforced	Judgments will be recognized and enforced
Exceptions (Article V):	**Exceptions (Article 9):**
– lack of party capacity	– agreement was “null and void”
– ack of proper notice	– lack of party capacity
– outside the scope of the agreement to arbitrate	– lack of proper notice

[49] *Ibid*. art. 6(b).

[50] *Ibid*. art. 6(c).

[51] *Ibid*. art. 6(d).

[52] *Ibid*. art. 6(e).

– proper arbitration procedure	– judgment "obtained by fraud"
– award is not yet binding, or has been set aside	– manifestly incompatible with public policy
– subject matter "is not capable of settlement by arbitration"	– inconsistent with local judgment
– "contrary to . . . public policy"	– inconsistent with earlier judgment

Once again, whether the differences in these lists will result in substantive differences in the choice between arbitration agreements and choice of court agreements remains to be determined through the further application of both conventions.

3.2.2. The Perspectives of the Contracting States

The questions raised by a comparison of the New York Convention and the Hague Convention require decisions not only by private parties, but by states as well. For the potential Contracting State, there are more opportunities to vary the terms of the Hague Convention. The New York Convention, in Article X, allows only one declaration: that a state will "apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."[53] The Hague Convention, on the other hand, contains three possible declarations that may limit the application of the Convention, and one that may extend its application.

> Article 19 of the Hague Convention allows a Contracting State to declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.[54]

This provision indicates the possibility for sovereign entrepreneurship. While it specifically allows a state to reduce the availability of its courts for international disputes, states not exercising the Article 19 declaration may in fact encourage recourse to their courts, thus creating business for their legal communities, even when the transaction involved has no other connection to the chosen forum.

While Article 19 allows limitations on the jurisdictional rules of the Hague Convention (those rules dealing with recognition and enforcement of a choice of court agreement), Article 20 provides a second possible declaration that can limit the application of the Convention rules regarding recognition and enforcement of judgments resulting from the

[53] New York Convention, art. X(1).

[54] Hague Convention, art. 19.

exercise of jurisdiction under the Convention. Pursuant to Article 20, a state may declare

> that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.[55]

This allows a Contracting State a second shot at a case taken originally to another state, but is a very limited exception, being available only when *all* elements relevant to the dispute other than the chosen court are "connected only with" the Contracting State that has made the declaration.

The third provision allowing limitation of the operation of the Convention is Article 21. As mentioned above,[56] this provision allows a Contracting State to declare that it will not apply the Convention to a matter to which it "has a strong interest in not applying this Convention."[57] Any state making such a declaration must "ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined," and is subject to reciprocal application such that other Contracting States will refuse to respect exclusive choice of court agreements selecting the courts of the declaring state in disputes involving such matters.[58] This element of reciprocity is designed to discourage states from making Article 21 declarations.

The final provision allowing for a declaration is Article 22, already discussed above.[59] It allows Contracting States to expand the scope of the Convention such that the provisions on recognition and enforcement of a judgment will apply as well to judgments based on non-exclusive choice of court agreements. This will not make the jurisdictional rules of Articles 5 and 6 applicable to non-exclusive choice of court agreements. To do so would have created other issues that were intentionally left out of the Convention.[60] It will, however substantially expand the value of the Convention if the declaration is widely exercised.

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55 *Ibid*. art. 20.

56 *See supra* note 34 and accompanying text.

57 Hague Convention, art. 21(1).

58 *Ibid*. art. 21(2).

59 *See supra* note 9 and accompanying text.

60 For example, choice of court agreements allowing litigation in either of two states (but excluding litigation in all others) would have required rules for parallel litigation in the jurisdictional chapter of the Convention (Chapter II). This would have raised difference between the traditional civil law *lis pendens* approach respecting the jurisdiction of the first court seised (a race to the courthouse) and the traditional common law approach allowing parallel litigation, but also permitting courts the discretion to decline jurisdiction through the doctrine of *forum non conveniens* (a race to judgment). For further discussion of Article 22, *see* Brand, Herrup, 153–59.

4. CONCLUSIONS: LEVELING THE PLAYING FIELD FOR CHOICE OF FORUM AGREEMENTS

A comparison of the New York and Hague Conventions reveals distinctions that will be important in planning decisions of both states and private parties. For states, those decisions come at the ratification or accession stage, in determining specific issues of Hague Convention scope in the application of declarations under Articles 19, 20, 21, and 22. Here the principal question is how states themselves want to place limits on party autonomy. The first three declarations all allow a state to enter the Convention with additional limits on party autonomy either by limiting the cases the particular Contracting State's courts may accept under an exclusive choice of court agreement (Article 19), by limiting the foreign judgments a Contracting State will allow its courts to recognize and enforce (Article 20), or by excluding additional subject matter disputes from Convention Scope on a reciprocal basis (Article 21). The fourth declaration allows a state to expand the scope of the Convention, providing for enhanced free movement of judgments based on non-exclusive choice of court agreements.

For private parties, a comparison of the New York and Hague Conventions demonstrates decisions about the exercise of party autonomy to select a forum for dispute resolution in transnational commercial relationships. There are clear language distinctions between the jurisdictional rules found in Article II of the New York Convention and those found in Articles 5 and 6 of the Hague Convention, as well as nuanced distinctions between the recognition and enforcement rules found in Articles III and V of the New York Convention and Articles 8 and 9 of the Hague Convention. The extent to which these distinctions will be significant for practical purposes in choosing between agreements to arbitrate and choice of court agreements remains to be seen. What is clear is that the similarities are greater than the differences, and that widespread ratification and accession to the Hague Convention will change the climate from the simple existence of an enforcement mechanism for arbitration and none for litigation, to a balanced enforcement mechanism for both. This will require that transactions lawyers draft choice of forum clauses with greater attention to the real differences between arbitration and litigation.

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ICA AND THE WRITING REQUIREMENT: FOLLOWING MODERN TRENDS TOWARDS LIBERALIZATION OR ARE WE STUCK IN 1958?

Article 7 of the Model Law was revised in 2006 to liberalize any requirements of form, consistent with modern commercial practices and modern legal trends reflected in national laws. To the extent adopted by national legislatures, either of the two available options under this revision will effectively eliminate any requirement of a "record of consent," thus making arbitration agreements more easily enforceable in the adopting jurisdiction. However, any such revision of national laws on arbitration based on the revisions of Article 7 of the Model Law will not necessarily have any effect on enforcement of awards in other jurisdictions under the New York Convention of 1958. Thus, the revision of the Article 7 of the Model Law presents a very real possibility that an arbitral tribunal seated in a jurisdiction adopting these revisions may accept jurisdiction over a dispute and render an award that might not be enforceable in other jurisdictions because it fails to meet the requirements of Article II of the Convention.

In an effort to preempt this issue, in conjunction with its promulgation of the 2006 revisions of the Model Law, UNCITRAL also adopted a resolution making specific recommendations regarding the interpretation of the Convention. While undoubtedly of some persuasive value, these recommendations do not, however, carry the same force as the actual language of the Convention itself. Thus, the international commercial arbitration community faces a dilemma. Should national legislatures adopt revised Article 7? How should national courts interpret the Convention? Should an effort be mounted to draft a parallel convention on enforcement of arbitral awards?

This paper addresses these questions by evaluating the revisions of Article 7, in the context of the well established principles of competence-competence (both negative and positive) and separability, and suggests that, perhaps, the limits of Article II may be quite appropriate as long as arbitration remains a regime based on actual "consent." However, the paper further suggests that perhaps the normative circumstances most frequently advanced in arguing for liberalization of the writing

requirement actually dictate that arbitration should today be treated as the default regime for resolution of international commercial disputes. The paper concludes with a brief discussion of a regime in which international commercial arbitration functions as the default, in the absence of any agreement by the parties on dispute resolution.

Key words: *International Commercial Arbitration – Writing requirement – Consent – Default – Separability – Enforcement*

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1] [hereinafter *Convention*] is, by almost any measure, an overwhelming success. In 144 countries that are party to this Convention, foreign arbitral awards are enforced with relative ease and efficiency, subject only to a narrow set of specific and well defined exceptions. [2] However, the application of the Convention is limited, under Article II, to "agreements in writing."[3] Article II further defines "agreements in writing" in terms of two requirements: (1) a written arbitration agreement—either contained in a broader contract[4] or as a standalone arbitration contract; and (2) a signature or exchange of correspondence.[5] The first can be characterized as a requirement of a "record of content" and the second as a requirement of a "record of consent."

Despite its record of success, the Convention has been increasingly criticized as outdated and no longer reflective of modern commercial practices or modern national laws governing arbitration of commercial disputes. During the fifty years since the conception of the Convention, arbitration has become far more commonplace—arguably rising in acceptance from the occasional, to the frequent, and even to the dominant method of dispute resolution for parties to international commercial agreements.[6] As a result, the cautionary and evidentiary functions inherent in Article II appear largely out of place today.[7]

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[1] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 7 I.L.M. 1042 [hereinafter *Convention*].

[2] *See* Article V of the Convention.

[3] While Article VII arguably allows for the application of portions of the Convention, in combination with portions of more liberal national law, *see* Convention at 3, the full application of the Convention alone is so limited.

[4] This broader contract is often called the "container" contract.

[5] Admittedly, some variations of this characterization exist. However, this characterization may fairly be characterized as a strong majority approach to interpreting the intended effect of the original text. Additionally, the original language was limited to an exchange of letters or telegrams, but such terms are almost universally read to include most, if not all, forms of modern correspondence.

[6] Admittedly, there is little empirical data on this last point, but the assertion is so often made by commentators that it would appear to be accepted as fact today.

[7] Much has been written on this issue, suggesting that the formal writing requirement is both obsolete and overly burdensome in modern commercial practice. *See*, *e.g.*,

Until quite recently, Article 7 of the UNCITRAL Model Law on International Commercial Arbitration [hereinafter *Model Law*][8] mirrored Article II of the Convention.[9] However, Article 7 of the Model Law was revised in 2006[10] to liberalize any requirements of form, consistent with modern commercial practices and resulting legal trends reflected in national laws.[11] To the extent adopted by national legislatures, this revision reduces or eliminates existing requirements as to the form of an arbitration agreement, thus making more arbitration agreements enforceable in adopting jurisdictions. However, any such revision of national laws on arbitration based on the revisions of Article 7 of the Model Law[12] will not necessarily effect enforcement of awards in other jurisdictions under the Convention. Thus, the revision of the Article 7 of the Model Law presents the very real possibility that an arbitral tribunal seated in a jurisdiction adopting these revisions may accept jurisdiction over a dispute and render an award that ultimately might not be enforceable in other jurisdictions because it fails to meet the requirements of Article II of the Convention.

In an effort to preempt this issue, and in conjunction with its promulgation of the 2006 revisions of the Model Law, UNCITRAL also adopted a resolution[13] making two specific recommendations regarding the interpretation of the Convention. First, the definition in Article II should not be read as exhaustive.[14] In effect, the listed means of satisfying the writing requirement should be read as "including, but not limited to . . . ." Second, Article VII of the Convention should be given a broad effect such that a party can rely on the enforcement provisions of the Convention in combination with any more liberal requirements as to the form of an arbitration agreement provided in the national law of the enforcing

Janet Walker, "Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement", *J. L. & Com.* 25/2005, 153, 153–65.

[8] United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration § 7 (1985), G.A. Res. 40/72, U.N. Doc. A/40/17, annex I (Dec. 11, 1985).

[9] While Model Law Article 7 arguably provided somewhat greater flexibility in meeting the requirements for a "record of consent" and a "record of content," it required both, just like Article II of the Convention.

[10] United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration § 7 (1985, as amended 2006), G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec.18 2006) [hereinafter *Model Law*], at 4–5. Other provisions were also revised, including a revision to Article 35 related to the Article 7 revision. *Ibid*. at 20–21.

[11] *Ibid.* at 27–28 (Explanatory Note by the UNCITRAL secretariat).

[12] *Ibid.* at 4–5.

[13] *Ibid.* at 28–29 (Explanatory Note by the UNCITRAL secretariat), 39–40 (Recommendation regarding the interpretation of Article II).

[14] Model Law, at 39–40 (Recommendation regarding the interpretation of Article II).

country.[15] While undoubtedly of some persuasive value, these recommendations do not of course carry the same force as the actual language of the Convention itself.

This brings us to the current dilemma faced by the international commercial arbitration community. Should national legislatures adopt revised Article 7? How should national courts interpret the Convention? Should an effort be mounted to draft a parallel convention on enforcement of arbitral awards?[16] In thinking about each of these intimately related questions, it is useful to consider first the specific provisions of revised Article 7.

Revised Article 7 actually provides two alternative options, and the UNCITRAL Secretariat's Explanatory Notes[17] take no position as to which might be preferred. Option one essentially eliminates the requirement of a "record of consent." Oral agreements to arbitrate might be fully enforceable as long as the remaining requirement of a "record of content" is met. Consent need only be proven as required under applicable national contract law. Option two goes one step further, eliminating both the requirement of a "record of consent" and the requirement of a "record of content," and relying on applicable national law for any proof of intent, as well as any requirement of definiteness as to content. Interestingly, there may be little meaningful difference between the two options in the case of an agreement to arbitrate under institutional rules, as the rules themselves may meet any requirement under Option one with respect to a "record of content."[18] However, the focus of this paper is on the requirement of a "record of consent," which is abandoned in both Option one and Option two.

Historically, an agreement to arbitrate a dispute and forego the right to resort to national courts was characterized as giving up "one of the basic rights of the citizens of any civilized community—that is to say, the right to go to their own courts of law" and was further described as "a serious step, for which written evidence is needed."[19] However, as arbi-

[15] *Ibid.*

[16] No one has seriously suggested doing anything to threaten the existing Convention, as its value, as currently drafted, is undisputed. However, a parallel convention, with a more liberalized requirement as to form, might be developed with the hopes of eventually rendering the existing Convention obsolete over time.

[17] Model Law, at 27–28.

[18] The notes from the working group suggest potential contrary views on this, as noted in final comments by the Belgian delegation. *See* U.N. Doc. A/CN/.9/609/Add.3, at 2 (May 12, 2006). However, the issue is not formally addressed by the Explanatory Note.

[19] A. Redfern, M. Hunter, *The Law and Practice of International Commercial Arbitration*, 1999³. This characterization has been modified somewhat to reflect modern practices in the fourth edition.

tration has increasingly become the most common means of resolving international commercial disputes, most have suggested that the need for written evidence, or at least some sort of easily accessible record, has diminished, and arbitration agreements should be treated just like any other contract. This view is essentially adopted by the revisions to Article 7 of the Model Law. With respect to the issue of consent, agreements to arbitrate are treated just like any other contract is treated under applicable national law. Of course the logical predicate to such treatment is that, with respect to consent, an agreement to arbitrate is just like any other contract. But is that true?

Very few other contracts or contractual provisions[20] are given any degree of effect prior to the determination of their formation or enforceability—and irrespective of whether or not the parties are found to have ever reached an agreement. And yet, arbitration agreements are routinely given such effect under the related doctrines of positive competence-competence and separability. In the case of most purported agreements, the parties may directly resort to a court to determine whether they are bound. Yet in the case of arbitration, the doctrine of negative competence-competence limits the court's initial review of consent to a "prima facie" determination, leaving any more thorough decisions to any potential action to set aside the arbitrators' decision.[21] Moreover, these three doctrines, which each give unique and extraordinary effect to an agreement to arbitrate, are fundamental to a modern arbitration regime like the Model Law.

Article 16 (1) of the Model Law provides arbitrators with the competence to decide their own jurisdiction—often called positive competence-competence. This principle is very well established in modern arbitration.[22] However, it is worth remembering that the doctrine requires one to engage in an act of "bootstrapping"[23] or to take a "leap of faith" in effectively granting the arbitrators the authority to "presume" that the parties agreed to arbitration, while actually deciding whether the parties "in

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[20] Choice of law and choice forum provisions may be among the very few exceptions.

[21] Admittedly, only the doctrine of separability is firmly established under the United States Federal Arbitration Act. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). However, U.S. law is largely out of step with modern arbitration law with respect to the doctrine of competence-competence. *See* First Options, Inc., v. Kaplan, 514 U.S. 938 (1995) (explaining that the question of whether the parties agreed to arbitrate is one for the court, unless the parties have expressed a "clear and unmistakable" intent to the contrary). This approach under U.S. law stands in direct contrast to Article 16 of the Model Law.

[22] The United States Federal Arbitration Act is of course a notable exception. *See supra* note 35.

[23] One cannot of course lift oneself up by one's own bootstraps—no matter how hard one pulls.

fact" agreed to anything at all. Article 16 also provides for the separability of the arbitration agreement, such that the arbitration agreement will survive the invalidity of—and perhaps even the failure to form—the contract in which it is contained. While the doctrine of separability is almost certainly a practical necessity for any modern arbitration regime, its application requires a substantial element of legal fiction. At least one prominent commentator has explained that such extraordinary treatment of an agreement to arbitrate is justified by the strict form requirements of Article II of the Convention.[24] In short, the strong requirement of a "record of consent" justifies the act of "bootstrapping" necessary for positive competence-competence and the legal fiction necessary for separability.

Article 8(1) of the Model Law requires a court to decline jurisdiction in the face of a valid arbitration agreement,[25] and the doctrine of negative competence-competence provides that this initial court decision should be limited to a "prima facie" determination of whether the parties agreed to arbitrate—leaving a more thorough examination to any potential subsequent action to set aside the initial decision by the arbitrators. Such a "prima facie" determination is generally quite simple if one requires a "record of consent," but becomes far more difficult in the absence of such a record. In fact, in the absence of a clear record, any determination of consent by the court under Article 8(1) might necessarily entail a full and complete examination of the issue.[26]

Without a clear and easily accessible record of consent, how does this affect the principles in support of "bootstrapping" or making the analytical "leap of faith" necessary to justify the jurisdiction of the tribunal to decide its own jurisdiction under the doctrine of positive competence-competence? How does this affect the foundation for the legal fiction necessary to invoke the doctrine of separability? How does this affect the basis for limiting a court to a "prima facie" determination of whether the parties agreed to arbitration under the doctrine of negative competence-competence? Arguably, the justifications, foundations, and practical applications of all of these fundamental principles are seriously undermined by the elimination of any form requirement with respect to consent to arbitrate.

So, does this mean we are "stuck in 1958"? Not necessarily. There may be another, simpler, more practical, and more analytically defensible approach to bringing the law into conformity with modern commercial practice. The movement towards liberalization of the form requirements

[24] A. van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, 1987, 156.

[25] This same provision is found in Convention Article II(3).

[26] Effectively, this might send all jurisdictional challenges to the court, as is the case under the United States Federal Arbitration Act, absent "clear and unmistakable" consent to the contrary. *See supra* note 35.

is supported, in large part, by the growing predominance of arbitration as the preferred means of deciding international commercial disputes. In fact, most of the literature suggests that arbitration is the normative default, as opposed to national court adjudication. If so, why not simply recognize arbitration as the legal default rule?

Upon initial consideration, the idea of private arbitration as a default over national courts might seem extraordinary—or even preposterous.[27] In many respects, however, the idea of national adjudicatory mechanisms giving way to a private dispute resolution mechanism developed through international collaboration is no more revolutionary than national substantive laws yielding to a single body of transnational law developed through international collaboration. The latter was of course accomplished 30 years ago with the promulgation of the Convention on Contracts for the International Sale of Goods (the "CISG").[28] Perhaps the time has come to give serious consideration to a convention under which international commercial transactions would be subject to dispute resolution through arbitration—and not national court adjudication—unless the parties have agreed to the contrary, either opting out of the convention or specifically choosing a national court to decide their dispute.

With the encouraging prospects for broad acceptance of the new Convention on Recognition and Enforcement of Choice of Court Agreements, it seems that arbitration and national court adjudication agreements will be recognized and enforced on relatively equal footing. Thus, it appears to be a perfect time to revisit the more basic question of which should be the default if parties fail to make any effective choice between arbitration and national court adjudication. A normative, majoritarian approach would simply provide a default rule most reflective of actual commercial practice. As such, there is much to recommend a default legal rule providing for arbitration of international commercial disputes.

While in some ways this may appear to be a more radical idea than the abandonment of form under Model Law Article 7, it is arguably much easier to support by reference to basic legal principles. The need for each of the extraordinary doctrines discussed earlier arises from the combina-

[27] I first heard this idea expressed by Dr. Eugen Salpius four years ago in a talk he gave at my invitation, at Stetson University College of Law. Dr. Salpius was not addressing the form requirements for arbitration agreements, but was simply suggesting that, at some point, the law ought to recognize commercially normative facts, and designate arbitration as the default over court adjudication. While I initially found the idea quite interesting, I thought it far ahead of its time. However, as a few short years have past, I increasingly find the idea less and less extraordinary, and it appears increasingly rational and reasonable. *See* G. Cuniberti, "Beyond Contract– –the Case for Default Arbitration in International Commercial Disputes", *Fordham International Law Journal* 32/2009, 417, 417–488.

[28] United Nations Convention on Contracts for the International Sale of Goods, G.A. Res. 35/51, U.N. Doc. A/RES/35/51 (Jan. 1. 1988).

tion of the facts that (1) arbitration is not the default rule for dispute resolution, but (2) an effective arbitration regime requires the means to avoid spending unnecessary time and resources in court before going to arbitration. If arbitration is the default rule, then the need for competence-competence (negative or positive) or separability is either eliminated or greatly diminished.[29] Admittedly, these same sorts of issues might arise with the choice of a party to go to court, however, it is far more reasonable to apply extraordinary rules, along with extraordinary form requirements, to choice of court agreements that amount to exceptions to normative practices—as compared to our current treatment of arbitration as an "alternative" means of dispute resolution. This "exceptional," rather than "normative," treatment of arbitration is precisely why the form requirement for arbitration has become such a problem over time. Arbitration is treated as an "alternative," requiring actual consent, when it is in fact the predominant normative practice for resolution of international commercial disputes.

The abandonment of the requirement of a "record of consent" attempts to bridge this chasm between the exceptional nature of arbitration in 1958 and the normative nature of arbitration today. However, this bridge leads only to a legal regime in which arbitration—still an exceptional contract giving rise to some very extraordinary legal effects—is subject only to very ordinary contractual requirements. It would seem that such a bridge risks falling into the very chasm it seeks to span, especially when it comes to the application of negative competence-competence in a world without any required "record of consent."

Instead of attempting to "bridge" this chasm, why not simply move to the other side and recognize arbitration as the default rule? Legal recognition of this normative fact would dramatically reduce the amount of wasted time in courts attempting to avoid genuine agreements to arbitrate—thus eliminating the single most pervasive criticism of arbitration today. While the precise details of such a normative arbitration regime are beyond the scope of this paper, many potential elements are in place today.

The challenges of a default regime would not likely be any greater than those faced when parties agree to arbitrate today, but fail to provide any details. This issue can be addressed in a variety of ways through either well developed default legal regimes, such as the Model Law, or through the designation of default rules. For example, the Inter-American Convention on International Commercial Arbitration provides, in Article 3, a default set of rules,[30] based largely on the UNCITRAL Rules.[31] These

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[29] This might, to some degree, depend on the specific form of a default arbitration regime.

[30] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, OAS/Ser/A/20 (SEPF), 14 I.L.M. 336 (1975).

[31] UNCITRAL Rules, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec.15 1976).

rules very effectively address the potential absence of any "record of content" with respect to arbitral procedures in the event that the parties do nothing more than simply agree to arbitrate. This same approach could be taken in a convention making arbitration the default rule. If parties then failed to cooperate in constituting an arbitral panel, the Permanent Court of Arbitration could be employed to designate an appointing authority, as is done now in the case of ad hoc arbitration under the UNCITRAL Rules.[32]

It is also worth considering that today relatively few international commercial transactions lack any dispute resolution provision. Thus, the change of the default rule might not actually change the nature of the ultimate dispute resolution mechanism in very many cases. It would, however, likely add significant efficiencies to the arbitral process and would also comport far more with traditional contracts principles than the current approach to Article 7, in combination with Articles 8 and 16 of the Model Law. Lastly, it is important to remember that parties could always opt out—either by simply choosing not to arbitrate, and thereby leaving themselves to the vagaries and enforcement risks of unilateral choices of national courts, or by agreeing in advance on adjudication by a specific court, rather than arbitration.

In conclusion, we can all likely agree that the current requirements mandated by a strict interpretation of Article II of the New York Convention are out of step with modern commercial and arbitral practice. However, it seems worth considering, at this juncture, whether it is better to attempt to build a "bridge"[33] from 1958 to the present by abandoning the requirement of a "record of consent" or whether it might be more effective simply to move to the other side of the chasm and designate arbitration the default mechanism for resolution of international disputes, thereby avoiding any need for such a bridge.

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[32] *Ibid.*

[33] This characterization as a "bridge" comes from the notes of UNCITRAL Working Group II, which prepared the revisions of Model Law Article 7. *See* U.N. Doc. A/CN/.9/WG.II/WP.139, at 5 (January 23–27, 2006).

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WEST TANKERS, THE HEIDELBERG REPORT AND THE PRINCIPLE OF COMPETENCE-COMPETENCE

The West Tankers case of the European Court of Justice has already been extensively discussed in connection with the feasibility of English anti-suit injunction. The importance of the judgment however goes much further. By condemning the English court's anti-suit injunction, it strikes a blow on the fine tuned relationship between arbitral tribunals and the courts and puts a finger on a soaring wound. The Heidelberg Report, which was issued before West Tankers was decided by the ECJ, touches on the same issue. It vigorously ignores the principle of competence-competence. But it may nevertheless contain a solution to the problem which West Tankers made obvious. The article deals with the question whether or not the solution proposed by the Heidelberg Report would be an advancement and would further and promote arbitration as the primary tool for the resolution of international commercial disputes within the European Union.

Key words: *Competence-competence – Anti-suit injunctions – Heidelberg Report – West Tankers – Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

1. INTRODUCTION

The West Tankers case[1] has been extensively discussed in connection with the English anti-suit injunction, the issuance of which gave rise to that case. Much more can be found in West Tankers though. By condemning the English court's anti-suit injunction, it strikes a blow on the fine tuned relationship between arbitral tribunals and the courts and puts a finger on a soaring wound. The Heidelberg Report, which was issued before West

[1] ECJ, Allianz SpA and another v. West Tankers Inc., Case C–185/07 (2009).

Tankers was decided by the ECJ[2], touches on the same issue. Vigorously ignoring the principle of competence-competence, it may nevertheless contain a solution to the problem which West Tankers made so obvious.

2. WEST TANKERS

In August 2000 a meanwhile notoriously well-known vessel, the *Front Comor*, collided with a jetty in Siracusa, Italy. The owner of that vessel was West Tankers Incorporated. The jetty which, obviously, was seriously damaged, was owned by ERG Petroli SpA which, by coincidence, was not only the owner of the jetty but had also chartered the Front Comor.

The Charter Party contained an arbitration clause with the place of arbitration in London.

A part of ERG's loss was covered by insurance and, seeking recovery of the rest, ERG initiated arbitration proceedings in London based on the arbitration clause in the Charter Party. The insurance companies which had covered a part of ERG's loss also sought redress from West Tankers. However, in ignorance of the arbitration clause in the Charter Party, they seized an Italian court in Siracusa where they initiated litigation against West Tankers. And this is where the problem began.

West Tankers clearly preferred English arbitration to Italian courts and, in reliance on the arbitration clause, applied for an interim injunction from an English court against the insurers which would order them to stop the Italian litigation and to initiate arbitration proceedings instead, should they wish to enforce their purported claims.

The case was finally brought before the ECJ which found that decisions on the existence and validity of arbitration agreements fall within the scope of Regulation 44/2001 and, consequently, that related anti-suit injunctions are not permissible within the European Union.

None of this was very surprising. The judgment of the ECJ nevertheless caused great consternation, particularly in the UK but also outside the United Kingdom.

Why is that so? Although the West Tankers decision may well have been seen as an outrage by English lawyers, the abolition of anti-suit injunctions alone hardly seems to be that important for the rest of the world. Much more important, however, the ECJ's West Tankers Judgment put the finger on a soaring wound. It put the finger on an issue which – although of greatest importance – has never been resolved entirely or adequately.

[2] European Court of Justice.

3. THE ISSUE AT HAND

It is important to remember that – based on the West Tankers Judgment – the Italian court was free to proceed and to decide on the validity of an arbitration agreement which itself called for arbitration in London. From the perspective of West Tankers – and from the perspective of the arbitration community – this is indeed far less than ideal. In fact, it should not happen that way.

West Tankers and ERG had agreed on arbitration in London and, let us at least assume this for a moment, the insurers were bound by that clause. Therefore, in the first place, it should be an arbitral tribunal which decides on the validity of that arbitration clause.

Secondly, maybe the decision of the arbitral tribunal should be controlled by the courts. But these should be the courts at the place of arbitration. Never should an Italian court decide on the validity of an arbitration agreement which designates London as the place of arbitration.

The result of the chain of events which started with the collision of the *Front Comor* with the Italian jetty is so much contrary to the most fundamental principles of international arbitration that one might wonder whether the *Fromt Comor* sank only a jetty or even the whole system of international arbitration in Europe. Well, that system might not immediately sink but there is imminent danger of lasting and severe damage.

Clearly, this is neither the fault of the ECJ nor the fault of the Advocate General who was so heavily criticised for her Opinion which she delivered on 4 September 2008.[3] This criticism just does not hold water.

4. THE ADVOCATE GENERAL'S OPINION

The Advocate General rightly referred to Art II(3)[4] of the New York Convention which requires national courts to refer the parties to arbitration only where the court seized finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The Advocate General thus rightly found that,

> *" ... it is consistent with the New York Convention for a court which has jurisdiction over the subject-matter of the proceedings under Regulation No 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself. Article II(3) of the New York Convention re-*

[3] *See* the Opinion of Advocate General Kokott in ECJ, case C–185/07 *West Tankers* (2009).

[4] *See* Art II(3) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York" Convention).

quires national courts to refer the parties to arbitration only under three conditions:

- *the subject-matter of the dispute is actually capable of settlement by arbitration. If that is not the case, under Article II(1) of the New York Convention the Contracting State (and its courts) are not required to recognise the arbitration agreement;*
- *the court of a Contracting State is seized of an action in a matter in respect of which the parties have made an agreement within the meaning of that article;*
- *the court seized does not find that that agreement is null and void, inoperative or incapable of being performed."*

And further,

"Every court seized is therefore entitled, under the New York Convention, before referring the parties to arbitration to examine those three conditions. It cannot be inferred from the Convention that that entitlement is reserved solely to the arbitral body or the national courts at its seat. As the exclusion of arbitration from the scope of Regulation No 44/2001 serves the purpose of not impairing the application of the New York Convention, the limitation on the scope of the Regulation also need not go beyond what is provided for under that Convention."[5]

What could be held against that? Although heavily criticized, the reasoning of the Advocate General does not appear to be beside the point. The problem which we face here has not been created by the West Tankers judgment. The ECJ just made it visible in a particularly disenchanting way.

5. THE EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION AND THE UNCITRAL MODEL LAW

As so often if confronted with seemingly hopeless situations, one would be tempted to turn to the European Convention on International Commercial Arbitration for help. But not even the European Convention can be of much assistance here.

The Convention deals with a situation where arbitration proceedings are initiated before a state court is seized: In that case, the arbitrator whose jurisdiction is called in question is entitled to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement subject – only – to subsequent judicial control provided for under the lex fori. The court seized after arbitration proceedings have

[5] *See* the Opinion of Advocate General Kokott in ECJ, case C–185/07 *West Tankers* (2009) at paras. 55, 56.

been initiated shall stay its ruling on the arbitrator's jurisdiction until the arbitral award is made – unless it has good and substantial reasons to the contrary.[6]

So far, so good. At least this situation can be remedied by applying the European Convention.

However, even according to the European Convention, as long as one of the parties seizes a national court before arbitration proceedings are initiated, the court is free to decide on the existence and the validity of the arbitration agreement.

Not even the UNCITRAL Model Law, where it is incorporated, provides a remedy in such a case: According to its Article 8(1), a court before which an action is brought which is subject of an arbitration agreement shall refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Again, it is in the competence of the court to decide on the validity of the arbitration agreement. Most importantly, court here means any court rightly seized according to its domestic law; not just the court at the place of arbitration.

Of course, this result cannot be applauded. It is not what the international arbitration community wants and it is also not what the parties want; at least before one of them starts seeking for possibilities to derail the process because it fears that it might lose the case. So why do we arrive at such an unpleasant and unwelcome result?

6. THE PRINCIPLE OF COMPETENCE-COMPETENCE

The doctrine of competence-competence should not allow for such an outcome:

> *"[It] ... provides, in general terms, that international arbitral tribunals have the power to consider and to decide disputes concerning their own jurisdiction*."[7]
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> *"[It is] ... the power of the arbitral tribunal to decide upon its own jurisdiction*."[8]
>
> *"[It is] ... t]he fact that arbitrators have jurisdiction to determine their own jurisdiction*."[9]

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[6] *See* Art V(3) European Convention on International Commercial Arbitration.

[7] G. B. Born, International Commercial Arbitration, 2009, 853.

[8] A. Redfern, M. Hunter, Law and Practice of International Commercial Arbitration, 2004^4, 252.

[9] E. Gaillard, J. Savage, Fouchard, Gaillard, Goldman On International Commercial Arbitration, 1999, 395.

And it is recognized by all developed national legal systems. But, as Borne put it,

> *"[d]espite this broad international acceptance of the competence-competence doctrine, there is almost equally broad disagreement and uncertainty concerning the doctrine's precise scope and consequences. With remarkable and unusual diversity, leading legal systems take substantially differing approaches to the arbitral tribunal's competence-competence and to the related allocation of jurisdictional competence between arbitrators and national courts*."[10]

Hence unfortunately, the doctrine of competence-competence is not always, and, in fact, very rarely what it appears to be at first sight. It is not only one of the most important, it is also one of the most contentious rules of international arbitration.

To borrow from Gaillard and Savage,

> *"[i]t has given rise to much controversy and misunderstanding, and behind the appearance of unanimity – most laws now recognize the principle in some form – it continues to be the subject of considerable divergence between different legal systems*."[11]

If we take a closer look, we can see that (at least) in most jurisdictions, it is not the arbitrators who ultimately decide on their jurisdiction. At best, they decide first and subject to further judicial control. Not even in Germany, which gave the name *Kompetenz Kompetenz* to the principle at hand, the arbitral tribunals have ever had the last word.[12] Rather, the tribunals have the first say and the courts will control afterwards. This is how it is understood in most places.

So what happens if one of the parties addresses a court, perhaps purporting that the arbitration clause in the contract is invalid. In that case, we have to distinguish:

Where arbitration proceedings are initiated first and later on one of the parties seizes a court, the European Convention, where applicable, comes to help: The court, in principle, will have to stay its proceedings. But where one of the parties manages to initiate court proceedings before the other party could file for arbitration, in most cases, it will be the courts, in the first place, to decide on the validity of the arbitration agreement. And even worse, it will be any court that has jurisdiction based on its domestic law or – in Europe – based on Regulation No 44/2001. This is where the principle of competence-competence, as it is understood in many jurisdictions, is not of great help. Regardless of that principle, a

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[10] G. B. Born, 853.

[11] E. Gaillard, J. Savage, 395.

[12] For the German principle of *Kompetenz Kompetenz cf., e.g.,* R. A. Schütze, *Schiedsgericht und Schiedsverfahren*, 2007^4, 75,at nos.136 *etc*.

court will decide first; and the parties cannot even know in advance which court that will be. This is where help is most needed.

7. THE HEIDELBERG REPORT

The Heidelberg Report[13], delivered by Professor Hess, Pfeiffer and Schlosser in September 2007, perhaps, could point into the right direction. It depends on whether one prefers to see the glass half full or half empty.

The report suggests the elimination of the arbitration exception from Regulation 44 so that

> *"... accordingly, a (declaratory) judgment on the validity of an arbitration agreement could be recognized under Article 32 JR. The danger of conflicting decisions on the effectiveness of arbitration agreements would be diminished.*"[14]

And further,

> *"... the position of a party relying on the validity of ... [an arbitration clause] would be reinforced, in cases where the decision of a civil court confirmed the validity of the agreement because such a decision would be recognised under Articles 32 et seq. JR in all Member States and prevent the courts in other member States from hearing the case on the merits*."[15]

It suggests that the courts of the place of arbitration should be the ones to decide on the validity of the arbitration agreement. As the rapporteurs put it,

> "*The proposition ... presupposes that a device could be developed for the purpose of discouraging, obstructing or frustrating litigation. This device should be as effective as an English anti-suit injunction or the French doctrine of the negative effect of the competence-competence. An international arbitration agreement protects both parties from being sued in any ordinary jurisdiction. Proper performance of such an agreement can only be enforced by safeguarding that a party of an arbitration agreement is not in fact compelled to defend a lawsuit in an ordinary court, particularly in a "foreign" one. The aim could be realized by protecting arbitration agreements in a similar way as proposed here in view of jurisdiction agreements. Court proceedings are to be stayed once proceedings for declaratory relief regarding the binding effect of an alleged arbitration*

[13] B. Hess et al, The Brussels I Regulation 44/2001 Application and Enforcement in the EU, 2008, (the "Heidelberg Report").

[14] *Ibid.* at no. 122.

[15] *Ibid.* This, as it looks, will not even require an amendment of the Regulation; West Tanker has already clarified the issue.

> *agreement are instituted in the country of the place of the arbitration in due time (to be decided by the court seized)*."[16]

Any other court seized by one of the parties shall stay the proceedings once the court at the place of arbitration is seized for a declaratory relief in respect of the existence, the validity, and/or scope of the arbitration agreement (No 123, 134).

The authors were quite aware of the ramifications of their proposal. As they state,

> "*the proposed formulation would also entail the so-called competence-competence of the arbitral tribunal ... a concept which is differently applied in the Member States. Last, but not least, ... [it] would entail that arbitration directly became a matter of Community law and replaced the autonomous concepts in the Member States. Accordingly, harmonisation of international arbitration might be considered as a severe intrusion into the procedural culture of the Member States*."[17]

And indeed it was.[18]

It is true that the Heidelberg Report seems to ignore the principle of competence-competence. But at least it clearly gives the last word to the court at the place of arbitration; which is already a lot. In combination with the respective provisions of the European Convention, this could be a big step forward.

As the Green Paper of the European Commission claims,

> *"... a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties.*
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> ...
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> *Next, a deletion of the exception might allow the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award. This may prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.*

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16 *Ibid.* at no. 123.

17 *Ibid.* at no. 126.

18 E.g., see the discussion at *http://conflictoflaws.net/2009/brussels-i-review-interface-with-arbitration/*

> *More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention*. "

Whether or not one is inclined to welcome this proposal will very much depend on the starting point of the critic. Departing from the proposition that the competence-competence principle (in its most pure form) shall be upheld (or rather one would have to say, introduced, since it does not seem to apply anywhere), the proposals of the Commission must be considered a most unwelcome setback. But, if that is the case, the introduction of competence-competence (again, in its purest form) is something to for with or without West Tankers, and with or without the propositions brought forward in the Heidelberg Report. If, on the other hand, one would prefer to see the glass half full, than the Heidelberg Report may well be seen as a step in the right direction. In other words: Starting from what we have now, it seems to be fair to say that the Heidelberg Report's proposal would be an improvement. It would probably not lead to a perfect world. But then again, who could ever expect to live in a perfect world?

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EXTENSION OF AN ARBITRATION AGREEMENT TO NON-SIGNATORIES: SOME REFLECTIONS ON SWISS JUDICIAL PRACTICE

The Article deals with the question whether a party that has not signed an arbitral agreement may nevertheless be bound to arbitrate. The author analyzes Swiss legal doctrine and, in particular, the recent practice of the Swiss Federal Tribunal which has repeatedly dealt with this issue. According to the Swiss Federal Tribunal, an arbitral agreement may be extended to a non-signatory party where such party, through statements or behaviour, has created a fair and reasonable expectation with another party that it considered itself bound by such arbitral agreement. The criteria to determine such 'fair and reasonable expectations' are identical to the ordinary criteria of (Swiss) contract law for the interpretation of statements or behaviour of a party to a contract.

Key words: *Arbitration agreement. – Extension to Non-Signatories. – Jurisdiction. – Piercing the corporate veil. – Group of companies. – Accession. – Assumption (of indebtedness).*

1. INTRODUCTION AND TERMINOLOGY

The topic of this paper – the extension of an arbitration agreement to non-signatory parties – appears in a vast number of varieties and has been dealt with by countless arbitral tribunals, sometimes convincingly, sometimes rather adventurously. The present paper does not endeavour to provide an overview over the various theories and ideas put forward by arbitral tribunals why an arbitration agreement should or should not be binding upon a third, non-signatory party. Rather, this presentation is guided by the principle that every arbitral award ultimately may have to

stand the test of judicial review, be it because it is challenged before a municipal court at the place of arbitration or because it is subject to court review at the enforcement stage. It is thus the courts' practice, and due to the author's legal background, the Swiss Federal Tribunal's practice, which is the focus of this paper.

An arbitration agreement, even though it mostly forms part of a contract between two or more parties, is an independent agreement, and its scope and validity are examined separately from the main contract. Having the topic of this paper in mind, the term "extension" of an arbitration agreement is somewhat misleading: The discussion is not about extending an arbitral agreement to a non-party but rather about determining who the parties to an arbitral agreement really are. Arbitration being a voluntary alternative to litigation in state courts, an arbitration agreement may only be binding for such party that has either explicitly or impliedly consented to it.

2. THE ARBITRATION AGREEMENT IN SWISS ARBITRATION LAW

The decision by an arbitral tribunal to extend an arbitration agreement to a non-signatory party is a jurisdictional decision: The arbitral tribunal holds that a particular party is (or is not) party to the arbitration agreement and the arbitral tribunal therefore has (or has not) jurisdiction over such party. When faced with the challenge of such jurisdictional decision, the Swiss Federal Tribunal's starting point is Article 178 of the Swiss Private International Law Act (hereinafter: SPILA)[1]. This provision reads as follows:

> "*(1) As to form, the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telecopier, or any other means of communication that establishes the terms of the agreement by text.*
>
> *(2) As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties, or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law."*

When discussing the extension of an arbitration agreement to non-signatories under Swiss arbitration law, two questions must therefore be distinguished: (1) the application of the formal requirements for an arbitral clause also to the extension of such clause, and (2) the possibility of the extension as such. These two questions shall be dealt with separately hereunder.

[1] This Act applies to all international arbitral tribunals having their seat in Switzerland.

3. FORMAL VALIDITY OF THE EXTENSION OF AN ARBITRATION CLAUSE

Article 178 SPILA states in para. 1 that the arbitration clause must be in writing. This formal requirement does not mean that the arbitral clause must be signed by the parties bound by it but that it at least must be "proven by text". The question now is whether this 'in writing' requirement must also be fulfilled with regard to parties that are not formal (signatory) parties to the contract containing the arbitration clause but to which the arbitration clause is to be extended. In other words: While there need not be any concrete signature (neither by the initial parties nor by any further parties to which the clause should be extended), must there at least be some written expression of intention to become party to the arbitration clause or do merely oral statements (or behaviour) suffice for such third party to be bound by an arbitral clause?

The question whether or not the extension of an arbitral clause to non-signatories is subject to the same formal requirement of para. 1 of Article 178 SPILA is controversial in Swiss arbitration doctrine, in particular because of the Federal Tribunal's decision of 16 October 2003[2]. In that decision, the Federal Tribunal has taken the (very apodictic) position that the formal 'in writing' requirement of Article 178 para. 1 SPILA applied only to the arbitration clause concluded between the initial parties, but not to third parties to which it eventually may be extended[3]. In other words, the arbitral tribunal held that, once the formal requirements of Article 178 para. 1 SPILA are fulfilled as far as the initial parties are concerned, the extension of this arbitral clause to non-signatories is not subject to the same formal requirements but only to para. 2 of Article 178 SPILA (which provision states that an arbitration agreement otherwise is valid if it complies with the law chosen by the parties or, eventually, with Swiss law). Thus, pursuant to this decision of the Federal Tribunal, the extension of an arbitration clause to third, non-signatory parties would also be possible in the absence of any written statement, on the basis of mere oral statements, conclusive evidence and behaviour.

Some authors are rather critical vis-à-vis the Federal Tribunal's apparently 'liberal' interpretation of the 'in writing' requirement and hold that, except situations of abuse of rights, the extension of an arbitral clause to non-signatories must also comply with the formal requirement of Article 178 para. 1 SPILA[4].

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[2] DFT 129 III 727, 735 etc.

[3] *Ibid.*, 736

[4] *See* J.-F. Poudret, S. Besson, *Droit comparé de l'arbitrage international*, Zurich / Basle / Geneva 2002, 258, with further references in fn. 496; Poudret in his Case Note to DFT 129 III 727 in *ASA Bulletin* 2004, 390 etc.; W. Wenger, M. Schott Article 186 N

A compromise solution is offered by Habegger in his Case Note to DTF 129 III 727[5]: While it is recognized that Article 178 para. 1 SPILA also plays its part in the question of extension of an arbitral clause to a third, non-signatory party, Habegger argues that "no overly strict requirements should apply to the formal validity of an extension of the arbitration clause to a third party"[6]. This compromise solution well summarizes the Swiss Federal Tribunal's approach as to the formal requirements for an arbitration agreement in matters of extension to non-signatories. To put it briefly: It is not the "in writing"-requirement which is an obstacle to the extension of an arbitration agreement. The true test is whether there was – explicit or implied – consensus by the non-signatory party to be bound by the arbitration agreement.

4. THE EXTENSION OF AN ARBITRATION CLAUSE TO NON-SIGNATORIES IN SWISS PRACTICE

When determining whether there was – explicit or implied – consensus by the non-signatory party to be bound by the arbitration agreement, the Swiss Federal Tribunal applies the ordinary rules of Swiss contract law to ascertain and interpret the behaviour and statements of a non-signatory party. However, one important procedural limitation must be borne in mind: The Swiss Federal Tribunal is not an ordinary appellate body in matters of (international) arbitration. Its scope of review of an arbitral award excludes the facts of a dispute and is limited to the proper application of the law. Consequently, to the extent an arbitral tribunal has concluded that a non-signatory party in fact agreed to be bound by the arbitration agreement in question (i.e. concluded that there was factual consensus by such party), such conclusion will not be reviewed or questioned by the Swiss Federal Tribunal. Thus, only where an arbitral tribunal has interpreted the statements and behaviour of the non-signatory party under aspects of good faith and established a so-called "normative" (implied) consensus, such conclusion is subject to review by the Swiss Federal Tribunal.

28, in *Basler Kommentar IPRG*, 2007[2]. The contrary view – i.e. that the extension of an arbitral clause is not subject to the formal requirements of Article 178 para. 1 SPILA at all – is advocated by M. Blessing, *Introduction to Arbitration – Swiss and International Perspectives*, Basle 1999, 189 etc. This absolute view appears to be shared also by B. Berger, F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Berne 2006, 520.

[5] Ph. Habegger, "Extension of arbitration agreements to non-signatories and requirements of form", ASA Bulletin 2004, 398 etc.

[6] *Ibid.*, 410.

On what basis may thus an arbitral clause be extended under Swiss law? Two situations must be distinguished: The interpretation of the behaviour and/or the statements of the non-signatory party on the basis of the principle of confidence (*Vertrauensgrundsatz*) and the abuse of rights, in particular the theory of 'piercing the corporate veil' (*Durchgriff*), including also the theory of the 'group of companies'.

4.1. Interpretation of behaviour – Principle of confidence

An arbitral clause may be binding for a third, non-signatory party by virtue of that party's own behaviour. In other words: The third party may, by its own behaviour, have created the expectation with the counterparty that it (the third party) considered itself bound by the contract and the arbitral clause contained therein. The third party is thus bound by the arbitral clause where the counterparty in good faith interpreted the behaviour of that third as accession to the agreement and the arbitral clause[7].

Thereby, it must be distinguished between the (implicit) accession to the arbitration clause and the accession to the main contract: A non-signatory party may, based on an interpretation of its behaviour or statements, well be deemed to have agreed to arbitrate disputes in relation to a contract to which it otherwise neither explicitly nor implicitly is a party. Thus, the (sometimes same) statements or the behaviour of a party must be examined twice, once with regard to a possible accession to an arbitral agreement, and once with regard to a possible accession to the main contract.

In a case opposing a Turkish building contractor and a Russian building principal under a construction agreement, the Turkish contractor had sued the Russian principal and a second Russian company (which had not signed the construction contract) for the payment of remuneration. The arbitral tribunal confirmed its jurisdiction over the second, non-signatory defendant in an interim award which was challenged before the Swiss Federal Tribunal. In its decision[8], the Federal Tribunal upheld the jurisdictional award and confirmed the extension of the arbitration clause to the second, non-signatory party because of various written statements this second party had made to the Turkish claimant in the course of the contractual relationship between that contractor and the principal. In these statements, the second defendant had confirmed an assignment of the rights and obligations under the construction contract from a predecessor company to the current principal, confirmed the financing under the con-

[7] B. Berger, F. Kellerhals, 521.

[8] 4P.126/2001 of 18 December 2001.

struction contract and confirmed, together with the principal, the indebtedness for the remuneration towards the Turkish contractor. The Swiss Federal Tribunal held that, to the extent such statements did not already amount to a factual consensus to be bound by the arbitration agreement, they could in any event be understood in good faith as expressing consent to be bound. The second, non-signatory party had not given a separate guarantee but had assumed its indebtedness (*Schuldübernahme*); in such situation, the arbitral clause follows the assumed obligation. This was the more so since in its statements the second party had made explicit references to the construction agreement.

Another case opposed three Lebanese companies, parties to a construction agreement. The claimant company had also sued an individual (non-signatory of the construction agreement) who was said to exercise control over the defendant companies and who had repeatedly intervened in their management. The arbitral tribunal had held on the basis of Lebanese law (which was said to be influenced by French legal doctrine) that the third party had repeatedly interfered with the execution of the contract by the signatory parties and thus manifested its intention to be party (also) to the arbitral clause. The non-signatory defendant challenged this award before the Swiss Federal Tribunal which rejected the appeal in the abovementioned decision 129 III 727 of 16 October 2003. This decision is sometimes referred to as example for the Swiss Federal Tribunal's alleged tendency to take a liberal approach to the extension of arbitral clauses to non-signatories. However, the appeal was not rejected because the Swiss Federal Tribunal concurred with the arbitral tribunal's reasoning as to the extension but simply for formal reasons, because the appellant did not properly state its reasons of appeal. Thus, apart from the (more general) statement as to the formal requirements for an extension of an arbitral clause to non-signatories, this decision should not be relied upon too strongly.

Said decision DFT 129 III 727 was referred to and examined in a subsequent decision of the Federal Tribunal[9], where the Federal Tribunal again emphasized that it is necessary for an arbitral clause to be extended to a non-signatory party that such party constantly and repeatedly intervened in the performance of an agreement and, by doing so, expressed its intention to become party to the arbitral agreement contained therein. In said case, the Federal Tribunal held that the fact that the non-signatory party had given the sellers of a company a guarantee on behalf of the purchaser and subsequently financed the transaction does not amount to such non-signatory party becoming party to the arbitral agreement between sellers and purchaser. The fact that the Federal Tribunal, by refer-

[9] 4P.48/2005 of 20 September 2005.

ring to decision 129 III 727, again emphasized that an involvement by a non-signatory in the negotiations and the performance of a contract alone is not sufficient for an extension of an arbitral clause shows that it is determined to follow a rather cautious approach vis-à-vis extensions of arbitral clauses.

This is also confirmed by the Swiss Federal Tribunal's decision in case 4A.128/2008 of 19 August 2008: In this case opposing a sub-contractor company from Cyprus and the main contractor company from Qatar regarding the construction of a building complex in Qatar under a construction agreement, the sub-contractor had sued the main contractor as well as the latter's (non-signatory) Italian mother company for remuneration. The involvement of the Italian mother company was based on a "Parent Company Guarantee" in relation to the construction agreement in which the Italian mother company had stated that it "will indemnify [the subcontractor] as if the Guarantor [the Italian mother company] was the original obligor". The arbitral tribunal had refused to extend the arbitral clause of the construction agreement to the Italian mother company. Upon challenge by the claimant Cyprus company, the Swiss Federal Tribunal confirmed the non-extension. It stated that a guarantee was not the same as an assumption of indebtedness and that not every security given by a third party under an agreement between two other parties entailed the extension of the arbitral clause to that third party. The Federal Tribunal held that an extension was only warranted where there existed a specific arbitral agreement with that third party, a sufficient reference to the arbitral clause in the main contract, or a sufficient expression of explicit or implicit consent to be bound by the arbitral clause. Absent any other statements by the mother company, neither the mere parent-daughter relationship nor the mere reference to the main contract in the guarantee were sufficient to justify the assumption of an (implicit) consent to be bound by the arbitral agreement.

4.2. Abuse of rights, 'piercing of the corporate veil' and 'group of companies'

The above examples show that the Swiss Federal Tribunal follows a rather cautions approach when it comes to the interpretation of statements or behaviour of non-signatories with a view to extending an arbitral clause to them. However, even where no such behaviour by the third, non-signatory party exists, such party may be bound by the arbitral clause, based on the theory of 'piercing the corporate veil', or more generally, in cases of abuse of rights, pursuant to the following argument: The autonomy of a legal entity A which is party to an arbitral agreement may be disregarded where a third, non-signatory party B is economically identi-

cal with party A and party B (ab)uses the autonomy of party A merely for the purpose of circumventing otherwise binding obligations vis-à-vis third parties or frustrate a third party's rights[10].

In this respect, the term 'piercing the corporate veil' may be misleading in two ways: On the one hand because it may designate both the reason for extending an arbitral clause to a non-signatory party as well as the ground for a cause of action on the merits against such party, and on the other hand because it may give rise to the assumption that an extension of an arbitral clause is warranted in all situations where a group of companies exists. These issues must be clearly distinguished.

First, the two different instances – jurisdiction and cause of action on the merits – must not be confused, and their separate examination may well lead to different results: While a party may be liable for damage on the basis of theories such as liability for confidence (*Haftung für Konzernvertrauen*), *culpa in contrahendo*, etc., this does not mean that such party automatically also is subject to an arbitral clause of a contract to which it is not party. Second, the mere fact alone, that a concern (i.e. a group of companies) exists does not yet lead to an extension of the arbitral clause to which a company of such group is party to other companies of such group[11].

Thus, when examining instances of 'piercing the corporate veil', two (separate) ways may lead to an arbitral clause being binding also for a non-signatory party[12]:

(i) where the 'piercing of the corporate veil' leads to disregarding the autonomy of the signatory party of the contract and, consequently, to a replacement of such signatory party as party to the contract by the controlling non-signatory party (so-called *echter Durchgriff*); or

(ii) where it can be established that such third, non-signatory party, by virtue of its own behaviour, has created the bona fide expectation that it considers itself bound by the arbitral clause and, where so found, also by the main contract; in such case the non-signatory party does not replace the signatory party but becomes an additional party to the arbitral clause.

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[10] B. Berger, F. Kellerhals, 527.

[11] *See* the decision of the Federal Tribunal in the famous Westland-case of 19 April 1994, DFT 120 II 155 etc., 172; see also the unequivocal statements of the Federal Tribunal in its decision of 29 January 1996, ASA Bulletin 1996, 496 etc., reprinted in F. Knoepfler, Ph. Schweizer, *Arbitrage International*, Zurich / Basle / Geneva 2003, 241 etc., 244; for further decisions see J.-F. Poudret, S. Besson, 234

[12] *See* B. Berger, F. Kellerhals, 530; W. Wenger, M. Schott, 29; concurring also J.-F. Poudret, S. Besson, 253.

It appears that the Federal Tribunal so far has only once accepted to pierce the corporate veil for reason of abuse of rights, in a decision of 1991[13], where the sole shareholder of a company had stripped the subsidiary of its assets and even dissolved it.

The piercing of the corporate veil was rejected in the above-referenced decision of 29 January 1996. In that decision, the Federal Tribunal also held, with regard to the group of companies doctrine, that such theory could only be applied very restrictedly and in any event only in cases where particular circumstances exist which would justify the claimant party's confidence in a situation created by the third, non-signatory party. In the referred case, no such circumstances existed as, pursuant to the findings of the arbitral tribunal to which the Federal Tribunal was bound, the claimants (subcontractors) had been aware of their counterparty being their only contractual partner and not member of the consortium of the contractors and the non-signatory mother company (itself a member of the consortium) had not interfered with the performance of the contract other than was required by its position as main contractor to the entire project[14].

5. SUMMARY

Letting aside the question of formal validity of an arbitral clause in relation to non-signatory parties, the practice of the Swiss Federal Tribunal regarding extension of an arbitral clause may be summarized as follows: A non-signatory party is obliged to arbitrate where the statements and behaviour of a such party must in good faith be interpreted so as to meaning that such party considered itself bound by the main contract as a whole or at least by its arbitral clause. Where the statements and behaviour of a non-signatory party may not in good faith be interpreted so as to meaning that such party considered itself bound by the arbitration agreement and/or the main contract, this party may nevertheless be obliged to arbitrate if it has abusively relied on and invoked the autonomy of the signatory party and therefore must, based on the theory of 'piercing the corporate veil', itself be considered to be bound by the arbitration clause as well as the main agreement. This latter argument also applies to the situation where, in a group of companies, a non-signatory party, by its behaviour and statements, has created a bona fide expectation which would justify an extension of the arbitral clause to such party.

The above-referenced cases and the summary show that there exists no objective standard which would be applied by the Swiss Federal

[13] *ASA Bulletin* 1992, 202, reported in J.-F. Poudret, S. Besson, N 259.

[14] *See* F. Knoepfler, Ph. Schweizer, 244.

Tribunal to statements or behaviour of a non-signatory party. Rather, the Federal Tribunal's reasoning may be put in the short formula that the decisive factor is the "fair and reasonable expectations" of the parties involved in the dispute. In other words, it does not suffice to examine what has been said or done by a non-signatory party, it must also be taken into account vis-à-vis whom such statement or action was made or was intended to be made. Only the combination thereof would lead the Swiss Federal Tribunal to confirm the extension of an arbitration agreement also to a non-signatory.

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MULTI-PARTY ARBITRATION: THE ORGANISATION OF MULTI-PARTY PROCEEDINGS – THE PROBLEMS FACED BY PARTIES AND ARBITRATORS

An inquiry into what problems are faced by parties and arbitrators in multi-party arbitrations must start with the question: When are there more parties involved in arbitration proceedings? Thus the circumstances that give rise to "multi-party arbitration" are identified, and the background to such issues as the perennial questions of "When may an arbitration clause be extended to non-signatories?" and "When may the proceedings be extended to others involved in the same economic transaction?" are covered with reference to some of the key cases that instigated a change of approach.

The organisation of the arbitral proceedings in such multi-party arbitral proceedings is then examined, first from the point of view of the parties and then from the point of view of the arbitral tribunal.

From the point of view of the parties the issue of appointment of the arbitrators and the setting up of the arbitral tribunal is discussed, and reference is made to the specific provisions of various institutional rules regarding multi-party arbitral proceedings. The alternatives that are available and what is advisable are discussed. The possibilities of consolidating parallel proceedings and the advisability of thus creating multi-party proceedings, are looked at, again with reference also to the provisions of the rules of various arbitral institutions.

What the arbitral tribunal needs to be aware of in the multi-party situation is also examined, particularly the necessary step of establishing jurisdiction. The establishment of specific issues to be dealt with in a logical order so that parts of a dispute may be dispensed with is recommended and the steps that can be taken to minimise the difficulties that arise from separately conducted parallel proceedings are enumerated. The article identifies that from the point of view of the arbitral tribunal the need to ensure that due process is observed, so that any difficulties with regard to enforcement are minimised, must be constantly taken into account, with a heightened awareness of equal treatment of the various parties.

The conclusion is drawn that multi-party arbitration is on the increase as a result of the more complex economic structures that are now a standard in commercial life. The arbitral community seeks to show that arbitration is the dispute resolution of choice but with more complex, multi-party multi-contract disputes this challenge is now greater than ever. The use of institutional rules is recommended to prevent frustration and delay, and the need for arbitral tribunals to keep themselves informed and be alert to the needs of the parties is emphasised.

Key words: *Multi-party arbitration – Multi-contract – Extension to non-signatory – Connected agreements – Parallel proceedings*

1. INTRODUCTION

This Chapter is based on the talk given at the First Belgrade International Arbitration Conference on 27 March 2009. As stated at the beginning of the presentation in Belgrade, the topic of Multi-Party arbitration is so huge that enormous books, large legal tomes, that have included the writings of some of the most eminent practitioners in International Arbitration, have been written on the subject[1], and so to encapsulate the topic in a presentation of 15 minutes was a challenge indeed.

The topic had been chosen as it was one of the issues in this year's VIS International Commercial Arbitration Moot problem. On the basis that not all in the very large audience were well versed in the intricacies of International Arbitration, and considering it too limiting, and indeed perhaps confusing to focus on one aspect of the problem without presenting something of the big picture to start, therefore for those who were not necessarily that familiar with the issue, a brief outline of how Multi-Party Arbitration could come about was first given, setting the context., Since the presentation was included in the section on procedural issues, under the heading "The organisation of multi-party arbitration", a summary of the problems faced by both parties and arbitrators in terms of the organisation of the proceedings was then set out. A particular indebtedness to a former CMS colleague and one of the most respected authorities on multi-party arbitration, Bernard Hanotiau, for his advice and support, and his writings on the subject was acknowledged. The structure of the presentation, for which Bernard's logical approach was followed [2], is repeated in this chapter, but with a bit more "flesh on the bones" than was possible at the conference in Belgrade.

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[1] See most recently *Multiple Party Actions in International Arbitration*, Oxford University Press, 2009.

[2] See B. Hanotiau, *Complex Arbitrations– Multiparty, Multicontract, Multi-issue and Class Actions*, Kluwer, 2005; B. Hanotiau, "Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties– Issues: An Analysis", *Journal of International Arbitration* 3/2001, 251–360.

2. THE CONTEXT OF MULTIPLE PARTY ARBITRATION – WHY WOULD THERE BE MORE THAN TWO PARTIES TO THE ARBITRATION PROCEEDINGS?

2.1. Who are the parties to the contract(s) or to the arbitration clause(s) contained therein?

When drafting a contract the parties include a dispute resolution clause and if they decide on arbitration it is an accepted legal principle that this clause, containing the agreement to go to arbitration, is an agreement in its own right, separable from the main contract. Thus if the parties have signed the contract containing an arbitration clause those signatories of the contract are bound to arbitrate any dispute arising out of that contract, and not turn to, for instance, the local courts.

The question arises: How can there be an extension of the arbitration clause to further parties? That is those who have not signed the arbitration agreement. Generally speaking only those who have signed, and therefore, consented to arbitration, can be forced to arbitrate the dispute. However, it could be that that those who formally signed the contract are not the real parties to the agreement, or at least not the sole parties to it.

The legal principles of:

- Representation and agency
- Third-party beneficiaries and guarantee clauses
- Universal and individual transfers
- Estoppel
- Incorporation by reference
- Consent or conduct as an expression of implied consent or as an alterative to consent

have all been relied upon to extend the arbitration clause to another party and so one may end up with more parties than two who are then required to resolve the dispute by arbitration.[3]

2.2. May an arbitration clause be extended to non-signatories within a group of companies: other companies of the group, directors, and/or shareholders?

The relatively common situation resulting in a claimant introducing more respondents to the proceedings than simply the other party that signed the contract is where the claimant is looking to another corporate entity related to the contractual partner, which it considers has deeper

[3] *Ibid.*

pockets/a sounder financial base, to cover the sums due. Equally, once a claimant has commenced proceedings the respondent may seek to counterclaim and include a related company or shareholder of the original claimant as a party to the arbitral proceedings.

Thus a whole series of possibilities arise, but the factual schemes can be divided into two groups, one relating to the extension of the clause to one or several non-signatories as additional defendants/respondents, namely:

- *Extension to the parent company*
- *Extension to one or more subsidiaries or one or more companies of the group which are not subsidiaries*
- *Extension to a sister corporation and an employee*
- *Extension to a director or general manager*
- *Extension to an individual (possibly a majority shareholder of the group) or another company within the group*

And the other to the extension to one or more non-signatories as additional claimant (s), namely:

- *Extension to the parent company*
- *Extension to an individual (possibly a majority shareholder of the group) and another companies within the same group*
- *Extension to one or more subsidiaries or one or more companies within the group which are not subsidiaries*
- *Extension to a director and principal shareholder*

This aspect of the topic had been covered at the conference with reference to specific situations in the excellent presentation of Dr Michael Mraz, "The extension of an Arbitration Agreement to non-signatories", in the session on "Foundations: the arbitration agreement and arbitrability". He had shown with detailed diagrams exactly how one could end up with non-signatories being the actual "partner", and so have reason to have them drawn into the arbitration proceedings.

The topic of non-signatories stands alone and much has been written on it,[4] but it provides for a host of situations which could result in more than two parties being parties to the arbitration clause and the subsequent arbitral proceedings.

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[4] See for instance W. W. Park *Non-Signatories and International Contracts– An Arbitrator's Dilemma* in *Multiple Party Actions in International Arbitration*, Oxford University Press, 2009; W. W. Park "Non-Signatories and International Arbitration" in: L. W. Newman, R. D. Hill (eds.), *The Leading Arbitrator's Guide to International Arbitration*, 2008²; B. Hanotiau, "Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law"*, ICCA Congress Series*, 13/2007.

2.3. The possibility of bringing together in one single proceedingall the parties who have participated in the performance of one economic transaction through interrelated contracts.

Often one has the situation that there is an awareness, right at the start of a project, by those participating that, where there are a series of contracts, since the contracts are interlinked, a multi-party arbitration clause may be needed. Indeed often the arbitration clause in the different contracts is sensibly identical, referring to the same institution which is to administer the arbitral proceedings, but equally, sometimes, rather confusingly, different arbitration clauses, referring to different institutions, are used. In any event there is still debate as to the efficiency of bringing together disputes that arise in one project or one economic transaction out of different contracts in a group of interrelated contracts. Further, it has to be remembered that despite the fact that there are interrelated contracts a dispute may arise solely between two parties and it does not follow that there is automatically a multi-party dispute.

These groups of contracts may arise out of various contractual schemes, the most common being the following three contractual arrangements:

- A B and C are members of a consortium but all sign different contracts; a framework agreement or a cooperation agreement, a joint venture agreement, and/or specific contracts.
- A signs a contract with B, one with C and one with D (horizontal unit) (e.g. an Employer signs Contract 1 with the architect, Contract 2 with the construction company and Contract 3 with the consulting engineers).
- A signs a contract with B, B a contract with C and C a contract with D (vertical unit)

The facts of the dispute will dictate which parties are included in the arbitral proceedings and there can be no hard and fast rule. Construction projects will typically have a series of interrelated agreements, for instance the "vertical unit" referred to above is a typical construction project situation where the Employer/Owner contracts with a construction company, which itself then subcontracts the whole undertaking to a subcontractor, and the subcontractor in turn further subcontracts on different parts of the project.

From an analysis of case law, making reference here to only a couple of the landmark decisions, looking at a tiny fraction of the relevant cases,[5] one may observe that arbitral proceedings relating to disputes concerning multiple parties in these groups of contracts situations have been commenced where:

[5] See B. Hanotiau, (2001), 304–329.

– The parties are different but the contracts contain the same arbitration clause or the clauses are compatible.

It will always depend on the facts of the case and the issue in dispute, but nevertheless there will not be an automatic assumption that there is a multilateral contract simply because the various contracts contain the same arbitration clause.[6]

– The parties are different and the contracts do not contain identical or compatible arbitration clauses.

The argument being that even where the parties are different and the contracts have differing arbitration clauses, nevertheless the dispute relates to the one and same project and should be decided in one proceeding. However, despite a decision by an arbitral tribunal that it had jurisdiction in relation to complimentary and interdependent contracts, the award rendered in the *Sofidif* ICC arbitration[7] was annulled by the Paris Court of Appeal on the basis that a single arbitration could only take place with the consent of all the parties concerned.

– The parties are the same and they have concluded two or more contracts, one without an arbitration clause, or containing a clause which gives jurisdiction to national courts, or another incompatible arbitration clause.

The decision as to whether a dispute arising out of two or more agreements between the same group of parties, where one lacks an arbitration clause, may be the subject of a single arbitral proceeding and be decided upon together, will ultimately depend on an interpretation of the will of the parties. A succession of cases has shown that this is indeed possible.[8]

The questions which have arisen have included:

– May an arbitral tribunal hearing a dispute which arises principally from a specific contract decide issues arising from connected agreements entered into by the same parties?

Arbitral tribunals which have established their jurisdiction under an arbitration clause will generally extend their jurisdiction to disputes arising under a closely connected agreement between the same parties even if it does not contain an arbitration clause. This has occurred in a number of cases, including ICC Case No. 7929 of 1995[9] where a Finnish com-

[6] See for example *Yearbook of Commercial Arbitration*, 22/1997, 191.

[7] For references and comment see E. Gaillard, "L'affaire Sofidif ou les difficultés de l'arbitrage multipartite", *Revue de l'Arbitrage*, 1987, 2759; Y. Derains, E. Schwartz, *A Guide to the ICC Rules of Arbitration*, Kluwer, 2005²

[8] See *Revue de l'Arbitrage* 1992, 66; *Revue de l'Arbitrage* 1997, 535; Société Firma Waibel v. Käüffer, *ASA Bull.* 2000, 381; *Revue de l'Arbitrage* 2000, 501

[9] ASA Bull. 1996, 544; Yearbook of Commercial Arbitration 25/2000, 312.

pany and its wholly owned subsidiary commenced arbitration proceedings in Zurich against an Oregon Corporation based on a series of agreements, where one agreement contained an arbitration clause and another did not. The arbitral tribunal rendered an award determining that it had jurisdiction over any claims arising from the second agreement "if and to the extent it is shown to be part of a unified contractual scheme" with the first agreement. To define the phrase "unified contractual scheme" the arbitrators had referred to the definition used by Craig, Park and Paulsson: "Complex situations where numerous contractual documents relate to one or organic relationship."[10]

– May an arbitral tribunal hearing a dispute which arises principally from one or more contracts decide issues arising from one or more connected agreements when the latter do not bind all the parties to the first agreements or also bind one or more persons who are not parties thereto?

In ICC Case No. 6230 of 1990,[11] concerning a main contract, incorporating the FIDIC conditions of contract, and a sub-contract, relating to the construction of a power plant, where both contracts contained the identical arbitration clause, the arbitral tribunal found that it had jurisdiction and held that the claimant, the sub-contractor, was entitled to compensation from the respondent, the main contractor, despite the fact that payments to the sub-contractor had been made dependent on receipt of payment from the owner, (which was now in financial difficulty). However, in another case concerning this issue, ICC case No. 6829 of 1992[12] the arbitral tribunal held that if a number of parties conclude a series of contracts which are interrelated this does not of itself allow the arbitral tribunal to extend its jurisdiction based on one contract to another contract to which only one of the parties to the arbitration is a party.

One last point that needs to be considered in this section is the intervention of third parties, in particular as a result of national legislative provisions which allow a third party to intervene. Generally speaking, however, the joinder to the arbitral proceedings of a third party will require the consent of both parties to the arbitration and the consent of the arbitral tribunal.

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[10] L. W. Craig, W. W. Park, J. Paulsson, *ICC Arbitration*, 2000[3].

[11] Yearbook of Commercial Arbitration 17/1992, 164.

[12] Yearbook of Commercial Arbitration 19/1994, 167.

3. THE ORGANIZATION OF MULTI-PARTY ARBITRAL PROCEEDINGS – WHAT DOES A PARTY STARTING PROCEEDINGS NEED TO DO?

3.1. The Setting up of the Arbitral Tribunal in Multi-Party Arbitration –The Appointment of Arbitrators

Once the decision is taken to commence arbitration, following a dispute arising, regardless of whether there are only two parties or whether there are more, the first step, together with the filing of the Request for Arbitration itself, is deciding on the appointment of the arbitral tribunal, with the party commencing arbitration having to nominate "its" arbitrator for the arbitral tribunal, consisting of three arbitrators, or agree on a sole arbitrator. It is accepted practice that the claimant must name its arbitrator already when actually commencing the arbitration proceedings.

There are various options open to the claimant in arbitration proceedings, regardless of how many parties there are to the proceedings, namely:

- Appointment of a Sole Arbitrator
  - By agreement of the parties.
  - By an arbitral institution, either by agreement of the parties or in default of an appointment by the parties.
- Appointment of an Arbitral Tribunal of three members – (only one arbitrator appointed for claimant and one for respondent)
  - In the situation where there is one claimant and one respondent each party nominates its arbitrator, in default of an appointment, e.g. by a non-participating respondent, the arbitral institution may make an appointment.
  - In the situation where there is more than one claimant there needs to be agreement by all claimants on the appointment of "the arbitrator nominated by claimant", similarly if there is more than one respondent agreement by all respondents on the appointment of "the arbitrator nominated by respondent."
  - Agreement that an arbitral institution appoints all three members of the arbitral tribunal.

There is generally a great desire by a party to be instrumental in the choosing of "its" arbitrator. In the context of multi-party arbitration this becomes even more contentious – there may well be a conflict of interest, with the different claimants, or different respondents, not necessarily agreeing on who would be the best person for the job.

3.2. Specific provisions on setting up the Arbitral Tribunal under the Applicable Rules – What do the Rules say?

In each case the actual arbitration clause agreed upon by the parties will determine how the parties are to go about choosing their tribunal and reference will be made to the institutional rules chosen.

Looking specifically at the Rules most likely to appear in an arbitration clause in a dispute arising out of a contract in this geographical part of the world, the Central and Eastern European region, one can identify the following clauses dealing with Multi-Party arbitration:

3.2.1. ICC Rules (1998) – Article 10[13]

The issue of appointment by an arbitral institution became the subject of fierce debate as a result of the *Dutco* case (Cour de Cassation decision January 1992[14]) following the decision taken by the ICC at the time. It was the ICC Court practice to require the multiple parties named as either claimant or respondent to nominate an arbitrator jointly, failing which the Court would designate an arbitrator on their behalf[15].

The facts of the *Dutco* case are that ICC arbitration was commenced by Dutco one of three consortium partners, against its partners BKMI and Siemens in connection with a dispute concerning a cement plant in Oman. BKMI and Siemens contested the admissibility of the Request for Arbitration and required that Dutco file two separate Requests for Arbitration, one against each of the consortium partners. A joint nomination of arbitrator was made under protest, with a tribunal then being constituted following appointment of the third arbitrator by the ICC Court. This tribunal then rendered an Interim Award finding that it had been properly constituted, considering that the then article in the ICC Rules concerning the appointment of an arbitrator by multiple parties did not conflict with any rule of public policy or general principles of equality as

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[13] Article 10 – Multiple Parties

"*(1) – Where there are multiple parties whether as Claimant or as Respondent, and the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.*

(2) – In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate."

[14] Sociétés BKMI et Siemens c/ société Dutco, Cour de cassation (7 January 1992), *Revue de l'Arbitrage* 1992, 470.

[15] See S. Bond The Experience of the ICC International Court of Arbitration, Multi-party Arbitration, ICC Publishing, 1991.

argued by BKMI and Siemens, and thus the arbitral proceedings could validly continue against both BKMI and Siemens.[16]

BKMI and Siemens applied to the Paris Court of Appeal to have the award set aside, on the grounds that the arbitral tribunal was irregularly constituted and that recognition of the award was contrary to international public policy. The Court of Appeal found that the tribunal had been properly constituted and that there had been no violation of public policy. The court reasoned that the arbitration clause between the parties itself was intended to cover disputes involving all three of the parties and it was clear from the clause agreed that they would not each be able to designate an arbitrator. Before the Court of Cassation the judgment of the Court of Appeal was annulled, leaving however the arbitral award itself intact, but remanding the matter for re-hearing before the Court of Appeal of Versailles. Although the parties then settled their dispute amicably and a final answer on the issue was not obtained through the courts, the litigation attracted considerable attention and resulted in the ICC Rules being re-drawn and the emergence of a new provision, the current Article 10. Article 10(1) re-states the general rule, that multiple parties, whether claimant or respondent shall jointly nominate an arbitrator, but Article 10(2) now provides the Court with the power to appoint all members of the arbitral tribunal in the absence of an agreement of all the parties on the joint nomination. With this provision, in the absence of agreement by the parties, the appointment by the Court of all the arbitrators in the tribunal means that all the parties are treated equally, and the arguments raised in the *Dutco* case are overcome.

It should be noted, however, that the current Article 10(2) of the ICC Rules is drafted in such a way as to allow for a certain discretion on the part of the Court and is not intended to apply automatically in all cases where multiple parties fail to make a joint nomination. With the use of the word "may" it was intended that the Court look at each matter on a case by case basis.

3.2.2. LCIA Rules (1998) – Article 8[17]

The LCIA Rules equally now provide for the appointment of all members of the arbitral tribunal by the institution, disregarding any nomination made by an individual party in the absence of agreement by all the

[16] See Y. Derains, E. Schwartz.

[17] Article 8 Three or More Parties

"1) Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator and the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent two separate sides for the formation of the arbitral tribunal as Claimant and Respondent respectively, the LCIA Court shall appoint the arbitral tribunal without regard to any party's nomination.

parties. However, here the article provides for a mandatory appointment, the LCIA Court "shall" appoint the arbitral tribunal.

3.2.3. Swiss Rules (2004) – Article 8[18]

The new combined Swiss Rules of 2004 incorporate the same idea of allowing the institution to appoint all three members of the arbitral tribunal where the parties are not in agreement on the appointment of the arbitrator/s, but have chosen to use the word "may", and therefore imply a discretionary power rather than a mandatory power[19].

3.2.4. Vienna 2006 Rules

Article 15 of the new Vienna Rules of 2006 provide a detailed clause on multi-party arbitration[20].

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(2) In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the appointment of the Arbitral Tribunal by the LCIA Court."

[18] Article 8 Appointment of Arbitrators in Bi-Party and Multi-Party Proceedings

"(3) In multi-party proceedings, the arbitral tribunal shall be constituted in accordance with the parties' agreement.

(4) If the parties have not agreed upon a procedure for the constitution of the arbitral tribunal in multi-party proceeding, the Chambers shall set an initial thirty-day time limit for the Claimant or group of Claimants to designate an arbitrator and set a subsequent thirty-day time limit for the Respondents to designate an arbitrator. If the group or groups of parties have each designated an arbitrator, Article 8 paragraph 2 shall apply by analogy to the designation of the presiding arbitrator.

(5) Where a party or group of parties fail(s) to designate an arbitrator in multi-party proceedings, the Chambers may appoint all three arbitrators and shall specify the presiding arbitrator."

[19] For other arbitration rules with a mandatory power see Article 6(5) of the AAA International Arbitration Rules and Article 18 of the WIPO Arbitration Rules.

[20] For commentary see F. Schwarz, C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria*, Kluwer, 2009. The text of Article 15 reads as follows:

Article 15 – Multiparty Proceedings

(1) A claim against two or more Respondents shall be administered only if the Centre has jurisdiction for all of the Respondents, and, in the case of proceedings before an arbitral tribunal, if all Claimants have nominated the same arbitrator, and:

a) If the applicable law positively provides that the claim is to be directed against several persons; or

b) If all Respondents are by the applicable law in legal accord or are bound by the same facts or are joint and severally bound; or

c) If the admissibility of multiparty proceedings has been agreed upon; or

3.3. The possibilities of consolidating parallel proceedings – Additional Parties to the arbitral proceedings

Again whether the parties may consolidate parallel proceedings will depend on what they have themselves agreed in the initial arbitration clause and the institutional rules they have chosen. From the point of view of Counsel for a party the merits of consolidation need to be considered carefully. When drafting the arbitration agreement in a multiple, related contract situation three complications arise:

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d) If all Respondents submit to multiparty proceedings and, in the case of proceedings before an arbitral tribunal, all Respondents nominate the same arbitrator; or

e) If one or more of the Respondents on whom the claim was served fails or fail to provide the particulars mentioned in Article 10 paragraph 2, b) and c) within the thirty-day time limit (Article 10 paragraph 1).

(2) Where a claim against a number of Respondents cannot be served on all Respondents, the arbitral tribunal shall, upon application of the Claimant (the Claimants), be continued against those Respondents on whom the claim was served. The claim against those Respondents to which the claim could not be served shall be subject to separate proceedings.

(3) If multiparty proceedings are admissible, the Respondents must agree among themselves whether they wish to have the dispute decided by one arbitrator or by three arbitrators, and, if a decision by three arbitrators is desired, must jointly nominate an arbitrator.

(4) In the case covered by paragraph 3 of the present Article, if there is not agreement among the Respondents concerning the number of arbitrators, the respondents shall be requested by the Secretary General to provide evidence of such agreement within 30 days after service of the request.

(5) If no evidence of agreement on the number of arbitrators is presented within the period mentioned in paragraph 4 of the present article, the board shall determine whether the dispute is to be decided by one arbitrator or by an arbitral tribunal.

(6) If the Respondents have agreed that the dispute is to be decided by an arbitral tribunal, but without nominating an arbitrator, they shall be requested by the Secretary General to indicate the name and address of an arbitrator within thirty days after service of the request.

(7) If no arbitrator is jointly nominated within the period mentioned in paragraph 6 of the present Article and if the dispute is to be decided by an arbitral tribunal, the Board shall appoint the arbitrator for the defaulting Respondents.

(8) In cases other than those mentioned in paragraph 1 of the present Article, the consolidation of two or more disputes shall be admissible only if the same arbitrators have been appointed in all the disputes that are to be consolidated and if all parties and the sole arbitrator (arbitral tribunal) agree.

(9) The decision whether multiparty proceedings, as per paragraph 1 of this Article, are admissible, shall be taken by the sole arbitrator (the arbitral tribunal) upon application of one of the Respondents. If the admissibility of multiparty proceedings is denied the arbitral proceedings return to the stage they were in for the Respondents before the sole arbitrator (the arbitral tribunal) was appointed.

- All the related contracts must have identical or complimentary arbitration clauses. While courts in certain jurisdictions have a discretion to order consolidation of related arbitrations, they will not necessarily do so where the parties have provided for inconsistent arbitration proceedings.[21]
- The parties must provide a procedure for consolidation, taking into account a wide range of circumstances, including the risk of multiple and overlapping proceedings being commenced before multiple arbitral tribunals.
- When the related contracts involve more than two parties, as will often be the case, the parties must take into account that there will be a multi-party situation and all that that brings with it.[22]

The recommendation is that a separate stand alone protocol setting out the arbitration agreement is obtained and signed by each relevant party.[23] Alternatively a consolidation clause may be included or a fall back option.[24]

Joining an already existing set of arbitration proceedings will require the consent of all concerned, in keeping with the consensual nature of arbitration. Here a party will need to be aware of the stage of the existing arbitration proceedings; new claims cannot and should not be introduced at an advanced stage of the arbitration. Under the ICC Rules this introduction of new claims is formally not allowed after the signing of the Terms of Reference; and generally speaking it is from a practical point of view not a good idea as this new element, and the need to decide on how the process shall continue is likely to hinder the efficiency and speed of resolving the dispute in hand. Taking into consideration, of course, that one wants a matter resolved speedily – this however, may not always be the case and tying up all the loose ends, for instance, may be the prime concern.

Parties should be made aware that in a project or transaction involving multiple parties and multiple contracts, international arbitration may in fact be a definite disadvantage compared to litigation, since consolidation of related arbitral proceedings is not automatic and cannot be assured with an absent party, bearing in mind the need for consent, and may therefore easily result in inefficiencies and delay.

The relevant institutional rules may have specific provisions that would assist consolidation and joinder as always it is necessary to refer to

[21] E. Gaillard, J. Savage (eds.), Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, 518–524.

[22] P. D. Friedland, Arbitration Clauses for International Contracts, Juris 2007, 135–136.

[23] *Ibid.*,136.

[24] For examples of such clauses see *Ibid.*, 137–141.

the provisions in the applicable Rules. The ICC is considered to be a consolidation friendly institution and therefore inclusion of a long clause in the original contract may in fact be unnecessary, bearing in mind that it is difficult to predict what exact constellation of dispute will occur and where consolidation is advisable, thus leaving it to be decided on an ad hoc basis once the dispute has arisen, taking into account the fact that the parties must in any case consent.

Looking at the institutional rules most used in the Central and Eastern European area (ICC Article 4(6)[25], LCIA Rules Article 22[26] and Article 4 of the Swiss Rules[27]), the Swiss Rules take the matter of joinder of proceedings further, but it nevertheless remains a discretionary matter, ultimately requiring the consent of all the parties involved.

3.4. Cross-Claims

When there are claims between Respondents the question is should separate proceedings be brought. Counsel for the party will need to de-

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[25] *"When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19."*

[26] Article 22 Additional Powers of the Arbitral Tribunal

Article 22 (h) – to allow, upon the application of a party, one or more third persons to be joined in the arbitration as a party, provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.

[27] Article 4 Consolidation of Arbitral Proceedings (Joinder) Participation of Third Parties

(1) Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Chambers may decide, after consulting with the parties to all proceedings and the Special Committee, that the new case shall be referred to the arbitral tribunal already constituted for the existing proceedings. The Chambers may proceed likewise where a Notice of Arbitration is submitted between parties that are not identical to the parties in the existing arbitral proceedings. When rendering their decision, the Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings. Where Chambers decide to refer the new case to the existing arbitral tribunal, the parties to the new case shall be deemed to have waived their right to designate an arbitrator.

(2) Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

cide whether the matter will be dealt with more speedily in separate arbitral proceedings, if that is the ultimate aim of the party. This is really a matter to be decided on a case by case basis. It must be understood that from a procedural point of view, in any event in order to simplify dealing with the issues in dispute, the arbitral tribunal is likely to separate the disputes between different parties depending on the actual issues (see below).

4. THE ORGANIZATION OF MULTI-PARTY ARBITRAL PROCEEDINGS – WHAT CAN THE ARBITRAL TRIBUNAL DO?

4.1. The Organisation of the Arbitration Proceedings by the Arbitral Tribunal

The Arbitral Tribunal will receive the file and on seeing that here one has proceedings with a long list of parties – what does the Tribunal do? Whilst observing the standard procedure of having a preparatory conference to discuss the conduct of the proceedings with the parties, in multi-party proceedings the first step will be to establish whether all parties have been correctly included as parties to the arbitration proceedings.

As has been identified above although a party may have not signed the original arbitration agreement there may be circumstances which make it nevertheless a party to that agreement and fully justify its inclusion in the arbitral proceedings. Equally it is inevitable that a party that has not signed the agreement that contained the arbitration clause, a non-signatory, will raise the defence that it cannot be a party to the arbitration since it never agreed to be bound by an arbitration agreement.[28]

Hence as a first step the Arbitral Tribunal must establish its jurisdiction over all the parties. Thereafter it should look at any specific issues which typically arise when there are more that two parties in dispute and the arbitral tribunal will then want to find ways and means of minimising delays caused by and the difficulties that arise when there are separate parallel proceedings concerning the same or similar issues in dispute between the parties.

4.1.1. Establish Jurisdiction– Establishing who is a party to the arbitral proceedings– that is over whom does the arbitral tribunal have jurisdiction.

Ideally the jurisdictional issue should be dealt with as a preliminary step – with separate briefs/ submissions by the parties concerned, and a hearing simply on jurisdiction if necessary. Following which the arbitral

[28] See the situations identified in Section A I-III, above.

tribunal should then render an Award on Jurisdiction. Including a party in proceedings on the merits, where that party objects to its involvement, leaving a decision on the validity of the participation of that one party until the final award raises a costs issue, and can even raise problems with regard to the enforceability of that final award. It is wise, therefore, for a tribunal to deal with this issue of jurisdiction as a first step, rather than forcing a party to participate on the merits.

The preparation of the jurisdictional side of the proceedings will follow the same standard practice as that necessary in the resolution of the dispute on the merits.[29] Thus a procedural timetable, establishing the sequence of exchange of briefs by the parties, and when and how evidence (documentary and witness evidence as necessary) is to be presented, will need to be agreed with the parties. All the practical matters that would need to be covered in respect of a hearing on the merits would need to be dealt with. Here, however, with the issue in dispute being limited to jurisdiction of the arbitral tribunal over one or other particular party.

The arguments that can be raised for and against establishing jurisdiction have been covered in section A above, setting out why there might be more parties to the arbitral proceedings. A respondent party that has been named as one of several parties in the Request for Arbitration but which did not sign the agreement containing the arbitration clause will want to present evidence in support of its position that it cannot be made party to the arbitral proceedings. Ultimately each matter will revolve around its own facts and whilst efforts are made by arbitral tribunals to be consistent with previous decisions, there still is no rule of precedent requiring an arbitral tribunal to follow a particular course and an arbitral tribunal is free to distinguish a matter on the facts of the case.

4.1.2. Look at Specific Issues

The difficulty of multi-party arbitration is that the different disputes may have become a tangled web and it is difficult to see what gave rise to what. It still remains doubtful as to whether a multi-party arbitration will be more efficient and faster than commencing individual arbitrations for the individual claims.[30] As in any arbitration, however, the easiest and most efficient way to proceed is to establish a list of the issues in dispute as early as possible. The arbitral tribunal is then likely to deal with different sets of issues in stages, always with the agreement of and after consultation with the parties, hopefully in a logical order.

[29] For the organisation of proceedings in International Arbitration generally *see* A. J. van den Berg, "Organizing an International Arbitration: Practice Pointers", in L. W. Newman, R. D. Hill.

[30] J. G. Frick *Arbitration and Complex International Contracts*, Kluwer, 2001.

Specific issues which may arise in the course of the arbitral proceedings

- Opposability of the name-borrowing provision
- Pass-through claims
- Direct action of the subcontractor against the employer
- Determination of the law applicable to the various contracts within the contractual chain
- Joint responsibility for debts incurred by a company of the group and set-off

4.1.3. Minimise the difficulties which can arise from separately conducted parallel arbitral hearings

The initiative to minimise the difficulties associated with parallel proceedings lies with the parties themselves in that at the outset they may appoint either the same arbitrators, or at least the same chairman as in the already existing proceedings.

The question is do the parties want the knowledge and information gained in one arbitration to be available in the other arbitration. Information available to an arbitrator can sometimes in fact quite unwittingly impede his/her ability to remain completely impartial.

Listing the problems that are likely to arise and how they can be avoided:

Communication of information or documents obtained in another arbitration.

The question will always be to what extent may there be a communication of information or documents obtained in another arbitration, and confidentiality issues will arise, this issue must be resolved with the consent of the parties involved.

Independence and impartiality of the arbitrators

Clearly the independence and impartiality of the arbitrators appointed in parallel cases must be unquestionable, and not give rise to any later ground for challenge of the award.

Nomination of same technical expert

By nominating the same technical expert the risk of inconsistent assessments is avoided. Generally, particularly in common law based arbitral proceedings the onus will be with the parties themselves to facilitate this side of presenting the evidence, but where an expert is appointed by the arbitral tribunal, as is likely to happen in proceedings with a civil law based tribunal, then it would be necessary for the tribunal to inform itself on who the technical experts in the parallel proceedings are.

Fixing the timetable for the proceedings so that no pre-judgment of certain common issues takes place

An arbitral tribunal can make an informed scheduling of the sequence of dealing with the issues in a multi-party dispute, so that by fixing the timetable with deadlines for Briefs, submission of evidence, hearing of witnesses etc established in such a way it does not result in prejudgment of any issue, which logically needs further evidence and debate.

The classic way of dealing with this problem is bifurcation – breaking up the proceedings into issues which can be resolved by Partial Award. This generally has the advantage of also assisting the parties to then reach a settlement, as once certain issues are dealt with the remaining contentious business may no longer have the same paralyzing effect, allowing the parties to resolve the matter themselves.

4.1.4. Be aware of the effects on Enforcement of the Arbitral Award

Finally, but by no means to be ignored, is the fact that multi-party proceedings raise issues with regard to enforcement of the arbitral award, specifically the equal treatment of the parties. Particular attention must, therefore, be paid to and there should be an all-prevailing awareness by the arbitral tribunal of the need to respect due process with equal treatment of the parties.

More than ever in multi-party arbitration the grounds for refusal of enforcement under Article V of the New York Convention must be at the forefront of the minds of the arbitral tribunal.

Additionally there should be an awareness of the Res Judicatur effect of an award rendered elsewhere in an arbitration arising from the same project, although there is still the difficultly of lack of a doctrine of precedent and, therefore, it is certainly not clear that an arbitral tribunal is bound by the decision of another arbitral tribunal.

5. CONCLUSION

Multi-party arbitration is on the increase, with more complex economic constellations having now become standard in commercial life. The ICC considers that one third of arbitrations now involve a complex multi-party, multi-contract issue. Further, multi-party arbitration presents even greater challenges to arbitrators and the arbitral community, seeking to show that international arbitration is the dispute resolution procedure of choice.

What conclusion can be drawn with regard to optimising the organisation of multi-party arbitration proceedings? Clearly Institutional Rules agreed by the parties in the arbitration clause assist in preventing delay and frustration of proceedings. Although generally there is some sort of recourse to local courts for assistance with the appointment of arbitrators, as a rule this is considered inadvisable, and certainly time consuming. Therefore, from the claimant's point of view, any such delaying tactics are best avoided by having a clear agreement on institutional rules in the arbitration agreement included in the contract between the parties right at the start.

At the end of the day however, how one best handles complex or parallel proceedings in the interests of the administration of justice will turn on the facts of each case, it is the experience and awareness of the arbitral tribunal, its sensitivity to and its ability to keep itself informed of all the issues between the parties, that will determine how quickly and efficiently the disputes will be resolved.

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ARBITRATION AND INSOLVENCY PROCEEDINGS

In international arbitration, insolvency proceedings pertaining to the estate of a party can have diverging and unpredictable effects: Does the arbitration clause remain valid? Does insolvency result in a stay of pending arbitration? Do national insolvency proceedings acknowledge an arbitral award, in particular for verification purposes? No uniform answer is possible, as most recently demonstrated by the matter Elektrim vs Vivendi. The need for an international Convention going beyond the EC Regulation on Insolvency Proceedings is evident.

Key Words: *Arbitrability – Bankruptcy – EC Regulation on Insolvency Proceedings – Insolvency – Jurisdiction*

A scarcely strewn topic where arbitration and national law can get into conflict is the opening of insolvency proceedings. Some years ago it was seen as an outlandish and somewhat odd issue to deal with. In our days it has become more and more widespread, and it is worth to take a thorough look at it. The most pressing questions of law, regarding insolvency proceedings in connection with arbitration, evolve from the fact that arbitration mostly handles international matters so that different jurisdictions, procedural provisions, private international laws and insolvency regulations as well as arbitration laws are concerned.

Most legal systems differ between bankruptcy (forced liquidation) and reorganization of the debtor. While the reorganization imposes restrictions on the management but allows business to continue, bankruptcy in most cases goes along with the liquidation of the company and the appointment of a receiver, excluding management from representing the company. Insolvency proceedings are based on the principle of *par conditio creditorum*, the collective enforcement of creditors' claims and equal treatment (centralization). Therefore the bankruptcy proceedings are conducted by a state court to protect the legitimate expectations of the parties

involved and the certainty of transactions. Arbitration, on the other hand, excludes state courts and, moreover, follows a completely different legal principle: *Pacta sunt servanda* (decentralization). An arbitration clause constitutes an "agreement" and thus emphasizes the parties' autonomy in pursuing their rights. So it is quite natural that certain strains arise between the concept of arbitration and the principle of collective enforcement underlying insolvency laws.

Another aspect that has to be taken into consideration is the Sovereignty of State, which constitutes a substantial obstacle for centralization of insolvency proceedings and leads to the question of the law applicable and the validity of a choice of law by the parties. None of these questions can be answered in general because a uniform solution would require uniform laws, which do not exist. But the questions can be put in categories which result from the lack of such laws:

i) the lack of international treaties regarding the jurisdiction in insolvency proceedings and

ii) the lack of national legislation regarding the particularities of arbitration and insolvency.

i) Most countries exert their jurisdiction on companies that have assets within their territories. But only some national insolvency laws claim worldwide jurisdiction over the property of the debtor, like the United States or the United Kingdom do. However, in most cases corporations do not have assets in just one territory, but all over the world. Therefore each country has to consider that insolvency proceedings will also be opened in another. To create and participate in international conventions requires considerable time and coordination. On the other hand, extending national jurisdiction beyond territorial boundaries without international accords and reciprocity will eventually lead to lack of enforcement. Although there exists a strong necessity for adjusting and aligning insolvency systems by means of multi-national treaties, there are just a few, the most important within the EC being Council Regulation N° 1346/2000 on Insolvency Proceedings. The Regulation provides for rules and regulations on the law applicable to insolvency proceedings and their effects as well as to pending lawsuits, which, generally speaking, follow the law of the Member State that has opened the insolvency proceedings (*lex fori processus*).

ii) Another stumbling issue are the splintered national legislations. As mentioned, insolvency and arbitration are following two different principles: *par conditio creditorum* and *pacta sunt servanda*. It should be the task of the national legislator to evaluate this antagonism and to provide legal solutions which would take into account the particularities of both procedures, especially of arbitration. Considering its nature of a contract, the arbitration clause has no effect *erga omnes*, but binds the con-

tracting parties only. In contrast, the collective enforcement of creditors' claims requires summary proceedings and the highest possible degree of centralization, leaving only little room for individual agreements.

Naturally there are several approaches, which cannot be depicted individually. But a short statistical survey[1] evinces common concepts and similarities: One point of interest is whether the commencement of insolvency proceedings has an influence on the validity of antecedent arbitration agreements, which is not the case in 70% according to the survey. The next logical step is to ask, whether it is possible to enter into an arbitration agreement during insolvency proceedings. Here a distinction has to be made between liquidation and reorganization. Since liquidation imposes wider restrictions on the management, it is not remarkable that only 10% of national laws examined allow a debtor to enter into such an agreement, while an administrator appointed by court may do so in 60% of all countries. Reorganization, being the gentle way of insolvency proceedings, presents a higher rate of about 45% allowing a debtor to opt for arbitration, while the administrator's capacity remains at 60%. In the course of insolvency proceedings, a settlement of verification disputes by way of arbitration is impossible in 85%.

Another subject of prime importance is arbitrability. As a common fact, the admittance of a claim to verification proceedings renders redundant any other pending procedure. Verification serves as a modality of evaluating the nature and amount of unsettled liabilities and renders all uncontested claims enforceable.

We should now take into consideration certain aspects of personal arbitrability, meaning the effects of insolvency on persons involved. In most jurisdictions insolvency proceedings do not invalidate existing agreements and thus the arbitration clause, but leave it to the liquidator to terminate or contest certain contracts which are deemed detrimental for the creditors' interests. An exception is Poland: Article 142 Polish Bankruptcy and Reorganization law stipulates that any arbitration clause concluded by the debtor prior to the commencement of insolvency looses its legal effects and that any pending arbitral proceedings shall be discontinued. This rule was dealt with by England's High Court of Justice in the case *Elektrim* vs *Vivendi*[2]. In 2003, Vivendi, as creditor, initiated arbitration against Elektrim as the debtor, the place of arbitration being London. Elektrim was declared bankrupt in Warsaw in 2007, so the Tribunal had to decide which law shall govern the effects of the Polish bankruptcy order. Based on Article 4 in connection with Article 15 EC Regulation on Insolvency Proceedings, the award concluded that the law, which governs the effects of insolvency proceedings commenced in another Member

[1] Statistics from Alternative Dispute Resolution Manual, World Bank 2007.

[2] [2008] EWHC 2155.

State, is the law of the Member State where the lawsuit is pending, in the case at hand English law (*lex fori*). Lawsuits pending therefore are deemed an exception from the principle that insolvency proceedings and their effects shall be judged under the law of the Member State where insolvency was opened, as stated in Article 4 of the Regulation (*lex concursus*). Therefore the arbitration clause was declared valid and intact, which was confirmed by English High Court.

This decision is of particular interest because the Swiss Federal Supreme Court rendered a decision on the same issue with similar facts, but on the basis of an LCIA arbitration panel sitting in Switzerland (thus outside the EC), where the Tribunal denied jurisdiction. The Tribunal held, and was affirmed by Swiss Supreme Court, that in the absence of applicable EC law, the conflict had to be decided by the ordinary rules of Swiss Private International Law (PIL). Swiss law contains a positive provision on arbitrability during insolvency proceedings (Article 177 para 2 PIL) which, however, applies only to states and state companies. For private entities the general conflict-of-law rules apply (Article 154 and 155(c) PIL which lead to the law of the state of incorporation of the company, ie, Polish law. Therefore *Elektrim* was denied the legal capacity of being a party to arbitration proceedings in Switzerland.

As another illustrating example one can refer to the ICC matter *FEG Ltd* vs *The Republic of Equatorial Guinea*[3]. In the course of arbitral proceedings pending in Paris, Claimant was declared bankrupt in Equatorial Guinea with the local state court appointing a receiver, excluding management from representing the Claimant. The arbitral tribunal had to decide whether it should recognize the bankruptcy order and therefore the capacity of the receiver to represent the Claimant. In their award, regarding only preliminary issues such as the question of representation, the Arbitrators set out four requirements that have to be met: i) The acting court must have jurisdiction, ii) the insolvency order must have become final and binding, iii) the insolvency proceedings must have respected due process and iv) the recognition of insolvency order does not violate fundamental rules and principles of international public policy. As the tribunal concluded that due process had been violated, it disregarded the appointment of the receiver, giving Claimant's management full right of continued representation. This award can somehow be seen as a guideline whether and under what conditions one should make an exception from the principle that, by opening insolvency proceedings, the liquidator and the trustee respectively enter into contracts existing between the debtor and the creditor and therefore are bound to the arbitration clause. Although the Tribunal did not lift the national insolvency order, it appraised its effects under the rules and conditions of the law of the Member State where arbitral proceedings had been commenced.

[3] Case N°14576/CCO/JRF/GZ.

Another aspect of personal arbitrability also results from the difference between liquidation and reorganization: During the course of (forced) liquidation the debtor, in most jurisdictions, looses its capacity to conclude an arbitration agreement in respect of the administered estates. A unique provision, however, exists in Serbian law: The creditors may agree with the state judge on a special arbitral procedure which does not follow the terms and conditions of usual arbitration under Serbian law but is accommodated to the particular needs of insolvency proceedings.

On the other hand, reorganization in virtually all jurisdictions grants the debtor full capacity to conclude arbitration clauses, sometimes depending on the prior authorization by the administrator.

The next important topic is subject-matter (objective) arbitrability. The various effects, both procedural and substantive, that insolvency proceedings can exert on the legal relationship at stake can make it necessary to identify the relevant procedural laws that govern the opening, conduct and closure of the insolvency proceedings, as well as the relevant substantive laws that govern maturity, pending conditions, set-off, employment contracts, pending offers etc. Another point of interest is the rescission of legal transactions because of unequal treatment of creditors. Here, the US Supreme Court distinguished between "core matters" and "non-core matters". Core matters are defined as actions of creditors which seek to enforce claims in assets or rights of the insolvent estate. These normally represent the predominant part of a liquidation process and, in most jurisdictions, are handled by filing creditors' claims in course of verification. "Non-core matters", on the other hand, embrace actions of creditors which seek to determine the existence, validity, content or amount of a claim. They result from objections against claims in the verification process if they are coupled with, eg, fraud or error.

Both types of conflict can have effects on arbitration: International matters, which always bring up the question which law to apply on the effects of insolvency, are a more complex topic though. In respect of "Core matters", most private international laws as well as the EC Regulation on Insolvency Proceedings follow the principle of centralization by declaring the law of the opening state as applicable (*lex concursus*), whereas "Non-core matters" generally follow the law of state, where the case is pending (*lex fori*). If the opening state corresponds with the forum state, national insolvency laws usually will, in consideration of the distinctions outlined above, provide for appropriate centralization. The tendency is that arbitration aimed at enforcement of claims will be stayed at the opening of insolvency proceedings, at least until verification. New arbitration proceedings usually may not be initiated in respect of "Core matters", because these issues are reserved for verification (*vis attractiva cuncursus*). This extension of the jurisdiction of bankruptcy courts is

quite understandable: The principal reason of insolvency proceedings is collective enforcement of claims for the purpose of simplification, acceleration and equal treatment, which leaves no room for individual actions.

Whether "Non-core matters" may be settled by arbitration depends on the "survival" of the arbitration clause. Most insolvency laws (except Polish law) do not affect the validity of existing contracts but leave the rescission of adverse agreements to the liquidator. Arbitration agreements, however, cannot be deemed adverse as such, but they have to be evaluated in connection with the underlying material legal relationship. Another aspect that has equally to be taken into consideration is the discretion of bankruptcy courts, especially in the US (what can complicate things enormously).

Now that we have dealt with the theoretical background I would like to add a few practical comments and suggestions in respect of three stages of arbitral proceedings during which insolvency can occur: Before, during and after arbitration is initiated.

1) Problems and singularities of insolvency occurring *before* arbitral proceedings:

First of all one must distinguish between bankruptcy and reorganisation, because the differences between both types of insolvency have, as shown above, practical influence on the entire process. Another very practical aspect is the advance on costs. It can lead to a blocked situation if the Rules of Arbitration require an advance on costs in order to initiate arbitral proceedings. In this case the arbitrators should contact the liquidator and potentially fix separate advances to unblock the course of arbitral proceedings in case of a counter-claim or a jurisdictional dispute. Whether it is reasonable to file an arbitration request in order to use the later award as a title verification proceedings will very much depend on the individual circumstances.

To conclude an arbitration agreement during insolvency is possible in different variants: Between the debtor or administrator and the creditors in case of reorganization, between these parties in respect of estates which do not belong to the bankruptcy assets or, like in Serbia, even during bankruptcy proceedings just between the creditors, what, however, I was told to occur rarely. In the latter case arbitration could work as a compromise if court proceedings would be too complicated or time consuming.

2) Problems and singularities of insolvency occurring *during* pending arbitral proceedings:

Sometimes arbitral proceedings may function as a "cause" of insolvency. However, the exists no difference to national court proceedings: In

both cases proceedings are stayed until verification. There exist, however, differences between national laws how to stay the proceedings. The legal framework can be designed as a system of a mandatory stay (as in Serbia), a de-facto stay connected with the requirement to obtain the permission to continue the proceeding, or as a relative stay to the effect that no decision to perform but only a declaratory decision can be delivered.

Even if no stay is imposed on a pending proceeding, the administrator and the liquidator, respectively, has to be informed due to his capacity to represent the debtor during the entire insolvency proceeding and to avoid problems of unilateral enforcement.

3) Problems and singularities of insolvency occurring *after* termination of arbitral proceedings:

If the Debtor becomes insolvent after an enforceable award was delivered, the principle of collective enforcement and centralization can nevertheless apply: The award will serve as the basis for verification in the same way as the judgement of a state court. If property outside the effects of insolvency shall be seized, the award will equally constitute a sufficient title for enforcement, like a state court title. However, this has to be taken with care: In the case *Victrix* Steamship Co., S.A. vs *Salen Dry Cargo*[4]*, A.B.,* a Swedish debtor became insolvent in Sweden. Arbitral proceedings where conducted in London, without stay or verification, and the prevailing Claimant applied for enforcement in the USA. The application was dismissed. The US court recognized the Swedish bankruptcy order as an act of "comity" and therefore refused enforcement on the basis of public policy. Therefore, it can be deemed indispensable to notify an award in the verification procedure.

Finally one can only hope that there will be not too many situations where arbitration and insolvency coincide.

[4] US Court of Appeals, Second Circuit, 1987, 825 F.2d 709.

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ETHICAL STANDARDS FOR ARBITRATORS, HYBRID PROCEEDINGS, RULES OF TRANSNATIONAL LAW: ARE WE MOVING TOWARDS A UNIFORM LAW OF INTERNATIONAL ARBITRATION?

The article examines trends towards uniformity in three important areas of the law of international arbitration: ethical standards for arbitrators, procedures for evidence taking, and application of transnational rules of law. While there is a clear movement towards the harmonisation of legal concepts and standards in all three areas which is the result of changes in international and domestic law, the practice of international arbitral tribunals and the activities of private or intergovernmental "formulating agencies", a comparison of developments also shows important differences. The degree of convergence which can be achieved depends on the acceptance of privately proposed rules by arbitrators, arbitral institutions and, to a certain degree, also by the courts reviewing the arbitral process. The described developments do not support the idea of the existence of an autonomous body of lex mercatoria, but provide ample evidence of a "transnationalist" attitude of arbitrators, arbitral institutions and formulating agencies, which aims at identifying and applying legal concepts to international commercial transactions which are consistent with their international character.

Key words: *Ethical rules – Hybrid proceedings – Lex mercatoria – New York Convention on the Recognition and Enforcement of Foreign Awards – Transnational rules of law – Uniformity of international arbitration law.*

1. INTRODUCTION

International commercial arbitration relies on manifold sources of law, including international conventions, national laws on arbitration,

rules and practices implemented by arbitral institutions, court decisions, decisions and practice as applied by arbitral tribunals and, last but not necessarily least, agreements between parties to arbitration proceedings. Yet, despite this great variety of public and private law sources, as noted by many observers[1], there seems to be a general trend towards unifying rules and standards applicable within the field of international arbitration. The great variety and flexibility which arbitration offers for solving national and cross-border legal disputes appears to be overshadowed by an increasingly standardised approach to private dispute resolution in the international arena.

This article examines this move towards uniformity with regard to three important areas of international arbitration law: ethical standards of behaviour for arbitrators, hybrid common/civil law proceedings on evidence taking and the reliance on rules of transnational law in arbitral decisions. The purpose of taking a closer look at the developments in these three select areas of international arbitration law is firstly to find out some useful details of the degree of harmonisation which currently exists, as well as about the influences which can explain the generally observed trend towards uniformity. Is there a general trend suggesting that all aspects of international arbitration law will become increasingly standardised, or is it necessary to differentiate between different areas of the law? Secondly, a closer look at developments may also be of some use in trying to find out whether these actually support the idea of an autonomously developing international arbitration law, of a *lex mercatoria* of arbitration.

In view of the broadness of the topics addressed in this article it is not possible to provide an exhaustive analysis. Rather, the study of these topics must necessarily remain a rough sketch of developments in international arbitration law, limited to a description of only its most salient features.

2. A BRIEF OVERWIEW OF THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION

In line with the international growth of business activities from the 1950s to the present day, international commercial arbitration has become a phenomenon of global significance.[2]

[1] Setting the development of arbitration in the general context: K.-H.Böckstiegel, “The Role of Arbitration within Today’s Challenges to the World Community and to International Law”, *Arbitration International* 22/2006, 165 etc.

[2] An excellent overview is given by J. Lew, “Achieving the Dream: Autonomous Arbitration”, *Arbitration International* 22/2006, 179 etc.

The first legal basis for international commercial arbitration was provided by the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards, which fundamentally changed the pre-existing regime of the recognition and enforcement of international arbitral awards as it existed in many countries.[3] Arbitral awards now have to be recognised and enforced practically globally[4] if the successful party shows the existence of an arbitration agreement and the ensuing award. National courts are granted the discretion to refuse enforcement only on the limited grounds set out in Art. V of the Convention (non-conformity of the award with the arbitration agreement or its decisions being outside the terms thereof; violation of due process; non-observance of public policy in respect of contents and subject matter of the award).

Equally important for the internationalisation of commercial arbitration have been subsequently the UNCITRAL Arbitration Rules published in 1976 and the UNCITRAL Model Law on International Commercial Arbitration of 1986, revised in 2006[5]. The objectives of the UNCITRAL Model Law can be said to have been twofold: Firstly, it has been a template of domestic law on arbitration which reflects widely accepted principles of international arbitration, allowing countries without such legislation, or those wishing to modernise their legislation, to easily formulate and adopt domestic legislation on international (and national) arbitration. Secondly, it has ensured that new legislation on arbitration adopted by individual countries followed the principles of the Model Law, thereby achieving a harmonisation of domestic arbitral legislation.

A fundamental principle of the Model Law, the strict limitation of the role of local courts in supervising international arbitration, is enshrined in its Art. 5:

> "In matters governed by this Law, no court shall intervene except where so provided in this Law."

The impact of the Model Law has been significant. To date, more than 60 countries and 6 US states have adopted or closely followed the Model Law. Many other countries, including "major arbitration jurisdictions" such as Switzerland, England, France, the USA and Sweden, have adopted and modernised their legislation espousing the Model Law's philosophy and many of its principles. As a result, the legal concepts of party autonomy, competence-competence, freedom of the arbitrators to select the procedure (within the confines of due process) and the strict

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[3] As reflected in the Geneva Protocol of 1923 and the Geneva Convention of 1927.

[4] More than 140 states have so far become members of the New York Convention.

[5] Mainly to modernise form requirements and to provide a more comprehensive regime for interim measures.

limitation of court interference in the arbitral process have all become common features of domestic legislation on international arbitration.

The UNCITRAL Arbitration Rules of 1976, currently under review for adaption to modern developments[6], are now frequently used in *ad hoc* commercial arbitration proceedings, in addition to the rules of the major arbitral institutions, but also in treaty-based arbitrations between investors and states. In the wake of the modernisation of domestic laws on arbitration, the established international arbitration institutions have revised and updated their rules, and a number of new and important institutions have emerged. Frequently, the updating of existing rules, or the creation of new ones, has been inspired by the model found in the UNCITRAL Arbitration Rules and the rules of the established institutions, with the consequence that "we see many similarities and often identical solutions".[7] None of these rules refer to national procedural law. Copying the approach of domestic legislation, they typically do not mention details of procedure, leaving them to the parties and the arbitrators to determine.

These changes have all brought about the internationalisation of arbitration. International arbitrators now have an unprecedented degree of discretion in determining issues of procedural and substantive law. The generally accepted removal of arbitration from the control of domestic courts represents perhaps the most significant element of a convergence in the law of international arbitration.

3. Ethical Standards for Arbitrators

The behaviour of arbitrators, both prior to their appointment and in the conduct of the proceedings, is fundamental to the arbitral process. In all national arbitration laws and in the New York Convention, the requirements of independence and impartiality appear as a vital aspect of the arbitral function. Other relevant issues of the deontology of arbitrators, although at the same time a matter of the contract between the arbitrator and the parties, are the diligent and efficient conduct of the proceedings, confidentiality, the fair and equal treatment of the parties and the avoidance of improper communications with the parties.

As regards the central issue of the independence and impartiality of the arbitrator, this is, although the phrasing may differ, established as a principle of arbitration in practically every domestic law on arbitration.[8]

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6 The revision process, undertaken mainly to adapt the Rules to their increased use in investor-state arbitration, was started in 2006.

7 K.-H. Böckstiegel, 165, 174.

8 Although the emphasis may differ. Art. 24 (1) of the English Arbitration Act of 1996, for example, only refers to impartiality while Art. 180 of the Swiss Statute on International Private Law only refers to independence. It is recognised, however, that both

According to Art. 12 (2) of the UNCITRAL Model Law, a party may challenge an arbitrator "if circumstances exist that give rise to justifiable doubts as to his impartiality or independence". There is no definition in the Model Law, nor typically in any of the domestic legislation on arbitration, of what is to be understood under "justifiable doubt", "impartiality" or "independence". Furthermore, except for requiring that a prospective arbitrator shall disclose "any circumstance likely to give rise to justifiable doubts as to his impartiality or independence", the legislation remains silent on any specific requirements regarding disclosure. Institutional arbitration rules are also limited to mentioning the principles without providing any more specific rules. Generally, therefore, the matter is left to the application of the principles by the courts and arbitral institutions and to legal writings. And at that level, however, in view of the myriad factual settings, the potential for coming to different results in applying the principles to specific facts is significant.[9]

However, while probably not unwisely, the national legislator in all countries has stuck to an approach leaving it to the courts to come to detailed answers under the rule of the general principles of independence and impartiality, a number of arbitral institutions and other private organisations such as the International Bar Association (IBA) have moved to formulate more detailed ethical rules for arbitrators, concerning the issues of impartiality and independence as well as other aspects with regard to the conduct of arbitral proceedings. In 1977 the American Arbitration Association (AAA) and the American Bar Association (ABA) jointly published their "Code of Ethics for Arbitrators in Commercial Disputes" which, covering the obligations of party-appointed and neutral arbitrators, catered mostly for the needs of US arbitration. In 2004, however, the Code was updated, this time clearly also aimed at arbitrators acting outside the national context of the AAA or other US institutions. In 1987 the IBA adopted its "Rules of Ethics for International Arbitrators" which from the outset were addressed to international arbitrators in any jurisdiction. In 1990 the London Chartered Institute of Arbitrators presented its "Guidelines of Good Practice", which, in 2001, were updated and integrated into a "Code of Professional and Ethical Conduct". And, most recently, in 2004, the IBA presented its "Guidelines on Conflicts of Interest in International Arbitration, which, with regard to the issues of independence and impartiality, replace the 1987 IBA Rules of Ethics[10].

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concepts represent "two sides of the same coin". See H. Raeschke-Kessler, "The Contribution of International Arbitration to Transnational Procedural Law", in: G. Aksen *et al.* (eds.), *International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner*, 2005, 647, 654.

[9] See, for example, H. Raeschke-Kessler, *op. cit.*, with reference to German jurisprudence on national arbitration proceedings, 655, 656.

[10] For a detailed comparison of ethical rules for arbitrators see G. Sachs, "Verhaltensstandards für Schiedsrichter", *German Institution of Arbitration* 23/2008.

All these rules and codes, in spite of their name, are essentially of a non-binding nature, with the exception of the CIArb Code of Conduct. The latter, although developed with the intention of a supra-national application, is addressed to the members of CIArb and has insofar a binding character, although it is not intended to replace any applicable law or arbitration rule.

Even to the extent they are non-binding, however, these rules and codes must be considered potentially influential as parties may not only agree upon them but may refer to them in challenge applications. The ultimate test for their impact would, of course, be their acceptance by the courts.

What makes the IBA Guidelines a special case in this context is their regulatory approach. Like the other codes, the Guidelines also provide a list of General Standards with regard to independence and impartiality, as well as disclosure requirements.

At the same time, however, the Guidelines take a very pragmatic approach by setting out lists of specific factual situations in relation to the General Standards, thereby allowing for an analysis of what type of factual situation is covered or not covered by a General Standard. These lists of specific factual situations are divided into a Green List (no conflict of interest), an Orange List (of conflicts which may give rise to justifiable doubts) and Red List (of conflicts which give rise to justifiable doubts). divided into waivable and non-waivable conflicts. While the lists are not meant to be, and cannot be, exhaustive, the General Standards of the Guidelines are for all cases to be the determining standard. The concept of the lists as understood by the IBA's working group is that they are not final, but should be monitored as they are used and should be continuously updated.[11]

Based on a comparison of the aforementioned rules, codes and guidelines, although differences in phrasing are never to be underestimated, the relatively harmonious standards they reflect, at least as far as the requirement of impartiality and independence are concerned, are remarkable. With regard to this latter issue, positions taken by the various rules show a clear case of convergence. Most jurisdictions traditionally provide that the same standard of independence and impartiality applies to every arbitrator, regardless of his particular function as sole arbitrator, co-arbitrator or chairman.[12] Until fairly recently, with regard to national arbitration, on the other hand, arbitration practitioners in the United States

[11] Otto L. O. de Witt Wijnen, N. Voser, N. Rao, "Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration", *Business Law International* 5/2004, 433 etc.

[12] While there is agreement in principle, there are differences in practice as to the role ascribed to party-appointed arbitrators which may result in different assessments as to the proper behaviour of party-appointed arbitrators. See, e.g., H. Raeschke-Kessler, 722.

of America adhered to a different concept, admitting non-neutral arbitrators if these were to be appointed by the parties. The 1977 AAA/ABA Code of Ethics still reflected that situation by distinguishing between the obligations of the "neutral" third arbitrator and those of party-appointed "non-neutral" co-arbitrators. In contrast, in the 1987 IBA Rules of Ethics, which were adopted to reflect an internationally applicable standard, any distinction of this sort was missing.

In the "second generation" of rules, the 2004 AAA/ABA Code of Ethics and the 2004 IBA Guidelines, this conceptual difference in legal traditions is still becoming visible, but a convergence of views has clearly taken place. The 2004 AAA/ABA rules, in a reversal of the previous position taken, now establish the presumption of neutrality for all arbitrators, including party-appointed arbitrators. On the other hand, General Standard 5 of the IBA Guidelines, inter alia in recognition of the past legal tradition in the US creates an exception for non-neutral party-appointed arbitrators, declaring the Guidelines not to be applicable in that respect. While in a formal view the exception in the IBA Guidelines looks at first sight like a gesture of deference to other traditions, the actual practice, including national and international arbitration proceedings under AAA Rules[13], shows that the international standard adhered to now is clearly that of requiring of all arbitrators the same standard of neutrality.

While there are differences with regard to the formulation of ethical requirements of arbitrators, both in style and in detail, there are also some striking similarities in the approach taken by the AAA/ABA, IBA and CIArb Codes. Reflecting the practical and theoretical difficulty of devising specific standards of independence and impartiality, none of the regulatory instruments provides for a definition of the concepts of independence and impartiality. In the CIArb Code of Conduct, the terms are used without any explanation. Canon I of the AAA/ABA Code refers to the requirement of the arbitrator to serve impartially and act independently from the parties, potential witnesses and other arbitrators. Only the 1987 IBA Rules of Ethics, by defining partiality and dependence, provide at least indirectly some kind of definition. These Rules, insofar as they deal with the issue of independence and impartiality, have, however, been replaced by the 2004 IBA Guidelines which, instead of defining these concepts, take recourse to defining lists of specific factual scenarios which serve to conceptualise the meanings of independence and impartiality.[14]

[13] The change to the all-neutral arbitral panel was gradual, first with the adoption by the AAA of its International Arbitration Rules in 1991, and then, in 2003, with the revision of the Commercial Arbitration Rules, which, in anticipation of the 2004 Code of Ethics, provided that even in domestic US arbitration all three arbitrators are presumed to be independent and impartial.

[14] See General Standard 2 (d) and the Non-Waivable Red List of the IBA Guidelines.

The 2004 IBA Guidelines therefore significantly surpass the definition detail provided by any prior rules.[15]

Notwithstanding these differences in regulatory approach, the following aspects of the rules show a tendency towards convergence. While under the provisions of the UNCITRAL Model Law it remained unclear whether there is a rule "when in doubt, disclose", this rule is now clearly established in the 2004 AAA/ABA Code,[16] as well as in the 2004 IBA Guidelines.[17] In line with the UNCITRAL Model law the standard for the disclosure of circumstances is clearly broader in both the 2004 AAA/ABA Code and in the 2004 IBA Guidelines than the standard allowing for the challenge of an arbitrator.[18] Under both rules, disclosure is viewed as a requirement to be fulfilled in the interest of the parties and therefore requires the communication of any circumstances which "may" give rise to doubts, while, at the same time, for a challenge to be successful, circumstances must exist which actually "give rise to doubts".

In addition, while the UNCITRAL Model makes no mention of this, the standard of what is to be disclosed, following the example of the ICC practice, in both the AAA/ABA and the IBA instruments, is guided not by an objective standard but by the subjective view of the parties of the proceedings ("in the eyes of the parties").[19]

The IBA Guidelines strengthen the disclosure requirement further by not only requiring a prospective arbitrator to make reasonable enquiries but by also imposing upon the parties the obligation to inform a prospective arbitrator about any relationship between it or another company of the same group of companies and the arbitrator.[20]

Another element of convergence of standards to be mentioned here is the express permission given to an arbitrator according to General

[15] See Canon I of the AAA/ABA Code of Ethics.

[16] Canon II B and D of the AAA/ABA Code of Ethics.

[17] General Standards 3 (c) and 7 (c) of the IBA Guidelines.

[18] AAA/ABA Code of Ethics: Canon II A: any relationships which might reasonably affect impartiality or independence; Canon II B: satisfied that he can serve impartially and independently; General Standard 3 (a): may give rise to doubts, 2 (b) give rise to doubts.

[19] Whether a subjective standard was to be followed, was a subject of debate within the IBA Working Group in which account was also taken of the opinions of the ICC Court of International Arbitration and other arbitral institutions. That convergence continues in this area is further documented by the rejection of the ABA Dispute Resolution Section of Proposed Arbitrator Disclosure Guidelines in May 2009, which were considered to result in excessive demands on arbitrators, inter alia, in excess of the IBA Guidelines and the AAA/ABA Code of Ethics. See S.A. Riesenfeld, "ABA Dispute Resolution Section Rejects Proposed Arbitrator Disclosure Guidelines", *TDM 1875–4120* May 2009, 1 etc.

[20] General Standard 7.

Standard 4 (d) of the IBA Guidelines to "assist the parties in reaching a settlement of the dispute at any stage of the proceedings, provided he has obtained the prior express agreement of the parties to act in this way." The possible role of the arbitrator as a facilitator for a settlement as it is practiced in many jurisdictions and rejected in others, is thereby made an internationally recognised possibility.

While with regard to the issues of arbitral independence and impartiality the developments show a clear trend towards the convergence of standards, the ethical codes do reflect some differences as concerns, for example, disclosure practice and the arbitrator's obligations concerning communications with the parties at the pre-appointment stage and during the proceedings. The disclosure required in the AAA/ABA Code of Ethics concerns almost any relationship, past or present, with a party, without any limit in time. In contrast, disclosure requirements under the IBA Guidelines, although the arbitrator is in case of doubt required to decide himself in favour of disclosure, are more limited, while situations listed in the Green List and situations listed in the Orange List which occurred more than three years ago do generally not require disclosure. The CIArb Code of Conduct, while expressly prohibiting arbitrators from providing any legal or technical advice to persons involved in the arbitration, limits itself otherwise to generally prohibiting any form of communication "which might reasonably be perceived to be improper, partial or biased." The 2004 AAA/ABA Code, on the other hand, provides in Canon III for a list of detailed rules of arbitrator conduct in communications with the parties, also covering the case of the non-neutral party-appointed arbitrator. Likewise, the 1987 IBA Rules of Ethics provide for a catalogue of rather specific rules on what an arbitrator may and may not do when communicating with the parties at the appointment stage or thereafter during the proceedings. The convergence which can be observed here appears to be more limited due to the fact that some perhaps rather fundamentally different notions of the role of an adjudicator in civil proceedings under the traditions of common law or civil law might come into play. One is left with the impression here that the codes provide rather rigid, detailed rules[21] which have little chance of becoming an internationally accepted standard in this regard.

As concerns the general question of the potential impact of private non-binding codes of ethics on the development of a unified international arbitration law, the essential issue is of course the acceptance and use of such standards by domestic courts and arbitral institutions. The 1977/2004 AAA/ABA Code of Ethics is regarded as having achieved a high degree

[21] E.g. Rule 5.4 of the 1987 IBA Rules of Ethics regulating the behaviour of an arbitrator if he becomes aware that a fellow arbitrator has been in improper communication with a party.

of judicial acceptance in the US[22] With regard to the 2004 IBA Guidelines, it is similarly to be observed that parties in their challenges increasingly refer to them as a basis for their arguments. In a 2008 decision, the Swiss Federal Supreme Court has reasoned on the IBA Guidelines as follows:[23]

> "Certainly, the Guidelines do not have force of law, yet constitute a valuable working tool to contribute to the uniformisation of standards in international arbitration in the area of conflicts of interests. As such this instrument should impact on the practice of the courts and the institutions administering arbitration proceedings."

The impact of rules such as the IBA Guidelines remains to be seen. As they have been drafted with the intent of continuously supplementing and updating the lists of factual settings, they certainly bear a significant potential for increasing uniformity in specific requirements concerning the independence and impartiality of arbitrators and their obligation to disclose any circumstances that may affect their independence or impartiality.

4. HYBRID PROCEEDINGS

Most modern arbitration statutes give the parties and the arbitrators the freedom to decide on the rules for the taking of evidence in the arbitration proceedings they have chosen.[24] Institutional arbitration rules typically take the same approach.[25] Art. 19 (2) of the UNCITRAL Model Law, reflecting this basic position, provides the arbitrators with broad discretion to determine all procedural matters as long as the parties have not reached any specific agreements (which is in many instances the case):

> "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence"

As to the standards limiting the freedom of arbitrators to determine procedural matters, these are according to the Model Law only the requirements of equal treatment of the parties and their right to be heard.[26]

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[22] B. Meyerson, J. M. Townsend, "Revised Code of Ethics for Commercial Arbitrators Explained", *Dispute Resolution Journal* 1/2004, 1 etc.

[23] Swiss Federal Supreme Court, 1st Civil Chamber, Decision of 20 march 2008, 4A 506/2007, *ASA Bulletin* 3/2008, 565 etc.

[24] UNCITRAL Model Law, Art. 19 (1).

[25] Art. 20 ICC Rules, Art. 14 LCIA Rules.

[26] Art. 18 UNCITRAL Model Law.

In many countries, even in the absence of statutory provisions to this effect, the national courts have affirmed the arbitral tribunal's broad powers in determining issues of evidence.[27]

It is a well-known fact that significant differences in procedural approaches exist in particular between the common law on the one hand which provides for detailed rules on evidence taking and gives the parties a highly active role in that process[28], and the civil law tradition on the other hand, which is characterised by the active, inquisitorial role of professional judges in establishing the facts. Naturally, therefore, international arbitrators, when dealing with parties from different legal cultures, in particular from common law and civil law traditions, have frequently faced the challenge to find solutions for the proceedings on evidence taking which would be acceptable to all parties and would also be in line with their own legal education and understanding.[29]

It can therefore be said that it has been national arbitration legislation which has provided international arbitral tribunals with the power to determine to what extent common law or civil law elements of evidence taking would become integrated into international arbitral procedure. What this suggests in the first place is a development of a great variety of procedural approaches and not necessarily a convergence of practices.

While it is true, depending on the arbitrators involved and their own legal cultures, but also of course depending on the parties and their legal backgrounds, that the system of international commercial arbitration allows for a variety of approaches to evidence taking, nevertheless a clearly observable trend towards the harmonisation of the arbitral procedure has developed. Hybrid evidentiary proceedings which combine common law and civil law elements have become a common practice, and this not only when parties from the common law tradition mix with parties from a civil law tradition. As Kaufmann-Kohler/Bärtsch stress, the need for finding pragmatic solutions has most certainly been at the origin of this development[30], but what has developed is also the recognition

[27] B. M. Cremades, "Powers of the Arbitrators to Decide on the Admissibility of Evidence and to Organize the Production of Evidence", *ICC Court Bulletin* 1/1999, 49; R. Pietrowski, "Evidence in International Arbitration", *Arbitration International* 22/2006, 373 etc.

[28] A law tradition which finds its origin in the emphasis on the role of the lay jury not only in criminal but also in civil trials. For a detailed analysis see Demayre, "An Essay on Differing Approaches to Procedures under Common Law and Civil Law", *German Arbitration Journal* 2008, 279, 281.

[29] G. Kaufmann-Kohler, P. Bärtsch, "Discovery in International Arbitration: How Much Is Too Much?", *German Arbitration Journal* 2004, 13, 17, emphasise that practices in procedure of international arbitration have been harmonised to a large extent as a result of necessity rather than out of a theoretical recognition that the ideal system is one situated in between the extremes.

[30] *Ibid.*

among international arbitrators with a common law as well as a civil law background that certain hybrid combinations in evidentiary proceedings are to be preferred as a general rule.

In many instances international arbitration procedures with the following main characteristics can be said to have become common practice:

4.1. Witness Evidence

Witnesses are typically being heard on the basis of written witness statements.[31] Every person can be heard as a witness, including parties and party representatives. Regardless of contraindicative local rules, arbitrators tend to permit counsel to a party to contact and prepare witnesses, including providing assistance in drafting the written statement, as long as the witness is not being manipulated. There are variations as to whether the written statement is treated as direct evidence or not, but written witness statements are only accepted under the condition that the witness appears to testify and submits to cross-examination. In many instances, in particular if the arbitrators are from a common law background, the cross-examination, and possibly further re-direct and re-cross-examination, is left to the parties, with the tribunal only asking additional questions thereafter if any. If the panel is made up of lawyers with a civil law background, but also not infrequently in cases where common law arbitrators sit, the arbitral tribunal may very actively engage in questioning, even taking the lead. As to rebuttal witness statements, the practice varies; typically they are allowed only, but subject to certain limitations on their contents and timing. With regard to the oral examination of witnesses, it has become commonplace to take a verbatim record of the testimony; tape-recording or dictation by the Chairman may also be used, but only in smaller matters and then typically only by arbitrators with a civil law background.

4.2. Document Discovery

Requests by one party for the production of documents in the control of the other party are entertained, but the conditions for making such requests acceptable are typically geared to allowing only the discovery of individual documents which can be shown to be of material relevance for the issues to be decided; this kind of discovery is a far cry from the US-style pre-trial discovery considered excessive by many.[32] If the counsel

[31] For an overview see R. Trittmann, B. Kasolowsky, "Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – the Development of a European Hybrid Standard of Arbitration Proceedings", *University of New South Wales Law Journal Forum* 14/2008, 43 etc.

[32] For a summary see *Ibid.*, 45 etc.

for the parties are from common law jurisdictions, however, discovery requests may go beyond individual documents and cover entire categories of documentary evidence. Issues of legal privilege may arise in connection with document requests, possibly leading to the difficulty that, in the case of parties from different jurisdictions, the arbitral tribunal faces a situation where different standards of privilege apply or a party cannot claim privilege at all under its local rules. No general standard can be said to have evolved yet, but the clear tendency, if one follows legal writings, is to apply the most favourable privilege standards to all parties in such situations.[33]

4.3. Expert Evidence

As to the use of party experts versus the appointment of an expert by the tribunal, there is less of a convergence visible so far. But even in proceedings with a panel and parties from civil law countries it appears to getting more and more common to let the parties provide expert evidence by their own expert witnesses rather than having the arbitral tribunal work by way of a tribunal-appointed expert. The reason for this can be very pragmatic as in many instances the parties have easier access than the arbitral tribunal to finding the required technically qualified experts within their respective industry.[34] Moreover, parties mostly prefer to have the opportunity to present technical evidence by their own experts and are willing to incur the additional costs as the arbitral proceeding gives them only once a chance to present their case and the appointment of a single expert by the arbitral tribunal inherently involves the risk that the focus of decision-making moves from the arbitral tribunal to this expert in the selection of whom the parties may have not been involved or at least to a lesser extent than in the appointment of the members of the tribunal. To reduce the time and costs involved in hearing party experts, arbitral tribunals engage more and more in the practice of hearing expert witnesses simultaneously, in the form of witness conferencing, an approach which can prove to be helpful in bringing the differences of viewpoint between experts very quickly to the fore for the arbitral tribunal. To be successful as a technique, it requires an arbitral tribunal willing to actively engage in questioning in the style of an inquisitorial civil law judge.

A significant characteristic of this development of a hybrid common law/civil law approach in evidence taking is the fact that it appears

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[33] For an argument in this direction see F. von Schlabrendorff, A. Sheppard, "Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution", in: G. Aksen *et al.* (eds.), 743.

[34] This aspect is also stressed by R. Trittmann, B. Kasolowsky, 47.

to have evolved largely as a result of arbitral tribunals seeking pragmatic solutions to issues of evidence taking rather than on the basis of adherence to some internationally agreed rules or guidelines. But it cannot be denied that the IBA Rules on the Taking of Evidence in International Commercial Arbitration adopted and published in 1999 have given a boost to this development.[35] Its predecessor, though, the 1983 IBA Rules, although well received, were taken over by the developments, in international arbitral practice, leading the Working Party of the 1999 Rules to the conclusion that they "needed to be updated and revised".[36] The 1999 Rules differ in many respects from their predecessor and are probably best characterised as a restatement of practices as they have developed. As the Working Party put it: "The IBA Rules of Evidence contain procedures initially developed in civil law systems, in common law systems and even in international arbitration processes themselves."[37] Their express intention is to fill the gaps left by law and institutional rules with respect to the taking of evidence. They are not intended to be binding, allowing parties and arbitral tribunals to make use of them as they see fit. Rather than providing rigid rules, they offer "options" from which, like from a template, parties and arbitral tribunals can choose which procedure to follow.[38] Thus, the section on witness of fact provides that any person, including a party or party's officer, "may" present evidence as a witness and that the arbitral tribunal "may" order the submission of written statements. Likewise, party-appointed experts or a tribunal-appointed expert "may" be called to testify, in each case accompanied by the concomitant set of rules for the one or the other approach. The section on the discovery of documents, however, is not formulated as an "option" but rather as a rule according to which a party is entitled to request the production of individual documents or of a narrow and specific requested category of documents from the other party and that such a request is to be granted by the arbitral tribunal, provided the documents requested are "relevant and material" to the outcome of the case. Other issues, such as that of legal privilege, are mentioned in the IBA Rules (to be decided "under the legal or ethical rules determined by the Arbitral Tribunal to be applicable"), but not answered, leaving it to international arbitral practice to determine how to answer such issues.

[35] According to H. Raeschke-Kessler, 731, the rules on discovery were introduced by the IBA Rules on Evidence. The writer of this article, however, has had the experience of the application of discovery rules similar to those laid down in the IBA Rules prior to their publication. Nevertheless, it is certainly justified to view the IBA Rules as exercising a strong influence on arbitral practice.

[36] Commentary on the New IBA Rules on Evidence, p.1.

[37] R. Trittmann, B. Kasolowsky, 44; IBA Working Party, Commentary on the New IBA Rules on Evidence, 1999, 2.

[38] R. Trittmann, B. Kasolowsky, 44.

As the frequent use parties and arbitral tribunals make of the IBA Rules of Evidence shows, there can be little doubt that they achieved the intended purpose. In the experience of this commentator it is not often the case that the parties and/or the arbitral tribunal agree to apply the Rules. But rather frequently they are referred to in the Terms of Reference or other procedural documents as a set of rules which are to serve as a general orientation for the arbitral tribunal in formulating the procedural rules on the taking of evidence.

Time has not been standing still since the publication of the 1999 IBA Rules of Evidence and since then, due to the conversion of business and personal correspondence to electronic form, the issue of discovery has become a question of even greater significance not only in litigation, but also in arbitration. The familiar burdens of complying with discovery demands in the paper era, even if as limited as in arbitration, threaten to gain a new quality in comparison to their potential scope and surrounding uncertainties of the parties' obligations in the modern world of e-discovery. Understandably, the 1999 IBA Rules of Evidence could have no answer yet to this new aspect and the current international arbitral practice is still in the process of finding its way to adequately deal with this development.

In view of the fact that the same principles of relevance, materiality and proportionality that govern the production of paper documents in international arbitration should also apply with regard to electronically stored information, it is possible to ask to what extent it is at all to be considered necessary to deal specifically with electronic discovery in arbitration. However, as the activities of a number of institutions show, the need is perceived to specifically address this aspect of discovery because of the sheer complexity, costs and potential burden involved in e-discovery which requires the special attention of international arbitrators.[39]

The following activities have most recently been undertaken:

In August 2007, the ICC Commission issued a report on Techniques for Controlling Time and Costs in Arbitration which, inter alia, deals with document production. In 2008, the ICC Commission established a Task Force which has been entrusted to produce a report on the Production of Electronic Documents in Arbitration. It is intended that this report supplements the report on Techniques for Controlling Time and Costs in Arbitration.

In May 2008, the International Center for Dispute Resolution (ICDR) (the international arm of the AAA) published its Guidelines for Arbitrators Concerning Exchanges of Information.

[39] For an overview of issues of e-discovery in arbitration see R. Smit, T. Robinson, "E-Disclosure in International Arbitration", *Arbitration International* 24/2008, 105; see also A. Meier, "The Production of Electronically Stored Information in International Commercial Arbitration", *German Arbitration Journal* 2008, 179 etc.

These Guidelines establish that e-documents can be produced in the form most convenient to the producing party and that requests must be "narrowly focused and structured to make searching for them as economical as possible". The arbitral tribunal is empowered to direct testing or other means of focusing or limiting any search for electronic documents. What is remarkable about these Guidelines is that, although they do not provide for regulating the production of e-documents in minute detail, they have become binding in all ICDR-cases commenced after May 31, 2008 and may be adopted at the discretion of the tribunal in pending cases.

In 2009, the International Institute for Conflict Prevention and Resolution (CPR) published its CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration. This Protocol provides guidance in the form of "recommendations as to practices that arbitrators may follow in administering proceedings before them, including proceedings conducted under the CPR Rules." They cover both the issue of disclosure of documents, including detailed provisions concerning the disclosure of electronic information, and the presentation of witnesses. In relation to both areas of procedure, the Protocol offers various "modes" which the parties can choose (modes of disclosure and modes of presenting witnesses) to adopt by agreement, before or after a dispute arises, and which provide the parties with different "mixes" of common law and civil law approaches to the taking of evidence. The intention behind this approach seems to provide a menu of options like the IBA Rules of Evidence, but to provide it in the form of four or three alternative combinations to be chosen.

In October 2008, the Chartered Institute of Arbitrators issued its Protocol for E-Disclosure in Arbitration. It is formulated in such a way that it binds members of the Chartered Institute but that at the same time it functions as a general recommendation for all arbitrators. The Protocol suggests that the parties give early consideration to e-discovery and seek to agree the scope and methods of production. It also allows the parties to adopt the Protocol as part of their agreement to arbitrate a potential or existing dispute. As concerns the specifics of e-documents, the Protocol provides inter alia the standards applicable to their production but also regulates that production should normally be limited to reasonably accessible data, excluding metadata, the restoration of back-up dates, erased, damaged or fragmented data, archived data or data routinely deleted in the normal course of business operations. These provisions are supplemented by rules empowering the tribunal to determine efficient procedures for the production of electronic documents and to allocate the costs of document production.

What can be said about all these "codifications" is that they attempt to provide instruments allowing to restrict certain types of US-style

discovery in international arbitration. They also show that there has been an evolutionary direction from arbitral tribunals filling the void left by national laws and institutional rules with practices of hybrid proceedings concerning the taking of evidence to an increasingly specific formulation of general standards of procedure via the IBA Rules of Evidence, and from there to recommendations such as the ICC Techniques, and additional non-binding or partially-binding rules such as those of ICDR and CIArb which seek to particularly grapple with the issue of e-discovery.

5. TRANSNATIONAL RULES OF LAW

For some time it has been accepted in legal theory, as well as in the practice of the state courts supervising the results of the arbitral process, that international arbitrators perform a genuine judicial function. In the wake of many developments strengthening arbitral activities, above all the New York Convention providing for the international recognition and enforcement of arbitral awards, the modernisation of arbitration laws in many countries in line with the UNCITRAL Model Law, the creation of uniform laws on trade such as the 1980 UN Convention on Contracts for the International Sale of Goods (now in force in more than 60 countries), as well as growing efforts to formulate internationally recognised principles and rules of law, such as by way of the UNIDROIT Principles or the Principles of European Contract Law, international business has come to view the arbitration tribunal, rather than the national courts, as its "natural" judge.

If substantive law may be "born in the womb of procedure", as Schmitthoff has put it[40], then international arbitral tribunals would be the place where transnational rules of law, whatever the status of general recognition and however incomplete and lacking in precision and clarity such rules may be in a given context, should have an opportunity to become crystallised, applied and developed.

Following the lead of the UNCITRAL Model Law[41], many modern arbitration laws have provided for special conflict of laws rules which give the arbitrators a considerable amount of freedom to apply not only any law of a given state but to also apply any "rules of law" agreed by the parties.[42] Some of these laws have gone beyond the UNCITRAL Model

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[40] C. Schmitthoff, "International Trade Usage", Institute of International Business Law and Practice Newsletter, Special Issue 1/1987.

[41] Art. 28.

[42] E.g. § 1051 (1) and (2) German Code of Civil Procedure, except that (2) refers the arbitrators to applying the law with the "closest connection" while Art. 28 (2) Model Law allows the arbitrators to choose the law they consider "appropriate".

Law and do not only allow the arbitrators to apply rules of law when chosen by the parties but also expressly provide for the possibility of applying rules of law in cases where the parties have refrained from making any choice of law[43]. Similarly many institutional rules provide the arbitrator with the freedom to apply any kind of law, including transnational legal principles in case he is asked to determine the applicable rules without reference to a choice made by the parties.

In addition, another development of "internationalisation" is to be observed at the level of the rules governing the choice of law to be performed by international arbitration. In a number of jurisdictions, but also in many institutional rules, arbitrators have been freed from the complexities of the task of identifying applicable national choice-of-law rules by empowering them to determine the applicable law or rules of law directly by way of which rules they find appropriate to apply (*voie directe*).[44]

An overview of how international arbitrators have dealt with the freedom granted to them to apply and formulate transnational rules of law must by necessity remain highly sketchy and limited. What can be said here on the basis of this commentator's personal experience and what seems to be confirmed by the ICC's study of the application of UNIDROIT Principles by ICC tribunals[45] and the Unilex Collection of awards[46], however, indicates that transnational rules of law, while not being frequently referred to by arbitral tribunals, appear to be recognised and accepted as a basis for resolving international commercial disputes. The practice of international arbitral tribunals allows the conclusion to be drawn that, in certain settings, if the parties have agreed upon their applicability or the domestic laws appear insufficient in answering the issues, pre-formulated standards such as the UNIDROIT Principles can either be the basis or at least assist in finding a law based solution.

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[43] Art. 1496 French N.C.P.C.; Art. 1054 Sec. 1 and 2 Netherlands Arbitration Act of 1986; Art. 187 Sec. 1 Swiss Law on Private International Law; K.-P. Berger, *The Creeping Codification of the Lex Mercatoria*, 1999, 80 etc., intending to reconcile the approach of the UNCITRAL Model Law with that of the liberal view reflected in the Dutch, French and Swiss legislation, argues that the term "the law" used in Art. 28 (2) UNCITRAL Model Law was not meant by the drafters to exclude any transnational considerations in the arbitrators' law finding process.

[44] New Zealand Arbitration Act, First Schedule, 28 (2); Danish Arbitration Act, § 28 (2); Greek International Commercial Arbitration Law, Art. 28 (2); English Arbitration Act, § 46 (3); French N.C.C.P., Art. 1496; Netherlands Code of Civil Procedure, Art. 1054 (2). While this liberal standard does not mean that arbitrators don't have to observe legal reasons anymore in determining the applicable law or rules of law, it certainly opens an easier path to arrive at applicable rules of law instead of some state law.

[45] UNIDROIT Principles of International Commercial Contracts. Reflecting on their use in International Arbitration, Special Supplement – ICC International Court of Arbitration Bulletin, 2002 (various authors).

[46] *www.unidroit.org*: database Unilex on CISG and UNIDROIT Principles.

In the great majority of cases, if the past experience of the ICC is to be taken as an indicator[47], international arbitrators do not decide at all on the basis of any transnational rules but simply apply the law as agreed by the parties. With the growing sophistication of international business transactions, including the quality of the legal advice provided for such transactions, a specific trend towards a denationalisation of the substantive law applicable to such transactions is not necessarily to be expected. However, some harmonisation of applicable national legal standards seems to be taking place. The driving elements of this general development in the area of international commerce are manifold, including uniform laws adopted by way of international conventions, such as the Convention on Contracts for the International Sale of Goods (CISG), international trade and investment regulations[48], contract drafting techniques aimed at making contract provisions increasingly functionally independent of any local rules, trade usages followed and "formulated" in many areas of commerce and industry, the harmonisation of laws and regulations in free or liberalised market zones and, last but not least, law reforms aimed at achieving the same solution for the same problem as in other countries.

What is to be observed in this context, and what characterises perhaps the application of national laws in particular, is the indication of international arbitrators to use the comparist method in the application of domestic laws in their awards. Such an, in the words of Berger,[49] "internationally useful" interpretation of domestic laws is, in this commentator's experience, often used by international arbitrators in order to arrive at an interest-oriented, commercially sensible solution of international disputes or also simply for the purpose of confirming their interpretation of a domestic law they find to be applicable. This is an area where use can be, and is, made of written transnational rules such as the UNIDROIT Principles[50] in order to check upon and arrive at a construction of a domestic law which is in line with the requirements of the international setting in which it applies.

In contrast to the CISG, which covers sales contracts, the UNIDROIT Principles cover commercial contracts in general. They can be seen as a general part of the CISG[51], but there is also an important distinction in terms of the regulatory approach to the unification of law. While the CISG

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[47] As can be gleaned from Pierre Mayer's investigation of ICC awards between 1996 and 2000, see P. Mayer, "The Role of the UNIDROIT Principles in ICC Arbitration Practice", in: *ICC UNIDROIT Principles Study*, 105 etc.

[48] E.g. the World Bank's "Guidelines on the Treatment of Foreign Investment".

[49] K.-P. Berger, 189.

[50] Others are, e.g., the Principles of European Contract Law and many more specialised rules such as INCOTERMS and others.

[51] H. Kronke, "The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond", *Journal of Law and Commerce* 25/2005–06, 451, 457, quoting Pierre Karrer.

is an international convention which, within its scope, provides for uniform commercial law for international transactions in its member states, the UNIDROIT Principles, being developed on the basis of the functional comparative methodology, limit themselves to restating principles and rules with regard to international commercial contracts, principles and rules which, in the words of Goode, "represent unconditional commitment and consensus of scholars of international repute from all over the world".[52]

The UNIDROIT Principles are neither an international convention nor a model law, but can be qualified as meta-legal principles and rules of a non-binding character, formulated by an intergovernmental organisation. As they have been put into a "statutory" form, they can be considered to assume "a normative quality".[53]

The UNIDROIT Principles were first adopted in 1994 and were then extended in 2004 to cover additional topics such as agency, set-off, assignment, limitation periods and electronic contracting. Currently, there is work taking place to further cover the topics of unwinding of failed contracts, illegality, plurality of obligors and of obligees and conditions and termination of long-term contracts for cause.

The UNIDROIT Principles contain general principles that deal with fundamental notions of contract law such as freedom of contract, freedom of form and proof, *pacta sunt servanda*, good faith and fair dealing and the primacy of usages and practices in international transactions. In addition to legal principles, they also contain rules with a clearly defined scope of application with regard to matters such as the conclusion of contracts, mode of payment, currency of payment, costs of performance, calculation of interest claims and many other technicalities of the conclusions and performance of contracts. Similar to the interpretation of a law on commercial contracts the UNIDROIT Principles are therefore to be "filled with life"[54] by weighing legal principles against rules in a complex assessment process taking account of the interests involved in particular factual settings; in order to promote unity, comparable to the provisions found in the Vienna Sales Convention and in the CISG[55]. Art. 1.6 UNIDROIT Principles provides for their autonomous uniform interpretation without reference to any domestic law (gaps are "as far as possible to be settled in accordance with their underlying general principles"). In the context of international commerce, international arbitrators have shown to be very receptive to fulfilling this function and to integrate UNCITRAL Principles in their law-finding process.

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52 Quoted in K.-P. Berger, 154.

53 *Ibid.*

54 H. Van Houtte, "The New UNIDROIT Principles of International Commercial Contracts, A New Lex Mercatoria?",, in: *ICC Institute of International Business Law and Practice*, 184–186.

55 Art. 7 (2) Vienna Sales Convention, Art. 17 CISG.

Looking at the role of the UNIDROIT Principles in International Commercial Arbitration it is not only instructive to see how receptive arbitrators have been to this "codification" of non-binding transnational principles and rules, but also how arbitrators have made use of them and how this, in turn, has led the authors of the Principles encouraged to describe the uses to be made of the Principles in the Preamble of the 2004 version in bolder terms than before. The 2004 Preamble states (with changes to the prior version marked):

These Principles set forth general rules for international commercial contracts.

> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
>
> New: *They may be applied when the parties have not chosen any law to govern their contract.*
>
> New: *They may be used to interpret or supplement domestic law.*
>
> They may be used to interpret or supplement international uniform law instruments.
>
> They may serve as a model for national and international legislations.

The acceptance and use of the Principles as transnational contract law rules as reflected in the some 150 published or otherwise known arbitral awards covers a wide range of types of transactions beyond the sale of goods, varying from contracts on work and services to construction, licences, BoT, shareholder agreements, partnership agreements, and merger and takeover agreements.[56]

As concerns the options for the applications of the UNIDROIT Principles as set out in their Preamble, it appears that this "menu" is generally followed if not surpassed by international arbitrators.

To the extent the published awards available on the internet are a valid indicator when the parties have agreed that their contract be governed by the UNCITRAL Principles or by general principles of law, arbitrators, almost invariably appear to arrive at the applicability of the Principles. They fully recognise the parties' right to agree on transnational rules and, if general principles of law are chosen, appear to have a clear preference for referring to the UNCITRAL Principles in such instances.[57]

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[56] H. Kronke, 455.

[57] In the Channel Tunnel case, the applicable law clause provided for an application of the principles common to both English and French law, and in the absence of such common principles of such general principles of international trade law as have been applied by national and international tribunals. The arbitral tribunal decided to apply the

International arbitrators have also shown their willingness to refer to the Principles in cases “when the parties have not chosen any law to govern their contract.” In part, as in ICC Award 15089 of 15 September 2008, such decisions are based expressly on the negative choice-of-law doctrine, which is based on the view that the parties’ decision not to agree on the applicability of a domestic law must be interpreted as a choice against the application of any domestic laws and therefore a choice in favour of transnational rules. But this doctrine is not widely adhered to[58]. In other decisions a wider, more objective approach is taken, finding, for example, that the conflict rules do not result in any clear connection of the contract with any domestic law[59] or come very straightforwardly to the application of the UNIDROIT Principles on the basis of the lack of choice of the contracting parties[60]. In a Russian Award of 5 November 2002 the arbitrators found the agreement of the parties to have both their laws apply to the contract tantamount to not agreeing on any domestic law and applied UNCITRAL Principles instead. But international arbitrators have also decided in no-choice settings in favour of the applicability of a domestic law and against UNCITRAL Principles, arguing, *inter alia*, that even if the Principles should be regarded as trade usages, such usage would not be relevant in the face of the applicable domestic law[61].

In some cases, international arbitral tribunals have gone as far as opining that the UNIDROIT Principles are “the better law” for international contracts, even though some domestic law might be applicable on the basis of conflict rules.[62]

UNCITRAL Principles. See Berger, op. cit., at 35/36. See also the decision of an *ad hoc* tribunal of 19 August 2005 which, on the basis of the parties’ agreement to apply “principles of international law”, based its decision on the UNCITRAL Principles (abstract published in Unilex). ICC Award 12.111 of 6 January 2003, deciding a dispute in which the parties had agreed on the applicability of international law, esteemed that the Principles of European Contract Law were not yet applicable and were an “academic exercise” (abstract published in Unilex).

[58] K.-P. Berger, 82 etc., ranks it as a “premature application of the *lex mercatoria*”, arguing that the lack of a choice of law clause may be due to a number of reasons, none of which necessarily indicates the parties’ intention to “transnationalise” their contract.

[59] E.g. ICC Award of 2004 or ICC 11265 of 2003(abstract published in Unilex).

[60] ICC Award 12.111 of 3 October 2003 (abstract published in Unilex).

[61] CIETAC Award of 2007 with regard to Chinese law; CIETAC Award of 2 September 2005 considered that the Principles have no subsidiary validity in relationship to the applicable domestic law (abstracts published in Unilex).

[62] See ICC Award 7110 of 1999, quoted by Y. Derains, “The Role of the UNIDROIT Principles in International Commercial Arbitration, A European Perspective”, in: *ICC Court of International .Arbitration, UNIDROIT Principles of International Commercial Contracts, Special Supplement – ICC International Court of Arbitration Bulletin* 2002, 18.

In a significant number of cases concerning sales contracts, where arbitral tribunals come to the applicability of uniform legislation such as the CISG, the arbitrators have referred to the UNIDROIT Principles, occasionally also to the Principles of European Contract Law, as a set of supplementary rules providing answers to the issue in question[63]. These decisions demonstrate the functionality of the Principles as an instrument for the gap-filling interpretation of the CISG, although the Principles, in contrast to the CSIG do not have the force of law.

Last, but not least, mention should be made of the high number of arbitral decisions, although arriving at the application of a domestic law, nevertheless refer to the UNIDROIT Principles, be that in the form of providing for an "international" interpretation of that law or be that merely for the purpose of confirming the results found by way of interpretation of the applicable domestic law[64]. While, on closer analysis, in some of these instances references to the UNIDROIT Principles may not signify much more than setting the result found on the basis of a domestic law in an international light, thereby giving them a more dignified status of acceptability[65], such additional reasoning nevertheless must be seen as an indicator of an effort by international arbitrators to fully grasp the transactional character of international commercial transactions and to strive for legal solutions which are based on common principles of law and justice.

6. CONCLUSIONS

The internationalisation of international arbitration has resulted in a convergence of legal standards, not only in general, but also with regard to ethical rules for arbitrators, procedures of evidence taking, and the application of substantive law and rules of law. While differences continue to exist

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[63] Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, decision of 23 January 2008; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Award of 30 January 2007; N.A.I. Award of 10 February 2005; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Award of 19 May 2004; ICC Award 11630 of 2002 (abstracts published in Unilex).

[64] Corte Arbitrale Nazionale ed Internazionale di Milano, decision of March 2008, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Award of 27 March 2007; WIPO Award of 25 January 2007; ICC Award 9 October 2006; ICC Award of June 2004; Ad hoc Award of 4 March 2004; ICC Award 12591 of 2004; ICC Award 11256 of 2003; ICC Award 11295 of December 2001; ICC Award 9078 of October 2001; ICC Award 11051 of July 2001 (abstracts published in Unilex).

[65] These are instances of an "internationally useful interpretation" of domestic laws; see K.-P. Berger, 189.

in all three chosen areas of the law, this movement towards uniformity generally helps to render arbitration a reasonably foreseeable and acceptable way for parties to resolve their international commercial disputes.

As the developments show, the trend towards a higher degree of harmonisation of legal standards is characterised by complex interactions between domestic laws, international conventions, various types of rules and standards formulated by "formulating agencies" such as arbitral institutions, intergovernmental organisations, bar organisations, and other private bodies, and by the common practice of the international arbitral tribunals which apply such laws, conventions and privately formulated rules and standards. There is not a single source of law which can explain the development towards greater uniformity. Typically, rules, guidelines, or standards produced by formulating agencies are by their nature non-binding in character, often not representing more than a "menu" of rules or practices to be followed, leaving parties and arbitrators the freedom and the pragmatic flexibility reach their own answers. But they acquire a law-like character when consistently applied and implemented by the arbitral tribunals whose awards are recognised and enforced by national courts.

Comparing developments in the three areas of arbitration law, the following is to be noted:

The development of unified ethical standards for the conduct of arbitrators is characterised by the fact that decisions as to compliance with such standards are still largely left in the hands of domestic courts.[66] There are rules and guidelines published by formulating agencies in this area, such as the IBA Rules of Ethics, the IBA Guidelines on Conflicts, the CIArb Code of Professional and Ethical Conduct and the AAA/ABA Code of Ethics, but up to now it remains open to what extent these have actually found widespread international acceptance in the courts and arbitral institutions beyond the level of generalities. The IBA Guidelines pursue an innovative approach as an instrument which attempts to define concrete factual settings and contextualise them with general principles. While these factual settings may be used as points of orientation, it remains to be seen whether they will have a significant effect on the development of harmonised detailed rules on arbitrators' conduct. The first reactions in the judiciary indicate that in particular the IBA Guidelines may have a lasting impact.

The development of a widely accepted concept of hybrid proceedings, on the other hand, seems to be due largely to arbitral practice, with

[66] There are only some jurisdictions, such as Switzerland or France, where the courts will refrain from reviewing decisions on challenges taken by arbitral institutions on the basis of a doctrine of non-interference in administrative interim decisions.

the IBA Rules on Evidence rather restating that practice than formulating new standards. As described, the IBA Rules on Evidence provide for a menu of options from which arbitral tribunals and parties can select and which provides for pragmatic solutions for issues of evidentiary procedure in the form of pre-formulated rules. A desirable degree of flexibility is therefore maintained. In this sense the IBA Rules on Evidence probably provide a generally adequate approach to harmonisation in this area even though areas such as legal privilege or the handling of request for electronic documents still require the development of more detailed procedural solutions. The attention paid to these issues by arbitral institutions, formulating agencies and the arbitral tribunals themselves, however, raises the expectation that a more or less uniform practice with regard to these issues will develop as well.

In the area of the substantive law applied by the arbitral tribunals two general trends are to be ascertained – the inclination of international arbitrators to transnationalise domestic law found to be applicable by way of an "internationally oriented interpretation" and the acceptance by international arbitrators of the UNIDROIT Principles as the embodiment of recognised principles of law applicable to international commercial contracts. While these trends exist, however, arbitrators do not generally engage in finding transnational rules of law by creating such rules themselves. Rather, they orient themselves by way of a comparative approach which might cover various domestic laws, and in which context UNIDROIT Principles are made use of as a supplementary source of law in relation to one or several domestic laws or, when parties have not made a choice of law or have referred to general legal principles, they refer to the Principles as rules reflecting the elements of a non-national law for commercial contracts..

Proponents of the *Lex Mercatoria* doctrine often rely on the growing uniformity of international arbitration law as evidence of the existence of an independent supranational legal system created not by the states but by the international business community. In the view of this commentator the developments in the law of international arbitration as set out above do not provide sufficient evidence for the existence of a *lex mercatoria*, understood as an autonomous system of rules of procedural and substantive law for international commerce. When international arbitrators create hybrid proceedings, transnationalise domestic laws, or apply general principles of law, they are doing nothing more than using the powers given to them under the authority of the states. They fulfil a recognised adjudicatory function sanctioned by national courts which refrain from interfering in this process, but this function is given to international arbitrators because state legislation so provides. If, however, *lex mercato-*

ria is viewed as a method[67] applied by international arbitrators in order to remove a dispute between parties from different jurisdictions from the ambit of national laws and procedures inconsistent with the requirements of international commerce and dispute resolution, then the developments towards a uniform law of international arbitration can be viewed as *lex mercatoria* in action.

[67] E. Gaillard, "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules", *ICSID Review: Foreign Investment Journal* 10/1995, 208; E. Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, 2008, in particular 60 etc.

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THE NOTION OF TRANSNATIONAL PUBLIC POLICY AND ITS IMPACT ON JURISDICTION, ARBITRABILITY AND ADMISSIBILITY

Given the increasing influence of the concept of transnational public policy in both the commercial and the investment arbitration context and the critique attached to its application the author devotes this paper to an analysis of the scope and content of this concept and its impact on arbitral proceedings at the pre-merits stage. In particular, in a first part, the author gives guidelines on how to distinguish transnational public policy from other public policy concepts as applied in arbitral proceedings and gives guidance on how to determine its scope and content.

Thereafter, the author analyzes in detail the impact of the notion transnational public policy on the arbitral tribunal's affirmation or denial of jurisdiction, arbitrability and admissibility during arbitral proceedings.

The author concludes that given the flexible content of transnational public policy, parties and arbitral tribunals should be cautious and carefully verify the objective existence and meaning of transnational public policy when considering applying it. Violations of substantive public policy are not necessarily postponed to the merits stage, but rather can have an impact on the arbitral tribunal's assessment of jurisdiction, arbitrability and admissibility.

Key words: *Public policy – Jurisdiction – Arbitrability – Admissibility – Unclean hands – Universal standards*.

1. INTRODUCTION

> *"Public Policy; – it is an unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."*[1]

[1] Richardson v. Mellish, 2 Bing 229, 303 (1824) cited by M. Reisman, "Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration", *ICCA Congress series* 13/2007, 849.

This quotation from *Burroughs J.* in *Richardson v. Mellish, (England, Court of Common pleas, 1824)* stands as an example for the feeling of distrust and concern caused by the notion of "public policy." Even though such concerns date back almost 200 years ago, they seem as prevailing and timeless as few other matters when it comes to the application of legal concepts. The very same concerns as voiced in this statement were recently pronounced by Michael Reisman, who put this statement at the beginning of his article "Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration."[2] In this article, Reisman explains his reservations about the application of transnational public policy in international arbitration. In particular, he refers to its "fleeting character" and expresses the fear that "the authorization of its application by international commercial arbitrators would lead to great uncertainty." [3] Furthermore, Reisman expresses doubts that transnational public policy is a legal concept with a verifiable judicial history. Instead he states that the "*invocation of transnational public policy becomes an easy way for those claiming to have an insight into the heart and the soul of international law to effect their own preferences without having to prove that they have become customary international law*."[4]

Notwithstanding this criticism and these concerns as to the legitimacy of the application of the concept transnational public policy, recent developments in international arbitration show an increasing influence of the concept of transnational public policy on arbitral proceedings and awards, including already at the pre-merits stage.[5] This increased impact of public policy considerations on international arbitration adjudication can be observed both in commercial arbitration and investment arbitration. In particular, as the author will show below recent investment arbitration adjudication shows that public policy concerns have already increasingly played an important role in the dismissal of a case at an early stage of the arbitration, that is, in the pre-merits phase.[6] But also in the

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[2] *Ibid.*

[3] *Ibid.*, 849, 854. In support of his characterization of international public policy as "fleeting," Reisman cites to a 2006 decision by the Swiss Federal Tribunal which observed, "The fleeting character of public policy may be inherent to the concept, due to is excessive generality; the wide scope of the almost countless opinions proffered in this regard would tend to prove it... As a commentator pointed out, all attempts to answer the numerous recurring questions raised by the interpretation of this concept merely resulted in raising further thorny or polemical questions."

[4] *Ibid.*

[5] G. B. Born, International Commercial Arbitration, 2009, 2177.

[6] Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, at para 146, available at *http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf*; Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case. No. ARB/03/26, Award of 2 August 2006, at para 249, available at *http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_001.pdf*.

field of commercial arbitration the impact of public policy on the pre-merits phase, specifically on jurisdiction and arbitrability, has been frequently discussed.

In view of the concerns raised in the beginning of this paper as to the content and legitimacy of the application of the concept of transnational public policy, which becomes even more virulent if applied at an early stage of the proceedings, the author will *first*, attempt to define the scope and content of the notion of "public policy" in general and "transnational public policy" in particular as frequently applied in the international arbitration context. *Second*, the author will turn to an analysis of the impact of transnational public policy already on the pre-merits phase of arbitral proceedings, in particular the affirmation or denial of jurisdiction, arbitrability and admissibility of claims. *Third*, the author concludes this paper with the observation that the "fleeting" and evolving concept of transnational public policy has gained some contours both with respect to its content and through its continued and consistent application by arbitral tribunals. A trend can be observed that particularly in investment arbitration public policy concerns have an increasing influence on the pre-merits phase. Given this consistent and continued application in both international commercial and investment arbitration it seems that the "unruly horse" public policy has been substantially tamed.

2. SCOPE AND CONTENT OF THE NOTION "PUBLIC POLICY" AS FREQUENTLY APPLIED IN INTERNATIONAL ARBITRAL PROCEEDINGS

When approaching the issue of public policy in international arbitration, one needs to take into account that the notion of public policy is by its nature not capable of precise definition. It is a flexible concept which is subject to further evolution, and which has also been described as the "relativity of public policy."[7] Inasmuch as Reisman's critique of the "fleeting" character of the concept of transnational public policy may be justified to a certain extent, the more important it will be to attempt to define the scope and content of this notion of "public policy."

As Reisman pointed out, the legitimacy of the application of this concept in international arbitration depends on the determination and verification of its scope and content. If a consistent and continuous approach to the notion of transnational public policy can be identified in the commercial arbitration context its application may be justified. Thus, in the following part, the author attempts to give guidance on the definition of

[7] P. Lalive, "Transnational (or Truly International) Public Policy and International Arbitration", *ICCA Congress series* 3/1986, 258, 262.

the scope and content of the notion transnational public policy as developed by commentators and international arbitral tribunals.

Despite the difficulty to fully grasp the concept of “public policy,” a differentiation of the concept of public policy is frequently made with respect to its scope and content. First, one can distinguish “national public policy” from “international public policy,” which again differs from the related concept of “transnational public policy,” which is frequently referred to in international arbitration. Furthermore, another distinction is frequently made between “procedural public policy” and “substantive public policy.” The author will further describe each of these concepts below.

2.1. National, International and Transnational Public Policy

While all of three concepts referred to above as “national public policy,” “international public policy” and “transnational public policy” seem to relate to the same concept of “public policy,” they differ in scope and content. An arbitrator when being confronted with public policy issues should carefully analyze the applicable rules to the arbitral proceedings and be aware of the distinction between these three concepts of public policy before applying any of them. He should not only ask himself what public policy means or stands for before applying it in arbitral proceedings, but also conduct an analysis to which body and rules he should turn when purporting to consider public policy.[8] This is particularly important in order to accommodate the legitimacy concerns with respect to the content and application of the concept transnational public policy raised by Reisman.

2.1.1. National Public Policy

When approaching this topic, one needs to distinguish between “national public policy” and “international public policy.” According to Catherine Kessedjian, national public policy is the more commonly used. She defines this notion as follows: “It is comprised of those fundamental rules, developed by each State, which are of utmost importance for that State’s society and from which citizens (and very often residents) of that State cannot derogate. It is territorial in nature.”

Given the territorial character of the notion of national public policy, its application in arbitral proceedings is subject to the determination of the applicable law. If the parties have agreed on a particular substantive law governing the dispute, the national public policy concept of the *lex contractus* must be applied.

[8] R. H. Kreindler, Approaches to the Application of Transnational Public Policy by Arbitrators, *Journal of World Investment* 4/2003, 239 etc.

However, the public policy standards of the *lex contractus* are not always the only public policy standards which an arbitrator should apply before rendering an award. Under certain circumstances, the arbitrator should also take into consideration the public policy standards of other national laws, e.g., the *lex arbitri*, the *lex societatis* or the law of the place of the performance when confronted with public policy issues. To which extent the arbitrator is obligated to do so depends on the whether the public policy violation constitutes a violation of a mandatory rule of e.g., the laws applicable at the arbitral seat or the laws of the place of enforcement.[9]

The reason for applying the concept of international public policy in international arbitral proceedings as derived from the applicable *lex arbitri* or law of the place of performance can be seen in the arbitrator's obligation to render a binding and enforceable award.[10] E.g., Art. V 2 (b) of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards ("New York Convention") provides that

> The recognition or enforcement of the award would be contrary to the public policy of that country.

Thus, in order to comply with his duty to render a binding and enforceable award, the arbitrator must or in any event should also take into account the public policy of the country where recognition or enforcement of the award is sought or likely to be sought.

2.1.2. International Public Policy

This is where the notion of "international public policy" comes into play. When confronted with an objection to an application for recognition or enforcement of an arbitral award on grounds of a public policy violation, many State Courts differentiate between national public policy and international public policy. The concept of international public policy has also found its way into some State legislation.[11] Many State Courts have exercised a substantial degree of restraint when applying the notion of public policy under Art. V 2 (b) New York Convention, to the extent that not every violation of the national public policy but only a violation of international public policy can constitute a ground for the refusal of recognition or enforcement of an arbitral award.[12]

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[9] *Ibid.*, 241 etc.

[10] P. Lalive, 258, 273; R. H. Kreindler, 239, 241.

[11] *See, e.g.*, in France art. 1502 of the Code of Civil Procedure (1981); in Portugal art. 1096 (f) of the Code of Civil Procedure.

[12] E.g. in a recent decision the German Federal Court of Justice (BGH) held that not every violation of a German mandatory norm constitutes a violation of German international public policy (BGHZ III ZB 17/08). For further references to various decisions of other national courts such as U.S., French, Portuguese, Luxemburg and Italian court decisions, *see* G. B. Born, 2834, 2835, fn. 638.

Thus, a further definition of the term international public policy is called for which Pierre Lalive has described as follows: "*The concept of international public policy of a given community, here of a State, is made up of a series of rules or principles concerning a variety of domains, having a varying strength of intensity, which form or express a kind of* ***'hard core'*** *of legal or moral values, whether in its negative or in its positive function.*"[13] [Emphasis added]

According to this definition, international public policy is a subset of internal public policy. It is generally narrower than the latter[14] and, by reason of its rootedness in internal public policy, specific to each State. Only the most fundamental norms of the national public policy form part of each State's international public policy. This narrow application of international public policy standards within the recognition and enforcement context has recently been confirmed by the German Federal Court of Justice ("BGH") by making an express differentiation between German national public policy and German international public policy, and clarifying that the latter is a narrower concept than the former.

In particular, the BGH held that not every arbitral award that is in contradiction with German mandatory norms constitutes a violation of German *ordre public*. Furthermore, the BGH clarified that not every violation of a German mandatory norm constitutes a violation of German international public policy. Rather, only a violation of the most fundamental norms, which reflect the legislator's essential value system as such so that no party may derogate from them, could constitute a violation of the German international public policy.[15]

This description of the content of international public policy made by the German BGH is also in line with the above-referenced definition by Pierre Lalive inasmuch as only the "most fundamental norms" or, as Pierre Lalive put it, "hard-core" legal norms of a State's national public policy are encompassed in the notion German international public policy.

Thus, referring back to the question whether and with which content an arbitrator should also apply, e.g., the public policy of the *lex arbitri* when being confronted with a public policy issue, the answer can be found in that State's international public policy. If the public policy under the *lex contractus* differs from the public policy applicable at, e.g., the seat of arbitration or place of enforcement, inasmuch as the public policy issue would violate the mandatory international public policy of the *lex arbitri* or place of enforcement, the arbitrator should also apply the inter-

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13 P. Lalive, 258, 264.

14 C. Seraglini, Lois de police et justice arbitrale internationale, 2001, 152, at para. 312.

15 BGHZ III ZB 17/08.

national public policy applicable at the seat or place of enforcement; otherwise, there is a risk that the award might be subject to annulment or refusal of recognition or enforcement.

Notwithstanding the above-referenced principles with respect to the applicable law which an arbitrator should take into consideration when being confronted with a public policy issue, given the transnational character of international arbitration, the arbitrator should also take into consideration the application of a "supranational" or "transnational" public policy.[16]

2.1.3. Transnational Public Policy

While international public policy is still State-made law, transnational public policy is understood to be detached from any specific legal system.

Catherine Kessedjin has defined the concept of "transnational public policy" as follows: "*[T]ransnational public policy is composed of mandatory norms which may be imposed on actors in the market either because they have been created by those actors themselves or by civil society at large, or because they have been widely accepted by different societies around the world. These norms aim at being universal. They are the sign of the maturity of the international communities (that of the merchants and that of the civil societies) who know very well that there are limits to their activities*.[17]

Audley Sheppard has recently defined the notion of transnational public policy in a similar way: "*By the term "transnational public policy" I mean those principles that represent an international consensus as to universal standards and accepted norms of conduct that must always apply. The concept of "transnational public policy", is said to comprise fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as "civilized nations*."[18]

According to these two definitions, transnational public policy, in contrast to international public policy, is detached from a specific legal system. It is "truly international"[19] in the sense that the most fundamental universal norms and values known to most legal orders and communities

[16] P. Lalive, 258, 276 etc.

[17] C. Keesdjian, "Transnational Public Policy", ICCA Congress Series 13/2007, 857, 861–862.

[18] A. Sheppard, "Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?", *Transnational Dispute Management* 1/2004, 1, 3.

[19] For the use of the term "truly international," *see* P. Lalive, 258 etc. In many cases, the terms transnational public policy and international public policy are used interchangeably.

form this body of law. Transnational public policy seems to be understood as a set of overriding rules and principles which may be applied irrespective of the law governing the dispute of the law governing at the place of arbitration. Indeed such well-known commentators as Pierre Lalive, Catherine Kessidjian and Richard Kreindler conclude that it is the arbitrator's duty to apply this notion in international arbitration given its universal character and the duty to protect the universal legal order from any violations.[20]

This concept of transnational public policy has also recently been applied in the context of corruption by an ICSID tribunal in *World Duty Free vs. Kenya*: "*In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to international public policy of most, if not all, States or, to use another formula, to* ***transnational public policy****."*[21] [Emph. added]

Also other international arbitral tribunals have referred to the notion transnational public policy, inasmuch as they confirmed that there exist universal standards which override the parties' choice of law and which must be observed by the arbitral tribunal.[22]

As can be derived from the above, the notion of public policy is threefold, which calls for a careful assessment which of the public policy notions should be applied in the specific context of the arbitral proceedings.

2.2. Procedural Public Policy versus Substantive Public Policy

Having distinguished the different concepts of public policy, their sources and application range, the arbitrator must identify the specific content of the respective public policy concept. With respect to the content, as explained above, these three concepts overlap. International public policy is generally narrower than national public policy. It necessarily comprises the essential and fundamental rules and values of a State's na-

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[20] P. Lalive, 258, 313 etc.; C. Keesdjian, 857, 862 *etc.*; R. H. Kreindler, 239, 249.

[21] World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, at para 157, available at *http://ita.law.uvic.ca/documents/WDFv.KenyaAward.pdf*.

[22] *See* e.g., Westacre v. Jugoimport, ICC Case No. 7047, Award of 28 February 1994, *ASA Bulletin* 1995, 301, 332; Hilmarton v. OTV, ICC Case No. 5622, Award of 19 August 1988, *Yearbook of Commercial Arbitration* 19/1994, 115, at para 34; Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, at para 141 etc., available at *http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf*; Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case. No. ARB/03/26, Award of 2 August 2006, at para 249, available at *http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_001.pdf*.

tional public policy. Transnational public policy by definition comprises the most fundamental norms of public policy which, ideally, each State should have embedded in its legal system and which thus should overlap with a State's international public policy.[23] Given this substantial overlap and the international character of international arbitration, not tied to any legal system, the author will focus below on the content of transnational public policy before discussing in detail its impact on the arbitral proceedings.

When discussing the content of public policy in general and transnational public policy in particular, a distinction is frequently made between procedural and substantive public policy. Procedural public policy governs the procedural aspects of an arbitral proceeding. Substantive public policy governs the rights and obligations of a party with respect to the subject matter of the dispute. Substantive public policy, by virtue also of the term "substantive," generally plays an important role when it comes to the merits of a case.[24]

At the same time, as will be shown below, substantive public policy concerns are not limited to the merits stage. Recent adjudication, in particular in the investment arbitration context shows that substantive public policy concerns may also have an impact on the pre-merits phase of the arbitration, in particular on the arbitral tribunal's jurisdiction, the arbitrability of the subject matter and the admissibility of the claims. Before turning to that question though it will be necessary to distinguish procedural from substantive public policy.

In conformity with the above-referenced definitions to make out the content of transnational procedural public policy, one needs to identify those fundamental rules and norms governing arbitral procedure on which an international consensus exists as to their universal binding character. Even if there existed uniform arbitral procedural rules, which are contained in e.g., the IBA Rules on the Taking of Evidence in International Commercial Arbitration or the UNCITRAL Model Law, the New York Convention, national arbitration laws and international arbitration adjudication, not every such rule necessarily constitutes a transnational procedural public policy.[25] As explained above, only the most fundamental rules and values, which are universally accepted principles, form part of transnational procedural public policy.

Furthermore, in the context of the drafting of the UNCITRAL Model Law it has been discussed whether there exist differences between

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[23] C. Keesdjian, 857, 859 etc.; R. H. Kreindler, "Standards of Procedural International Public Policy", *Stockholm International Arbitration Review* 2/2008, 143.

[24] Ph. Fouchard et al., Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 1661.

[25] R. H. Kreindler, (2008), 143.

Continental European law conceptions on the one hand and Anglo-American ones on the other as to the scope and content of transnational procedural public policy. [26] It has been argued that the former Continental European notion of procedural public policy relates more to public morals, health and safety, while the latter Anglo-American concept of public policy also embraces the fundamental aspects of procedural justice.[27]

Notwithstanding these differences in approaches to transnational procedural public policy, certain fundamental procedural rules and values have emanated over the years within the framework of international conventions and arbitral adjudication. Those rules and values encompass, e.g., the requirement that arbitral tribunals be impartial, that the making of the award not be induced or affected by fraud or corruption, that equal treatment be observed in appointing the arbitral tribunal, that the rules of natural justice be upheld, and that the right to a fair or reasonable opportunity to present one's case be maintained.[28] Notwithstanding these principles, the content of transnational public policy is evolving and flexible, so that the content of procedural public policy remains subject to constant development and reassessment as to the truly universal character of those principles and future principles which might develop over the years.

The same is true for transnational substantive public policy. Just like transnational procedural public policy, the content of transnational substantive public policy is difficult to determine and the principles and values, once identified, remain subject to change and further development. Notwithstanding this *caveat*, certain rules and principles have evolved over the years which are of universal character such that they are considered to form part of the body of transnational public policy. Examples of substantive public policy cited by both international arbitral tribunals and by commentators include both positive and negative obligations such as, *inter alia*, the principle of good faith and the prohibition of abuse of rights, *pacta sunt servanda*, the prohibition against expropriation without compensation, and the prohibition against discrimination. Furthermore, fundamental principles such as the prohibition against corruption, genocide, piracy, terrorism, slavery, drug trafficking and prostitution also form part of transnational public policy as being *contra bonas mores*. [29]

As will be shown below the transnational substantive public policy principles cited in this section do not only have an impact on the substantive law part of the dispute. Recent adjudication, in particular in the investment arbitration context shows that the application of transnational public policy principles plays already an important role when it comes to

[26] *See* A. Sheppard, 1, 4.

[27] R. H. Kreindler, (2008), 148.

[28] *Ibid.*, *see* A. Sheppard, 8.

[29] *Ibid.,* 4.

the determination of the arbitral tribunal's jurisdiction and the arbitrability and admissibility of the claims.

3. TRANSNATIONAL SUBSTANTIVE PUBLIC POLICY AND JURISDICTION

Whether or not a violation of transnational substantive public policy has an impact on the arbitral tribunal's jurisdiction has been subject to some discussion in the past.[30] When dealing with this question one needs to differentiate between treaty-based investment and contract-based commercial arbitration which respectively reveal a different approach to this question as undertaken by some arbitral tribunals.

In the contract-based commercial arbitration context, it has been frequently questioned whether a transnational public policy violation which potentially renders the underlying contract null and void also impeaches the arbitration agreement and thus the arbitral tribunal's jurisdiction. In investment arbitration, as will be elaborated further below, the issue is slightly different. In investment arbitrations the arbitration agreement generally is concluded or perfected once the investor accepts the Host State's offer to submit the dispute to arbitration. Thus, the issue is not so much the question whether an agreement to arbitrate is tainted by corruption and thus null and void, but more the issue whether the consent to submit to arbitration is still valid; thus whether an arbitration agreement can still be concluded. In this context recent ICSID awards such as the award in *Inceysa v. El Salvador* stand for the proposition that egregious transnational public policy violations such as manifest fraud may lead to a denial of jurisdiction. Thus, below, the author will first address the impact of public policy violations on the arbitral tribunal's jurisdiction in the commercial arbitration context before turning to the investment arbitration context where the issues are slightly different.

3.1. Commercial Arbitration

Interestingly enough, the investment arbitration position, i.e. that egregious transnational public policy violations may lead to an arbitral tribunal's denial of jurisdiction; has also been formerly expressed in the commercial arbitration context. In the well-known ICC award dating from 1963, Judge Lagergren had declined jurisdiction in a case involving bribery on grounds of a transnational public policy violation. He held that "*It cannot be contested that there exists a general principle of law recog-*

[30] A. Sheppard, J. Delaney, "Corruption and International Arbitration", 10th International Anti-corruption Conference, 1 etc., available at *http://www.10iacc.org/content.phtml?documents=106&art=167*.

nized by civilized nations that contracts which seriously violate bonas mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators [...] Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes."[31]

However, nowadays Judge Lagergren's position is no longer generally accepted in the commercial arbitration context.[32] Whether or not an illegal contract, such as a contract tainted by corruption, can lead to a denial of jurisdiction by an arbitral tribunal can be answered by turning to the principle of separability of the arbitration clause.[33]

According to the principle of separability of the arbitration clause, the illegality of the main contract generally does not affect the validity of the arbitration clause. Thus, even if the main contract is e.g. tainted by corruption and thus null and void, generally the arbitration clause would be considered to be separate from the main contract and thus not to be affected by the main contract's nullity. Consequently, the arbitral tribunal would still be competent to hear the case and exercise its jurisdiction to decide the case.

Only in very limited cases have courts considered that the illegality of the main contract may also impeach the validity of the arbitration clause. For example, in *Westacre Investments Inc. v. Jugoimport – SDPR. Holding Co. Ltd*., the English Court questioned whether in cases of gross violations of public policy the separability of the arbitration agreement could be upheld. In cases of bribery, the Court concluded that the public policy of sustaining international arbitral awards outweighed the public policy of prohibiting corruption.[34] Consequently, the Court did not hold that the arbitration agreement was impeached by the main contract's illegality. This decision can be interpreted as a decision upholding the principle of separability, after the application of a balancing test.[35]

Courts have held only in limited circumstances that the arbitration agreement may be deemed void *ab initio*, if the arbitration agreement forms an integral part of the main contract and if the main contract is il-

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[31] ICC Case No. 1110, Award [date unknown] 1963, *Arbitration International* 10/1994, 282, 293, 294.

[32] A. Sheppard, J. Delaney, 2.

[33] A. Redfern, M. Hunter, Law and Practice of International Commercial Arbitration, 2004,[4] 251.

[34] Westacre Investments Inc. v. Jugoimport – SDPR. Holding Co. Ltd., English commercial Court, *2 Lloyd's Report*, 111, 126 etc.

[35] For further details about this case, *see* A. Sayed, *Corruption in international trade and commercial arbitration*, 2004, 47 etc.

legal by operation of law. [36] In the specific context of an illegal gaming contract, which also included an arbitration agreement, the English Court of Appeal held that the gaming contract itself was null and void by operation of law. Consequently, the arbitration clause, which formed an integral part thereof, was null and void as well in application of the English Gaming Act. [37]

Notwithstanding this exception, generally, in commercial arbitral proceedings violations of transnational public policy do not have an impact on the arbitral tribunal's jurisdiction given the separability of the arbitration agreement. Only in very restricted circumstances has this principle not been upheld.

3.2. Treaty-Based Investment Arbitration

With respect to treaty-based investment arbitration, as explained above, the answer to the question whether a public policy violation could or should have an impact on the arbitral tribunal's jurisdiction cannot simply be answered by turning to the separability of the arbitration agreement principle.

In treaty-based investment arbitration, the agreement to submit the investment dispute to arbitration generally is deemed concluded once the investor accepts the Host State's offer to submit the dispute to arbitration as contained in the relevant bilateral or multilateral investment agreement ("BIT" or "MIT"). In this context, it has been discussed that only legal investments, which are in conformity with the relevant BIT or MIT provisions, enjoy protection under the investment treaty. Moreover, it has been concluded by international arbitral tribunals in the context of ICSID arbitration that the Host State's consent to submit an investment dispute to arbitration is limited to the condition that the investment is legal, in particular if the applicable BIT contains an "accordance with law" clause.[38] Thus, the doctrine of separability, which is applicable in the commercial arbitration context, is not necessarily applicable in such cases. No valid arbitration agreement would be concluded in cases of egregious substantive public policy violations for lack of the Host State's consent to submit the dispute to ICSID jurisdiction.

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[36] O'Callaghan v. Coral Racing Ltd., English Court of Appeal, *The Times*, 26 November 1998.

[37] *Ibid.*

[38] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case. No. ARB/03/26, Award of 2 August 2006, at para 245–252, available at *http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_001.pdf*; Fraport AG Frankfurt Airport Services Worldvwide v. Republic of Philippines, ICSID Case. No. ARB/03/25, available at *http://ita.law.uvic.ca/documents/FraportAward.pdf*.

Specifically, in *Inceysa vs. El Salvador*, the ICSID arbitral tribunal denied its jurisdiction by expressly relying on grounds of manifest transnational public policy violations[39] inasmuch as the investment had been tainted with fraud: "*International public policy consists of a series of fundamental principles that constitute the very essence of the State and its essential function is to preserve the values of the international legal system against actions contrary to it [...] It is uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country. If the Tribunal declares itself competent to hear the dispute between the parties, it would completely ignore the fact, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally. This Tribunal considers that assuming competence to resolve the dispute brought before it would mean recognizing for the investor rights established in the BIT for investments made in accordance with the law of the host country. It is not possible to recognize the existence of rights arising from illegal acts because it would violate the respect for the law which, as already indicated is a principle of international public policy*."[40]

In applying these principles established by the arbitral tribunal in *Inceysa v. El Salvador* one can derive that in the context of investment arbitration, egregious substantive transnational public policy violations may have an impact on the arbitral tribunal's jurisdiction. Even though this is not directly an issue to be addressed in this paper, in this context the author would briefly like to bring to the readers' attention the issue of whether such a question should not rather be resolved at the merits stage since it relates to the question whether the investor enjoys substantive protection under the applicable BIT or MIT.

Nevertheless, as can be derived from the above, before applying the notion of transnational public policy arbitral tribunals have generally verified its scope and content and sought to legitimize its application. In certain cases arbitral tribunals even apply a balancing test with respect to conflicting public policy interests. Generally, only after careful verification have arbitral tribunals come to the conclusion that a public policy violation could have an impact on the arbitral tribunal's jurisdiction.

4. TRANSNATIONAL PUBLIC POLICY AND ARBITRABILITY

Whether or not a dispute is arbitrable is both closely related to issues of the illegality of the arbitration agreement and to questions of pub-

[39] Even though the arbitral tribunal refers to "international public policy," the universal character it attributes to it and the context reveal that indeed the arbitral tribunal referred to the concept of transnational public policy as described above.

[40] Inceysa Vallisoletana S.L. v. Republic of El Salvador, at para 245–249.

lic policy. The question of enforceability of an illegal arbitration agreement can also be characterized as a question of arbitrability. At the same time, a dispute can be non-arbitrable because allowing the parties to resolve it by way of arbitration would constitute a violation of the State's public policy.

The arbitrability of the subject matter of the dispute may ultimately depend on the applicable public policy standards of the states concerned, particularly at the seat of the arbitration and the place of arbitration. However, certain issues arising in criminal, domestic relations, bankruptcy, real property and governmental sanctions are generally not arbitrable under the applicable law of most States. [41]

Generally though, most civil law systems have a rather broad statutory definition of arbitrability. E.g. Section 1030 German Civil Procedure Code provides: "*Any claim involving an economic interest [vermögensrechtlicher Anspruch] can be the subject of an arbitration agreement*."

Section 177 (1) of the Swiss Law on Private International Law provides similarly and under both statutes the term "*vermögensrechtlicher Anspruch*" is to be interpreted broadly. Nevertheless, disputes which involve a public interest, e.g. criminal law matters, child custody, domestic relations are not considered to be arbitrable.[42]

The similar is true under French law which provides in Article 2059 French Civil Code that "all persons may submit to arbitration those rights which they are free to dispose of" while Article 2060 provides that *"[o]ne may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or to disputes concerning public bodies and institutions and more generally in all matters in which public policy is concerned*."

A similar generous approach to the arbitrability of a dispute has also been applied by U.S. Courts.[43] Thus, in light of the foregoing, generally disputes are arbitrable unless they concern a public policy issue; keeping in mind though that the public policy exception is generally interpreted narrowly and applied restrictively.[44] Public policy interests such as the State's monopoly to criminal law matters set certain limits to the arbitrability of a dispute e.g. involving corruption on the one hand. On the other hand, a contractual claim involving an economic interest arising out of a contract tainted by arbitration is nevertheless generally considered to be arbitrable.

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[41] G. B. Born, 771.

[42] *Ibid.*, 777.

[43] See. e.g. Mitsubishi Motors, 473 U.S. at 639–640.

[44] G. B. Born, 790.

Consequently, disputes concerning a State's public policy are generally not arbitrable since. However, violations of transnational public policy, such as bribery which involve an economic interest, are generally arbitrable and do not have an impact on the arbitral tribunal's jurisdiction.

5. TRANSNATIONAL PUBLIC POLICY AND ADMISSIBILITY

As Jan Paulsson points out in his article "Jurisdiction and Admissibility," the concept of admissibility needs to be distinguished from jurisdiction.[45] While an arbitral tribunal's decision on jurisdiction is subject to judicial review, determinations as to the admissibility of a claim should be final. In contrast to jurisdiction, at the admissibility stage, the arbitral tribunal does not question whether a particular claim can be brought before a certain forum but rather questions whether the claim should be heard at all. [46]

Against this background, it is easier to put certain recent ICSID awards such as *Plama v. Bulgaria* and *World Duty Free v. Kenya* into perspective in which the respective arbitral tribunal had dismissed the investor's claims inadmissible on grounds of egregious transnational public policy violations.

In *World Duty Free v. Kenya* the arbitral tribunal held that "*In light of domestic laws and international conventions relating to corruption, and in light of the decision taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal*."[47] and that "*Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of* ex turpi causa non oritur actio." [48]

In *Plama vs. Bulgaria*, the arbitral tribunal expressly referred to the reasoning of the arbitral tribunal in *World Duty Free v. Kenya*. By concluding that the investment had been tainted by fraud, the arbitral tribunal dismissed the investor's claim on grounds of public policy violations

[45] J. Paulsson, "Jurisdiction and Admissibility", *Transnational Dispute Management* 6/2009, 601 etc.

[46] *Ibid.*, 617.

[47] World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, at para 157, available at *http://ita.law.uvic.ca/documents/WDFv.KenyaAward.pdf*.

[48] *Ibid.*, at para 179.

without going into the merits: "*In consideration of the above and in light of the* ex turpi causa non oritur actio*, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT.*"[49]

Both of these ICSID decisions stand for the proposition that egregious public policy violations should result in a dismissal of the case inasmuch as the arbitral tribunal should not even lend its assistance to a claimant bringing such claims. In other words, in referring to the definition provided by Paulsson above, an arbitral tribunal may dismiss claims whose enforcement would be in violation of transnational public policy as inadmissible.

The concept *ex turpi causa non oritur actio* has been also referred to as the unclean hands doctrine, which is rooted in Roman Law principles.[50] Pursuant to this principle no court should lend its assistance to a plaintiff who comes with unclean hands, e.g. who has committed a violation of transnational public policy.[51] Accordingly, in application of this concept, claims which arise from an illegal action in violation of transnational public policy are to be dismissed as inadmissible without going into the merits of the dispute. Thus, in the light of the foregoing and the recent ICSID adjudication egregious transnational public policy violations may have an impact on the claims' admissibility inasmuch as arbitral tribunals have held that such claims cannot be upheld and the arbitral tribunals thus refused to go into the merits of the dispute.

To a certain extent such an approach to public policy violations already at the admissibility stage can be perceived as a pre-evaluation and anticipation of the merits of the dispute. Even though the arbitral tribunal has not gone into the merits of the dispute it makes certain predictions that the claims would be without merit in view of the public policy violation and can thus not be upheld. This becomes especially clear in *Plama v. Bulgaria* in which the arbitral tribunal concluded that the investment did not even enjoy any substantive BIT protection in view of the gross public policy violations.[52]

At the same time it also reveals a trend that international arbitral tribunals sanction transnational public policy violations quite strictly al-

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[49] Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, at para 146, available at *http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf.*

[50] L. Garcia-Arias, "La Doctrine des "Clean Hands" en Droit International Public", Y.B. A.A.A 30/1960, 14, 16.

[51] World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, at para 178.

[52] Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, at para 146.

ready at an early stage of the arbitral proceedings. The extensive quotation to the principles such as *ex turpi causa non oritur actio*, which, as described above, forms part of the unclean hands doctrine, suggests that arbitral tribunals even feel compelled to sanction public policy violations already before entering into the pre-merits phase. Behind this approach might be the reasoning that otherwise an arbitral tribunal might be deemed to grant judicial assistance to someone who comes with "unclean hands." And that would be "an affront to public conscience" as the arbitral tribunal in *World Duty Free* v. *Kenya* put it.[53]

In view of this rigid approach by arbitral tribunals sanctioning violations of public policy already at an early stage of the arbitration, it becomes even more important to carefully verify the existence of a transnational public violation before applying such harsh sanctions. At least in *World Duty Free v. Kenya* the arbitral tribunal recognized the need for such a careful and restrictive approach towards the application of transnational public policy by stating "*But it has been rightly stressed that Tribunals must be very cautious in this respect and carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards.*"[54]

Thereafter, the arbitral tribunal engages in an extensive analysis of the respective instruments and sources of international law before concluding that bribery is against transnational public policy. Only after carefully assessing the scope and content of the applicable public policy and after applying a balancing test which took into account that the Kenyan head of the State had also committed bribery, did the arbitral tribunal come to the conclusion that, nevertheless, Claimant's claims should be dismissed on grounds of a transnational public policy violation.

6. CONCLUSION

Given the flexible content of transnational public policy, parties and arbitral tribunals must be cautious and carefully verify the objective existence and meaning of transnational public policy when considering applying it. Recent adjudication, particular in the investment arbitration context, shows that violations of substantive public policy are not necessarily postponed to the merits stage, but rather can have an impact on the arbitral tribunal's assessment of jurisdiction, arbitrability and admissibility. It thereby reveals a trend that arbitral tribunals tend to sanction egre-

[53] World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, at para 178.

[54] *Ibid.*, at para 141.

gious violations of transnational public policy already at an early stage of the arbitral proceedings refusing to grant judicial assistance to a party with "unclean hands." This trend however, bears some danger since it can be conceived as preemption of the merits. Thus, only after a careful assessment of the objective existence and meaning of transnational public policy and only in cases of clear and egregious violations of transnational public policy may its application at such an early stage in the arbitral proceedings be justified. At the same time, the continued and consistent application of transnational public policy standards in both commercial and investment treaty-based arbitration indicates that over the years arbitral tribunals have identified certain universal standards which must be applied in all fora. In this respect it seems like the "unruly horse" has been substantially tamed.

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CONTEMPORARY MULTIDISCIPLINARY LEGAL THEORIES AND THE "WORLD STATE"*

The scientific nature of a theory or theories is tested for very different reasons, such as insufficiently developed methodological apparatus, obvious partiality and insufficiency, small probability, ethical unacceptability of the results, etc. The latest theories represent a special object of attention. Since there is a large number of various multidisciplinary legal theories today, only those most intriguing ones will be presented and commented upon, those that are used in order to communicate results that compel serious questioning of their scientific value or point at the goals which are contained in their deeper layers as less noticeable or undisclosed.

The contemporary multidisciplinary theories are interesting and challenging. They are also useful, at least because they force today's jurists to wake up and get out from the daily routine created by the satisfaction with what has already been achieved. But, we shall still have to wait for some more serious scientific results of these theories, unless it happens that they (together with the presented theories) become forgotten in the meantime like any other thing that falls out of fashion.

Key words: *Legal theory. – Multiculturalism. – Constitutionalism. – Communitarianism. – Feminism.*

At the end of the 20th and the beginning of the 21st century, the state and law are increasingly being studied in a more multidisciplinary

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manner. Thus the conditions have been created for a “big opening up” of consolidated schools and trends, and for a significant thematic expansion of the legal interest towards the topics and areas that were usually outside the interests of lawyers. In addition to the traditional topics from the theory of justice to the legal science, and from the theory of norm to the theory of organization, there is an increased affirmation of the studies of the constitutionalism as a distinctive theory of law, feminist studies, critical legal studies, new institutionalistic theories, multiculturalism, communitarianism, sociological-anthropological legal pluralism, all the way to the functionalistic and informatics legal theories, including bioethics with bio-jurisprudence and the movement of law and literature. [1]

1. PRESENTATION OF THE LATEST MULTIDISCIPLINARY LEGAL THEORIES

1.1. Critical Legal Studies Movement

During the 1980’s, a Critical legal studies movement was founded in the USA with the goal to fully critically examine the legal phenomenon. The criticism of the members of this movement was particularly aimed towards the legal practice that relies on liberalism, acts formalistically, shows strong tendency towards objectification, strives towards inadmissible universality and applies law as a form of economy.

As opposed to the American realism, which today may be encountered more in a museum than in real life, the members of this movement considered law to be a myriad of social rules. For this reason, they directed their interest towards finding a new way for their interpretation and application. According to them, “law is a political means” that exists in order to achieve interests of the group, party or class that creates it. That’s why “the rich and powerful use the law as a coercion instrument with the aim to preserve their existing position within the social hierarchy.”[2]

The fact that this is a proper movement and not a legal school is shown by its members Roberto Magabeira Unger, Duncan Kennedy, Robert J. Gordon, Morton Horwitz, Catherine A. MacKinnon, Jacques Derrida and others, who otherwise belong to different streams of thought within the American realism, Marxism and their “post-culturalistic criticism.” Some members of this movement consider law to be an ideology, others see it as a result of a class struggle, while the third group apply “deconstruction” as a method in order to analyse law and justice, justice and force, force and law.

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[1] D. M. Mitrovic, *Legal Theory*, Belgrade 2007 (in Serbian).

[2] G. Vukadinovic, *Theory of the State and Law II*, Novi Sad 2007 (2008), 85 (in Serbian).

The deconstruction method represents a recognizable feature of the Jacques Derrida's study. This essentially psychological and respective method has quickly been accepted as useful when the examining of the subject of the research should be used to remove one's own perplexity in front of the mists that enfold the newly-emerging forms of the dominance over people. The point of support lies in Derrida's position that "violence is not outside the legal order, it stands in the very foundation of law."[3] With further application of the deconstruction method, Derrida shows that law is no longer a logical and coherent system, but rather a product of a game of meanings ("the glass bead game") that is not determined in terms of time.

Yet, the main representative of this movement is Roberto Magabeira Unger who, in his *Knowledge and Politics*, first developed a rounded-up "personality theory," wanting then also to develop a "positive theory" that would influence the change of the existing society. In it, Unger formulates "the ideal of the community with *organic groups* that will overcome the system of dominance. The management of the activities of these groups and the prevention of imposing one to the others will be done by the *state* that should be at the world level."[4]

1.2. Feminist Jurisprudence

Within the Critical legal studies movement, but also outside of it, there have been feminist studies created and developed as well with their *feministic jurisprudence* and different trends (*feminism differences*: Francis Elisabeth Olsen; *cultural feminism*: Carol Gilligan; *radical feminism*: Catherine A. MacKinnon; Scandinavian school *Women's Law*: Tove Stang Dhal, etc.).[5] At the legal plane, this trend first had as its goal achieving an equal social treatment of women, which was done through reformist demands to formally abolish discrimination of women in comparison with men. The objective of the next step was to attain a special social treatment for women aimed at establishing essential equality among men and women through the mutual respect of their respective differences. At the purely theoretic plane, however, the feministic studies are very varied in their themes and go from "the recognition of the role of law as an instru-

[3] J. Derrida, "The Force of Law", *Deconstruction and the Possibility of Justice*, New York 1992 (transl. Novi Sad 1995), 54.

[4] G. Vukadinovic, 88.

[5] To mention for example C. Mackenzie, *Toward a Feminist Theory of the State*, Cambridge, MA. 1989; J. Christman, „Feminism, Autonomy and Self-Transformation" *Etics* 99/1995; M. Friedman, „Feminism, Autonomy and Emotion", *Essay on the Work of Virginia Held* (ed. J. G. Haber), Landham MD 1998; M. Fricker, J. Hornsby, „Feminism in Ethics: Conceptions of Autonomy", *The Cambridge Companion to Feminism in Philosophy*, Cambridge 2000.

ment capable of bringing benefits to women to the critics of the gender character of the legal norms built upon the predominantly male forms, categories and values, thus being unable to be the reflection of the vision and interests of the woman."[6] Numerous feministic analyses of the society have been made on this basis in order to show the groundlessness of the liberal idea of universality and neutrality of the law and point at the unfounded notion of the gender and functional character of women from the man's perspective. Moreover, numerous so-called "feministic theories of the state and law" have been created, although contemporary most developed countries with their law have long ago stopped considering themselves gender-neutral or gender-committed, but have not given up the pretensions towards some kind of the universality of law. Why would it be the case with the Theory of the State and Law, which certainly has not been created for any gender reasons?[7] Perhaps, because it commits their authors less.

1.3. Economic Analysis of Law

The Economic Analysis of Law school, known also as the new *Chicago Law School* (as opposed to the old one that was developed during the period prior to the WWII with the aim to bring back the trust in the power of the market forces: Paul H. Douglas, Frank H. Knight, Henry Schultz, Jacob Viner, Milton Friedman and others), was oriented at methodological issues. Its aim is to highlight a close relationship between economics and law, and particularly to demonstrate to the legislative and judiciary bodies the significance of their legal solutions in the light of the economic consequences they create.

Starting from the assumption that law reflects the logic of economics, i.e., that it rests on the economic principles, this school analyzes the legal norms in the regulations and court decisions using the economic reasoning. It "particularly examines whether the legal solutions contained in the regulations and individual decisions are such that they enable optimal distribution (allocation) of the economic sources and means (resources)" used in order to increase the level of the social prosperity and, as a conclusion, proposes that the legal institutes should be adjusted to that goal. These institutes should be created in such a manner as to instigate the economic optimum. The economics analysis school also explains the coercion forms in different systems of law or in different parts of the same system of law (legal, case law, etc.). Since this is an Anglo-Saxon

[6] G. Fassò, *Storia della filosofia del diritto I–II*, Bologna 1966–1968 (transl. Belgrade - Podgorica 2007, 685).

[7] D. M. Mitrovic, 15–18.

school, its interest is primarily focused on the judge as the creator of law.[8]

The ideological instigators of the Economics Analysis of Law are Ronald Coase, Richard Posner and Guido Calabresi. Ronald H. Coase, one of the founders of the school and the Nobel Prize laureate for his economic researches, has pointed out that a judge must be ready to seriously analyze the economic consequences of his/her decisions on the economy at large, and not only the necessary costs of conducting a court proceeding. Coase's basic theory is that economic activity should be the ultimate arbitrator in the court proceeding of the decision-making.[9]

The most important representative of this school is Richard Allen Posner. By starting from the notion that "economics-loaded law represents the basis for a positive theory on the most promising legal domain," Posner is trying to subject law in its entirety to the economic analysis, setting up as the first task of law "the maximum increasing of wealth and not the creation of a support for a welfare state." According to him, the assistance to social security programmes is nothing more than a "robbery".[10]

Posner's philosophy is even more painted with pure pragmatism devoid of all ethical behaviour, for he refuses to accept "any more significant role of the moral theory in the legal studies".[11] On the other hand, by giving in to the exaggerations of economism, some other representatives of this school have even claimed that law and legal science as a whole may be brought down to economics and economic science, thus getting closer to the version of Marxism of the Soviet early period theory.

The Economics Analysis of Law, based on the principles of behaviourism, normativeness, descriptivism and evolutionism, has approached law in a pragmatic way, justifiably pointing at frequently neglected economic consequences of the creation and enforcement of legal rules. But, just like any other exaggeration, it has fallen into reductionism by instrumentalizing law, by bringing it down to the level of economics or, even by making it equal to economics. With such unnatural unilateralism, it completely switched off from its scope other numerous sides, particularly the value, ethical and humanistic goals of law, reducing everything to rationality and efficiency ("economic machine", "economistic violence") aimed at "maximizing the benefit" or at least "Pareto improvements" in the name of a possible prosperity of the projected "post-industrial societies".

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[8] K. Jones, *Law and Economy*, Burlington, MA 1983; D. M. Hausman, M. S. McPherson, *Economic Analysis, Moral Philosophy and Public Policy*, Cambridge 2006.

[9] R. Coase, *Essays on Economics and Economists*, Chicago 1994.

[10] R. Posner, *The Problematics of Moral and Legal Theory*, Cambridge, MA. 2002, 227–228.

[11] G. Vukadinovic, 83.

The economic analysis school has raised what concerned citizens pay attention to on a daily basis to the level of science in a provocative and humanly unacceptable manner. It seems that the “achievements” of such teaching are the enactment of obviously “unjust” laws (for instance, the latest law on employment in France which places (“redistributes”) the burden of costs to the poorer or unemployed layers of citizens), “surprising” verdicts for the “powerful,” setting up of private prisons or, even, “the spirit of the text” of the Bologna Declaration.[12]

1.4. Constitutional Legal Theories

The crisis of the legal positivism has not lead only to the creation of new natural law legal theories of Radbruch, Dworkin, Finnis, Fuller and others or to completely new feministic theories, but also to the new constitutional theories (new constitutionalism) which are distinctive legal theories that differ from legalistic theories. Their best known representatives are Robert Alexy and Carlos Santiago Nino. While legalistic theories have allegedly been brought down to traditional iuspositivism, constitutionalistic theories are more aimed towards the study of increasingly more complex normative composition of the contemporary constitutional systems. That is why they put the problem of ethical correctness of law on the first place, almost at the very centre of their study, maintaining that in this way they sufficiently confirm that they cannot be brought down to current law in its positivistically determined formal contexts. Their recognizable feature is linked to the introduction of ethically relative contents into law which reflect legally established principles and inherent rights of an individual. At the level of a constitutional and political system, however, constitutionalistic theories advocate the establishment of a decisive role of the law-maker in the area of the enforcement of constitutional principles and the same role of judges when executing these principles. In fact, the role of the law-maker and judges in these theories is so much stressed that the judges may, for instance, reach decisions that are contrary to the laws, in which the teachings of these theories remind of the teachings of the free law creation school.[13] But, their basic goal is different, since in the numerous variants of these theories their members wholeheartedly advocate justification of a voluntary constitutionalization of a secession as an agreed (consensus-based) form of separation which (due

[12] It is possible that the application of such teaching has lead to the current monetary and financial crisis in the most developed countries, since it is impossible that the state authorities have not monitored the activities of the respective financial institutions and have not noticed a clear danger of short- and long-term consequences. Could it be concluded from this that there is currently yet another large redistribution of the social wealth (in fact, *an international robbery*) over all insufficiently protected social strata of the contemporary states in line with Shakespeare’s thought from *Titus Andronicus*: “Suum quique is our Roman justice. /The Prince takes indeed what is his” (Act I, Scene I).

[13] G. Fassò, 669–676.

to the agreement of the mother state) should be differentiated from a unilateral secession.[14]

Although of a small scientific value, constitutionalistic legal theories are not of a small political value, since they may be used as a convenient "scientific" foundation for new globalistic political doctrines and ideologies.

1.5. Multicultural Legal Theories

Among the new teachings or the latest interpretations of the existing teachings on human liberties and rights, going from individual and ethical[15] to post-modernistic social and political ones,[16] special place is held by multicultural theories. When they study in factual and descriptive terms a certain type of society in which different cultural groups live, these theories are primarily subject of interest of sociologists and legal sociologists. When they are used to mark in normative terms a legal and political ideal towards whose realization a state should strive for using law and education as its instruments, then they become predominantly the subject of interest of political and social, and legal philosophers.[17]

Multicultural theories examine the relations that concern an individual or collective identity of a person and different social groups that demonstrate their characteristics more and more openly by referring to an established "third" or some even newer generation of human liberties and rights. This has come into being thanks to the influence of the social and political philosophy in the West, where autonomy and law were first linked with the new interpretations of the old teachings on "the self" (*Identity and Conceptions of the Self*), and then also with completely new teachings on the so-called "collective identity." At that point, the collective identity is usually developed from an individual identity and put into wider moral and political contexts. Thanks to such an approach, law has also started to be comprehended as a means for regulating relations that

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[14] M. Jovanovic, *Constitutionalizing Secession in Federalized States: A Procedural Approach*, Utrecht 2007, ix-xix and 14–46.

[15] D. Gauthier, *Morals by Agreement*, London 1986; L. Howorth, *Autonomy: An Essay in Philosophical Psychology and Ethics*, New Haven 1989; T. Hill, *Autonomy and Self-Respect*, New York 1991.

[16] R. Young, *Autonomy: Beyond Negative and Positive Liberty*, New York 1986; T. Christiano, *The Rule of Many: Fundamental Issues in Democratic Theory*, Boulder, Colorado 1988 (1996); S. White, "Political Theory and Post Modernism", *Political Theory*, 18, 1/1991; J. Crittenden, *Beyond Individualism: Reconstructing to Liberal Self*, New York 1992; J. Christman, "Liberalism, Autonomy and Self-Transormation": *Social Theory and Practice* 27, 2/2001.

[17] G. Fassò, 707.

concern a widely understood right to an individual and collective (autonomous) identity (Gerald Dworkin).[18]

The basis for an individual and collective identity lies with new liberal teachings on "neutral state" and "the policy of difference," put together with the teachings on durable, inherent, collective ("group differentiated") rights which – once they are recognized – become acquired, which means that they may no longer be limited or abolished. A special problem is how to solve the relation between the tasks of a liberal state and the application of the teaching on collective rights, since liberalism lies on freedom and individualism, while this is not the case with collective rights that are based on the idea of equality.[19] For this reason, it is pointed out in these theories that a man is an autonomous being in comparison with the others who is not interested in some metaphysics-based law, but only in that which enables him to present himself in the light of his essentially individual racial, religious, gender and other differences. And these differences are seen as his autonomous individual or collective identity.

When it comes only to the collective autonomous identity, multicultural theories make a clear distinction between collective (joined) exercising of individual rights (for instance, labour rights in case of a strike of employees) and the exercising of collective rights whose legal rightful owner is some collective, the essence of which as an "autochthonic population" comprises distinctive features of social groups established on the basis of racial, gender, ethnical, homosexual or even handicap characteristics. These collective rights differ from the common rights of associated individuals primarily because they are "given" as such, because they are not created through the association of individuals, but by the very existence of the collectives which are gradually and eventually granted "the right to exist" and "the right to (internal and external) self-determination".[20] And while most of the countries even today very cautiously recognize the right to existence for the so-called "ascriptive groups," there is a small number of countries (in which there is a protection stemming from the right to such self-determination) where it is considered that such value is

[18] G. Dworkin, *The Theory and Practice of Autonomy*, Cambridge – New York 1988.

[19] For example R. Dahl, *Democracy and Its Critics*, New Haven-London 1989; A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven 1977; J. Rawls, *Political Liberalism. The John Dewey Essays in Philosophy, 4*, New York 1993, and *Justice as Fairness: A Restatement*, Cambridge, MA. 2001;; S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, Chicago 1995; J. Christman, *States and Citizens*, Cambridge 2003 and *Autonomy and the Challenges to Liberalism*, Cambridge, MA. 2005; T. Iversen, *Capitalism, Democracy and Welfare*, Cambridge 2005; C. Wolfe, *Natural Law Liberalism*, Cambridge 2006.

[20] M. A. Jovanovic, *Collective Rights in Multicultural Communities,* Belgrade 2004, 141–151 (in Serbian).

becoming a basis for the development of "alternative constitutional contexts," where "those who have the right to self-determination are granted autonomy to a considerable degree".[21] These groups also have the right to declare what kind of state protection they require, after the state has previously asserted its position with regards to that issue. And it is precisely within this context that new possibilities have been found for the expansion of the multiculturally recognized law to the sphere of the autonomous collective identity.

The best known representatives are Charles Taylor, who is considered to be one of the founders of this theoretically heterogeneous school, Will Kimlicka, Christine M. Korsgaard, Ian Brownlie and Christian Tomuschat.[22] Still, a special place belongs to Joseph Raz,[23] Hart's student and heir. His thought, that moves within a scope from the philosophy of moral, via the philosophy of law, all the way to the political philosophy, finds its unity in the notion of the "philosophy of practical mind" or "practical philosophy" which is opposed to the neutralism of the liberal tradition and affirms a special version of the so-called "multicultural liberalism" taken as "normative regulation" that "justifies promotion, encourages progress of cultural minorities and demands respecting of their identity." Such Raz's "multicultural choice" is based on the values of the "idea of freedom" (according to which "freedom and the development of an individual depend on their full belonging to a cultural, living and respected group") and the "idea of the pluralism of values" (which consists of recognizing the values of different cultures created on any basis whatsoever, even if they are mutually in discord.).[24]

1.6. Communitarian Legal Theories

Multicultural theories are very close to communitaristic theories that particularly stress community, identity and freedom as values, that is, a society as a community joined together through the same values. Such an approach has necessarily lead to a criticism of multicultural theories which, according to the communitarists, as central thought put the ideas

[21] A. Cassese, *A Self-Determination of Peoples – A Legal reappraisal*, Cambridge – New York 1995, 351–352. Quoted according to: M. A. Jovanovic, *Collective Rights in Multicultural Communities,* 150.

[22] I. Brownlie, *Rights of Peoples in International Law*, Oxford 1988; C. Tomuschat, *Self-Determination in a Post-Colonial World*, Dordrecht 1993; Ch. M. Korsgaard, *The Sources of Normativity*, New York 1996; C. Taylor, "Invoking Civil Society" in: C. Taylor. *Philosophical Arguments*. Cambridge, MA 1995, 204–224 (transl. Belgrade 2000); V. Kimlicka, *Multicultural Citizenship: A Liberal Theory of Minorities Rights*, Oxford 1995.

[23] J. Raz, *Practical Reason and Norms,* London 1975; *The Morality of Freedom*, Oxford 1986 and *Ethics in the Public Domain. Essays on the Morality of Law and Politics*, Oxford 1994.

[24] G. Fassò, 710.

of liberalism and individualism supported by the “atomized” vision of a civic society. The best known representatives of the communitarian school of though (Michael Voltzer, Alasdair MacItyre, Mike Sandel, Amitai Etizioni) deal with the political issues related to the citizens, organization of a society and nation as a phenomenon.[25] For instance, according to Voltzer (“liberal communitarist), “the area of justice is a society in which there is no social property that serves as a means of domination”.[26] This means that the area of justice is surely to be found where it is either unimportant or unattainable. Noticing the contradiction, Voltzer makes social justice relative by making it dependent on the social circumstances or the cultural milieu of the society. But, can we talk about justice then?

1.7. Socio-Anthropological Legal Pluralism

At the beginning of the 1960’s, after two decades of calm, a *renewed interest in the legal pluralism* rose among the representatives of a contemporary sociology of law, particularly among those of its American supporters who had studied sociology of organization and anthropology of law. Among them, a special place is held by William Evan, Karl Llewellyn and Adamson Hoebel.

According to William Evan,[27] a well known American sociologist of law and organization, in order to comprehend a distinctive social composition of law that is derived from the notion of a legal system, one should renounce the etatistic approach according to which law is linked to the state and its coercion. In his opinion, the composition of a legal system comprises two necessary and sufficient conditions: plurality of legal norms and the role of the bodies of the main authorities in the state adjusted to these norms. These conditions for determining the pluralism of a legal system are supplemented by the measurements of jurisdiction and democracy. It is through their combining that a distinction may be made between the democratic systems of public and private law, and the undemocratic ones. Nonetheless, their division is relative, since undemocratic systems may become democratic and *vice versa*. Evan’s school of thought explains the modern needs of the interventionism-inclined state, but at the same time it criticises the extremes in the way of its functioning, depicted in the overstated etatism and individualism.[28]

[25] M. Sandel, *Liberalism and Limits of Justice*, Cambridge – New York 1982; *A Short History of Ethics*, New York 1998 (1996); A. Etizioni*, The Third Way to a Good Society*, London 2000; M. Voltzer, *Spheres of Justice*, New York 1983.

[26] M. Voltzer, 16.

[27] W. M. Evan, “Public and Private Legal System”, *Law and Sociology. Exploratory Essays*, New York 1962.

[28] G. Vukadinovic, 159–160.

According to Karl N. Llewellyn[29] and E. Adamson Hoebel, American legal sociologists-anthropologists who separately studied social authority without the state (anthropology and anatomy of social conflicts), i.e., the pluralistic authority (freed from the etatism of positivistic legal theories), it is wrong to bring down the entire primitive law to the so-called "group law." It is also wrong to bring down modern law to individualistically comprehended state law, when in fact it is the new social pluralism, that is adjusted to the requirements of the contemporary and increasingly more globalized society, which is more and more prominent in contemporary law.

Other contemporary legal writers also determine new legal pluralism in different ways. For some (Max Gluckman and Paul Bohannan)[30] it is characteristic to point out the idea on the existence of a myriad of different legal orders within the same order, i.e., "co-existence of different norms or legal systems in the same or complementary political and legal fields." Such sociologically painted legal pluralism is seen and determined as a "legal medley" created by a dedicated crossing and depositing, as a phenomenon of "superlegality," as "a dynamic process of uneven and unstable combination of legal systems," which can be conveniently used to explain a supernational development of the system of law of the European Union. Others (such as Jean Wanderlinden) determine pluralism as an application of different legal mechanisms within the same order and in the same situations. Such legal pluralism relates to the integral parts of the system of law: legal institutions, branches or areas, on the basis of which numerous types of legal systems can be differentiated (parallel and integrated, cumulative and isolated, desired and committing, imposed and agreed upon, etc.). According to Wanderlinden, the system of law always aims at establishing the "unity of law" and "the material and psychological homogenization of social groups."[31] Yet, this unity is "unjustified and unjust," since the unique system of law "does not ensure justice or the efficiency of law," but the predominance of the ruling group or a balance of equal social groups. The third group simplifies the legal pluralism and brings it down to *non-etatistic dualism* between the so-called "infra-law" (based on the beliefs, folklore or even vulgar forms of behaviour) and increasingly globalized contemporary state law. According to Jean Carbonnier, legal pluralism shows that the system of infra-law (rules of subculture, including there even the rights of children) exists not only outside, but also inside the general system of the state law, even

[29] K. Llewellyn, E. A. Hoebel, *The Cheyeenne Way. Conflict and case Law in primitive Jurisprudence*, Oklahoma 1941.

[30] M. Gluskman, *The judicial process among the Borotse of Northern Rhodesia*, Manchester 1955; P. Bohannan, *Justice and Judgement among the TIV*, London 1957.

[31] G. Vukadinovic, 161–162.

when the old legal rules have been formally abolished by the state.[32] Following Carbonnier's anthropological observations and suggestions, Norbert Rouland, the most significant contemporary French sociologist-anthropologist, has developed his idea of legal pluralism (by studying early Roman and early autochthonic laws in the eastern provinces of the Roman state) with the objective to explain the political and legal goals of the former colonial states and the incredibly diverse pluralism that was to be come across in the then colonized societies. The most important result of his study is the conclusion that the Roman *ius gentium* was created in order to resolve the pluralistic problem of a myriad of legal systems applied among the subjugated nations.[33] This conclusion particularly benefits the advocates of the modern super-national and international integrations, since it is obvious that all of the societies are integrally and essentially pluralistic, as was also the case with their laws.[34]

2. REVIEW OF THE PRESENTED MULTIDISCIPLINARY LEGAL THEORIES AND THEIR SCIENTIFIC ACHIEVEMENTS

The multidisciplinary theories that have been shown in brief with the critic commentaries are aimed towards three topics: law, justice and state. Their goal is to prove that a society should be brought to the final phase of the world state with a civic society through deconstruction,[35] what is openly advocated by Roberto Magabeira Unger when he claims that law and the world state are the means for preventing the establishment of domination among the so-called "organic" social groups.

2.1. Law

When it comes to law, a special attention should be drawn to four novelties and remarks. One novelty will be the consideration of a possibility of constitutionalization of the so-called secessionist clause in the liberal-democratic states. But this is not establishing of a legitimate scientific interest, but rather its criticism, since the acceptance of that novelty and its possible introduction into the constitutions would require the creation of completely new notions of the state and state regulation. And if such recon-

[32] J. Carbonnier, *Sociologie juridique*, Paris 1978.

[33] G. Vukadinovic, 162–163.

[34] B. Dupret, "What is plural in the law? A praxiological answer," *Égypte/Monde arabe*, 1/2005, 159–172, M. Sharifi, "Justice in many rooms since galanter: de-romanticizing legal pluralism through the cultural defence," *http://www.law.duke.edu/journals/lcp*, last visited Dec. 2008.

[35] D. M. Mitrovic, "Law in the light of the theory of chaos and the legal theory", *Annals of the Faculty of Law in Belgrade (Anali Pravnog fakulteta u Beogradu, in Serbian with summary in English) – Anali PFB* 1–3/1997, 139–149.

struction was done, it would be in place to ask a question whether it is then a state at all.[36] It is no coincidence that the contemporary constitutional and political science in the world calls such "states" – "uncompleted." Therefore, constitutionalistic theories contain a danger of breaking up current states by legitimizing secessionist clauses, despite the fact that civilized separation is always better than uncivilized joined life or uncivilized separation. It is no coincidence that even in the most developed liberal-democratic states of the federal type there is no right to *nullification* (giving up by nullifying an act, through a veto from a member-state), or a right to *secession*. The prohibition of these rights is not a coincidence. The prohibition of nullification (usually formulated in the form of the so-called protective clause) represents a measure against dissolution in complex unique states that are, as a matter of rule, created through a merger. It consists of the prohibition of a member-state vetoing decisions of the federation bodies. The prohibition of secession represents an additional protection of the state against an arbitrary separation, i.e., a unilateral disintegration of any part of the federal state by its member-states.

The next novelty and remark is that in the presented theories the contents of the rule of law (Rechsstaat) is more and more "diluted" by linking it to the widest existence and respect for human liberties and rights in the multiculturalistic or communitaristic sense of meaning (Charles Taylor, Joseph Raz, Mike Sandel, Michael Voltzer and others), or that the legal state is more and more openly denounced and considered to be superfluous, since it stopped long ago being able to answer to the new technological, informatic, legal and social challenges,[37] owing to which the state of emergency is sometimes opted for that could at some moment of crisis grow into a regular state of a large number of states or a possible World State.[38]

The latest socio-anthropological theories conveniently follow upon these theories and through studying ancient societies and laws or the legal pluralism in the contemporary laws they try to disclose the common denominator that would serve as a scientific solution or a basis for explaining and justifying the current super-national organising,[39] as is the case since 1992 with the European Union or since 2005 with the newly-founded North-American Union.

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[36] M. Jovanovic, *Constitutionalizing Secession in Federalized States: A Procedural Approach*, Utrecht 2007, M. Jovanovic, S. Samardzic (eds.) *Transition and Federalism – East European Record, Federalism and Decentralisation in Eastern Europe: Between Transition and Secession*, Zurich – Vienna 2007.

[37] D. M. Mitrovic, "Legal state as a legal thought and as a legal experience," *Anali PFB*, 1–2/1993, 173–183; See also *Legal state – the origin and future of an idea*, Belgrade 1991 (in Serbian).

[38] J. Lynch, *Age in the Welfare State*, Cambridge 2006; M. Deflem, *Sociology of Law*, Cambridge 2008.

[39] D. M. Mitrovic, *Autonomous right*, Belgrade 2007, 51–55 (in Serbian).

The fourth novelty, that is, the fourth remark of a purely methodological character should be added to the afore-said and this remark consists of the intellectual concentration on the imagined goal in accordance with which these theories are shaped up, and not *vice versa*, therefore, in the substitution between the initial assumptions. The characteristic example is Posner's school of thought devoid of ethics and morality, feministic teaching owing to unnecessary exaggeration (can there be feministic theory of state and law at all?, since the determination of the notion of state and law, as it has been said, is outside and above the gender-determined understandings and teachings) or the exaggeration of some multiculturalistic schools of thought on the right of ascriptive groups to enter into contracts with the state, as for instance with Christian Tomuschat, the final consequence of which would also include the right to a feudalistic establishment (territorial and political autonomy) on the basis of gender or sexual affiliation of the members of such groups (which is insulting at least for the national minorities or religious confessions as traditional heirs of such a right). The entering into such a hypothetical collective agreement would additionally lead to the notion of particularity of the state and social organization, which could easily turn into a means for the destruction of the current or future states. If the external and internal borders of the states should be re-drawn, the widely applied teaching on collective rights in a liberal state, supported by the constitutionalistic teaching on the secessionist clause in the federal state even if only of the liberal-democratic type, represents an exceptionally powerful means to achieve the prediction of the former UN Secretary General (Butros Butros-Ghali), who announced in the last decade of the previous century that by the year 2050, this organization would have around 400 member-states.

2.2. Justice

It is characteristic for the presented theories that they make justice relative, all the way to the distortion of the idea of the natural law. For instance, Michael Voltzer, first the one who continued and then the critic of the ideas of John B. Rawls[40] and Ronald M. Dworkin, starts from the

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[40] In his famous work *A Theory of Justice*, John Rowls determines “contractualness” as a convenient method for determining the principles of justice. Justice, Rowls points out, can be established only through a contract. This contract is relative and hypothetical since it stems from the “original position of justice.” It is the result of a unanimous acceptance by “uninterested rational individuals,” provided that they “consciously choose from the position of justice.” And “as soon as the original contract is entered into and the veil of ignorance is removed, people are no longer in the position of mutual lack of interest. The reason why they are allowed to follow their selfish interests, and nothing else beyond the veil of ignorance, is that this veil imposes individual choices in such a way that it ensures meeting of the *basic requirements of justice*, no matter what the decisions are like of those who choose provided they are rational.” In a social state created in such a manner, Rowls maintains, entering into some new contract among people may be

social pluralism as the basic area of the social justice and correctly challenges Rowls's claims by pointing out that individuals are not just isolated primary subject, since the understanding of justice depends on the history and culture of each society.[41] But, Voltzer's understanding of justice can also not be accepted, since justice in his school of thought gets relative and diluted to the point of being unrecognizable, which opens up a proper question: what is justice in his teaching, and what is law? This, of course, is no coincidence, since by making the justice relative it provides a false halo of justice for the current law.

The most serious critic of Rowls's natural-law school of thought was Amartya Sen. In his work "Development as Freedom," not only did he criticize Rowls's way of looking at the distributive social justice, for such justice necessarily aims towards balanced distribution of resources and goods, but also his neglect of the ethical dimension of the man that does not come down only to interests and their purpose. In that way – Sen points out – Rowls does not pay attention to the circumstances in which an individual lives (it is one thing, for instance, to have a bicycle in China, and quite another to have it in one of the countries with the high standard of living, etc.).[42]

2.3. State

As far as the state is concerned, a particularly prominent criticism is the one of the notion of sovereignty and advocacy for the world state.

The change regarding the concept of sovereignty as an absolute feature of the state authority occurred only in the 19th century owing to the increased affirmation of the modern school of thought on national sovereignty and the legal state. Also, at the end of the 19th century a question was raised concerning the sovereignty in a complex state. This question was answered in such a way that even today it is the federal state that is considered as sovereign and not its members. Still, since the first half of the 20th century, sovereignty again started to be openly denounced or made relative as a decisive characteristic of the state. It was particularly Leon Duguit who negated sovereignty, establishing instead of it the

achieved only through their "negotiations" and "consensus," provided that they adhere to "three separate norms" used to regulate the *institutions of a just society*: "biggest possible equal liberties" norms, "fair equality of opportunity" norms and "giving priority to the least well-off" norm (*the principle of difference*)." Rowls thinks that in this way "justice becomes the first virtue of the social institutions" of a just society. When these rules are just, they establish a basis for legitimate expectations." But, when the "bases of these requirements are uncertain, so are the borders of the liberties of people." See: J. Rowls, *A Theory of Justice*. Cambridge, MA. 1971 (revised 1999).

[41] M. Voltzer, 16–19 and on.

[42] A. Sen, *Development as Freedom*, Belgrade 2002, 521–524 and on (transl. in Serbian).

notion of public function and service. After him, this was done by other French authors (for instance, Edgar Morin and Georges Gurvich). Even today, some authors maintain that sovereignty should be discarded for it does not correspond to the new social reality, since it has shown great perniciousness through history as a cause of many wars. A characteristic example is the one of Neil MekCormick who, taking into account the contemporary European integrations as a model field for his research, concludes that Europe has entered the area of “post-sovereignty”.[43] However, to discard the notion of sovereignty means to neglect its central role in the legal and political science. This has forced other authors to examine the possibilities for the reshaping of the notion of sovereignty in order for it to be able to respond to the new challenges (instead of discarding it or abolishing it in the science). *The theory of constitutional pluralism* has been created on these grounds and according to this theory the states are not the only places in which sovereignty may be found. The relation among the states should be *heterarchical*, and not hierarchical, since the modern circumstances require the abandonment of the unique and absolute sovereignty as something “zero sum game” for the benefit of a dialogue and adjustment among the constitutional authorities of different states (Neil Walker). On the basis of this, other authors, such as David Held, have concluded that states will not weaken due to the loss of their external sovereignty. On the contrary, thanks to this they will strengthen their internal sovereignty!,[44] since there are always tasks that are exclusively of the internal character, i.e., that fall under the exclusive competence of the state (in line with yet another compromise school of thought on the *domaine réservé*), because of which nobody, not even the international community, is allowed to interfere with these purely interior state

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[43] N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Law, State, and Practical Reason)*, Oxford 2002 particularly insists on truly noticeable changes that have led to the weakening of the sovereignty of the European Union members and on that occasion he refers to the fact that through the founding agreements the member-states have passed a large part of their sovereign authorities to the European Union (because of which they cannot autonomously regulate a number of issues that used to fall under their exclusive competence), that former state borders physically have disappeared (despite the precisely determined areas of the present member-states), that a unique European citizenship has been created, that there is an ongoing creation of a unique European system of law, etc. Yet, the fact that sovereignty does not belong to history is reflected in the recent example of England which, on the occasion of the enactment of the first Constitution of the European Union, did not even want to hear that something would be put into it that would interfere with its national sovereignty. And, since the Constitution was adopted in March 2005, the citizens of two European Union member-states through referendum refused to accept it. This forced other member-states to postpone the organization of their respective referendums, which led to the adoption of the Constitutional Agreement (Berlin Declaration) of the European Union in June 2007, instead of the European Union Constitution.

[44] D. Held, “Changing Contours of Political Community”, *Global Democracy*, London 2006, 26.

affairs.[45] Such Held's teaching on the sovereignty, together with the similar teachings of other authors, represents a certain theoretical preparation for the situation in which the positions on the imminence of the loss of the national sovereignty and the necessity of giving up national interests could easily turn into claims on the need to reform former national sovereignties into a new "cosmopolitan sovereignty" whose title-holder would be the World Federal State with a universal ruler as some kind of a Hellenistic version of the "spirited law".[46]

When it comes to the world state, it should be pointed out that the idea of the world state is just a little younger than the idea of the state, for it was necessary first to come to the notion of the state in order to be able to think about the world state as an idea that embodies the entire humanity arranged under one common political authority. This idea has been consistently spreading from the ancient cosmopolitan beginnings (starting with the kinic and stoic schools) to the present day.

Already according to Marcus Aurelius, the world state represents a "holistic vision of the universe and the mankind in it, in which the universe, God, nature, truth, law, ratio and man are closely interlinked into a cosmic order."[47] Eighteen centuries after this most famous Roman emperor-stoic, Bertrand Russell also advocates for the same idea, but he explains the establishment of the World State with practical reasons, finding in it "the main medicine against wars" and "the primary world interest linked with the survival of the human race". The World State or the "Superstate" should be, according to Russell, sufficiently strong "to be able to resolve all the disputes among nations in accordance with the law," since only it "can be achieved after different parts of the world become so closely linked that no part can be indifferent to what is happening in any other part of the world".[48] And while the ancient and medieval teachings used to determine the World State as a universal monarchy modelled after the Roman Empire, the presented multidisciplinary theories determine the World State as a modern republican and democratic world state with the federal state arrangement, i.e., as the *world federation of states*. But, remembering the several-thousand-year long state and legal tradition, and particularly the form of the Roman Empire, one may wonder: if a small

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45 V. C. de Visscher, *Théories et realités en droit international public*, Paris 1960, 281 and on.

46 G. Poggi, "Cosmopolitism and Sovereignty", *Political Restructuring in Europe: Ethical Perspectives*, London 1994, 89 and on. See also: R. Glossop, *World Federation? A Critical Analysis of Federal World Government*, Jefferson 1993.

47 M. Aurelius Antoninus, *The Communings With Himself*, London 1961, VII, 9. A. Gajic, *The Idea of the World State – Legal, Political, and Philosophical-Legal Aspect,* PhD thesis, Novi Sad 2008, 60 (in Serbian).

48 B. Russell, *The Prospect for Industrial Civilisation*, London 1923, 16. Quotation according to A. Gajic, 98.

world Leviathan is created once, will it not grow up and develop to the proportion that surpasses the gloomy anticipations of George Orwell in his novel "1984".

The idea of the World State, as it may be observed, represents a favourite topic of the presented multidisciplinary theories, only developed to the final limits, which requires the examining of its permanent elements: space, population and authority. And since we are still talking about the state, only this time about the world state, it should therefore have all the elements of the statehood, which means that one only needs to notice and examine their features in comparison with the present typical states.

First of all, the World State would have for its realm the entire three-dimensional world space. It would, therefore, change its shape from the upside-down cone with an irregular base into a regular sphere with the centre in the geometrical middle of the Earth. As such, the World State would not have its external state borders. Instead of them, there would be only internal administrative borders between the members of the world federation. And this means that the spatial reach of such world authority would spread until the factual borders of its power. The World State would encompass the entire humanity, i.e., all the inhabitants of the planet who would be subjected to its authority and hence would be obliged to respect the world legal order. All its citizens would have the world citizenship, and in the case of its federal organization, also the "quasi-citizenship" of the federal members (dual citizenship). With this, for instance, the need for the current differentiation between citizens on one side and foreigners and expatriates on the other would cease, but not the need to determine the conditions for the acquisition and termination of the citizenship (including there the possible appearance of the so-called "global expatriates"). The most interesting thing with the establishment of the World State is that there would be a renewal in the affirmation of the idea of the state authority and state sovereignty that would be exercised over all the inhabitants and in the entire state space. This would, for instance, make the institutes of asylum, extradition, etc., obsolete, if not even impossible. Moreover, the World State would dispose with all the attributes of sovereignty in their purest form. It would be fully independent, for no competitive authority of any other state would exist. Also, it would be superior, for it would dispose with the same such state authority supported by the world federal armed forces, which means that in the earth proportions it would be absolutely factually and legally unlimited, like some kind of Hobbs' "mortal god" or, like with Hegel, at least "something earthly divine". It could without any legal limitations enact universal mandatory regulations, while it would legally answer to no one, thus becoming "legal god" in its purest sense of meaning ("dominus et deus"). And this means that the law it is creating would also become like some

kind of "less perfect divine law" (*lex divine*). Also, such state could not be internationally recognized by anybody, nor would it be necessary any longer, which means that at the moment of its creation, using the model of a social agreement, all states would voluntarily (or those few disobedient ones through coercion) transfer to it all of their external state authorities. Its rule would be limited only by the physical and social reasons, and these physical limitations would not relate to the state borders that would no longer exist. Although unique, the sovereignty of the World State would not be monolithic, but, like in the modern federations, split between itself and the federal members which would to a certain degree keep the given interior sovereignty. Also, by using the thousand-year-old state and legal tradition, the federalized World State would be ready to be separated from the civic society that would "with its out-of-state position, with the existence of free public opinion and other out-of-institution forms of association, represent not only an autonomous sphere of social life outside the reach of the state authority, but also an essential dam against the comprehensiveness of such sovereign state and totalitarian tendencies that could appear in it over time",[49] which would give a new impetus to the contemporary autonomous views. Such optimistic picture, as it has been mentioned, was developed by Roberto Megabeira Unger in his book "Knowledge and Politics" when he sets "the ideal of a community with *organic groups* that will overcome the system of dominance. The management of the activities of these groups and the prevention of imposing ones to the others will be done by the *state* that should be at a world level," which in his opinion means that the task of the modern doctrine on the state is "to examine the sense that could be used to resolve the conflict between the idea of a small group and the idea of the universal republic".[50]

Although activities aimed at the creation of the World State have been with us for a long time,[51] this is still a social utopia, but this time with a possibility for it to be really realized thanks to the *globalization*, the instrument which cropped up "out of nowhere" and almost "omnipresent in less than a decade".[52] This clearly shows that many experts and

[49] A. Gajic, 17.

[50] R. M. Unger, *Knowledge and politics*, New York 1976 (transl. Zagreb 1989), 324 and on.

[51] For instance, on the occasion of the fiftieth anniversary of the foundation of the United Nations in 1995, a proposal of a special UN Commission for global management entitled "Our Global Management" was adopted and this proposal represents a direct reason for the review of the UN Charter in this direction.

[52] As a reminder, terms "globalism," "globalization" or "mondialism," along with other derived or similar expressions, have been created and used in academic discussions during the last two decades of the 20th century in order to denote an increasingly stronger action of the unifying factors in the modern world. Shortly after, they became an integral part of the numerous doctrines' and ideological positions' vocabulary. Also, different posi-

laymen see in the strengthening of the globalistic aspirations a serious or the greatest threat to democracy in the modern liberal societies.[53] Many others, however, see in the globalization a road towards the establishment of the World State which should be advocated by all means available. Between these extremes, there is a simple truth: today's development of the most developed societies has not been made possible either by the church, or the politics, or the rule of the contemporary states or corporations, but by *technology* in the widest possible sense of meaning: from a wheel to a pencil to a computer and virtual engineering of every possibly conceivable system. But, its possibilities have been tamed today and only partially utilized. Therefore, it is no longer reasonable to ask whether to get to the world state, which imposes itself technologically (whenever it does get created), but rather to what kind of the world state: whether to get to the state where *needs* will rule (since technology is already making that possible now) or to the state where *profit* will rule, as is the case now (since the current monopolistic exploitation and distribution of goods allow it).

It seems that in the near future state laws will increasingly act within the frameworks of the super-national state orders, since the "legal pluralism of the international type feeds upon etatistic law, just as equally as upon the sovereign rule",[54] all until one possible moment in which the super-national orders would melt into a universal order of the World State, no matter how it may be envisaged.

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tions concerning globalization as a social process have led to further divisions to the so-called "sceptics" (who decline the existence of globalization as a social process), "globalists" (who in globalization see a desirable change that leads to the expansion of the ideology of neoliberalism and market economy), "superglobalists" (who consider globalization to be an objectively planetary process), "antiglobalists" (who focus only on the undesirable consequences of the globalization process) and "transformationists" (who study globalization in a comprehensive and balanced manner). D. Ronald, *National Diversity and Global Capitalism*, Ithaca 1996; A. Gidens, *The Third Way. The Reneval of Social Democracy*, London 1998; N. Chomsky, *Profit over People: Neoliberalism and Global Order*, New York 1999; C. Boggs, *The End of Politics*, New York 1999.

[53] In addition to the present example of the European Union, the existence of the same globalistic intents is confirmed by the agreement (which is not of trading nature, as one may think) signed in 2005 (but not publicized to the American people and not ratified in the US Congress) on the foundation of the North-American Union (*Security and Prosperity Partnership of North America /NAU/*) with the future unique monetary unit "amero." This agreement put its signatory members (USA, Canada and Mexico) under obligation to renounce their state sovereignty. Thus, for instance, the current US Constitution from 1787 will become obsolete in the foreseeable future, as well as the constitutions of Canada and Mexico. Also, there is a plan to set up similar super-national creations (African Union and Asian Union). All of them should at one moment, jointly, unify under One World Government, i.e., under the World State, which St. John the Theologian speaks of in an apocalyptic way in the final writing of the Scriptures entitled "The Revelation." See: D. Simic, *The World Order*, Belgrade 1999 (in Serbian).

[54] N. Viskovic, *Theory of State and Law*, Zagreb 2001 (2006), 129 (in Croatian).

3. OTHER MULTIDISCIPLINARY LEGAL THEORIES

Other modern multidisciplinary legal theories are no less interesting, although they are aiming in a different direction. A special position is held by the system, cyber and bioethical theories, including the Law and Literature Movement, which will not be particularly commented here.

3.1. Supertheory of the Systems and Cyber Jurisprudence

Among the modern theories, a special place is taken by the "supertheory" of the systems by *Niklas Luhmann*, who created his well-known system theory of law starting from the notion of "normative expectation". For Luhmann it represents a "form of orientation used by the system to "feel" the contingency of its environment with regards to itself and taken over as its own, as uncertainty, in the process of its own renewal".[55] It is particularly the physical force of the state that represents an undeniable reason for the establishment of the "normative expectation", the increasing of which (thanks to the role of the state) "acquires the shape of law".[56] Luhmann determines it in the following way: "Law is a system regardless of which variant of the stratified definition of the system we may choose. It is a whole comprised of elements, legal regulations, linked with the requirement of mutual uncontradiction. As a whole, law is separated from its setting, clearly marked by the system borders, with proportionately high degree of autonomy. This autonomy rests on the foundations of the rule of law, that is, on the condition that each legal regulation derives its legality from another legal regulation and thus, in that logical sequence, all the way up to the basic norm – the valid constitution. Law is also self-referent, since the legal system refers to itself and particularly to its unity through a postulate of proportionate permanence, i.e. legal security, economy condition, ideal of justice".[57]

Luhmann also examines the reflexivity of law, which consists of the procedural, and the legal and moral parts. The aim of the first part is to provide the answer to the question what procedure is used against which legal norms are created, while the aim of the second part is to provide the answer to what kind of legal norms may be created at all.[58]

The law expressed in the form of legal norms is linked with the "reaction through disappointment" in case of its violation. It entails the

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[55] N. Luhmann, *Soziale Systeme, Grundriss einer allgemeninen Theorie*, Frankfurt am Main 1984, 364 and on. More in G. Vukadinovic, *Luhmann's "supertheory" of the systems*, in: *The Theory of Law I*, Petrovaradin 2001, 487–495 (in Serbian).

[56] J. Habermas, *Theorie des kommunikativen Handels*, Bd. II, Frankfurt am Main 1981, 263.

[57] E. Pusic, *Social Regulation*, Zagreb 1989, 11–12 and 16 (in Croatian).

[58] N. Luhman, *Rechtssoziologie*, I, Hamburg 1972, 99 and 188.

application of physical force which is the result of the reaction of the state owing to an individual's "disappointment" caused by a failed normative expectation. This reaction happens in two ways: by interpreting the deviant action, and then through a demand for a sanction and its application. Nevertheless, the force is not applied always in the same way, which means that the rationalization of law also does not happen in a uniformed manner. In the early phases of its development, law had to confirm itself in each newly-created case through a demonstration of force. With the passage of time, the force has been centralized in the form of the state monopoly, while law has gotten centralized in the form of decisions supported by the state force as the final means of coercion.

The second best known representative of the system theory, Alfred Geirer, also uses the notion of expectation to explain the creation of social and legal regulations which is a necessary consequence of the scarcity and human inter-dependence which at the level of consciousness get the form of uncertainty (*metus et indigentia*) owing to "existential uncertainty in scarcity" or "powerlessness of consciousness with regards to the information necessary in order to survive." For this reason, according to Geirer, the basic features of consciousness are "integration of the past, present and future, self-reference, and the arrangement of behaviour." The mentioned elements of consciousness determine the man with regards to the world and himself, bringing into connection the interest-inspired motives and the behaviour of each individual. These elements are manifested as "complex sub-systems of consciousness." "Normative sub-system of consciousness" is also like that and it serves from the very beginning for the neutralization of the uncertainty "which is one of the main problems in the passage to consciousness in general".[59]

The system theories of law of Luhmann and Geirer are further developed into even more modern theories, the goal of which is to create and examine cyber models of law, taking into account the effect of the social factors on the behaviour of the legal models. For this reason, in science they are also called *political-cyber legal theories* or *cyber models of jurisprudence*, which entails "*an arranged whole* (structure), which is *built on the basis of certain criteria* (functions) and which *is not subject to certain disturbances* (influences or challenges of the environment) that come from the social surroundings." According to their best known advocate Karl W. Deutsch, "law provides, that is, ensures that the social system accepts the political system." This acceptance and adherence to the laws (legality) in a political system depend on to which extent "there are ways along which an individual may get quick and correct orders".[60]

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[59] A. Geirer, *Die Physik das Leben und Seele*, Munich – Zurich 1985, 233. See: E. Pusic, 109, 139, 149 and 156.

[60] G. Vukadinovic, 250–251.

3.2. Bioethical Legal Theory

The abandonment of the meta-ethical researches around the middle of the last century did not mean the end in the interests related to moral forms and issues, but rather it first lead to the transition “from the meta-ethics to the normative ethics,” and soon afterwards also to the researches in the “applied ethics” (environmental ethics, business ethics, and bioethics).

The term “bioethics” (“the ethics of life” or “the ethics of everything living”) was first used in 1971 by American Van Ransselaer Potter in his book “Bioethics. A Bridge to the Future,” indicating by it a science whose goal is to improve the quality of living. As such, it is rather “a cluster of multidisciplinary researches, discussions and procedures” the objective of which is “to explain or resolve the issues of ethical character” created through the application of technological innovations, than some new ethics or a cultural movement. Bioethics deals with questions such as: “When does life begin? When and until when can we talk about ‘personality’ or ‘human life’? How much autonomy has an individual got in determining his own life and death? When to continue with the life-support, and when to terminate it? When to protect the mother, when the foetus or, even, the embryo in the tube? Where are the limits of the curing and which are the limits of the humane and inhumane experimenting?”[61]

The best known representative of the bioethical school of thought in the legal science and philosophy is Italian Francesco D’Agostino. Inspired by the Roman-Catholic teachings, he criticizes the dismemberment of the man which in science abolished its essential core (turning him into a “medley of phenomena” and “the being on the other side of phenomenon”) and finds in law a “relational human experience, a system of defence of inalienable prerogatives of a person in its reality of a subject in a relation”.[62] These inalienable prerogatives, according to D’Agostino, rest on four main bioethical principles. The first one is the principle of defence of the physical life which sanctions its integrity (since the corporal life is “basic value of a personality”). This is further developed into the principle of freedom and responsibility which entails, for instance, that a sick person is treated as a personality, but also a moral responsibility of a physician to refuse all morally unacceptable procedures (the issue of euthanasia, etc.). The third principle is the principle of wholeness which, for instance, allows an intervention into the physical life of persons if it is truly necessary for saving the whole of “body-psyche-spirit.” Finally, the fourth principle is the principle of sociability and assistance which obliges each individual to live while participating in the realization of the lives of others. With the afore-mentioned principles, D’Agostino set the foundations of “biojurisprudence” whose goal is to set the limits of the man’s freedom to interfere with the life’s processes.

[61] G. Fassò, 705.

[62] *Ibid,* 706 and on.

3.3. Law and Literature Movement

We should also mention an interesting relationship between law and literature which has, particularly in the USA, acquired the form of an entire multidisciplinary-based movement called precisely like that: *"law and literature* movement." The goal of this movement is to research in a multidisciplinary way the relationships between literary works and legal theory and practice, since law, as a cultural property and social fact, has been undoubtedly present in literature since long ago.[63] And law itself feels the need to observe itself in the spiritual creations coming from the pen of the most talented thinkers who have chosen literary instead of legal creativity, but could not help noticing the significance of law and leaving their inscriptions about it.[64]

4. CONCLUSION

Different novelties which contain the presented latest multidisciplinary theories with selectively expressed remarks, are not the only novelties, or the remarks for that matter, but what is common with all of these theories is the same methodological shortcoming consisting of a randomly selected number of elements (like, for instance, in the teaching of Michael Voltzer) or assumptions (for instance, in the teachings of the Chicago Law School, multiculturalists or feministic jurisprudence). To each such selection, at least the same number of other equally important as-

[63] D. Vrban, *Sociology of Law,* Zagreb 2006, 16 (in Croatian). See also: V. D. Schwanitz, *The Theory of System and Literature; new paradigm* (translation), Zagreb 2000, 222–228.

[64] As a literary topic, law appeared from the first time in the antiquity texts of Sophokles (497/6–406/5 B.C.), Petronius Gaius Arbiter Titus (1st century) and others. This is also the case in the Middle Ages, particularly in the drama pieces of William Shakespeare (1564–1616: *The Merchant of Venice, Titus Andronicus, Coriolanus, Hamlet, Macbeth,* in his historic dramas, etc.) as well as in the 19th and 20th centuries in the realistically inspired literature, from Honoré de Balzac, Charles John Huffam Dickens, Fyodor Mikhaylovich Dostoyevsky or Gustave Flaubert to Jules Verne: *Paris in 20th century*, Albert Camus: *The Stranger*, Franz Kafka: *The Trial, The Castle,* Aldous Leonard Huxley: *Brave New World*, Yevgeny Ivanovich Zamyatin: *We*, George Orwell: *1984* and others. All of them are dominated by the topics related to human destiny and judiciary, justice and altruism, political repression, identity, social conformism, gender, sex and others, which makes them a valuable material for looking at law from a completely different angle of rationality. D. M. Mitrovic, "William Shakespeare on the State and Law," *Anali PFB*, 1–2/1990, 95–118 and "Law, Justice and Mercy in the Dramas of William Shakespeare," *On Justice and Righteousness,* Belgrade 1995, 243–253 (in Serbian); E. V. Gemmette*, Law in literature: An annotated bibliography of law related works*, New York 1998; R. Posner, *Law and Literature*, Cambridge, MA. 1998; P. J. Heald, *Guide to law and literature for teachers, students and researchers*, Athens, GA 1998; V. M. Feeman, A. Lewis, *Law and Literature*, Oxford 1999.

sumptions, elements or properties may be added, which is a remark that also relates to some contemporary natural science teachings (for instance, the teachings of Lon L. Fuller or John M. Finnis, who will not be the subject of this work). As if it has been forgotten that a correct scientific assumption must start from what has already been scientifically proven or at least objectified, and not from what is the result of one's own observation of the permanent or unavoidable in the human nature and society, since this observation is extremely volatile, and hence, relative, which also makes it scientifically unimportant. And only when the unimportant has been discarded, can arguments be derived and judgements can be passed, and they show that the stated teachings can hardly stand the test of their scientific statements in the methodological and epistemological sense of meaning, as has been properly noticed by Karl Popper when he claims that behind the universal words and their meanings there is a much more important problem: "the problem of universal laws and their truthfulness; i.e., the problem of regularity". And that also sets quite different "intellectually important goals" such as the formulation of the problem, attempt to set up theories that would resolve the formulated problems and the critical consideration itself of the mutually contradicted theories. These goals enable the researcher to take as a scientific position only such critical position "which does not search for verification, but for key tests that could rebut the theory that is being tested, without ever being able to definitely confirm it".[65]

Other significant remarks stem from the stated basic methodological and epistemological remark, and these are: *relativity* with regards to the value sense or justification (for instance, of the justice and the role of the law-maker and supreme court when legitimizing secessionist clause), obvious *unacceptability* of the final scientific claims owing to their untruthfulness (in Popper's sense of the strictest testing of scientific positions): for instance, creation of some forms of territorial autonomy on the basis of racial, gender or sexual characteristics or determination of the state and its organization contrary to their nature and purpose, or *unethical conduct* and *exaggeration* (as in the case of the Chicago School of Economics or different feministic theories and schools of thought) that lead to unilateral approach when the scientific positions are developed consistently and until the end. But, the political benefit from the claims stated in these theories that are used to propose, proclaim as final or justify socially dubious projects about which members of the society have not been properly informed, is more than obvious. It is not difficult to notice that the latest sociological and anthropological teachings, and only

[65] K. Popper, *Unended Quest; An Intellectual Autobiography*, New York 1976 (transl. Belgrade 1991), 26, 29–30, 48. See also: D. M. Mitrovic, "Can Law be Comprehended: What is Law?", *Anali PFB* 1–2/2002, 85–108.

partially or indirectly the system-cyber and bioethical theories, complement wonderfully and support other presented theories which in a somewhat self-proclaimed and utopian manner deal with the resolving of contemporary legal and social issues. Yet, the most interesting is the *inconsistent* position of the most important multidisciplinary theories with regard to the ethical problems which are either excluded, where the positivistically directed scientific apparatus has been developed and reliable within its limits, or over-exaggerated, where such scientific apparatus is insufficient or lacking, or they are made relative, when the results do not coincide with the goals set in advance. This reveals two faces of Janus of the presented multidisciplinary theories, which have obtained a strong impetus at the very end of the "dispersed" 20th century and the same type of the beginning of the 21st century. One side of that face represents the damage inflicted on the science and the society by well-paid "academic scribblers" or "hired publicists," as such persons were called by Charles Right Mills.[66] The other side, however, represents an encouragement in terms that not all the representatives of these theories have opted for such kind of "bread-winning," but are truly engaged in a great legal and social experiment that is currently going on. Still, the idea persisted to separate what was natural according to the gender features, to join and equalize what was unnatural or ascriptive with the natural and traditional features, to make a state renounce the right to its own existence, to bring down individuals or social groups to subjects that should behave strictly in accordance with the economic formulas, etc. Such dissolution of the traditional notions, values and forms may serve as an important foundation for political doctrines and practice, the goal of which is a new redistribution of power that would be controlled in the future by one world government supported by the global law order. Perhaps due to their value neutrality or practical ethical direction the system-cyber and bioethical theories are more valuable for the achievement of the global harmony and the rule of law as a desirable goal in the foreseeable future, since they have a respect for what is common for all (existence of organization and system, application of information technologies, right to dignified life and death, humane medical treatment, etc.) without imposing self-proclaimed "most important" social values and formulas.

The contemporary multidisciplinary theories are interesting and challenging. They are also useful, at least because they force today's jurists to wake up and get out from the daily routine created by the satisfaction with what has already been achieved. But, we shall still have to wait for some more serious scientific results of these theories, unless it happens that they (together with the presented theories) become forgotten in the meantime like any other thing that falls out of fashion.

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[66] Ch. R. Mills, *The Power Elite*, New York 1960, 284–285.

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DIREKTKLAGEN VON KRIEGSOPFERN GEGEN STAATEN MIT GENAUEREM BLICK AUF DIE NATO OPERATION "ALLIED FORCE" IN DER BR JUGOSLAWIEN: 10 JAHRE SPÄTER

10 Jahre nach dem NATO Einsatz in der BR Jugoslawien sind die eingetretene Folgen für die betroffenen Zivilisten in Vergessenheit geraten. Ihre individuellen Schadensersatzansprüche gegen die Täterstaaten scheiterten vor nationalen Zivilgerichten an Grundsätzen der traditionellen Völkerrechtslehre. Dies bedeutet für die Kriegsopfer jedoch völlige Rechtsverweigerung. Die Rechtsverweigerung, sei sie prozessrechtliche oder materiell-rechtliche, kann nach geltendem Völker- und innerstaatlichen anwendbarem Deliktsrecht folgenderweise beseitiget werden:

Erstens steht es fest, dass die rechtswidrige kriegsbezogene Schädigung ein Delikt darstellt. Dies eröffnet dem Geschädigten die Möglichkeit, den Schädigerstaat vor den Gerichten des Staates einzuklagen, in welchem der Schaden eingetreten ist.

Zweitens, ist nach geltendem Recht die Staatenimmunität bei individualisierten Verletzungen der Menschenrechte und Verletzungen des humanitären Völkerrechts zu versagen.

Drittens sind kriegsbezogene Ansprüche den herkömmlichen deliktischen Ansprüchen des nationalen anwendbaren Rechts gleichzustellen.

Daraus ergibt sich, dass solche Ansprüche im Rahmen der traditionellen Grundsätze des IPR zu behandeln sind. D.h., man muss jegliche Widersprüche zwischen dem Völker- und dem anwendbaren nationalen Deliktsrecht durch die Anpassungsmethode beseitigen.

Die Anpassung ist derart durchzuführen, dass die Verletzung völkerrechtlicher Primärnormen an die Rechtsfolge der Norm des nationalen maßgebenden Deliktsrechts angeknüpft wird. Einer solchen modifizierten Anwendung der Primärnor-

men des Völkerrechts haben sich die Militärgerichtshöfe bedient, als sie die Strafverfahren gegen die NAZI Verbrecher geführt haben.

Schlüsselwörter: *Staatenimmunität.– Deliktsrecht.– Forum conveniens.– Menschenrechtsverletzungen.– Verletzungen von Normen des Humanitärvölkerrechts– Jus cogens.– Rechtsverweigerung.– Anpassung.*

1. EINLEITUNG

1.1. Die rechtliche Stellung der Kriegsopfer im Völkerrecht[1]

Seit knapp 100 Jahren wird in der Lehre darüber gestritten,[2] ob dem Einzelnen ein unmittelbarer Schadenersatzanspruch gegen den Schädigerstaat zusteht. Obgleich im Laufe des II Weltkrieges Millionen von Kriegsopfern, d.h. Zivilisten hohe sach– oder immaterielle Schäden erlitten hatten, haben doch nur wenige von ihnen durch Abschluss völkerrechtlicher Verträge volle Reparationszahlungen für getanes Unrecht erhalten.[3] Darum machen die in Kriegszeiten betroffenen Zivilisten ihre Schadenersatzansprüche unmittelbar vor nationalen Gerichten geltend.

In den letzten zwei Dekaden wurden solche Zivilklagen in mehreren Ländern gegen die BR Deutschland und Japan erhoben.[4] Die Ergebnisse der gegen die Schädigerstaaten eingeleiteten Zivilverfahren waren für die Kläger enttäuschend.[5] Obwohl, nämlich, die beiden Rechtsordnungen die Reparationspflicht des Täters wegen rechtswidriger Schädigung des geschützten Rechtgutes gewährleisten,[6] läuft der Schadener-

[1] Wegen der unüberschaubaren Literatur wird nicht auf alle bei dieser Arbeit benutzten Quellen verwiesen.

[2] S. z.B. schon am Anfang 20. Jahrhundert: *A. Roth*, Schaden für Verletzungen Privater bei völkerrechtlichen Delikten, Berlin 1934; In neuerer Zeit: *E. Engle*, Private Law Remedies for Extraterritorial Human Rights Violations, Diss. Bremen 2006, S. 7 ff; *A. Scheffler*, Die Bewältigung hoheitlich begangenen Unrechts durch fremde Zivilgerichte, Berlin 1997, S. 33 ff.; *W. Cremer*, Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationalen Gerichten, in: Archiv für Völkerrecht (AVR) 3/2002, S. 137 ff.

[3] Über internationalen Entschädigungsformen S. statt vieler *S. Kadelbach*, Staatenverantwortlichkeit für Angriffskriege und Verbrechen gegen die Menschlichkeit, in: Berichte der deutschen Gesellschaft für Völkerrecht (BDGVR), Heidelberg, 40 (2003), S. 94 ff.

[4] Für eine vollständige Liste solcher Klagen s.: *B. Hess*, Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht, in BDGVR, (2003), S. 109 ff.

[5] Die Klagen wurden als unbegründet abgewiesen und es wurde den Klägern die Erstattung von Gerichtskosten auferlegt. Vgl. *Ph. Hermann*, Aktueller Fall: Das Recht auf Leben nicht einklagbar? Das Varvarin Urteil des Landsgerichts Bonn vom 10 Dezember 2003, in: Humanitäres Völkerrecht-Informationsschriften (HuV-I) 2(2004), S. 79; *Ch. Johann*, Amtshaftung und humanitäres Völkerrecht, in: HuV-I, 2(2004), S. 87.

[6] Case Concerning the Factory at Chorzów, Deutschland v. Polen (Chorzow Factory – Fall), PCIJ, Series B, no. 6, S. 36 ff.

satzanspruch des Einzelbetroffenen gegen den Schädigerstaat ins Leere. Die künstliche Trennung zwischen dem Völker– und dem Nationalrecht löst einen Normenmangel aus, welcher ein, unerfreulicher, Normenwiderspruch teleologischer Art ist.[7]

1.1.1. Traditionelle Konzeption des Völkerrechts

Dieses unbefriedigende Ergebnis stützt sich auf die traditionelle Völkerrechtslehre,[8] die, kurz gefasst, sagt, dass nur die Staaten Rechtssubjekte des Völkerrechts sind. Hingegen wird die Einzelperson auf völkerrechtlicher Ebene durch seinen Heimatstaat vertreten und genießt diplomatischen Schutz.

Im, gegen den Staat eingeleiteten Zivilverfahren, bedeutet dies, dass die Normen des Völkerrechts dem Einzelnen keinen individuellen Schadenersatzanspruch zubilligen.[9] Denn, wie von Herr *Tomuschat* erläutert, sei jeder Krieg ein Massenschadensereignis, welches von seiner Natur her die individuellen Schadensersatzansprüche ausschließe.[10]

An einer solchen Lehre ist die Klage im Fall Varvarin vor dem LG Bonn gescheitert.[11] In ähnlichen Fällen haben ja auch die US Gerichte keine Grundlage für einen individuellen Anspruch auf Schadenersatz gegen den Schädigerstaat gefunden haben.[12]

1.1.2. Gegenwärtige Tendenzen

Seit dem Ende des II Weltkriegs wird das Völkerrecht privatisiert. Die rechtliche Stellung des Einzelnen wird durch mehrere effektive menschenrechtlichen Schutzeinrichtungen verbessert. Das internationale humanitäre Völkerrecht wurde auch stark fortentwickelt.[13] Außerdem, hat sich in der völkerrechtlichen Lehre die Theorie der Normenhierarchie entwickelt, woraus die Kategorie der *ius cogens* Normen entstanden ist.[14] Fast alle Normen des humanitären Völkerrechts gehören zum

[7] Vgl. *G. Kegel / K. Schurig*, IPR, 8. Auflage, München, 2000, S. 308.

[8] Diese Ansicht vertritt vor allem *W. Heintschel von Heinegg*, Entschädigung für Völkerrechtsverletzungen, in: BDGVR, 40 (2003), S. 25 ff.

[9] Vgl. *Ch. Tomuschat*, Reparations for Grave Human Rights Violations, in: Tulane Journal of International and Comparative Law (2002), S. 173.

[10] Ibid., S. 177.

[11] LG Bonn, Der Varvarin Fall, Neue Juristische Wochenschrift (NJW), 2004, S. 525 ff.

[12] S. z.B. *Handel v. Artukovic*, U.S.D.C. Centr. Dis. of Cal., 601 F. Supp. 1241 (1985).

[13] Vgl. statt vieler *D. Thürer*, Der Kosovo-Koflikt im Lichte des Völkerrechts: von drei scheinbaren Dilemmata, in: AVR 1(2000), S. 13 ff.

[14] S. statt vieler *S. Kadelbach*, Zwingendes Völkerrecht, Berlin, 1992, S. 33 ff.

zwingenden Völkerrecht,[15] sowie auch die fundamentalen Menschenrechte.

Die oben bezeichnete Entwicklung im Völkerrecht hatte auf die kriegsfolgenbezogenen Zivilverfahren bedeutenden Einfluss: So scheint es, dass das traditionelle Dogma des Völkerrechts, nach welchen der Kriegszustand die geltende interne Rechtsordnung suspendiert, nunmehr als überholt gilt.[16] Schon das deutsche BVerfG hat im Jahre 1996[17] zum Ausdruck gebracht, dass es keine völkerrechtliche Regel gebe, welche verbiete, dass dem in einem Krieg Geschädigten kein aus dem anwendbaren nationalen Recht abgeleiteter Anspruch zustehe. Außerdem betonte das BVerfG, dass der Geschädigte seine Schadenersatzansprüche vor einem Zivilgericht geltend machen könne, und zwar ungeachtet des Bestehens des diplomatischen Schutzes.

An diesen Anhaltspunkt knüpften die deutschen[18] und z.B. niederländischen Gerichte[19] die Frage an, ob die durch Kriegsereignisse Geschädigten ihre Schadenersatzansprüche unmittelbar auf die Verletzungen der Primärnormen der *ius in bello* stützen können.

Schließlich haben sich die deutschen Gerichte in mehreren Zwangsarbeiterfällen [20] entschieden, dass den infolge der Kriegsereignissen Geschädigten einen unmittelbaren Schadensersatzanspruch zusteht. Ein solcher Anspruch wird unmittelbar aus dem anwendbaren nationalen Deliktsrecht abgeleitet. Obwohl diese Position der deutschen Gerichte heftig umstritten ist,[21] zeigen die neusten Entwicklungen in der Lehre[22] und in der Spruchpraxis, dass sich diese Methode Schritt für Schritt durchsetzt.

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[15] Vgl. statt vieler *D. Schiendler*, Die erga-omnes Wirkung des humanitären Völkerrechts, in: Festschrift (FS) für *R. Bernhandt*, Berlin (1995), S. 199 ff.

[16] Vgl. In dem Sinne *Ch. Johann*, a.a.O. (Fn. 5), S. 90; *Ph. Hermann*, a.a.O. (Fn.5), S. 82; *B. Hess*, a.a.O. (Fn. 4), S. 114 ff.

[17] BverGE, 94, 315 ff. Ihm folgend OLG Köln im Fall Varvarin, NJW, 2005, S. 2860 ff.

[18] Z.B. LG Bonn, NJW, 2004, S. 525 ff., der Varvarin Fall. Für eine erschöpfende Liste von Fällen Vgl. *Ch. Johann*, a.a.O. (Fn. 5), S. 87 mit dazugehörenden Fußnoten.

[19] S. näher *C. Höhn*, Anmerkung zum Urteil der Arondissementsrechtsbank's Grevenhage von 7 April 1999, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht) (ZaöRV 59(1999), S. 863 ff.

[20] S. z.B. LG Bonn, in: Der Streit (1998), S. 101, 102, Az. 1 O 134/92; KG Berlin, Urteil vom 19.02. 2001, Az. 9 W 7474/00.

[21] Vgl. dagegen *W. Heintschel von Heinegg*, a.a.O. (Fn. 8), S. 27 ff; *Ch. Tomuschat*, a.a.O. (Fn. 9), S. 177.

[22] Vgl. *B. Hess*, a.a.O. (Fn. 4), S. 114 ff; *F. Kalshoven*, State Responsibility for Warlike Acts of Armed Forces, in: International and Comparative Law Quarterly (ICLQ) 4(1991), S. 827 ff; *L. Zegveld*, Establishing a Individual Complaints Procedure for Violations of International Humanitarian Law, in: Yearbook of International Humanitarian Rights (YIHR) 3(2000), S. 384 ff.

So, z.B. als das OLG Köln den Varvarin Fall in zweiter Instanz zu entscheiden hatte.[23] Hier sprach es als Rechtens aus, dass die Schadenersatzansprüche der Opfer der NATO Luftangriffe auf die Brücke in Varvarin nach dem deutschen Deliktsrecht, d.h. dem deutschen Amtshaftungsrecht zu beurteilen seien.

Schon diese kurze Darstellung der möglichen Klagbarkeit der individuellen Schadenersatzansprüche vor Zivilgerichten zeigt, dass die Aussicht des Klägers auf Verfahrenserfolg davon abhängt, von welchen theoretischen Erwägungen sich ein Richter leiten lässt. In den USA wurden z. B. solche Individualschadenersatzklagen sogar zurückgewiesen, denn den geltend gemachten Ansprüchen mangelte es an der Klagbarkeit.[24]

1.2. Die rechtliche Qualifikation des kriegsbezogenen Unrechts

In der Regel stellt die rechtswidrige Schädigung des geschützten Rechtsgutes ein Delikt dar, welches dem im Krieg geschädigten Opfer deliktische Haftungsansprüche gewährt.[25] Zu solchem Ergebnis kommt man, wenn man entweder nach der *lex fori* oder nach der *lex causae* die Rechtsfrage qualifiziert, es sei denn, dass die *lex causae*, auf die verwiesen wird, nicht davon ausgeht, dass die Kriegsereignisse die Anwendung des Privatrechts suspendieren.[26]

Die rechtwidrige Kriegshandlung des Schädigerstaates erfüllt des Weitern den Tatbestand einschlägiger Menschenrechtsnorm.[27] In der Regel könnten die Opfer die Verletzung ihres Rechtes auf Leben im Rahmen des "self-contained Systems" einer der existierenden Menschenrechtskonventionen rügen.

2. INDIVIDUELLE KLAGEN GEGEN AUSLÄNDISCHE TÄTERSTAATEN WEGEN KRIEGSWIDRIGER SCHÄDIGUNGEN

Kriegswidrige Schädigungen von Zivilisten entstehen meistens aus Verletzungen des humanitären Völkerrechts und der Menschenrechte.

[23] OLG Köln, NJW, 2005, S. 2860 ff.

[24] Vgl. z.B. *Saltany v. Reagan*, 886 F.2nd 438 (D.C.Cir. 1989); *Nejad v. United States*, 724 F. Supp. 753 (C.D.Cal. 1989).

[25] *B. Hess*, a.a.O. (Fn. 4), S. 111, 112; *J. Bröhmer*, State Immunity and Violations of Human Rights, The Hague/Boston/London, 1997, S. 150.

[26] In dem Sinne *J. von Hein*, The Law Applicable to Governmental Liability for Violations of Human Rights in World War II, in: Yearbook of Private International Law (YBPIL) (2001), S. 196.

[27] Z.B. Das Recht auf Leben garantiert im Artikel 2 der Europäischen Menschenrechtskonvention.

Was die Verletzung des *ius in bello* betrifft, sei es hervorgehoben, dass die Ansprühe der Einzelnen ungeachtet dessen entstehen, ob der bewaffnete Konflikt legitim oder illegitim im Sinne des geltenden Völkerrechts geführt wird. Jeder am Krieg beteiligte Staat ist für die Verstöße gegen das *ius in bello* verantwortlich.[28] Daraus folgt, dass die nationalen Zivilgerichte die Haftung desjenigen Staates beurteilen müssen, welcher zwingende Normen des humanitären Völkerrechts verletzt und dadurch dem Einzelnen den Schaden zugefügt hat.

2.1. Bestimmung der internationalen Zuständigkeit für die Klageeinleitung gegen ausländische Staaten

In Kontinentaleuropa gilt uneingeschränkt die Regel *forum loci delicti commissi*, d.h. die Tatortsregel.[29] Bei Distanzdelikten steht dem Geschädigten frei zur Wahl, ob er die Klage gegen den Schädiger vor den Gerichten des Handlungs– oder Erfolgsortes erheben will.

Etwas anders gilt im Angloamerikanischen Rechtskreis. Dort dient die Begründung der internationalen Zuständigkeit der Wahrung der politischen Interessen des Staates.[30] Aus diesem Grund ist es dem einzelnen Richter überlassen, arbiträr zu entscheiden, ob die internationale Zuständigkeit gegeben ist, auch wenn der Streitfall keine “minimum contacts” mit dem Forumstaat aufweist.[31] Die Lehre der “non-conveniens” ergänzt diesen Grundsatz.[32]

Die Regel *forum loci delicti commissi* zeigt uns, dass sich die Bestimmung der internationalen Zuständigkeit an die Abwägung der im Streitfall enthaltenen international privatrechtlichen Interessen anlehnt.[33] Da in Deutschland die kriegsschädigende Haftung des beklagten Staates als Amtshaftung verstanden wird, wird die Meinung vertreten, dass deutsche Gerichte ausschließlich für die Klagen gegen den eigenen Staat zuständig seien.[34]

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[28] *Ch. Johann*, a.a.O. (Fn. 5), S. 91 mit w.N.

[29] Vgl. *R. Geimer*, Internationales Zivilprozessrecht (IZPR), 4. Auflage, München, 1997, Rn. 1496a; Vgl. auch *S. Kadelbach*, a.a.O. (Fn. 3), S. 92, 93 betreffend die Begründung der internationalen Zuständigkeit verschiedenen mit dem Streitfall verbundenen Staaten.

[30] S. näher *R. Michaels*, Two Paradigm of Jurisdiction, in: Michigan Journal of International Law 27(2006), S. 622 ff; *R. Schütze*, Forum non conveniens und Rechtsschauvinismus, in: FS für *E. Jayme*, München (2004), 854.

[31] Vgl. statt vieler *R. Geimer*, a.a.O. (Fn. 29), Rn.127.

[32] Vgl. statt aller *R. Schütze*, a.a.O. (Fn. 30), S. 849 ff; *M. Rau*, Domestic Adjudication of International Human Rights Abuses and the Doctrine of Forum Non-Convenience, in: RabelsZ 61 (2001), S. 186 ff.

[33] Vgl. *B. Hess*, Staatenimmunität bei Distanzdelikten, München, 1992, S. 299 ff; *S. Kadelbach*, a.a.O. (Fn. 3), S. 92.

[34] Vgl. Id., S. 16 mit w.N. Id., S. 92.

In anderen europäischen Ländern hingegen,[35] besagt die Opfertheorie, dass dem Geschädigten mindestens zwei Gerichte zur Verfügung gestellt werden müssen, und zwar dasjenige des Schädigerstaates und dasjenige, welches im Staat der begangenen unerlaubten Handlung liegt. Ggf. auch das des Staates, in welchem der Schaden eingetreten ist. Dabei ist "forum shopping" möglich und rechtmäßig.[36]

Bei Klagen gegen die Staaten muss man der Anwendung der Regel *forum loci delicti commissi* den Vorzug geben.[37] Wie bei jeder wegen eines begangenen Delikts erhobenen Klage, richtet sich nämlich die Bestimmung der internationalen Zuständigkeit in kriegsbezogenen Fällen auch nach den Interessen des Geschädigten, d.h. des Klägers. Seine Interessen sind um so mehr schutzwürdig, als ihn das Unrecht durch ein Kriegsverbrechen oder durch einen Verstoß gegen das *ius cogens* zugefügt wurde, welcher zugleich die Verletzung eines fundamentalen Menschenrechts darstellt.

Außerdem wäre die Verfahrenseinleitung vor den Gerichten der Schädigerstaaten dem Geschädigten nicht zumutbar. Es ist nämlich nicht zu erwarten, dass die Gerichte des beklagten Staates ein faires Verfahren und insbesondere Unparteilichkeit gewährleisten können.[38] Der überzeugende Beweis dafür sind die Klagen, welche vor den Gerichten in den USA gegen die amerikanische Regierung erhoben wurden und in welchen die Handlungen des amerikanischen Militär gerügt wurden. In allen solchen Fällen wurden sogar die Kläger erniedrigend ausgelacht.[39]

Schließlich, wird in der Spruchpraxis die zutreffende Ansicht vertreten,[40] dass die internationale Zuständigkeit der Gerichte der Schädigerstaaten als Verbrecherstaaten *per se* ausgeschlossen sei. Es dürfe nicht sein, dass die Rechtsstreitigkeiten vor den Gerichten derjenigen Staaten ausgetragen werden, deren Militär Kriegsverbrechen oder Verbrechen gegen die Menschlichkeit verübt habe.

[35] So ist z.B. in Serbien.

[36] *Staudinger/B. von Hoffmann*, Vorbem. Artikel 38, Rn.15.

[37] In dem Sinne auch *A. Alam*, Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study, in: The Netherlands International Law Review (NILR) 3(2006), S. 403; *N. Ronzitti*, Compensations for Violations of the Law of War and Individual Claims, in: Italian Yearbook of International Law (IYIL) 2(2002), S. 41.

[38] Derselbe Vorwurf gilt auch für die Durchführung des Verfahrens vor den Gerichten des geschädigten Staates.

[39] S. z.B. *Koohi v. United States*, 967 F 2nd 1328 (9th Vir. 1992); *McFarland v. Chaney*, 1991, WL 43262 (D.D.C), bestätigt durch 971 F.2nd 766 (D.D.Cir. 1992), cert. denied, 506 U.S. 1053 (1993).

[40] U.S. Supreme Court, *Republic of Germany v. Altmann*, 7 June 2004, 541 U.S. (2004). S. insbesondere ausdrücklich *Bouzari and others v. Islamic Republic of Iran*, Cour d'appel de l'Ontario, Urteil vom 30 Jun 2004, International Law Reports (ILR) (2005), S. 124 ff.

2.2. Die Klagen vor den Gerichten der Opferstaaten: die Wirkung der verfahrenshindernden Einrede der Staatenimmunität

2.2.1. Begriff und Zweck der Staatenimmunität

Solchen Schadenersatzklagen steht im Ermittlungsverfahren die Einrede der staatlichen Immunität entgegen. Es ist nämlich insbesondere in der völkerrechtlichen Lehre die Meinung verbreitet,[41] dass die Staatenimmunität eine völkerrechtliche Gewohnheitsregel darstellt. Diese Regel besagt, dass ein Staat nicht in einem anderen Staat verklagt werden darf.

Die Regel der Staatenimmunität wird im Wesentlichen auf die souveräne Gleichheit von Staaten, d.h. auf ihre staatliche Souveränität zurückgeführt (*par in parem non habet jurisdictionem*).[42] Es stellt sich jedoch die schwer zu beantwortende Frage, ob überhaupt ein solcher völkerrechtlicher Rechtssatz entstanden ist.[43] Im Hinblick darauf ist es in Wirklichkeit weder eine einheitliche Staatenpraxis noch die Rechtsüberzeugung (*opinio juris*) mit genauer Präzision festzustellen. Noch schwieriger ist die Tragweite der Staatenimmunitätsnorm zu ermitteln. Darüber hinaus könnte man sich fast vergeblich darum bemühen, die Änderung oder den Untergang eines völkerrechtlichen Gewohnheitssatzes zu bestimmen.

Meines Ermessens nach, ist die Staatenimmunität eine Norm des internen Prozessrechtes, welche Ausfluss uneingeschränkter staatlichen Gerichtsbarkeit ist,[44] da das Völkergewohnheitsrecht nicht ausdrücklich gebietet, dass ein Staat dem anderen die Immunität zugewähren muss. Bei Beurteilung, ob Immunität zu gewähren oder zu versagen ist, soll sich der Forumstaat vor allem von seinen internationalen *erga omnes* Pflichten leiten lassen, wobei insbesondere die mögliche Verletzung von *ius cogens* Normen zu beachten ist. Der Immunitätsschutz ausländischer Staaten stützt sich in der Tat auf *comitas gentium*.[45]

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41 So z.B. *B. Hess*, a.a.O. (Fn. 33), S. 29; *A. Scheffler*, a.a.O. (Fn. 2), S. 50; *O. Dörr*, Staatlicher Immunität auf dem Rückzug?, in: AVR 3(2003), S. 2003.

42 Die Aussage trifft nicht zu, weil dem Gleichheitsgebot schon Genüge getan ist, wenn jeder Staat über den anderen Gerichtsbarkeit ausüben darf. Vgl. zutreffend *R. Geimer*, a.a.O. (Fn. 29), Rn.556.

43 Vgl. *L. Caplan*, State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory, in: American Journal of International Law (AJIL) 4(2003), S. 745 ff; *W. Cremer*, a.a.O. (Fn.2), S. 144 ff.

44 In dem Sinne schon *H. Lauterpacht*, The Problem of Jurisdictional Immunities of Foreign States, in: British Yearbook of International Law (BYIL) 28(1951), S. 229; *L. M. Caplan*, a.a.O. (Fn. 43), S. 745, 746.

45 *Schooner Exchange v. McFaddon*, 11 US 116; Crunch 116, 137. Diese Ansicht wird in der Regel in allen US Amerikanischen Urteilen wiederholt. Vgl. *M. Murray*, Jurisdiction under the Foreign Sovereign Immunities Act for NAZI War Crimes of Plunder

Hingegen würde die Versagung der Staatenimmunität auch für *acta ex jure imperii* chaotische zwischenstaatliche Folgen herbeiführen. Das beste Beispiel dafür ist der gerichtliche Schlagabtausch zwischen den USA und dem Iran.[46] Daher, wird die Staatenimmunität zugewährt, damit die normalen internationalen Beziehungen zwischen den Staaten abgewickelt werden können.[47] Aus diesem Grund muss für die Staaten die unabhängige und souveräne Funktion ihrer Organe gewährleistet werden. Dies wird dadurch erreicht, dass *acta ex jure imperii* der Kontrolle eines anderen souveränen Staates nicht unterworfen sind. Es lässt sich daraus schließen, dass die Staaten bei der Ausübung von *acta ex jure imperii* solange Immunität genießen sollen, bis sich der Handlungsstaat an Rechtsstaatlichkeitsprinzipen hält. Jeder Staat ist auch an Rechnormen gebunden, verstößt er gegen das Völkerrecht, insbesondere wenn er gegen *ius cogens* verstößt, wird der Zweck der Zugewährung der staatlichen Immunität verfehlt.[48]

2.2.2. Ausnahmen: deliktsrechtliche Ausnahmeklausel und ihre Tragweite

In neuerer Zeit gilt das Prinzip, die Staatenimmunität in gewissen Fällen nicht anzuerkennen.[49] Dies bezieht sich insbesondere auf die deliktsbezogene Immunitätsausnahme. Sie besteht im Wesentlichen darin, dass sich der Täterstaat auf keinen Immunitätsschutz berufen darf, wenn seine Organe auf dem Territorium des Forumstaates Personen– oder Vermögensschäden verursacht haben.[50] Dabei wird nicht mehr zwischen den hoheitlichen und nichthoheitlichen Handlungen unterschieden.[51]

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and Expropriation, in: New York University Journal of Legislation and Public Policy, spring(2004), S. 106 m.w.N.

[46] Die Ergänzung von FSIA von 1996 (28 USC § 1605 (a) (7) zog nach sich Retorsionsmassnahmen seitens Iran. S. darüber näher statt vieler *B. Hess*, a.a.O. (Fn. 4), S. 191 m.w.N.

[47] *J. Gaudreau*, Immunité de l’Etat et violations des droits de la personne: une approche jurisprudentielle, in: HEI Publications (2005), S. 6 ff; O. Dörr, a.a.O. (Fn. 41), S. 202 m.w.N.

[48] Vgl. in dem Sinne International Criminal Tribunal for former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Decision on Jurisdiction (Appeal Chamber), Urteil vom 2 Oktober 1995, ILR (1995), S. 483 ff. In dem Sinne auch ausdrücklich *A. Auer*, Staatenimmunität und Kriegsfolgen am Beispiel des Falles Distomo: Anmerkung zum Urteil des Obersten Sondergerichts vom 17. September 2002, BRD v. Miltiadis Margellos, in: Zeitschrift für öffentliches Recht (ZöR) 3(2006), S. 459.

[49] S. statt vieler *A. Bianchi*, L’immunité des Etats et les violations graves des droits de l’homme, in: Revue générale de droit international public (RGDIP) (2004), S. 64 ff; *B. Hess*, a.a.O. (Fn. 33), S. 291 ff; *J. Bröhmer*, a.a.O. (Fn. 25), S. 144 ff; *A. Scheffler*, a.a.O. (Fn. 2), S. 45 ff.

[50] S. näher statt vieler *O. Dörr*, a.a.O. (Fn. 41), S. 207 m.w.N; *W. Cremer*, a.a.O. (Fn. 2), S. 144 ff; m.w.N.

[51] *E. Handl*, Staatenimmunität und Kriegsfolgen am Beispiel des Falles Distomo: Anmerkungen zur Entscheidung des Obersten Gerichtshofs Griechenlands, in: ZöR

Es ist strittig, ob die deliktsbezogene Immunitätsausnahme auch auf bewaffnete Konflikte ihre Anwendung findet.[52] Das Übereinkommen der UNO über die Immunität der Staaten und ihres Vermögens von der Gerichtsbarkeit vom 02.12.2004[53] enthält diesbezüglich kein ausdrückliches Gebot.[54]

2.2.3. Die Anwendung der deliktsrechtlichen Ausnahmeklausel auf Menschenrechtsverletzungen und kriegsbezogene Verstöße gegen das humanitäre Völkerrecht

Man fragt sich, ist die Immunitätsdeliktsausnahmeklausel auch auf die kriegsbezogenen Delikte oder die schweren Menschenrechtsverletzungen zu erweitern?

Die Bestrebungen in der Literatur und Spruchpraxis[55] sind darauf gerichtet,[56] die Staatenimmunität bei Verstößen gegen die zwingenden Normen des Völkerrechts zu beschränken. Trotzdem kann man kaum feststellen, ob sich in diesem Bereich ein neuer Gewohnheitsrechtssatz entwickelt hat.

Die Entwicklung der menschenrechtlichen deliktischen Ausnahmeklausel begann mit der Entscheidung des US Gerichtshofes im Fall Leteiler v. Chile,[57] in welcher dem beklagten Staat Chile die Immunität im Zivilverfahren versagt wurde. Aber, ging später der US Supreme Court einen ganz anderen Weg und billigte den beklagten Staaten Immunität im Erkenntnisverfahren. [58]

3(2006), S. 435, 436; *De Senna/De Vittor*, State Immunity and Human Rights: The Italian Supreme Court Decision in the Ferrini Case, in: European Journal of International Law (EJIL) 1(2005), S. 94.

[52] Dagegen z.B. *O. Dörr*, a.a.O. (Fn. 41), S. 214 ff; E. Handl, a.a.O. (Fn. 51), S. 439; *H.P. Foltz*, Staatenimmunität und Kriegsfolgen am Beispiel des Falles Distomo: zum Umgang mit jus cogens, in: ZöR 3(2006), S. 493. Dafür *A. Auer*, a.a.O. (Fn. 48), S. 459, 460; *W. Cremer*, a.a.O. (Fn. 2), S. 154.

[53] UN Doc. A/57/561 vom 07.12.2002.

[54] Vgl. *Ch. Tomuschat*, L'immunité des Etats en cas de violations graves des droits de l'homme, in: RGDIP (2005), S. 56, welcher behauptet, dass das Übereinkommen ein klarer Beweis dafür ist, dass die deliktsbezogene Ausnahme auf bewaffnete Konflikte nicht auszudehnen sei.

[55] S. z. B. Corte di Cassazione (Secione Unite)-Der Fall Ferrini-Urteil no. 5044 vom 6.11. 2004, Rivista di diritto internazionale 2(2004), S. 539 ff; Areopag, Urteil no. 11 vom 4.05. 2000-Der Fall Distomo-, Kritische Justiz, 2000, S. 772 ff.

[56] Vgl. *M. Panezi*, Sovereign Immunity and Violation of Jus Cogens Norms, in; RHDI 56(2003), S. 207 ff; *B. Hess*, Staatenimmunität bei Menschenrechtsverletzungen, in: FS für *R. Schütze*, München (1999), S. 269 ff; *W. Cremer*, a.a.O. (Fn. 2), S. 155 ff. m.w.N.

[57] *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

[58] *Argentine v. Ameralda Hess Shipping Co.*, 488 US 428 (1989; *Hugo Princz v. FR of Germany*, 26 F. 3rd 1166 (D.C. Cir. 1994)

Daraus kann man folgern, dass sich eine Immunitätsausnahme für Menschenrechtsverletzungen in den USA bis dato noch nicht entwickelt hat. Das gleiche Ergebnis gilt für England[59] und Deutschland[60], wo sich der BGH im Falle Distomo äußerte, dass die die *acta ex jure imperii* ausländischer Staaten von der Staatenimmunität erfasst wurden. Die Internationalen Gerichtshöfe, wie z.B. der IGH[61] und EGMR[62] haben sich zur vollen Gewährleistung der staatlichen Immunität ausdrücklich geäußert.

Auf der anderen Seite haben die griechischen[63] und italienischen Gerichte[64] anders entschieden.[65] In der Sache Distomo hat der Areopag eine ganze Reihe von guten Argumenten aufgezählt, welche gebieten, dass dem ausländischen beklagten Staat Immunität versagt wird, wenn seine Organe, einschließlich seines Militärs, ein Verbrechen gegen die Menschlichkeit in Kriegszeiten verübt haben. Eine solche Argumentation wird auch in den neuesten theoretischen Erwägungen vertreten.[66]

Im wesentlichen hat sich das griechische Gericht darauf berufen, dass:

a) keine Immunität im Erkenntnisverfahren zuzubilligen ist, wenn die im Gebiet des Forumstaates vorgenommenen Handlungen gegen *ius cogens* verstoßen.

b) Kriegsverbrechen oder Verbrechen gegen die Menschlichkeit nicht hoheitlich qualifiziert werden können.

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[59] S. z.B. *Al-Adsani v. Government of Kuwait*, 107 ILR 536 (C.A. 1996).

[60] BGH (III ZR 245/98), Entscheidung vom 26. Juni 2003, NJW, 2003, S. 3488 ff.

[61] Case Concerning the Arrest Warrant of 11 April 2000 (DR Congo v. Belgium), Urteil vom 14.02. 2000, ILM (2002), S. 536 ff.

[62] EGMR, *Al-Adsani v. UK*, Urteil vom 21. November 2001, Reports on Judgments and Decisions (RJD), 2001-XI; *Fogarty v. UK*, Urteil vom 21. November 2001, RJD, 2001-XI; *McElhinney and Ireland v. UK*, Urteil vom 21. November 2001, RJD, 2001-XI.

[63] Areopag, Entscheidung Nr. 11/2000 vom 4.05. 2000, Kritische Justiz, 2000, S. 472 ff. Für die umfangreiche Geschichte des Falles Distomo S. näher statt vieler A. Auer, a.a.O. (Fn. 48), S. 449 ff.

[64] Corte di Cassazione, 11. März 2004, Rivista di diritto internationale 2(2004), S. 539 ff. Für einen Kommentar S. *De Senna/De Vittor*, a.a.O. (Fn. 51), S. 90 ff.

[65] Diese Tendenz ist inzwischen in Italien Regel geworden. Im Fall "Civitella" hat der Kassationsgerichtshof die Verurteilung Deutschlands zu Schadenersatz bestätigt (Entscheidung vom 21 Oktober 2008). Darüber hinaus hat das oberste italienische Gericht im Juni 2008 die Vollstreckbarkeit des griechischen Urteils "Distomo" bestätigt und damit Zwangsvollstreckungsmassnahmen gegen deutsches Eigentum in Italien ermöglicht.

[66] S. *A. Orakhelashvili*, State Immunity and International Public Order, in: German Yearbook of International Law (GYIL) 45(2002), S. 258 ff; *A. Bianchi*, a.a.O. (Fn. 49), S. 96 ff; *J.F. Flauss*, Droits des immunités et droits de l'homme, in: Schweizerische Zeitung für internationales und europäisches Recht (SZIER) 3(2000), S. 308 ff.

Hingegen legte das italienische Kassationsgericht mehr Wert darauf, ob die rechtswidrige *ex jure imperii* Handlung des Schädigerstaates zugleich eine international verbotene Straftat, wie z.B. Kriegsverbrechen oder Verbrechen gegen die Menschlichkeit, darstellt. Wenn dem so ist, dann entfällt der Immunitätsschutz.[67]

Es stellt sich die Frage, welche Bedeutung die in Fällen Letelier, Distomo und Ferrini gefällten Urteile haben. Wie Eingangs erwähnt, stellt m.E. die Staatenimmunität überhaupt keine völkerrechtliche Gewohnheitsnorm dar. Daraus ergibt sich, dass man nicht in der Lage ist, im Wege einer logischen Deduktion[68] den angeblichen Rechtssatz der Staatenimmunität auf Einzelfälle mit zufrieden stellendem Grad der Bestimmtheit anzuwenden. Es steht auch fest, dass das Völkerrecht den Staaten weder gebietet noch verbietet, den ausländischen Staaten die Immunität im Zivilverfahren, welches auf Schadenersatz wegen schweren Menschenrechtsverletzungen oder Verletzungen des humanitären Völkerrechts gerichtet ist, zuzubilligen oder zu versagen.

Das ist der beste Beweis dafür, dass die Staatenimmunität nur ein Ausfluss staatlicher Souveränität, d.h. der uneingeschränkter Gerichtsbarkeit ist. Darüber hinaus ist für die Frage der Geltung der Staatenimmunität auf die Entschädigungsverfahren wegen Verletzungen der *ius in bello* ausschlaggebend, welchen Pflichten, die sich aus dem vorrangigen *ius cogens* ergeben, der Forumstaat nachkommen muss. Jede *ius cogens* Norm erzeugt nämlich eine Verpflichtung *erga omnes.* [69] Wenn sie in die nationale Rechtsordnung inkorporiert werden, so werden sie zugleich Bestandteil des internen “ordre public”.

Bei einem Widerspruch zwischen dem prozessualen Rechtshindernis, wie es die Staatenimmunität ist, und einer dem “ordre public” zugehörigen Norm, ist der Richter verpflichtet, der niederrangigen und dem “ordre public” widersprechenden Normen die Anwendung zu versagen. Selbiges gilt auch im Zivilverfahren, welches die Opfer von Menschenrechtsverletzungen oder von Verletzungen des humanitären Völkerrechts gegen die ausländischen Staaten einleiten.

Der Mangel einer sekundären *ius cogens* Norm, welche prozessuale Durchsetzbarkeit von Schadenersatzansprüchen vorsehen würde, verhindert die Versagung der Staatenimmunität nicht.[70] Denn das Auseinan-

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[67] Theoretisch in dem Sinne *K. Reece/J. Small*, Human Rights and State Immunity: Is There Immunity from Civil Liability for Torture?, in: NILR 1(2003), S. 20.

[68] *H.P. Foltz*, a.a.O. (Fn. 52), S. 484 ff. betont zutreffend, dass die Rechtsnorm entweder durch einen induktiven oder deduktiven Ansatz entwickelt und bestimmt wird.

[69] *W. Cremer*, a.a.O. (Fn. 2), S. 137; *A. Bianchi*, a.a.O. (Fn. 49), S. 172; *D. Schindler*, Die Erga Omnes Wirkung des humanitären Volkerrechts, in: FS für R. Bernhardt, Berlin (1995), S. 200, 201 ff.

[70] Dagegen jedoch z.B. *K. Schmalenbach*, Immunität von Staatsoberhäuptern und anderen Staatsorganen, in: ZöR 3(2006), S. 493. Vgl. auch *O. Dörr*, a.a.O. (Fn. 41), S. 215.

derfallen zwischen *ius cogens* und dem Immunitätshindernis findet nicht auf der Ebene des Völkerrechts, sondern auf der Ebene des nationalen Rechts statt.

Die Aussagekraft der angeführten Argumentation bedeutet jedoch noch nicht, dass man das Verständnis für Realität außer Acht gelassen hat. Die Aufhebung der Staatenimmunität zöge eine Welle von Privatklagen nach sich,[71] welche die Rechtspflege jedes Landes zum Untergang verdammen würde.

Sicherlich kämme die Aufhebung der Staatenimmunität im Falle der Massenvernichtungen von Städten und Zivilisten, wie es am Endes des II Weltkrieges mit Leipzig geschehen ist oder im Fällen der Massenvernichtung der Umwelt und Zivilisten, welcher sich das US Militär als Kriegsführungsmethode in Vietnam bedient hat, nicht in Frage. Die sich daraus ergebenden, sei es völkerrechtliche oder zivilrechtliche, Ansprüche sind auf der völkerrechtlichen Ebene zu regeln.

In Gegensatz dazu, beeinträchtigt die Versagung der Immunität die Verwirklichung ihrer Zweck in ganz zeitlich und räumlich isolierten Fällen und individuell bestimmbaren schwerer Menschenrechtsverletzungen oder Verstößen gegen das humanitäre Völkerrechts nicht.[72] Die zweite Voraussetzung für die Versagung der Staatenimmunität wäre, dass das Verbrechen ausschließlich im Forumstaat lokalisiert ist.[73]

2.3. Zugang zum Gericht, Rechtsverweigerung und Staatenimmunität

In einem Rechtsstaat ist die Rechtsverweigerung verboten.[74] In diesem Sinne ist auch die in Artikel 6 EMRK verkörperten Garantie des Rechts auf Zugang zu einem unabhängigen, unparteiischen und auf Gesetz beruhendem Gericht.[75] Dieses Recht muss effektiv, darf jedoch nicht illusorisch sein. Es ist nichtsdestoweniger absolut. Das Recht unterliegt verhältnismäßigen Einschränkungen. Dennoch, dürfen solche Einschränkungen den Wesengehalt des gewährten Rechts nicht zwecklos machen. Davon ausgehend, fand der EGMR in drei Fällen, dass die

[71] Vgl. *B. Hess*, a.a.O. (Fn. 4), S. 130 ff; *Ph. Hermann*, a.a.O. (Fn. 5), S. 79; *Ch. Johann*, a.a.O. (Fn. 5), S. 91.

[72] *J. Bröhmer*, a.a.O. (Fn. 25), S. 211 ff. Kritisch dazu *B. Hess*,a.a.O. (Fn. 56), S. 280, fn.69.

[73] So ausdrücklich *R. Geimer*, a.a.O. (Fn. 29), Rn. 626c.

[74] Über den Sinn und Tragweite der Rechtsverweigerung S. *J. Paulsson*, Denial of Justice in International Law, Cambridge, 2005, S. 62.

[75] Über das Recht auf Zugang zum Gericht und seine Tragweite S. statt vieler A. Jaksic, Arbitration and Human Rights, Frankfurt/M-Peter Lang Verlag, 2002, S. 277 ff. m.w.N.

Staatenimmunität eine angemessene Beschränkung des Rechts auf Zugang zum Gericht darstellt.[76] Er entschied, dass die Staatenimmunität geltendes Völkergewohnheitsrecht sei.

Im zeitlich zuletzt entschiedenen Fall betreffend der Staatenimmunität, nämlich im Fall Markovic,[77] welcher den NATO Einsatz in der ehemaligen BR Jugoslawien betraf, erweiterte der EGMR die Verhältnismäßigkeit der Einschränkung des Artikel 6 EMRK auf materiellrechtliche Gründe. Die Einschränkung sei auch verhältnismäßig, wenn das materielle Recht des beklagten Staates verbiete, dass innerstaatliche Gerichte überhaupt die "acts of foreign policy" eigener Regierung gerichtlich überprüfen. D.h. im Ergebnis, dass die Regierungsentscheidungen den rechtsstaatlichen Grundsätzen nicht unterliegen.

Die Lehre ist sich jedoch einig,[78] dass es immer ein Gericht geben muss, welches international Zuständig ist, in der Sache zu entscheiden. Sonst gäbe es eine offene, verbotene Rechtsverweigerung. Nach fast einhelliger Meinung der Lehre[79] ist diesem Gebot Genüge getan, wenn der Schädigerstaat seine Gerichte den Kriegsopfern öffnet.

2.4. Das Verfahren im Schädigerstaat: substanzielle Rechtsverweigerung

2.4.1. Einleitende Bemerkungen

Die obige Ansicht beruht auf der Anwendung der klassischen Theorie des Justizgewährungsanspruchs und dessen Tragweite. Man fragt sich, ob Artikel 6 seinem Wortlaut und Zweck nach einen Anspruch auf eine Sachentscheidung garantiert,[80] d.h. den so genannten Rechtschutzanspruch. Das wäre m.E. zu bejahen, umso mehr als man Artikel 6 systematisch und funktionell bezogen mit dem Zweck des Artikels 13 auslegt.

Artikel 13 EMRK garantiert nämlich das Recht auf wirksame Beschwerde. "Wirksam" in der Konventionspraxis bedeutet,[81] dass es in nationalen Rechtsordnungen ein Rechtsmittel geben muss, dessen Einlegen die Beurteilung der angeblichen Verletzung und sogar die Beseitigung der

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[76] S. supra Fn. 62.

[77] EGMR, *Markovic and others*, Urteil vom 14.12. 2006, § 95.

[78] *B. Hess*, a.a.O. (Fn. 33), S. 318, 319; *E. Habscheid*, Immunität internationaler Organisationen und Art. 6 I EMRK, in: FS für *R. Schütze*, München (1999), S. 275. Dagegen z.B. *S. Hobe*, Durchbrechung der Staatenimmunität bei schweren Menschenrechtsverletzungen-NS Delikte vor dem Aeropag, in: Praxis des internationalen Privat– und Verfahrensrecht (IPRax) (2001), S. 339.

[79] *B. Hess*, a.a.O. (Fn. 56), S. 283; *J. Bröhmer*, a.a.O. (Fn. 25), S. 195.

[80] In dem Sinne ausdrücklich *E. Habscheid*, a.a.O. (Fn. 77), S. 257; *B. Hess*,a.a.O.(Fn. 56), S. 282; *Ch. Grabenwarter*, Europäische Menschenrechtskonvention, 2. Auflage, München, 2005, S. 356.

[81] S. z. B. EGMR, *Rotary*, Urteil vom 4.05. 2000, § 67.

Verletzungsfolgen für Betroffene ermöglicht.[82] Dies bedeutet, dass das einschlägige Rechtsmittel insoweit effektiver sind, als es die Überprüfung der Menschenrechtsverletzung in der Sache gewährleistet.

2.4.2. Andwendbares Recht

In Europäischen Länder gibt es zwei Arten der kollisionsrechtlichen Anknüpfungen für Schadensersatzklagen, welche wegen Verletzung der Menschenrechte oder wegen Verstöße gegen das internationale humanitäre Recht erhoben werden. In Serbien, wie in anderen Staaten Europas knüpft man an die übliche Tatortregel.[83] In Deutschland dagegen wird nach fast einhelliger Meinung die Ansicht vertreten,[84] dass auf die Haftung des Staates für obige Verbrechen immer das Recht des Schädigerstaates angewendet wird. In angloamerikanischen Rechtskreisen wird diesbezüglich die *lex fori* angewandt.[85]

Es ist auch durchaus möglich, dass die Gerichte des Forumstaates direkt auf die einschlägigen Normen des internationalen Humanitärenrechts zurückgreifen.[86] Diese Frage ist jedoch höchst umstritten. M.E. kann man Artikel 3 der HLKO von 1907 oder Artikel 91 des I Zusatzprotokolls von 1997 nicht anders teleologisch auslegen, als dass die angegebenen Normen unmittelbar die Haftung des Schädigerstaates gegenüber der Einzelnbetroffenen begründen.[87] Anderweitig hätte die Einführung solcher Normen in die Übereinkommen keinen Sinn gehabt.

Trotzdem sind alle Schadenersatzklagen der Kriegsopfer gegen Staaten an substanzieller Rechtsverweigerung gescheitert. Nur scheinbar haben die Gerichte in der Sache entschieden, tatsächlich haben sie keine Sachverhaltsermittlung erlaubt.[88]

So entschied der BGH, dass den Klägern keine Ansprüche auf Schadenersatz zu stehen, welche aus dem Völkerrecht unmittelbar abzu-

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[82] S. z.B. EGMR, *Assenov and others*, Urteil vom 28.10. 1998, RJD, 1998-VIII, § 117.

[83] Artikel 28 des Serbischen IPRG von 1982. S. auch Artikel 33 (2) schweizerischen Gesetzes über das internationale Privatrecht.

[84] S. statt vieler *Staudinger/B. von Hoffmann*, Vorbem. Artikel 38, Rn.228b; *J. von Hein*, a.a.O. (Fn. 26), S. 205; *B. Hess*, a.a.O. (Fn. 4), S. 118, 119 m.w.N.

[85] Nachweise bei *A. Scheffler*, a.a.O. (Fn. 2), S. 225 ff.

[86] *S. Schmahl*, Amtshaftung für Kriegsschäden, in: ZaöRV 66(2006), S. 700.

[87] Vgl. in dem Sinne auch *F. Kalshoven*, a.a.O. (Fn. 22), S. 871 ff; *L. Zegveld*, a.a.O. (Fn. 22), S. 479 ff.

[88] Leitentscheidungen sind die Urteile des LG Bonn und das Urteil des BGH im Fall Varvarin (LG Bonn, Urteil vom 10. Dezember 2003, NJW, 2004, S. 525 ff; BGH, Urteil vom 2.11. 2006, III-ZR 190/05.) Sowie der Fall *Markovic* in Italien anlässlich des Bombardements der Serbischen TV Station in Belgrad (Corte di Cassazione, (Sezione Unite), June 5, 2002, no. 9517, Presidenza Consiglio ministri v. Markovic et altri, Rivista di diritto internazionale 4(2002), S. 682 ff.).

leiten wären, denn solche Einzelnansprüche kenne das humanitäre Völkerrecht nicht. Zweitens, ließ der BGH die Frage offen, ob das deutsche Amtshaftungsrecht auf solche Schadenersatzansprüche anwendbar sei. An mehreren Stellen hat sich der BGH in seiner Entscheidung darauf berufen, dass manche für die Sachentscheidung relevanten Fragen nicht justiziabel seien. Sie stünden im Ermessen des Bundesverteidigungsministeriums.

Hingegen entschied der italienische Kassationshof im Falle *Markovic*, das Gericht sei überhaupt nicht zuständig, da der Streitgegenstand nicht justiziabel sei. Die Kriegsführung liege im freien Ermessen der Regierung. Der EGMR[89] hat seinerseits entschieden, dass die Zubilligung der Staatenimmunität aus materiellrechtlichen Gründen auch keine unangemessene Beschränkung des Rechts auf Zugang zum Gericht darstelle.

Es bleibt festzustellen, dass die angerufenen Spruchkörper in obigen Entscheidungen eine klare substanzielle Rechtsverweigerung ausgesprochen haben.[90]

2.5. Harmonisierung zwischen den Primärnormen des Völkerrechts und nationalem Recht: die Anwendung der Anpassungsmethode

Die Anpassungsmethode wendet u.a. die Modifizierung einer materiellen Norm an.[91] Sie dient als Methode zur Beseitigung von Normenwidersprüchen, und insbesondere zur Lückenfüllung. Den eine Lücke hätte zur Folge hat, dass ein Sachverhalt nach keiner der möglich anwendbaren Rechtsordnungen sachlich bearbeitet wird.

Wenn die Entstehung von Normenwidersprüchen auf die Schadenersatzklagen wegen kriegsbezogener Schädigungen von Zivilisten übertragen wird, bedeutet dies, dass, wie das LG Bonn z.B. entscheiden hat, weder das humanitäre Völkerrecht noch das interne Deliktsrecht zur Anwendung kommt. Die dadurch eröffnete Lücke ist umso mehr nicht tragbar, als man in Kauf nimmt, dass beide Rechtsordnungen auf dem Prinzip *neminem laedere* entwickelt wurden, welches als Quelle des Völkerrechts im Sinne des Artikels 38 der Satzung des IGH gilt.[92]

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[89] EGMR, *Markovic and others*, Urteil vom 14.12. 2006, § 95.

[90] Vgl. *N. Ronzitti*, a.a.O. (Fn. 37), S. 44 und *JJ. Fawcett*, The Impact of Article 6 (1) of the EHRC on Private International Law, in: ICLQ 1(2007), S. 7, sind der Meinung, dass die Opfer des NATO Einsatzes in Jugoslawien einer Rechtsverweigerung aufgesetzt werden, es sei denn dass den Schädigerstaaten die Immunität vor Gerichten in Serbien aufgehoben wird.

[91] S. statt aller *G. Kegel*, Das Ordnungsinteresse an realer Entscheidung im IPR und im internationalen Privatverfahrensrecht, in: FS für *U. Drobnig*, Tübingen (1998), S. 327 ff.

[92] Schon *Ulpianus*, Digesta I, 10. “Honeste vivere, alterum non laedere, suum cuique tribuere”.

Die ersten Fälle der Anpassung zwecks Lückenfüllung wurden im Strafrecht vorgenommen, wo dies strengstens verboten ist. Es handelte sich um mehrere Verfahren vor dem Internationalen Militärgerichtshof in Nürnberg gegen die NAZI Verbrecher. In jener Zeit bestand nämlich keine völkerrechtliche Norm, welche die Folgen für die Verletzung der Primärnormen vorsehen würde, geschweige denn die strafrechtlichen Sanktionen. D.h. es gab keine im Völkerrecht vorgesehenen Straftaten. Die Urteile, durch welche manche von den Angeklagten zum Tode verurteilt wurden, wurden auf folgende Art und Weise begründen[93]:

Erstens, berief sich der IMG auf die Verletzung des Artikels 46 der HLKO von 1907 und sagte:

"Such murders and ill-treatment were contrary to international conventions, in particular to Article 46 of the Hague Regulations, 1907... These acts violated Articles 46 and 50 of the Hague Regulations... as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed...".

Die strafrechtlichen Folgen für die Angeklagten bestimmte das Gericht wie folgt: "We may point out that the Hague and Geneva Conventions relating to rules of land warfare and the treatment of prisoners of war provide no punishment for the individual who violated those rules, but it cannot be questioned that he who murders a prisoner of war is liable to punishment".

Das Israeli Gericht,[94] vor welchem *Adolf Eichmann* zur Verantwortung gezogen wurde, war bei Begründung seiner Entscheidung noch klarer: "...It is true that international law does not establish explicit and graduated criminal sanctions...But, for the time being, international law surmounts these difficulties...by authorizing the countries of the world to mete out the punishment for the violation of its provisions. This they do by enforcing these provisions either directly or by virtue of the municipal legislation which has adopted and integrated them".

Daraus lässt sich der Schluss ziehen, dass die Strafgerichtshöfe die strafrechtlichen Folgen für die Verletzung der Primärnormen des Völkerrechts in Anwendung entweder der allgemein anerkannten Rechtsgrundsätze oder durch Einberufung der in internen Rechtsordnungen vorgesehenen Strafsanktionen fanden. Daher, wurde *in casu* das materielle Strafrecht modifiziert angewandt.

Bei solchen Präzedenzanwendungen des materiellen Strafrechts erübrigt sich die Erörterung, ob z.B. Artikel 3 der HLKO "self-executing"

[93] S. z.B. Trial for War Criminals before the Nuremberg Military Tribunals under Control Law, no. 10, Vol. XIV, Nuremberg, 1949, S. 332 ff.

[94] Supreme Court of Israel, *Attorney General v. Eichmann*, ILR (1962), S. 277, Nr. 11 des Urteils.

ist oder nicht. Wenn er nur zu den Primärnormen zählt und billigt dem Einzelnen keinen Anspruch gegen den Schädigerstaat zu, wird eine Lücke eröffnet, selbst wenn der Forumstaat auch das interne Deliktsrecht als nicht anwendbar erklärt. Der Rechtsschutzsuchende darf im Rahmen der Anwendung des Rechtsstaatlichkeitsprinzips nicht in der Schwebe gelassen werden.

Derselbe Gedanke ist auf die kriegsbezogenen Schadenersatzansprüche zu übertragen. Führt die künstliche Trennung zwischen dem Völker– und Privatrecht zu dem Ergebnis, dass der Geschädigte aus welchem Grund auch immer leer ausgeht[95], dann muss diese Lücke durch Anpassung geschlossen werden. Die Pflicht des Forumstaates die Methode der Anpassung anzuwenden, ist auf die Erfüllung seiner Verpflichtung zum *erga omnes* Schutz des zwingendes Rechts zurückzuführen.

Kommt es in individuellen Schadenersatzfällen zu keiner Anwendung einer der möglich anwendbaren Rechtsordnungen, so wird dieser Normenzweck verfehlt.[96] Wäre nur die interne oder nur völkerrechtliche Rechtsordnung anwendbar, dann könnte der Einzelgeschädigte vollen Rechtsschutz genießen. Im letzten Fall durch diplomatischen Schutz seines Heimatlandes.

Jede Primärnorm des humanitären Völkerrechts ist in die interne Rechtsordnung inkorporiert. Jeder Verstoß gegen die Normen des humanitären Völkerrechts entspricht einem in der nationalen Rechtsordnung vorgesehenen Delikt. Demzufolge sind die jeweiligen Verletzungen der Primärnomen des humanitären Völkerrechts an die Rechtsfolgen der deliktischen Normen nationalen maßgebenden Rechts anzuknüpfen. Dadurch wird die künstlich eröffnete Lücke geschossen.

3. DIE NATO OPERATION “ALLIED FORCE” IN DER EHEMALIGEN BR JUGOSLAWIEN: EIN SONDERFALL DER RECHTSVERWEIGERUNG

Der beste Beweis für die unbefriedigende rechtliche Stellung der Kriegsopfer sowohl im Völkerrecht als auch in den nationalen Rechtsordnungen sind die Versuche, die Folgen des NATO Einsatzes in der ehemaligen BR Jugoslawien zu beseitigen. Wie Eingangs erwähnt, schützt das humanitäre Völkerrecht die Rechtsposition der Einzelnen, und zwar ungeachtet dessen, welche von den Konfliktparteien für die Verletzung des *ius ad bellum* verantwortlich sind.

[95] Die interne Rechtsordnung darf nicht künstlich zerfallen (defragmentiert) werden. *D. Looschelders*, Die Anpassung im internationalen Privatrecht, Heidelberg, 1995, S. 115.

[96] Id., S. 6, 8, 116.

Die einzelnen Kriegsereignisse, welche entweder Folgeschäden ("collateral damage") nach sich gezogen haben oder welche ausschließlich Zivilisten getroffen haben (Varvarin, Gradelica Zug, Serbische TV Station), sind allgemein bekannt und in der Literatur genug erörtert.[97]

Abhilfe wurde auf beiden, d.h. international und national, Ebenen verlangt. Alle eingelegten Rechtsbegehren hatten weder vor den internationalen Gerichtshöfen noch vor den nationalen Gerichten Erfolg.

Zuerst hat sich der IGH für unzuständig erklärt,[98] über den Antrag Jugoslawiens auf Anordnung von vorläufigen Maßnahmen zu entscheiden. Damit ist auch die Möglichkeit entfallen, dass die am Krieg beteiligten Staaten vertraglich die Kriegsfolgen regeln, einschließlich der Schadenersatzansprüche der betroffenen Zivilisten. Auch der Weg zum diplomatischen Schutz wurde dadurch blockiert.

Die größte Enttäuschung für die Opfer brachte das Urteil des EGMR im Fall *Bankovic*.[99] In diesem Urteil hat das Gericht die Beschwerde als unzulässig zurückgewiesen. Im Gegensatz zur ständigen Praxis der EMRK Kontrollorganen nahm das Gericht die Position ein, dass die Konvention keine extraterritoriale Wirkung entfalte. Daraufhin erklärte der EGMR auch die Beschwerde im Fall *Markovic* für unzulässig.[100] Das Gericht hat die Meinung vertreten, dass die materiellrechtliche Immunitätssperre keine unangemessene Beschränkung des Rechts auf Zugang zum Gericht darstelle.

Die Schadensersatzklagen der einzelnen Opfer scheiterten auch in Deutschland, Italien und in den Niederlanden, wie oben bereits ausführlich dargelegt wurde.

Wenn man jeden Fall des angestrebten Rechtschutzes und die rechtliche Stellung der Kriegsopfer des NATO Einsatzes als Ganze betrachtet, so kommt man zum einzigen möglichen Schluss, dass den infolge des NATO Einsatzes "Allied Force" geschädigten Zivilisten ein großes Unrecht getan wurde. Sie wurden noch ein Mal die Opfer der Rechtsverweigerung.

Für das Bestehen der Rechtsverweigerung ist unbeachtlich, ob es zu keiner Sachentscheidung aus prozess– oder materiellrechtlichen Gründen gekommen ist.[101] Schon *Hugo Grocius* schrieb, dass ungerechte Ent-

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[97] S. z.B. unter der unübersehbaren Literatur *W. Fernrick*, Attacking Enemy Civilians as Punishable Offence, in: Duke Journal of Comp. and Int. Law 7(2007), S. 498 ff; *P. Benvenutti*, The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia, in: EJIL 3(2001), S. 518 ff.

[98] Legality of Use of Force, *Yugoslavia v. Belgium*, Order of 2 June 1999, Order Denying Request for Provisional Measures of 2 June 1999, § 45, 46.

[99] EGMR, *Bankovic and others*, Urteil vom 12.12. 2001, RJD-XII, § 67.

[100] EGMR, Markovic and others, Urteil vom 14.12. 2006, § 95.

[101] *J. Paulsson*, a.a.O. (Fn. 73), S. 62. So auch EGMR, *Bellet*, Urteil vom 4.12. 1995, Series A, no. 333-B, § 36.

scheidungen eine Form der Rechtsverweigerung darstellen. Den Kriegsopfern sei nämlich gleichgültig, ob ihre Klagen an Staatenimmunität oder an der Stellungnahme des Gerichts, dass der Streitgegenstand nicht justiziabel sei, scheitere. [102]

Es erübrigt sich, auf die Frage näher einzugehen, was der Ausgang des Zivilverfahrens gewesen wäre, wenn die Geschädigten ihre Ansprüche gegen die USA vor den US Gerichten geltend gemacht hätten. Solche Erfahrungen haben wir schon gemacht, nachdem die Opfer des Bombardements von Libyen im Jahre 1986 und die Opfer des abgeschossenen iranischen Passagierflugzeuges Klagen vor den US Gerichten erhoben haben.[103]

4. SCHLUSSBETRACHTUNGEN

M.E. kollidiert im Falle der schweren Menschenrechtsverletzungen und Verletzungen des humanitären Völkerrechts das prozessuale Hindernis der Staatenimmunität mit den in der internen Rechtsordnung inkorporierten Normen des *jus cogens*. Die letzteren erzeugen die Verpflichtungen der Staaten *erga omnes* und werden zugleich der Bestandteil der *ordre public.*

Die *ordre public* Klausel verbietet die Anwendung der ihr untergeordneten und ihr widersprechenden Normen. Dies sollte auch für die Staatenimmunität gelten. Warum diese juristisch-dogmatische Erwägungen in Wirklichkeit fast keine Anwendung finden, ist mehr eine Sache der Realpolitik.

Auf jeden Fall kann man nach geltendem Recht den Staaten Immunität versagen, bei individualisierten und vereinzelten Verletzungen der Menschenrechte und Verletzungen des humanitären Völkerrechts. Dies umso mehr, wenn begangene Handlungen internationale Straftaten darstellen.

Kriegsbezogene Ansprüche, welche aus der Verletzung des humanitären Völkerrechts herzuleiten sind, stellen zugleich herkömmliche deliktische Handlungen dar. Dasselbe gilt für vereinzelte Menschenrechtsverletzungen, wie z.B. absichtliche Tötung von Menschen. Dementsprechend sind diese Vorgänge auch nach üblichen IPR Prinzipien an das anzuwendende Recht anzuknüpfen. In der Regel kommt in solchen Fällen das Prinzip *lex loci delicti commissi* zur Anwendung.

Schließlich, sei nun noch hervorgehoben, dass die Folgen des NATO Einsatzes in der BR Jugoslawien noch fortwirken. Die Versuche

[102] Bei *J. Paulsson*, a.a.O. (Fn. 73), S. 82.

[103] S. supra Fn. 24.

eine Wiedergutmachung zu erreichen, scheiterten sowohl auf der internationalen als auch auf der nationalen Ebene.

Bei Schädigungen von Zivilisten handelt es sich um vereinzelte, individualisierte Kriegsereignisse, welche vom Sachverhalt her jedes Zivilgericht bearbeiten könnte. Es ist auch in europäischer Tradition tief verwurzelt, dass nach Beendigung der zwischenstaatlichen Konflikte alle strittigen Fragen vertraglich geregelt werden. Darüber hinaus ist zu vermuten, dass wenn es den politischen Willen dazu gäbe, dass ein Europäisches Schiedsgericht eingerichtet werden sollte, welches unparteiisch und nach europäischer Rechtstradition die tragischen, aber vereinzelte Folgen der Kriegsereignisse der NATO Operation "Allied Force" endgültig regeln würde.

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VICTIMS OF WAR AND THEIR DAMAGE COMPENSATION CLAIMS AGAINST STATES: NATO INTERVENTION "ALLIED FORCE" IN THE FORMER YUGOSLAVIA REVISITED – 10 YEARS AFTER

The NATO intervention in the former Yugoslavia was accomplished 10 years ago and has caused a great number of civilian victims. Until now they have not succeeded in getting any relief, neither at international nor at municipal judicial level. Victims of armed conflicts were barred from getting any redress for wrongdoing due to the traditional concept of state immunity and the concept of non-justiciability of individual claims against States arising from events taken place in an armed conflict. The damage compensation proceedings conducted before national tribunals of state perpetrators ended in the de facto denial of justice and impunity.

However, State perpetrators can be held responsible within the framework of international and applicable municipal law in the following way:

Firstly, the tribunals in Serbia are the most convenient forum for the settlement of disputes arising out of torts committed with respect to war activities in Serbia.

Secondly, the state immunity doctrine is not to be upheld in cases of serious violations of human rights and international humanitarian law, whereby such violations represent individualized and identifiable events.

Finally, the individual must be regarded as the beneficiary of reparation for violation of international humanitarian law. Such a result has to be achieved by ap-

plying the method of adjustment known in Private International Law. As the international law contends mostly the primary norms, they must be amended with effects contained in norms of applicable municipal law of torts. Thus, if a primary norm of international law has been violated, the effects of such a tortious act should be judged in accordance with the municipal law applicable to the law of torts. Such an adjustment method of primary norms of international law was already applied in the criminal proceedings against the NAZI leaders.

Key Words: *State Immunity.– Violation of fundamental human rights.– Violation of International Humanitarian Law.– Jus Cogens.– Forum conveniens.– Denial of Justice.– Law applicable to torts.– Adjustment (Anpassung).*

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NOTARY PUBLIC AS THE PUBLIC AUCTION CLERK IN GREEK LAW – NOTARY-RELATED NULLITIES IN PUBLIC AUCTIONS OF IMMOVABLE PROPERTY

According to Greek law, notaries public are unsalaried public functionaries (not civil servants) and their function is governed by the Code of Notaries currently in force (Law 2830/2000; before that, it was governed by the provisions of Laws 670/1977, 1333/1973, and even earlier, by the Law on Courts and Notary Public Offices of 1835). As a result of the above characteristic (unsalaried public functionaries), notaries public are not subject to hierarchical official dependence but only to inspection by the locally competent Prosecution Authority at First Instance (Art. 41 Code of Notaries; nevertheless, prosecutors are not vested with the authority to give binding instructions to notaries public, while their written opinions are only of a consultative character).

Notaries public are appointed by decree of the Minister of Justice, published in the Government Gazette (art. 26 Code of Notaries), after having succeeded in the relevant panhellenic competition for the filling of vacant notary public posts, that is conducted annually at the district of local Courts of Appeal during March (Art. 25 Code of Notaries). To become a notary public, one must meet the following eligibility criteria: a) has attained at least the age of twenty eight years and has not exceeded the age of fourty two (art. 21 § 1 Code of Notaries), b) is a Greek national, c) holds a Degree in Law by a Faculty of Law of a domestic university (or of foreign university, after equivalence of degree having been recognised), d) has been or was a lawyer or a judicial functionary (of any branch or degree) or an unsalaried registrar of mortgages or a notary public that resigned from office (art. 20 Code of Notaries).

Notaries public hold a permanent position and must retire from office upon attainment of the age of seventy years (art. 33 Code of Notaries). They enjoy personal guarantees equivalent to those provided to judicial functionaries by the Greek Constitution (art. 92 §4 Constitution). Their disciplinary law is governed by articles 42–95 of the Code of Notaries, whereas their civil liability is sought by the remedy of the action for mistrial (art. 73 § 1 of the Law introducing the Civil Code). Finally, notaries public are compulsorily organised in Notaries' Associations formed according to the districts of local Courts of Appeal (art. 97 § 1 Code of Notaries); these

associations are legal entities governed by public law and are supervised by the Ministry of Justice (art. 98 Code of Notaries).

Key words: *Notary public.– Public auction.– Nullities.– The element of harm.– Enforcement acts in stages.*

1. INTRODUCTION

In a lecture at the Law Faculty of the Hebrew University of Jerusalem on a legal-comparative study of enforcement organs, Professor *Konstantinos Kerameus* stressed that "in any country in Europe that *ius commune* preceded the era of great codifications of the 19th century, the doctrine of non-separation of judicial assessment from judicial coercion perceived enforcement to be a natural extension of judicial cognizance. This is why enforcement was mainly assigned to the court that adjudicated the dispute".[1] Nevertheless, this close interdependence between assessment and enforcement enfeebled in continental Europe, following the entry into force of the French Code of Civil Procedure of 1806[2]. It is nevertheless a fact that ever since that time European systems waver between the judicial and administrative classification of enforcement,[3] A typical example of that is German law, where the former classification still prevails, but modern tendencies are in favour of the administrative approach.[4]

While comparative review indicates that there is a variety of systems of enforcement[5], escalating between quasi judicial perceptions[6] and true administrative methods[7], most systems follow the median

[1] K. Kerameus, Organs of execution and executory titles in a comparative perspective, *Harmenopoulos* (Arm.), Monthly law review edited by the Bar Association of Thessaloniki, 50/1996, pp. 5 et seq. (in Greek).

[2] See closer K. Kerameus, previous fn., Arm 50/1996, pp. 7/8, with references to fn. 18–20; additionally also P. Yessiou-Faltsi, *Law of Execution I. General Part*, Sakkoulas, Athens-Thessaloniki 1998, § 4 III p. 59 (in Greek).

[3] K. Kerameus, supra, fn. 1, Arm 50/1996, pp. 7 et seq.; P. Yessiou–Faltsi, supra, fn. 2, § 12 I p. 208.

[4] K. Kerameus, supra, fn. 1, Arm 50/1996, p. 8, with explanatory notes in fn. 21 et seq.

[5] See K. Kerameus, supra, fn. 1, Arm 50/1996, pp. 7 et seq.; P. Yessiou– Faltsi, supra, fn. 2, § 12 I p. 208.

[6] A typical example is that of Austrian law, where the institution of the court of execution (Exekutionsgericht) exists; this court is the competent central institution that directs the entire enforcement process; see P. Yessiou-Faltsi, supra, fn. 2, § 12 I p. 208, with references.

[7] The system adopted by Swiss law is indicative, whereby, in contrast to the regulation of cognizance proceedings, which is a matter of the individual cantons, at the level of enforcement there is a single, federal enforcement procedure for the satisfaction of pecuniary claims. In the frame of this system there are specially organised enforcement

way[8]. In other way, enforcement is vested in functionaries of the law, who, even though they do not exercise judicial powers, they are not members of the public administration either[9]. In contrast to foreign jurisdictions, where the court of execution[10] is vested with the conduct of an auction, the Greek legislator decided, both in the Civil Procedure of 1834 (CP/1834) and in the Code of Civil Procedure of 1968 (CCP/1968), that the competent organ for the conduct of the auction shall be the notary public. Thus, the notary public that will carry out the compulsory auction is appointed by the petitioning creditor in the order of enforcement given to the bailiff (art. 927, 1st sentence in f. CCP)[11]. In fact, it has been decided that "in case that there is a public auction on the basis of a procedurally inexistent order given by the petitioning creditor [: revoked order], then this auction is procedurally null and void, without requiring the incurrence of harm (Art. 159 nr. 3 of the CCP), as there is a breach of a fundamental rule of the system (requiring ... an order to enforce Art. 927 CCP)"[12].

services (Betreibungsämter), assisted by administrative institutions, that have a very loose relation to courts; see more closely P. Yessiou-Faltsi, supra, fn. 2, § 12 I p. 208. A clearly broader adoption of administration models is observed in Swedish law, for which see K. Kerameus, supra, fn. 1, Arm 50/1996, p. 8.

[8] K. Kerameus, supra, fn. 1, Arm 50/1996, p. 8.

[9] In English law, where the competent organ of enforcement of High Court judgements is the High Court Enforcement Officer (HEO), as well as his bailiffs and employees, see esp. A. Zuckerman, *Zuckerman on Civil Procedure. Principles of Practice*, Sweet & Maxwell, London 2006[2], p. 829 (no. 22.128), who points out: "The HEO (previously known as a Sheriff) is independent of the court and charges fees calculated by reference to the amounts involved; as Sir Jack Jacob explained the HEO, operates "a form of private enterprise in the business of enforcement of judicial processes and is highly productive"; for the most recent amendments to the law of enforcement in English law see J. Kruse, "Enforcement Law Reform and Common Law", *Civil Justice Quarterly* 27/2008 pp. 494 et seq.

[10] See e.g. for French law P. Yessiou Faltsi, supra, fn. 2, § 4 III p. 59, with references to fn. 71; for Italian law see P. Yessiou-Faltsi, supra, fn. 2, § 4 III p. 61 and § 12 I p. 209, with references to fn. 19; for Austrian law see P. Yessiou-Faltsi, supra, fn. 2, § 12 I p. 208.

[11] J. Brinias, *Compulsory Enforcement* II[2], Sakkoulas, Athens 1982, § 312 p. 813 (in Greek); Court of Appeal of Athens 7396/2004, *Nomiko Vima* (NoV), Monthly law review edited by the Bar Association of Athens 53/2005, pp. 1614 et seq. (1616 II). In fact it is accepted also in cases of voluntary partition of immovable property that it is the petitioning creditor – co-owner who pursues the auction (and not the court) that appoints the clerk of the auction, as long as there is no regulation in the CCP that corresponds to that of article 1092(2) CP: Three-member District Court of Thessaloniki 7583/2008, Arm 52/2008, pp. 1381 et seq. (p. 1382 I), with further references.

[12] "But also because it will constitute a violation of a procedural provision, which establishes grounds for cassation in cognizance proceedings, according to arts. 559 nos. 9 and 14 CCP (CCP 159 no. 2)": Court of Appeal of Crete 90/1995, *Helliniki Dikaiosyni* (EllDni), Monthly law review edited by the Judges' and Public Prosecutors' Association 36/1995, pp. 1297 et seq. (p. 1298 I).

Nullities of public auctions that are related to notaries public or to their actions are crucial in the evaluation of the relevant selection. In particular:

2. NULLITIES OF ENFORCEMENT THAT ARE RELATED TO NOTARIES PUBLIC IN THEIR CAPACITY AS CLERKS CONDUCTING PUBLIC AUCTIONS

2.1. Notary – related nullities

Pursuant to article 998(1) CCP, the immovable property attached is auctioned publicly before a notary public in the area where the immovable property is situated[13]. It may as well be defined in article 4(1) of the Notaries' Code (Law 2830/2000) that "notaries public exercise their duties in the districts of Magistrate Courts that they are appointed in, as Magistrate Court districts are defined each time[14]", but, the law recognizes a broad exception for notaries public of the Greek capital. In particular, pursuant to article 4 (2) of the Notaries' Code, by way of exception to the provisions in previous paragraphs, notaries appointed in municipalities that are included in the judicial districts of the Athens, Piraeus, Nikea, Kallithea, Nea Ionia, Peristeri, Halandri, Maroussi, Salamina, Acharnes, Kropia, Elefsina, Megara, Marathon, Lavrion (Kea Island excluded), Nea Liosia and Aghia Paraskevi Magistrate Courts may exercise their duties in the other districts of the above Magistrate Courts, as long as an auction is assigned to them[15] and therefore there can be no nullity of the auction on those grounds. For example, the 1st Chamber of the Supreme Court has ruled that an auction carried out by the replacement of an Athens notary public (also a notary public in Athens) for immovable property situated in the district of the Aharnes Magistrate Court is not null and void[16]. Earlier, the Greek Court of Cassation (the Supreme Court)

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[13] About the fact that the place of conduct of an auction of immovable property may not differ from the seat of the notary public where the property is situated, see under the law previously in force the opinion of the Larissa Prosecutor of First Instance 485/1961, NoV 10/1962, pp. 331/332.

[14] Court of Appeal of Athens 7396/2004, NoV 53/2005, pp. 1614 et seq. (1616 II); One-member District Court of Lamia 228/1998, *Archeion Nomologias* (ArchN), Archive of Court Rulings 50/1999, pp. 393 et seq. (394 II).

[15] Or, if they are called to draft the notarial deeds in the residence, store or office of the contracting parties or in hospital/clinic, if hospitalized, or in prison, if detained, or in the branch of a bank or of a credit institution or organization, as well as when they act together with another notary public, according to the renumbered second paragraph of article 4 of the Notaries' Code, as it applies after the amendments of law 2915/2001, as the said paragraph bore the number 3 until then.

[16] Supreme Court 145/1997, EllDni 39/1998, pp. 103 et seq. (104/105); similarly in the cassated judgment of the appellate judgment of the Court of Appeal of Athens

had correctly ruled that there can be no invalidity in an auction that was carried out by an Athens notary public, because at the time of its conduct no notary public had been appointed, nor was there a Magistrate Judge acting as a notary public in the district where the immovable property was situated (Zografos Community at the time)[17]. In any event, when the seat of the municipality or of the community where the auction is conducted belongs to the district of another Magistrate Court (and therefore, of another notary public), the exercise of notarial duties is not contrary to the provision of article of the Notaries' Code. In particular, according to article 998(1) CCP, auctions are carried out before a notary public of the district where the immovable property is situated; in case the notary public should travel to the seat of the municipality or of the community, which lies within the district of another Magistrate Court (and notary public) to carry out the auction, it was correctly accepted that there can be no nullity of the auction, as this is imposed by law and not by the will of the notary public[18].

Notaries public that are absent or impeded in the exercise of their duties are replaced by another notary public of the same district, who is appointed by the president of the Council or the judge presiding at the Court of First Instance, upon a proposal by the party requesting the replacement, or even without it[19]. In the absence of another notary public in the district of the Magistrate Court, another notary public is appointed as a replacement originating from the same or from another district of a

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6648/1994, EllDni 1996, pp. 1126 et seq. (1128): both under the similar regime of the previous Notaries' Code (law 670/1977); additionally also One-member District Court of Athens 11822/1971, NoV 19/1971, p. 1466; One-member District Court of Athens 141/1971, NoV 19/1971, p. 494 (they all rejected the grounds of opposition put forward that the auction was conducted by an incompetent clerk of the auction); opinion of the Athens Prosecutor of First Instance 14/1971, D (Diki; monthly law review edited by Professor C. Beys) 2/1971, pp. 461/462, with opposing remarks J. Psomas.

[17] Supreme Court 310/1956, NoV 4/1956, p. 918: it was the case of Zografos community, which had recently been detached from the municipality of Athens (13.1.1929) and the auction was held on 27.4.1930.

[18] Opinion of the Prosecutor at the Supreme Court 5/1997, EllDni 38/1997, p. 1939 (under the previous Code of Notaries: law 670/1977).

[19] Court of Appeal of Thessaloniki 2692/1992, Arm 36/1992, pp. 749 et seq. (750 I): on the occasion of an auction of movable property, the Court accepted that "the opposing debtor was lawfully granted a copy of the auction report by the notary public I.M [who was replaced] and not its replacement, as the notarial deed of the auction report belongs to the archive of the first notary public". –In any case, it was ruled that "No provision of this (law 670/1977) or any other law prohibits the exercise of the notary's duties during the time of his leave; for the same reason the deposit of documents related with the auction to his hands and the drafting of the relevant auction report does not lead to the nullity of these acts and of the subsequent auction": One-member District Court of Larissa 623/1988, NoV 36/1988, p. 1673 II down; of the same opinion are J. Hamilothoris, C. Kloukinas, T. Kloukinas, *Law of Execution*, Nomiki Vivliothiki, Athens 2005, no. 41 p. 29 (in Greek).

Magistrate Court of the same Court of First Instance, appointed as described above, and in his absence, the Magistrate Judge of the seat [art. 3(1) of the Notaries' Code][20]. However, when replacement is effected without an act of the president of the Council or of the judge that is presiding at the Court of First Instance, the auction is not ipso jure null and void, but, according to the case-law of Greek courts, it is contingent upon the requisite of procedural or patrimonial harm sustained[21],[22]. Moreover, in the event of death or retirement of a notary public before the conduct of the auction and as long as his archive has been reassigned[23] to another notary public (newly appointed or not)[24], according to the provisions of article 128 of the Notaries' Code, i.e. following an order of the First Instance Prosecutor (following an opinion of the board of the Notaries' Association), the latter is the lawful clerk of the auction[25].

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[20] The same was foreseen under the previous law (see art. 168 of organization and decree 21/3/1836); see on the issue of lawful conduct of an auction by a magistrate judge the opinion of the Arta Prosecutor of First Instance 7681/1935, *Themis* (Th.), Monthly law review, no more edited 37/1926, p. 46.

[21] Supreme Court 1454/1998, EllDni 40/1999, pp. 789 et seq. (790) = D 30/1999, p. 348 (summ.); Court of Appeal of Athens 9955/1998, ArchN 51/2000, pp. 640 et seq. (648 I); Court of Appeal of Athens 5242/1993, EllDni 35/1994, p. 462; Court of Appeal of Athens 7396/2004, NoV 53/2005 pp. 1614 et seq. (1616 II).

[22] In view of the fact that the initial second paragraph of article 4 of the Notaries' Code, in which it was stipulated that "each notarial act performed beyond the district of the previous paragraph is null and void and the violator is liable to indemnify the injured party, while at the same time he is subject to disciplinary indictment", was abolished by article 32(1) of law 2915/2001, the nullity of the auction that is conducted by an incompetent notary public is correctly linked to the concurrence of the element of harm, as the penalty of nullity is no longer imminent [see before the abolishment of the regulation P. Yessiou-Faltsi, *Law of execution II. Specific part*, Sakkoulas, Athens-Thessaloniki 2001, § 59 IV pp. 408/409 (in Greek).

[23] Under the Civil Procedure of Maurer it was adjudicated that the lack of notification about the person of the new notary public, after the death of the initially appointed, results into nullity of the auction; so according to Court of Appeal of Patras 157/1906, Th. 19/1908–1909, pp. 148 et seq. (149 I).

[24] That the person appointed as the temporary holder of the archive of a retired notary public could under Civil Procedure of 1834 issue a summary of the schedule "of the auction of 28.1.68 before the aforementioned deceased notary public as a clerk of the auction under the condition that the notary public to be appointed as a replacement of the deceased will not have settled" see opinion of the Patras Deputy Public Prosecutor 1/1968, NoV 16/1968, p. 349.

[25] Supreme Court 1156/1980, EEN (: Ephimeris Hellinon Nomikon; Newspaper of Greek Jurists; edited in Athens) 48/1981, p. 267 (while the legislative decree 1333/1973 on the Code of Notaries was still in force), dismissing the grounds of opposition against the auction based on the opposite. –Due to the lack of a corresponding regulation (art. 128 of the Notaries' Code) in the law previously in force, it was accepted that in case of passing of a notary public, the auction was conducted not by the notary public who took over his archive, but his replacement instead; so according to the opinion of the Athens Pros-

Provisions on disqualification of judges[26] may not apply to notaries as clerks of the auction; however, in order to ensure the guarantees of impartiality and sound judgement during the conduct of an auction, the law prohibits outbidding in the particular auction to the notary public himself[27], as well as to his servants/employees [art. 965 (1) 2nd sentence CCP,· see also art. 533 Civil Code][28], and also to his relatives by consanguinity or affinity up to the third degree [art. 7 of the Notaries' Code (law 2830/2000)][29]. In any event, also in this case, the nullity of the auction, which is not to be considered as ipso jure[30], is pronounced only when the element of harm[31] (procedural or patrimonial)[32] is present. As the dearly departed *Ioannis Brinias* noted, "it may be taught that the effect of the prohibition of article 533 [CC] is the nullity of the auction according to article 174 CC, the nature of which nullity as absolute or relevant is fur-

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ecutor 73760/1954 *K. Fafoutis*, NoV 3/1955, p. 89, who claimed (90 I up) that: "this perception is founded on articles 203–210 of the Organisation of Courts, from the conjunction of which appears that, when a notary public is for any reason unable to perform the duties assigned to him with regard to his archive, care is taken in order to replace him (Opinion of the Supreme Court Prosecutor 37/1929, Th. 40/1929, p. 772)".

[26] Comp. K. Kerameus, *Notarial impediment due to relationship with a contracting party* (in Greek), D 1/1970.341 et seq. (346); additionally also J. Brinias, *Law of execution*, Vol. I^{2}, Sakkoulas, Athens 1978, § 131 VIII p. 335/336 (in Greek).

[27] In fact *Emmanuel Mihelakis*, during the preparatory works of the CCP (session of 10.7.1957), insisted "in favour of the non – quotation except for the debtor of other persons as unable to bid, as it is self-evident that the notary public may not bid" (Draft of Civil Procedure VIII p. 166).

[28] That the auction is invalid according to art. 533 CC, because the long-standing assistant of the notary public that conducted the auction bidded in it, see Lasithi Court of First Instance 18/1960, Arm 14/1960, pp. 867 et seq. (868) = NoV 8/1960, p. 1143.

[29] It was nevertheless adjudicated under the previous law in force that an auction is not null and void due to the fact that the sister of the notary public that conducted the auction was a bidder: Court of Appeal of Athens 754/1939, Th. 50/1939, p. 713.

[30] See the distinction adopted in Supreme Court 1352/1998, EllDni 40/1999, p. 634, i.e. that "the violation of the provision of art. 533 CC may result into the nullity of the bidding according to the provision of art. 174, in which bidding the highest bidders were the aforementioned persons, which annuls the auction procedure and leads at the same time to the nullity of the adjudication, as well as of the adjudication report, whereas the prohibition of 965 (1) 2nd sent. CCP ..., refers to each bidding (and not to the last one) extending to the employees of the notary public of the auction and leads to nullity with the concurrence of the conditions in article 159 (3) CCP"; similarly J. Schinas, *Civil Code*, Commentary *by A. Georgiades – M. Stathopoulos*, Vol. III, Sakkoulas, Athens 1980; reprinted 2004, art. 533 no. 40.

[31] As accepted by the Drafting Committee of the CCP by majority (dissenting opinions by *J. Sakkettas* and *E. Mihelakis)*, who supported that the participation of these persons should be prohibited under penalty of nullity), in the session of 10.7.1957 (Draft of Civil Procedure VIII p. 166).

[32] This interpretative approach is considered to be dubious by P. Yessiou-Faltsi, supra, fn. 22, § 59 IV p. 419 with fn. 185.

ther contested", however, "the application of the principles of substantial law should be restricted to the cases of other auctions that are foreseen and regulated by substantial law (compare art. 199 CC) and not to public auctions that are regulated by the CCP; according to current perceptions, auctions do not constitute an act of sale but an act of public authority, regulated solely by procedural law"[33].

2.2. Nullities related to notaries' acts or omissions

The most frequently encountered grounds of opposition to enforcement due to actions of the auction clerk is obstruction of free competition and deterrence of potential bidders, which is condemned in the Greek jurisdiction[34]. The issue arose in the past, before the entry into force of Article 4 (13) of law 2298/1998, especially by reason of the guarantee imposed on bidders according to articles 1003(1) and 965(1) CCP. The compulsory deposit of guarantee, as well as the kind or the amount of guarantee relied on the reasonable judgement of the auction clerk, whose criteria were the costs of repeat auction and the potential difference between the proceeds of auction and repeat auction, as well as the avoidance of inconsiderate participation in the bidding of insolvent persons or persons of suspicious intentions, that merely aim at the protraction of the procedure[35]. It thus remains at the discretion of the notary public to accept the participation of a prospective bidder, even without the deposit of guarantee, if he/she decided that the bidder was solvent[36], to set unequal guarantee or guarantee of different kind for each bidder[37] or even to increase and/or reduce the amount of guarantee during the auction[38]. Ac-

[33] J. Brinias, supra, fn. 11, § 345 IV p. 884.

[34] See recently L. Pipsou, "Malicious deterrence of bidders as grounds for annulment of the compulsory auction", *Commemorative volume for J. Manoledakis*, Vol. III, Sakkoulas, Athens-Thessaloniki 2007, p. 927 et seq. (in Greek).

[35] See instead of others Supreme Court 347/1995, EllDni 37/1996, pp. 1333 et seq. (1334/1335); Supreme Court 1277/1994, EEN 62/1995, p. 738 = EllDni 37/1996, pp. 588 et seq. (589), with notes *G. Diamantopoulou*; Supreme Court 129/1994, NoV 42/1994, pp. 1167 et seq. (1168); Supreme Court 425/1988, EEN 56/1989, p. 221; Supreme Court 795/1988, EllDni 30/1989, pp. 571 et seq. (572 I). —Nevertheless, through an addition to article 965 (1) CCP, by virtue of article 3 of law 1653/1986, guarantee could not be higher than one third or lower than one eighth of the upset price.

[36] Supreme Court 405/2000, EllDni 41/2000, p. 1328.

[37] See the facts of the case in Supreme Court 347/1995, EllDni 37/1996, pp. 1333 et seq. (1335): the clerk of the auction, who had set guarantee at 4.000.000 drachmas, "for the agents of the two cassationees it accepted letters of guarantee as guarantee, for others he demanded cash and for one (A.M.) he was satisfied with a personal cheque from him, and at the same time he excluded at least another two interested bidders from participation, who offered the same guarantee as A.M., i.e. personal cheques".

[38] Supreme Court 1654/1988, EEN 55/1989, p. 764.

cording to the established case-law of the Greek Supreme Court, "any misuse or abuse by the clerk of the auction (acting as a State instrumentality, exercising authority of the public service and not representing the petitioning creditor, the debtor or the successful bidder) of the discretionary power to render the highest bidding contingent upon the deposit of guarantee does not constitute grounds of nullity of the auction as such, so that it can form the basis of the respective remedy of opposition against the petitioning creditor and the creditor. Any eventual subsequent unjustified obstruction of a bidder's participation in the auction, resulting from misuse or abuse of this power, may establish grounds of nullity of the auction, due to obstruction of free competition between potential bidders, under the additional condition that the above obstruction was effected following an understanding of the auction clerk with the highest bidder, thus leading to the debtor's loss"[39]. In fact, in order for the opposition to the auction to be successful, the element of malicious conduct should be described with clarity in the legal brief, i.e. the understanding of the auction clerk with the highest bidder, so as to exclude or obstruct the participation of solvent bidders and bring about the adjudication at a price lower than the actual value of the thing, to the detriment of the debtor and his/her lenders[40]. Nevertheless, according to the prevalent opinion in case-law, there constitutes no grounds of nullity of the auction and the adjudication,

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[39] Supreme Court 190/1992, EEN 60/1993, pp. 271 et seq. (272 I); similarly among many others also Supreme Court 405/2000, EllDni 41/2000, pp. 1328/1329; Supreme Court 347/1995, EllDni 37/1996, pp. 1333 et seq. (1334/1335); Supreme Court 1277/1994, EEN 62/1995, p. 738 = EllDni 37/1996, pp. 588 et. seq. (589), with notes *G. Diamantopoulou*; Supreme Court 1962/1990, EllDni 33/1992, pp. 542 et. seq. (544 II); Supreme Court 1654/1988, EEN 56/1989, pp. 764 et seq. (765 I); Supreme Court 795/1988, EllDni 30/1989, pp. 571 et seq. (572); Supreme Court 425/1988, EEN 56/1989, p. 221; Supreme Court 67/1985, EEN 52/1985, p. 843 = NoV 34/1986, p. 54; Supreme Court 533/1984, NoV 33/1985, pp. 757 et seq. (758); Supreme Court 141/1979, EEN 46/1979, pp. 245 et seq. (246 II) = NoV 27/1979, pp. 1098 et seq. (1099 II); Supreme Court 672/1974, ArchN 26/1975, pp. 131 et seq. (133) = EEN 42/1975, pp. 305 et seq. (306 II) = NoV 23/1975, pp. 282 et seq. (284 I).

[40] See indicatively from case-law Supreme Court 425/1988, EEN 56/1989, p. 221; Supreme Court 795/1988, EllDni 30/1989, pp. 571 et seq. (572), and from theory *L. Pipsou*, supra, fn. 34, III pp. 944/945, with numerous references in fn. 96. Nevertheless, the Greek Supreme Court has ruled that "a specific mention of the way, the aim and generally of the circumstances under which the clerk of the auction came to an understanding with the cassationnees was unnecessary, in order to evaluate that in the disputed case the conditions of the provisions applied indeed concurred. Also, it was unnecessary to further investigate whether the guarantee set by the clerk of the auction was proportional to its aims, the upset price and the degree of solvency of the potential bidders, as well as whether these were indeed solvent, and finally, whether they had the intent and capacity to bid beyond the sale proceeds achieved. It is sufficient that the aim of the understanding in question is presented, as well as the method of its realisation": Supreme Court 1277/1994, EEN 62/1995, pp. 738 et seq. (740 I) = EllDni 37/1996, pp. 588 et seq. (560/561), with notes *G. Diamantopoulou*.

when the agreement of the notary public with the bidder is not proved and it is merely the notary public's initiative[41].

Following the amendment of article 4 (13) of law 2298/1995, the aforementioned discretionary power of the notary public with regard to the deposit, the kind and the amount of guarantee was modified, and the relevant issue was rendered obsolete[42]. In article 965 (1) 3rd sentence CCP is it now stipulated that "highest bidders have to deposit in cash or by letter of guarantee or by cheque issued by a bank or by another credit institution a guarantee equal to one third of the upset price"[43]. In fact, the relevant regulation covers also the auction of immovable property, pursuant to an express statutory reference [1003(1) CCP]. The deposit of guarantee is now a requirement for the validity of the highest bidding, whereas the violation of the above provision on payable guarantee amounts –except for the criminal liability of the notary public[44]– leads to the nullity of auction and adjudication, under the condition however, of existing harm [art. 159 (3) CCP][45]. Nevertheless, the jurisprudential position towards malicious agreements between the auction clerk and the successful bidder with regard to guarantee, which is a sub-category of "malicious deterrence of bidders"[46], has been a leading guide for Greek courts when evaluating the conduct of the auction clerk, in cases that it hinders the

41 See instead of others Supreme Court 67/1985, EEN 52/1985, pp. 843/844 = NoV 34/1986, pp. 54/55, which did not quash the ruling of the appellate court that dismissed the opposition at hand, exactly because "such an act by the clerk of the auction, by which the said bidder of the above auction was excluded, was performed on his own initiative and not after guidance or understanding with the cassation – highest bidder"; already in this direction Supreme Court 672/1974, ArchN 26/1975, pp. 131 et seq. (133 I) = NoV 23/1975, pp. 282 et seq. (284 II) = EEN 42/1975, pp. 305 et seq. (306 II).

42 P. Yessiou– Faltsi, supra, fn. 22, § 59 VI p. 425 fn. 206; *L. Pipsou*, supra, fn. 34, 946.

43 On the ratio iuris of the provision, which consists on the one hand of limiting the risk of participation in bidding of insolvent persons or false bidders and on the other hand of avoiding unwanted surprises to potential bidders, see Explanatory Report of law 2298/1995, in P. Yessiou-Faltsi, N. Nikas, A. Kaissis, *Code of Civil Procedure*, Sakkoulas, Thessaloniki 1998, p. 764 et seq. (770).

44 See characteristically Supreme Court (in Council) 452/2000, NoV 48/2000, pp. 1032 et seq. (1033 II): acceptance of bank cheque issued by the highest bidder and adjudication of industrial unit of 3 bn. drachmas to the sole bidder for 166.000.000 drachmas.

45 As such is understood not only procedural but also patrimonial harm; see Supreme Court 268/2004, EllDni 46/2005, p. 433, with further references; additionally also Supreme Court (in Council) 452/2000, NoV 248/2000, pp. 1032 et seq. (1034 I).

46 This term was constituted by case-law see *J. Brinias,* Compulsory Execution V[2] (Sakkoulas, Athens 1982), § 646 II pp. 2123/2124 (in Greek); One-member District Court of Athens 5619/1992, EllDni 34/1993, p. 660; One-member District Court of Athens 4618/1993, D 25/1994, pp. 752 et seq. (757) and suggests the "hindrance of bidders and the obstruction of free competition pursued and often achieved by malicious, insidious

attendance of potential bidders. Therefore, according to the case-law of the Greek Supreme Court, the obstruction of free competition through the notary public's conduct is not sufficient to render the auction and the adjudication null; the malicious cooperation of the notary public with the successful bidder is also required. For example, even though the notary public "stated to the highest bidders that she would henceforth not accept any new bids that have only a slight difference from the previous ones, but only bids that are considerably increased, with the effect that the existing bidders were hindered from the continuation of the procedure"[47], the Greek Supreme Court accepted –despite the obvious obstruction of free competition through deterrence of potential highest bidders– that the auction was not defective, as the opposing debtor did not invoke before the court "in the brief of opposition malicious acts by the clerk of the auction"[48]. Similarly, the Supreme Court demanded a mention "in the brief of opposition of the exact malicious act of the said notary public, serving her own interest or the interest of another person participating in the bidding, thus obstructing the participation of the opposing debtor in the bidding"[49], in order to determine whether the false information given over the phone by the notary public affected the validity of the auction.

As it is aptly noted, the requirement by case-law of concurrence not only of more requisites than those required for the specification of the vague legal notion of "contrast to bonos mores" (or to good faith), but also of invocation and evidence of fact or inner state, which are by nature difficult –if not impossible– to prove, results into the validation of biddings achieved under circumstances that are disapproved by law[50]. The reasonable fear of annulment of auctions without conclusive facts is certainly not overseen, with regard to facts that specify the vague legal notion of bonos mores (or of good faith). This risk is however neutralized by the court stating the impossibility to form its own view. Proving critical facts is one thing; excessive exaggeration in data (facts or inner state) required each time to specify the crucial vague legal notion (good faith or bonos mores) is another[51]. Using the criterion of "obvious transgression"

and misleading means" see One-member District Court of Athens 5619/1992, supra; One-member District Court of Athens 4618/1993, supra.

47 Supreme Court 1128/1992, EllDni 35/1994, pp. 394/395 = EEN 60/1993, pp. 738 et seq. (739 I).

48 Supreme Court 1128/1992, EllDni 35/1994, pp. 394 et seq. (395 I up) = EEN 60/1993, pp. 738 et seq. (739 I).

49 Supreme Court 364/1997, NoV 46/1998, pp. 1416 et seq. (1417 I), with commentary by *F. Doris*.

50 See *C. Beys*, Notes under Supreme Court 1454/1998, D 30/1999, p. 348.

51 *C. Beys*, Notes under Supreme Court 1454/1998, D 30/1999, pp. 348 et seq. (349); see similarly *F. Doris*, Notes under Supreme Court 364/1997, NoV 46/1998, pp. 1417 et seq. (1418/1419), regarding the requirement of the element of malice.

of the limits imposed by good faith would be useful and compatible with the regulation of article 116 CCP; this criterion is also well-suited in the exercise of procedural rights or options; besides, it is a criterion used also by the makers of substantial law.[52] Thus, the non-nomination of malice as an individual subjective requirement in the pronouncement of nullity would contribute more effectively to ensuring the aim of the auction. Obstruction of free competition by deterring potential bidders from participation in the bidding for any reason, i.e. even when there is no malice involved, may lead to the nullity of the auction[53].

Nullities in the auction procedure may arise also with regard to temporal selections of the notary public. In particular, art. 3(2) of law 1653/1986 abolished the statutory rule that designated Sunday to be the auction day for immovable property, following a long-standing tradition[54]. The rationale of selecting the last day of the week was an effort to ensure the attendance of numerous bidders[55]. However, the modern way of living, at least in big cities, seemed to overturn this logic[56], and thus resulting into auctions being held "always on Wednesdays from 12 noon to 2 in the afternoon" [article 998(2) in. f.]. Certainly the Supreme Court did not exclude the possibility of auctions being held on Wednesdays, even on bank holidays. In particular, the Supreme Court in judgement No. 183/1999 of the 1st Chamber

[52] F. Doris, previous fn.; L. Pipsou, supra, fn. 34, Commemorative Volume Manoledakis (in Greek) III p. 949.

[53] J. Brinias, supra, fn. 46, § 646 VII p. 2133 et seq.; *id.*, Notes under Court of Appeal of Athens 543/1985, NoV 33/1985, pp. 1034/1035; *F. Doris*, supra, fn. 51; L. Pipsou, supra, fn. 34, Commemorative Volume Manoledakis (in Greek) III pp. 948/949; i*d.*, Remarks under Court of Appeal of Thessaloniki 889/1987, Arm 42/1987, pp. 1054 et seq. (1062); *I. Iliakopoulos*, Notes under the opposing One-member District Court of Athens 6267/1984, D 18/1987, pp. 447 et seq. (450); compare also P. Yessiou-Faltsi, supra, fn. 22, § 59 IV p. 424/425; additionally also Court of Appeal of Thessaloniki 726/1995, EllDni 37/1996, pp. 185 et seq. (187 I); Court of Appeal of Athens 543/1985, NoV 33/1985, p. 1033; One-member District Court of Kavala 2245/2002, Arm 58/2004, pp. 1318 et seq. (1319 II).

[54] Minutes of Revision Board (Athens 1967) p. 609; *J. Brinias*, supra, fn. 11, § 315 p. 817 with fn. 20; opinion of Messolongi Prosecutor of First Instance 2/1975, EllDni 17/1976, pp. 62 et seq. (63 II). – It is true that law 1653/1986 had left by obvious oversight intact the provisions of articles 960 (2) 4th sent.', 973 (1) and 999 (3) 2nd sent. CCP, in which Sunday was still mentioned. This legislative inconsistence was replaced by article 10 (10), (12) and (13) of law 2145/1993. In the meantime, theory and case-law [*P. Mazis,* Amendments to the law of enforcement through laws 1653/1986 and 1682/1987 (in Greek), NoV 35/1987, pp. 1155 et seq. (1156); Supreme Court 1446/1997, EllDni 39/1998, pp. 349 et seq., p. 350 I] proceeded with corrective (logical) interpretation and were of the opinion that in the above provisions Wednesday was meant instead of Sunday.

[55] P. Yessiou-Faltsi, supra, fn. 22, § 59 IV p. 414; opinion of Messolongi Prosecutor of First Instance 2/1975, EllDni 17/1976, pp. 62 et seq. (63 II).

[56] J. Brinias, supra, fn. 11, § 315 p. 817 fn. 20; P. Yessiou–Faltsi, supra, fn. 22, § 59 IV p. 414.

ruled: “the fact that an auction was conducted on the day of the funeral of the ex-Prime Minister (Andreas Papandreou) in the Rozena Community Offices in the Prefecture of Korinthia, while the funeral was taking place in Athens, does not by itself render the auction null and void, given the fact that there is no provision stipulating that auctions are not to be held on days that for some reasons are bank holidays”[57].

While the day of conducting auctions (now on Wednesdays) is imposed by law under penalty of nullity (“always”), irrespective of the harm caused[58], the inexact observance of the time period from 12 noon to 2 in the afternoon is not considered to bring about nullity without the element of harm[59]. The same solution (the concurrence of harm) is preferred also in case of late commencement of auctions of immovable property[60] or in

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[57] Supreme Court 183/1999, EllDni 40/1999, p. 1051, noting that “it is well known that until the year 1986 ... auctions were conducted always on Sundays, which is a day of rest, without any hindrance caused to interested bidders”. –In contrast to that, about the impossibility of holding an auction on election Sunday see opinion of Mesolongi Prosecutor of First Instance 2/1975, EllDni 17/1976, pp. 62 et seq. (63 II): under the regime applicable before the entry into force of law 1653/1986 (auctions on Wednesdays).

[58] J. Brinias, supra, fn. 11, § 315 p. 817; J. Brinias, P. Mazis, “Compulsory auctions according to the provisions of the Code for the Collection of Public Revenues of legislative decree 17.7/13.8.1923 “about special provisions on public limited companies”. Application or not to those provisions of the amendments to the CCP that were enforced by article 3 (1–7) of law 1653/1986, opinion, NoV 35/1987, p. 707; P. Mazis, supra, fn. 54, NoV 35/1987, pp. 1155/1156; P. Yessiou-Faltsi, supra, fn. 22, § 59 IV p. 414; opinion of Messolongi Prosecutor of First Instance 2/1975, EllDni 17/1976, pp. 62 et seq. (63 II); J. Hamilothoris, C. Kloukinas, T. Kloukinas, supra, fn. 19, no. 52 p. 33; Supreme Court 183/1999, EllDni 40/1999, p. 1051; but of the opposite position Supreme Court 1460/1995, EllDni 38/1997, p. 1548, according to which an auction may be declared null only with the concurrence of harm, which can not be rectified in any other way.

[59] Supreme Court 53/2004, D 33/2004, pp. 968 et seq. (970), with remarks *C. Beys*; Supreme Court 347/1995, D 24/1995, pp. 765 et seq. (770) = EllDni 37/1996, pp. 1333 et seq. (1337 I); Supreme Court 1460/1995, EllDni 38/1997, p. 1548; Court of Appeal of Athens 307/2003, D 32/2003, pp. 473 et seq. (477); Court of Appeal of Athens 1142/1995, D 25/1996, p. 331; Court of Appeal of Athens 1391/1997, EllDni 40/1999, pp. 174 et seq. (175 II) = NoV 46/1998, pp. 352 et seq. (354 I); Court of Appeal of Athens 2393/2002, EllDni 43/2002, pp. 1462 et seq. (1463 I); P. Yessiou-Faltsi, supra, fn. 22, § 59 IV p. 414; K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), *Code of Civil Procedure II*, Sakkoulas, Athens-Thessaloniki 2000, art. 998 no. 4 (in Greek); J. Hamilothoris, C. Kloukinas, T. Kloukinas, supra, fn. 19, no. 52 p. 34. Nevertheless, C. Beys supports in “Single auctioning of more immovables that were seized in the same attachment reporτ”, *D* 26/1995, pp. 747 et seq. (761), the opinion that even if the incurrence of harm is fully proved, the grounds of opposition are unfounded in law, because harm can be restituted by an action for mistrial (art. 73 of Explanatory Report of the Code of Civil Procedure) against the clerk of the auction.

[60] K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), supra, fn. 59, art. 998 no. 4; Supreme Court 347/1995, D 26/1995, pp. 765 et seq. (770) = EllDni 37/1996, pp. 1333 et seq. (1337 I); Court of Appeal Athens 1142/1995, D 27/1996, p. 331; Court of Appeal Athens 307/2003, D 35/2004, pp. 474 et seq. (477).

case of interruption and resumption of the auction during the aforementioned period of time for the auction[61]. As a rule, harm will amount to non-achievement of higher auction proceeds; therefore, the brief of opposition should name all persons wishing to but not being able to make a bid, by reason of a temporally defective procedure[62]. The same should be accepted under the new regulation of law 3714/2008, as the respective timeframe of 12–2 p.m. was moved to 4–5 p.m., pursuant to article 3(2) of the above law, which applies the new wording of article 959 (2) CCP (auction of movables) also to the auction of immovable property [art. 998(2) following its amendment by law 3714/2008].

Finally, the adjudication is effected by the lapse of a reasonable period of time since the last of the three calls for bidding and the cease of bids [arts. 1003 (1) and 965 (1) (2) CCP], since there is no temporal limitation under the CCP, in contrast to the previous law, where it was stipulated that adjudication was effected "to the highest bidder only three minutes after the last offer, following a signal given by a scepter or a bell" (art. 974 CP/1834). The intervening time between consecutive calls and the waiting time between third call and adjudication is not set out by law, since the last rests upon the sober judgement of the auction clerk. The latter ought to determine the relevant time periods, based on the criterion of achieving the highest sale proceeds[63] to the benefit of the lenders and the debtor[64]. Nullity due to violation of the above rules is not immi-

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61 One-member District Court of Athens 4618/1993, D 25/1994, pp. 753 et seq. (756), with concurring remarks by *N. Katiforis*. p. 757 et seq. (759), as it is noted in the judgement: "the uninterrupted conduct of the auction and the public announcement by the auctioneer or his employee of the interruption or resumption of auction (in the event of such interruption) is not foreseen under penalty of nullity in the provision of article 998(2) Civil Procedure, which refers to the time and place of conduct of auctions of immovable property, or in any other provision"; in the same direction already One-member District Court of Syros 131/1982, EllDni 23/1982, pp. 249 et seq. (250).

62 Supreme Court 53/2004, D 35/2004, pp. 968 et seq. (970), with critical remarks *C. Beys*, id. p. 970 et seq. (972); Court of Appeal of Thessaloniki 726/1995, EllDni 37/1996, pp. 184 et seq. (187 I); Court of Appeal of Pireaus 597/1979, EllDni 23/1982, p. 175; K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), supra, fn. 59, art. 998 no. 5; J. Hamilothoris, C. Kloukinas, T. Kloukinas, supra, fn. 19, no. 53 p. 34.

63 J. Brinias, supra, fn. 11, § 347 p. 886/887, aptly noting that the periods of time need not be equal in duration, but it results from their purpose that between each call for bidding and from the time between the last bid until the adjudication such time should intervene, so that a new bid may be submitted to the clerk of the auction and generally that competition is facilitated and adjudication is not coerced; see also additionally F. Mitsopoulos, "Issues of the preliminary stages of auction and adjudication", *D* 13/1982, pp. 305 et seq. (312); K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), supra, fn. 59, art. 965 no. 7.

64 Court of Appeal of Athens 8512/1985, EEN 53/1986, pp. 64 et seq. (65 I) = NoV 34/1986, pp. 235 et seq. (236 II) = D 17/1986, pp. 762 et seq. (763); Court of Appeal of Thessaloniki 4095/1990, Arm 45/1991, pp. 801 et seq. (802 I); Court of Appeal of Pi-

nent upon penalty of nullity, but is contingent upon the existence of harm incurred to the opposing debtor[65]. The Supreme Court has overturned a decision of the Larissa Court of Appeals, because it did not annul an auction in which "there were no three calls to the public for a higher bid before the adjudication, but there were merely hand gestures by the auctioneer, indicating the adjudication, i.e. actions that do not correspond to the factual prerequisites of article 965(2) CCP"[66]. It is nevertheless self-evident that the auction procedure continues after 2 p.m. until the time of adjudication, as long as there is a new bid within reasonable time from the last call for a higher bid[67]. In fact, the Greek Supreme Court has ruled that, if the auction continues after 2 in the afternoon with a sole offer (that however takes place after that time[68]) or with a new bidder, who appears after 2 p.m.[69], the auction may only be null and void only when it is

reaus 229/1990, EllDni 35/1994, pp. 163 et seq. (164 I); Court of Appeal of Athens 10219/1989, EllDni 33/1992, pp. 596 et seq. (599).

65 See indicatively K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), supra, fn. 59, art. 965 no. 7; Supreme Court 147/1994, EEN 62/1995, pp. 70 et seq. (71 I); Court of Appeal of Athens 8512/1985, EEN 53/1986, pp. 64 et seq. (65 I) = NoV 34/1986, pp. 235 et seq. (236 II) = D 17/1986, pp. 762 et seq. (763); Court of Appeal of Pireaus 229/1990, EllDni 35/1994, pp. 163 et seq. (164); Court of Appeal of Athens 10219/1989, EllDni 33/1992, pp. 596 et seq. (599 II).—Besides, under the previous law in force, where adjudication took place by the time of completion of exactly three minutes after the last bid (art. 974 CP), the Supreme Court had ruled that "there is no nullity if a short period of time (8΄) follows instead of three minutes, as in that way there is no violation of the provisions that refer to the time of the auction": Supreme Court 6/1967, NoV 15/1967, p. 635; the court of first instance had ruled differently in the same case, which accepted the nullity of the auction regardless of harm; idem President of District Court of Athens 4356/1965, NoV 13/1965, pp. 192 et seq. (193 I), stressing that "[the] acceptance of the opposite opinion ... would lead to abnormalities in the application of articles 906 and 979 Civ.Proc., for example by which it is stipulated that until adjudication the debtor is entitles to purchase the immovable property that is being auctioned".

66 Supreme Court 147/1994, EEN 62/1995, pp. 70 et seq. (71 I).

67 Supreme Court 1196/1993, EllDni 35/1995, p. 345; K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), supra, fn. 59, art. 998 no. 5; similarly before the reform of law 1653/1986 and Supreme Court 545/1971, NoV 19/1971, pp. 1417 et seq. (1418); Court of Appeal of Pireaus 597/1979, EllDni 23/1982, p. 175: "[c]onsequently, a statement of the notary public that after 12 o' clock noon [corresponding to 2 pm nowadays] he/ she shall not accept any new offers but bidding will be limited only between those persons who submitted their bids until 12 o' clock noon, is unlawful, if since that time interested parties were hindered in participating in the bidding, the auction should be annulled, if there was no intent on behalf of the notary public, as long as through this unlawful statement free competition and the achievement of higher sale proceeds were hindered".

68 Supreme Court 1460/1995, EllDni 38/1997, p. 1548 (: only bid by the petitioning creditor, which was submitted at 14:03, while adjudication was effected at 14:o8).

69 Supreme Court 1196/1993, EllDni 36/1995, p. 345: "during the period of time that intervenes between 2 pm and the adjudication, a new bidder is entitled to appear and participate in the bidding for the first time, after depositing the guarantee set by the clerk

proved that procedural harm was incurred[70]. There is no differentiation of the above under the new regulation through law 3714/2008, as, in the event of two bids, the adjudication is effected to the bidder offering the highest price, following a triple call for higher oral bids [art. 998(2), as amended by law 3714/2008, in conjunction with article 965 (2) sent. 8, as it applies after the adoption of law 3714/2008].

Nevertheless, it should be stressed that the above defects ought to be included in the auction report drafted by the notary public, as, according to art. 438 CCP, it constitutes full and conclusive evidence of everything certified in it towards all parties, as a public document; counterevidence is only allowed by challenging the validity of the document for falsification[71].

3. EVALUATION OF THE AUCTIONS' ASSIGNMENT CONDUCT TO GREEK NOTARIES. PARAMETERS OF IN STAGES ENFORCEMENT ACTS CHALLENGE AND THE ELEMENT OF HARM

According to Greek law, notaries public are unsalaried public functionaries [art.1(1) of the Notaries' Code)[72], an ancillary instrument in the award of justice, with two main duties: on the one hand, the drafting and keeping of notarial deeds [art.1(1) of the Code of Notaries] and on the other hand, the performance of enforcement acts, mainly of auctions [arts. 959 (1) and 998 (1) CCP on movable and immovable property

of the auction"; Court of Appeal of Athens 2393/2002, EllDni 43/2002, pp. 1462 et seq. (1463 I).

70 Supreme Court 695/1983, VN (: Vasiki Nomologia; Supreme Court's desicions) complementary I 376; Court of Appeal of Thessaloniki 726/1995, EllDni 37/1996, pp. 184 et seq. (187 I); K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), supra, fn. 59, art. 998 no. 5.

71 Of the rich case-law see indicatively Supreme Court 1394/1980, NoV 29/1981, p. 689; Court of Appeal of Athens 1391/1997, EllDni 40/1999, pp. 174 et seq. (175 II); Court of Appeal of Athens 499/1997, EllDni 38/1997, p. 1627; Court of Appeal of Athens 1142/1995, D 27/1996, pp. 331 et seq. (333); Court of Appeal of Thessaloniki 726/1995, EllDni 37/1996, pp. 184 et seq. (186 II); Court of Appeal of Athens 229/1990, EllDni 35/1994, p. 163; Court of Appeal of Athens 5795/1982, Arm 37/1983, pp. 791 et seq. (792/793).

72 The previous Code of Notaries (law 670/1977; art. 1) concurs. Under the regime of legislative decree 1333/1973 he was named as a "judicial functionary", while during the validity of the Organisation of Judicial Councils of 1835 a "civil servant". – A consequence of notaries public named "judicial functionaries" (and not civil servants) is that they are not hierarchically dependent, but are only subject to inspection by the locally competent prosecutor of first instance, according to art. 41 of the Code of Notaries; see *N. Nikas*, Civil Procedure I (Sakkoulas, Athens-Thessaloniki 2003) § 6 IV p. 70 (in Greek).

respectively][73], as well as the drafting of classification table, by which the insufficient sale proceeds are distributed according to specific legal rules (arts. 974–978 CCP)[74].

The fact that the actions of notaries public as clerks of the auction are subject to judicial control via the remedy of opposition to the auction (933 or 979 CCP for opposition to the table of classification) does not negate the correctness of the choice made by the Greek legislator to entrust notaries with the conduct of auctions (compulsory or voluntary; for the latter, see art. 1021 sent. 3 CCP) of immovable (and movable) property. As *Loukas Yidopoulos* characteristically underlined, under the previous law "the drafter of our code of procedure did not copy the French provisions on enforcement, but in certain parts it deviated from it, for reasons of simplification of the enforcement procedure. Nor did he omit the futile involvement of the court in the conduct of the auction of immovable property, assigning this to the clerk of the auction, either a magistrate judge or a notary public"[75]. However, the parameters of both the challenge of enforcement acts in stages and of the necessity of the element of harm appear to be crucial for the nullity of critical actions. In particular:

The challenge of enforcement acts in stages was enacted in the provision of article 934 CCP, the criterion for differentiated time frames being the act challenged by the remedy of opposition each time[76]. The rationale for the enactment of this provision –in fact the relevant regulation was the result of lengthy deliberations in the Revision Committee of

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[73] See also opinion of the Supreme Court Prosecutor 18/1972, in A. Thanopoulos, *The Code of Notaries*, Athens 1973, p. 44 fn. 8 (in Greek).

[74] K. Kerameus, *Law of Civil Procedure I*, Athens 1983^2, p. 118 (in Greek); J. Brinias, supra, fn. 26, § 131a p. 333 fn. 16.

[75] L. Yidopoulos, *Law of compulsory enforcement*, Vol. A, Athens 1933, § 5 p. 8/9 (in Greek).

[76] J. Brinia*s*, supra, fn. 26, § 164 p. 457 et seq.; *K. Kerameus*, "Opposition against an auction that took place on the last day of voluntary suspension" *Arm*. 42/1988, p . 630; K. Kerameus, D. Kondylis, N. Nikas (G.-Nikolopoulos), supra, fn. 59, art. 934 no. 1; C. Beys, *Civil Procedure*, Vol. 22, Sakkoulas, Athens 2004, art. 934 no. 1; N. Nikolopoulos, *Compulsory enforcement*, Sakkoulas, Athens 2002, p. 122 (in Greek); V. Vathrakokilis, *Code of Civil Procedure. Interpretative – jurisprudential analysis* vol. V, Athens 1997, art. 934 no. 55, with references to case-law, in which additionally Supreme Court 340/2006, D 37/2006, p. 1310; Supreme Court 916/2004, EEN 72/2005, p. 30 = EllDni 47/2006, p. 1645; Supreme Court 279/2004, NoV 53/2005, p. 277; Supreme Court 69/2001, EllDni 42/2001, p. 914; Supreme Court (plenary assembly) 108/1981, NoV 29/1981, p. 1275, the latter points out that: "by the general wording of the above provision but also due to the aim hereby pursued, establishing the challenge of the compulsory enforcement in stages in order to avoid the absurdity of its challenge after a long time due to nullities that could be challenged much earlier"; Court of Appeal of Athens 2755/1998, EllDni 40/1999, p. 1125 (no. 31); Court of Appeal of Thessaloniki 1606/1998, Arm 52/1998, p. 978; Court of Appeal of Athens 459/1993, NoV 42/1994, pp. 206 et seq. (214 I).

the CCP[77]– stems from need for a speedy realisation of the law-enforcement function of the law[78]. Therefore, in article 934 (1) case c CCP it is provided that the grounds of opposition that are related to the validity of the final act of enforcement, i.e. the drafting of the auction and adjudication reports, are subject to the third stage of time limits [art. 934 (2) CCP]. Violations that refer to the validity of the auction of immovable property and are related to the person of the notary public justify the remedy of opposition against the auction, while the timely character of the grounds of opposition that is related to the person performing the main act of the auction is self-evidently governed by the provision of article 934 (1) sent. c CCP[79]. In other words, the validity of the auction will be decided swiftly, something that does not prevent potential successful bidders from bidding.

Furthermore, the validity of the conducted auction and of the adjudication act, as presented above, is normally contingent in the cases at hand upon the element of harm (procedural or patrimonial). The latter will consist of the non-achievement of a higher proceed of sale; for this reason, all persons that wished to, but could not submit a bid due to a misconduct of the notary public of the procedure, should be specified by name in the brief of opposition. It has been proved by case-law that the necessity of concurrence of this element limits drastically the possibility of annulment of the auction and of the adjudication.

Besides, the comparison of the grounds of opposition generally with notary public-related grounds of nullity proves that the latter are limited and, in the majority of cases, they can be attributed to the difficulty in interpretation of legal provisions. Similarly, it has been proved that during the drafting of the classification table by the notary public, the latter –in most cases– acts correctly, whereas the opposition against the classification table is mostly to be attributed to the great difficulty in the interpretation of applicable provisions.

4. ADDENDUM

Enforcement is neither a functional extension of principal litigation, nor a method of judicial self-confirmation, but a balanced mixture of violence, threat and persuasion, designed to transform the executory title into reality. Legal comparative research has proved that, even such a tech-

[77] See Minutes of Revision Board, supra, fn. 54, pp. 424–427.

[78] G. Mitsopoulos, *Civil Procedure,* Vol. I, Athens 1972, pp. 49 and 55 (in Greek); Court of Appeal of Athens 6743/1985, D 15/1986, p. 337.

[79] Court of Appeal of Athens 9955/1998, ArchN 51/2000, pp. 640 et seq. (648 I); J. Hamilothoris, C. Kloukinas, T. Kloukinas, supra, fn. 19, no. 4o p. 29.

nical field like enforcement of civil claims seems to be open to productive comparison[80]. Especially when evaluated from the viewpoint of challenge of enforcement acts in stages and of the necessity of the element of harm, the choice of the Greek legislator to assign the conduct of auctions to notaries was successful. Besides, the almost bicentennial trial of Greek notaries in their role as clerks of auction has proved that the relevant choice was acceptable by Greek society as well.

80 *K. Kerameus*, supra, fn. 1, Arm 50/1996, p. 14.

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IMMUNITY OF HEADS OF STATE FOR INTERNATIONAL CRIMES: DEFLATING DICTATORS' LIFEBELT?

Absolute immunity of Heads of States in a forum other of their own jurisdiction, once firmly established under customary international law, has been repeatedly challenged after the Second World War. The article examines developments in international law and narrowing of the Head of State immunity through statutes and practice of international criminal tribunals, hybrid courts, Rome Statute and other treaties, and to some extent by state practice. The ICJ's Arrest Warrant decision is critically assessed as a step back in a progressive trend of limiting immunity as a defense to states leaders.

A conclusion is submitted, with highlights also on challenges and downsides of such an approach, that only international courts and tribunals may disregard both immunity of serving (personal immunity) and former heads of states (functional immunity), while states should continue to respect personal immunity of foreign officials. On the other stats, states can, but are no longer bound to respect functional immunity of foreign Heads of States in cases of gravest international crimes.

Key words: *Immunity of Head of State. – Immunity ratione materiae.– Immunity ratione personae. – International crimes. – Arrest Warrant case.*

Under customary international law, Heads of States are accorded with the immunity from jurisdiction and law enforcement other then of their own states.[1] This rule is grounded on the traditional premise that

* The views expressed herein do not reflect official positions of the OSCE. The article is partly based on a research paper done in 2002, at the LLM program of the Columbia University Law School, New York (USA), under the mentorship of late professor Oscar Schachter, to whom the author is indebted.

[1] For different types of Heads of State and recognition of the status, see A.Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours de la Academie de Droit International de la Haye*, 247/1994, 26,34–35.

state does not adjudicate on the conduct of another state, which streams from various rationales such as equal sovereignty of states, international comity, practical need for unimpeded international intercourse, etc. Immunity afforded to Head of State is the privilege that belongs to the country of origin. It is not an individual right and a protected person cannot waive his/her own immunity; it is only the state that such person represents that can do so.[2] Traditionally, immunity that shields Heads of State while in office has been absolute because it attaches to them as to the persons sitting at the highest sovereign positions that emanate from the state itself; this is immunity *ratione personae* or personal immunity. It is a procedural bar from exercise of a foreign jurisdiction over serving Head of State. Acts of Heads of State undertaken in official capacity during their mandates are covered by another prong of immunity – immunity *ratione materiae* or functional immunity. Under the classical Head of State immunity doctrine, official acts are equated with acts of state, and former Heads of State have enjoyed immunity from prosecution for such acts even after descending the post.[3] Personal immunity is linked to the official post, functional immunity concerns nature of the acts.[4] In practical terms, personal immunity is the first matter to be discussed if an incumbent Head of State is to be brought before a court, whereas functional immunity will come into play when jurisdiction is exercised over a former Head of State.

Head of State immunity has long remained unchallenged, but there have been several turning points in deliberating international law immunity of highest state officials, which have influenced the rules, altered perspectives and opened a plethora of discussions on the matter. This article tends to examine these developments and current trends in international law and touch upon state practice on the issue of immunity of Head of State with respect to core international crimes. Since this type of immunity is not regulated by a single comprehensive instrument, it is necessary to look back at a combination of historical records of development of international norms, jurisprudence of international courts and tribunals, and relevant national case law.

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[2] *Ibid.*, 35.

[3] For a similar definition, also I. Brownlie, *Principles of International Law*, Oxford University Press, Oxford 1998[5], 330–334.

[4] On the distinction between personal and functional immunities, see, e.g, R. Jennings and A.Watts (eds), *Oppenheim's International Law, Volume I*, Longman, London 1992[9], 345–346, I.Brownlie, 361–362.

1. DEVELOPMENT OF THE NORMS

1.1. Foundations and breakthrough: international *ad hoc* criminal tribunal

1.1.1. The Nuremberg and Tokyo tribunals

The fundaments to changing the rules and the understanding of the Head of State immunity were laid down with the establishment of the two military tribunals after the Second World War. The Charter of International Military Tribunal (the Nuremberg Tribunal) provided, in its Art. 7, that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[5] The Nuremberg Tribunal ruled in several of its judgments that the official character of acts committed in violation of international law may not be recognized as a defense.[6] The same principles were restated in the regulation of the Allies' interim administration in Germany (*Allied Control Council Law No. 10*) that also authorized trials to the Nazi war criminals.[7] The Nuremberg Charter did not differentiate between functional immunity and personal immunity. The Charter of the Tokyo Military Tribunal did not explicitly refer to Heads of State or Governments, but it also implied that the official capacity could not be a defense for the accused.[8] Since in none of the trials in Nuremberg, post-war Europe, or in the Far East a foreign Head of State was brought before the court, Head of State immunity, in either of these two forms, was not deliberated in the judgments at the time.

The Nuremberg and Tokyo charters opened a door to serious considerations of eroding at that time still firm customary international law norm of immunity of highest state officials. The international law principles as provided in the Nuremberg Charter and expressed in the judgments of the Nuremberg Tribunal were confirmed by a UN General As-

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[5] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, August 8, 1945, *58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280*

[6] International Military Tribunal (Nuremberg) Judgement and Sentences, reprinted in L. Henkin *et al*, *International Law: Cases and Materials*, West Publishing co, St Paul 1993[3], 383.

[7] Allied Control Council Law No10, art. II, Art 4(a), December 20, 1945, reprinted in *Law Reports on Trials of War Criminals XVI*, UN War Crimes Commission, London 1950.

[8] Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander of for the Allied Powers at Tokyo, January 19, 1946, Article 6, reprinted in *Treaties and Other International Agreements of the United States of America* Vol. 4, Washington 1946.

sembly resolution unanimously adopted in 1946.[9] The International Law Commission (ILC) also adopted, in 1950, the principles set by the Nuremberg Tribunal, affirming that persons who acted as Heads of State are not exempted from criminal responsibility.[10] The ILC stated that it merely formulated and listed the Nuremberg principles whose existence in international law had already been recognized.[11]

1.1.2. International criminal tribunals for the former Yugoslavia and Rwanda

Accountability of Heads of States resurfaced again in the 1990s, in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR), which contain identical provisions pertaining to irrelevance of official immunity. They read: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment".[12]

Slobodan Milošević was the first serving Head of State to be indicted and then tried by a court other then that of his own state.[13] By rejecting Milošević's challenge to the Tribunal's jurisdiction that relied on his official status, the ICTY affirmed that Head of State immunity did not shield from prosecution by the Tribunal, yet without making any distinction between personal and functional immunity.[14] The ICTY based such a holding on the customary international law foundations of the ICTY Stat-

[9] Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, Resolution 95 (I) of the United Nations General Assembly, 11 December 1946, *www1.umn.edu/humanrts/instree/1946a.htm*

[10] Principles of International Law recognized in the Charter of Nuremberg Tribunal and in the Judgment of the Tribunal Adopted by the International Law Commission of the United Nations, 1950, Principle III, Report of the International Law Commission, 5 June–29 July 1950, Doc. A/1316, *Yearbook of the International Law Commission Vol II,* 1950.

[11] *Ibid.*,374–380.

[12] Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. *827, U.N. SCOR, 48th Sess, U.N. Doc. S/RES/827*, 1993 (hereinafter ICTY Statute), Article7(2).

Statute of the International Criminal Tribunal for Rwanda, *S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955*, 1994, (hereinafter ICTR Statute) Article 6(2).

[13] ICTY, *Prosecutor v. Slobodan Milosevic*, Case No. IT–02–54, Indictment, para. 43 (24 May 1999) and subsequent amended indictments.

[14] ICTY, *Prosecutor v. Slobodan Milosevic*, Decision on Preliminary Motions, (IT–99–37-PT), Trial Chamber (8 November 2001), paras. 28–34. The Trial Chamber referred to Milošević as to "former President" which suggests that it considered his personal immunity stripped when Milošević's descended from the post prior to the commencement of the trial.

ute.[15] The drafting history of the ICTY and ICTR statutes indeed shows that they were meant to reflect the customary international law, including the confirmation of the principle of individual criminal responsibility irrespective of official position as it was set after the Second World War.[16] In a judgment preceding the *Milosevic* case, the ICTY held that the rule of the non-applicability of immunity from the Tribunal's Statute is "indisputably declaratory of customary international law".[17] The both statutes, including their drafting histories, however, neither explicitly make a distinction between functional and personal immunity, nor clearly recognize or deny personal immunity. It may be argued that unless explicitly removed, personal immunity, being well established under customary international law, will remain a defense.[18] Nonetheless, the mere fact that the indictment against Milosevic was preferred and confirmed while he was still in office, testifies about the ICTY's interpretation of its own statute as removing both functional and personal immunities. Furthermore, the reference of the International Court of Justice (ICJ) in the *Arrest Warrant* Judgment, to the ICTY and the ICTR as examples of the possible fora that may exercise jurisdiction over serving state officials, which will be deliberated below, can also attest to such a reading of the Tribunals' statutes.

The Chapter VII origin of the ICTY and the ICTR oblige all the states to co-operate with these tribunals, which may include execution of the tribunals' arrest warrants irrespective of the position of the accused, and leave no space to the states to dissent from the rule that immunity cannot be claimed in relation to their jurisdiction. On the other hand, the statutes of two *ad hoc* tribunals cannot be seen as source of new general rules of international law applicable in situations other than those falling under their jurisdiction. Anything beyond that is rather a matter of influence of these tribunals and their jurisprudence as reflection of customary law, which states may found more or less persuasive.

1. 2. Boundaries of States' will: treaties

1.2.1. Conventions and draft treaties

The 1919 Treaty of Versailles was the first international legal instrument to have set a normative precedent for accountability of a Head

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[15] *Ibid*., para 28.

[16] Report of the Secretary General on the Establishment of the ICTY, *UNSG S/25704* (3 May 1993), para. 29, 34–35, 55.

[17] See ICTY, *Prosecutor v. Furundzija*, Case No. ICTY–95–17/1 (10 Dec. 1998), para. 140.

[18] See Z. Deen-Racsmany, "*Prosecutor v. Taylor*: The Status of the Special Court for Sierra Leone and Its Implications for Immunity", *Leiden Journal of International Law*, 18/2005), 315, 319.

of State, but for a very concrete situation. It provided a basis for the prosecution of German Emperor William II after the First World War, but the trial never took place. [19]

Provisions pertaining to Head of State immunity may also be found in several multilateral treaties regulating systematically the matter of the crimes of international concern. The 1948 Genocide Convention, which forms a part of customary law, provides in its Art. 4, that persons who commit genocide "shall be punished whether they are constitutionally responsible rulers, public officials or private individuals".[20] Provisions that suggest accountability of the rulers may also be found in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[21] and in the 1973 Apartheid Convention.[22] The International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, which is intended to bind states in their mutual relations, includes a provision similar to that of the Nuremberg Charter that denies immunity to Head of State.[23]

1.2.2. Statute of the International Criminal Court

The Rome Statute of the International Criminal Court (ICC Statute) is the first multilateral treaty to provide explicitly that Heads of States and Governments shall not be exempted from criminal responsibility if they come under the jurisdiction of the Court for genocide, crimes against humanity, war crimes and the crime of aggression (Article 27 (1)).[24] Arti-

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[19] Treaty of the Peace between the Allied and Associated Powers and Germany, June 28, 1919 (Treaty of Versailles), Article 227. Emperor William II found shelter in the Netherlands, which refused to extradite him to face a trial.

[20] Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, *78 U.N.T.S. 277*, Article 4. The customary nature of the Convention's substantive norms was affirmed by the ICJ's Advisory Opinion on Reservations to the Convention on Genocide*, ICJ reports,* 1951, 24.

[21] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Art. 2 G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968). It applies to "representatives of the State authority and private individuals".

[22] "International criminal responsibility shall apply [...to individuals, members of organizations and institutions and representatives of State]", International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by GA Resolution 3068 (XXVIII) of 30 November1973, Article 3.

[23] Article 11 of the Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of International Law Commission*, Vol. II, Pt.2, 1988, 71.

[24] "[T]he Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence", Rome Statute of Inter-

cle 27 further sets forth that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".[25] These two provisions exclude both immunity *ratione materiae* and immunity *ratione personae* as shields from the Court's jurisdiction, and, as a procedural consequence, the Court does not have to establish what position the accused held at the time of crime or the indictment, since the accused would not be immune from criminal responsibility irrespective of his/her current or former post.[26]

However, Article 27 has to be read in conjunction with another provision of the Rome Statute, Art. 98(1), which provides for the following:

> "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".[27]

Based on this provision, the ICC, which may exercise jurisdiction over nationals and officials of states not parties to the Rome Statute,[28] may not request a state party to arrest or surrender an official of a third state who is protected by immunities afforded by under international law. Likewise, the same provision would prohibit the ICC to stretch its jurisdiction over nationals of non-parties while they are protected by immunities under international law.[29] The Heads of states that are not parties could nevertheless come under the ICC jurisdiction if a case is referred to the Court, in line with Article 13(b) of the Statute, by the UN Security Council acting under Chapter VII of the UN Charter.[30] This interpretation

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national Criminal Court, July 17, 1998, *U.N. Doc. A/Conf.183/9 (1998)* (hereinafter – ICC Statute), Article 27(1).

[25] ICC Statute, Article 27(2).

[26] See P.Gaeta, "Official Capacity and Immunities" in A. Casese, P.Gaeta, J.W.R.D Jones (eds), *The Rome Statute of the International Criminal Court – a commentary, Vol. I*, Oxford University Press, Oxford 2002, 990–991, and O. Triffterer, 'Article 27: Irrelevance of Official capacity', in O. Triffterer (ed), *Commentary to the Rome Statute of the International Criminal Court*, Nomos, Baden-Baden, 1999, 511.

[27] ICC Statute, Article 98(1).

[28] This is if a non-national commits a crime at the territory of a state-party, or if a situation is referred by the UN Security Council, ICC Statute, Article 12(2) and Article 13(b) respectively.

[29] See D. Akande, "International Law Immunities and the International Criminal Court", *American Journal of International Law* 98/2004, 421.

[30] In such a case, the Court is not precluded by nationality of the accused, nor territory where the offence was committed.

was demonstrated when the ICC pre-trial chamber issued an arrest warrant against Omar al-Bashir, the current President of Sudan – state that is not a party to the ICC, following the referral by the UN Security Council.[31] Although the Court was not elaborative in its decision, the waiver of immunity in this case seems to be implicitly streaming from the Security Council's Chapter VII powers, which also implies that state parties have to disregard Al-Bashir's immunity, since otherwise, without co-operation of state parties, the Court is not able to exercise its jurisdiction.[32] Third states, however, may still be bound to respect his immunity, under general international law.[33]

Therefore, only officials of non-parties may benefit from this exemption from the jurisdiction of the ICC – unless the case is referred by the UN Security Council, whereas the state parties cannot be spared from acting upon the Court's request against a Head of State of another ICC party. The provisions of the Rome Statute are waiver by the state parties of any immunity for their officials, including Head of State, in relation to the ICC jurisdiction. This may be considered as indicative of the state parties' preexisting *opinio iuris* that crimes under the ICC Statute should not attract immunity. On the other hand, the State parties are obliged to adhere to Article 27 of the Statute only when a situation involving a former or an incumbent Head of State comes within the jurisdiction of the Court in accordance with the Statute. Outside that scope, the states continue to be bound by other international law norms, and, consequently, the customary law regulation vis-à-vis non-party Head of State remains intact keeping his/her personal immunity in force.

1.3. Variations of state practice: national courts

When the former Chilean President Augusto Pinochet was arrested in the *United Kingdom*, in October 1998, pursuant to a Spanish international arrest warrant containing charges of torture, conspiracy to murder and detention of hostages, this triggered a series of proceedings before

[31] ICC, Warrant of Arrest for Omar Hassan Ahmad al-Bashir, Pre-Trial Chamber I, ICC–02/05–01/09, 4 March 2009, available at *http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf,* last time accessed 25 October 2009. UN Security Council Resolution 1593, 31 March 2005.

[32] See for similar opinion D. Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", *Journal of International Criminal Justice* 7/2009, 341–342. For a different view, which considers that states parties, because of Article 98(1), are not obliged to execute the ICC request for surrender, P. Gaetta, "Does President Al Bashir Enjoy Immunity from Arrest?", *Journal of International Criminal Justice* 7/2009, 324–325, 329.

[33] There are opinions that the immunity would be stripped generally vis-à-vis all the UN members, whereas state not parties to the ICC would not be obliged, but only permitted to arrest Al-Bashir D. Akande, *ibid*., 347–348.

UK courts that many have viewed as transforming the notion and scope of the Head of State immunity doctrine. A first instance UK court initially dismissed the arrest warrants, unanimously upholding Pinochet's claim of immunity as the former Head of State.[34] On appeal, the House of Lords, in its first decision, held by majority two that customary international law provides no basis for immunity from prosecution for international crimes.[35] That was confirmed by another House of Lords' Appellate Committee's decision, allowing for extradition of Pinochet to Spain.[36] It found a ground for denying immunity to Pinoche in the 1984 Torture Convention.[37] The majority held that the immunity of a former Head of State exists only with respect to the acts undertaken in the exercise of the functions of a Head of State, but that in this case immunity cannot be upheld since torture can never constitute an official act of a Head of State.[38] The Law Lords denied immunity to Pinochet only as to the crime of torture, and they relied on their interpretation of the Torture Convention, rather than on customary international law. Therefore, the Law Lords did not come into the situation to take a position whether the immunity of former Heads of States was excluded in all cases of international crimes. However, while denying immunity *ratione materiae* for certain acts committed in official capacity, the both Appellate Committees of the House of Lords agreed that *serving* Heads of State enjoy absolute immunity from suit.[39] The inviolability of personal immunity was affirmed again, in 2004, in a case concerning allegations of torture against President of Zimbabwe, Robert Mugabe, when a British judge upheld his immunity as a sitting Head of State.[40]

The House of Lord's Pinochet decisions was considered a landmark particularly because of their holding that commission of an international crime can never be recognized as an exercise of official function and that immunity for perpetrators of international crimes would be in-

[34] See C. M. Chinkin, "*Regina v. Bow Street Stipendiary Magistrate*, ex Parte Pinochet Ugarte", *American Journal of International Law* 93/1999, 703–704.

[35] *Regina v. Bow St. Metro. Stipendiary Magistrate, ex Parte Pinochet Ugarte*, 4 All E.R. 897 (H.L. 1998) (hereinafter –*Pinochet I*)

[36] The final say on the extradition rested with the UK Home Secretary, and, at the end, Pinoche was not extradited to Spain, but returned to Chile, because of his poor health condition.

[37] C. M. Chinkin, 705.

[38] See *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex Parte Pinochet* [1999] 2 All E.R. 827, 851 (opinion by Lord Hope), 852 (Lord Goff), (H.L. 1998) (hereinafter – *Pinochet III*); also opinions by Lord Browne-Wilkinson and Lord Hutton.

[39] See, for example, *Pinochet I*, 1334 (Lord Nickolls), 1336 (Lord Steyn), and *Pinochet III*, 844 (Lorde Browne-Wilkinson). Also see C.M. Chinkin, 705.

[40] Senior District Judge at Bow Street *Tatchell v. Mugabe*, Judgment of 14 January 2004, reproduced in *International and Comparative Law Quarterly* 53/2004, 769–770.

compatible with objectives of the treaties, such as the Torture Convention, to prevent such crimes. The *Pinochet* case, albeit very significant and praised in the doctrine and among human rights advocates, is nonetheless of a limited legal influence. This was a ruling of a national court, binding only within the national boundaries. It is an added evidence of state practice, but still not able to compel other states to follow its ratio.

In *France*, the Libyan leader Mouammar Ghaddafi was charged for complicity in a terrorist act.[41] In March 2001, the French Court of Cassation concluded that a criminal jurisdiction cannot be exercised over a foreign Head of State in office as it was precluded by customary international law.[42] Although the court was referring to the "Head of State in office", seemingly it found the ground for precluding the prosecution of Ghaddafi in his functional immunity.[43] The French Court, however, by concluding that terrorism is not among the international crimes that entail exception to Head of State immunity apparently extrapolated, *a contrario,* an affirmation that there are international crimes which would remove such immunity.[44]

A *Spanish* court ruled that it did not have criminal jurisdiction over the Cuban leader Fidel Castro, because he was the serving Head of State.[45] The Spanish court also concluded that international law did not require states to provide immunity for former Heads of State, but it did obligate states to recognize immunity to current Heads of State.[46] In a more recent case, the Spanish Court, in response to charges for international crimes, likewise affirmed immunity, based in international law, of Paul Kagame, President of Rwanda.[47]

The *Swiss* Federal Tribunal acknowledged, in the case involving the former Philippine president Marcos, that immunity of a Head of State

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41 On the details of the case see S. Zappalà, "Do Heads of States in Office Enjoy Immunity from Jurisdiction from International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*", *European Journal of International Law* 12/2001, 595–612.

42 *Ibid.,*596–597, citing *Arrêt de Cour de Cassation*, 13 March 2001, No.1414, 2.

43 S. Zappalà, 598 citing *Arrêt de Cour de Cassation,* 2.

44 *Ibid.,* 600–601 citing *Arrêt de Cour de Cassation,* 3.

45 "Spain Rules It Has no Jurisdiction to Try Castro", *Agence France-Presse*, 8 March, 1999.

46 El Auto de Solicitud Extradiction de Pinochet, *htttp://www.ua.es/up/pinochet/documentos/auto–03–11–98/auto24.htm* (last accessed 3 April, 2001)

47 Audiencia Nacional, Auto del Juzgado Central de Instrucción No. 4, 6 February 2008, 151–157, cited according to International Law Commission, Immunity of State officials from foreign criminal jurisdiction: memorandum / by the Secretariat, 31 March 2008, *A/CN.4/596*, para.101, available at: *www.unhcr.org/refworld/ docid/48abd597d.html* [last accessed 2 November 2009]

from criminal prosecution is absolute.[48] In another decision, in a case involving assets *de facto* controlled by the President of Gabon, the Federal Tribunal only signaled that immunity of a serving Head of State might be limited.[49]

Under the *United States'* law, discretional suggestions of the executive branch are decisive in granting immunity to a Head of State.[50] There were several proceedings in civil law suits in which the US courts granted immunity.[51] In a 1980s case, the US court ascertained the Head of State immunity for the President of Philipines Marcos, but the court withdrew the immunity once Marcos had ceased to be in the office, thus suggesting non-recognition of functional immunity.[52] The US government's suggestion of immunity trumped even the home country's waiver for the ex-president of Haiti Aristid.[53] In *Kadic v. Karadzic*, the explanation the court gave suggests that Radovan Karadzic would have been afforded immunity, had the United States' government recognized him as a Head of State.[54] In two most recent cases, a US appeals court confirmed absolute Head of State immunity of the former President of China, Jiang Zemin,[55] whereas another US appeals court upheld the immunity of the President of Zimbabwe Mugabe, but on the basis of diplomatic immunity.[56]

In continuing attempts to prosecute the former president of Chad Hissene Habré, a court in *Senegal* first dismissed the charges for the lack of jurisdiction, without deciding on immunity of Habré, who, as an ex-president at the time of initiation of the proceeding, was certainly not

48 See P.Gully-Hart, "The Function of State and Diplomatic Privileges and Immunities in International Cooperation in Criminal Matters: the Position of Switzerland", *Fordham International Law Journal* 23/1999, 1337–38.

49 *Ibid*., 1338–39, 1442.

50 See A. Fitzgerald, "The Pinochet Case: Head of State Immunity within the United States", *Whittier Law Review* 22/2001, 1004–1005.

51 he only criminal lawsuit involving immunity of a Head of State was *United States v. Noriega*, but the court denied immunity to Manuel Noriega solely on the grounds that he had never been elected or served as the constitutional Head of State of Panama. *United States v. Noriega*, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990).

52 *Republic of Philipines v. Marcos*, No. 84–146, (N.D. Cal. 1987) and *Domingo v. Marcos*, No. C82–1055-V, (W.D. Wash. 1982).

53 *Lafontant v. Aristid*, 139–40

54 *Kadic v. Karadzic*, 70 F.3d. 232, 236–237 (2d. Cir. 1995)

55 *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 2004 U.S. App. LEXIS 18944 (7th Cir. Sept. 8, 2004).

56 *Tachiona v. United States*, 386 F.3d 205, 2004 U.S. App. LEXIS 20879 (2d Cir. Oct. 6, 2004).

See S. Andrews, "U.S. Courts Rule on Absolute Immunity and Inviolability of Foreign Heads of State: The Cases against Robert Mugabe and Jiang Zemin', ASIL Insight, November 2004, available at www.asil.org/insights/2004/ 11/insight041122.html.

protected by personal immunity.[57] The UN Committee against Torture upheld the right of Senegal to try the former president Habré since it established that Senegal had violated the Torture Convention by failing either to prosecute or extradite him. Finally, in 2006, Senegal agreed to prosecute Habré at the request by the African Union, which found, although in a manifestly political decision, that it is both lawful and legitimate if Senegal exercises its jurisdiction over the *former* foreign Head of State.[58]

1.4. International forum as the (best) resort: cautiousness of the ICJ

1.4.1. ICJ's Arrest Warrant case (Congo v. Belgium)

Another turning point in filling in the body of law on Head of State immunity came with the decision of the International Court of Justice in the *Arrest Warrant* case (*DR Congo v. Belgium*).[59] The ICJ found Belgium, which circulated an international arrest warrant against the Congolese minister of foreign affairs, to have infringed inviolability and immunity from criminal jurisdiction that foreign ministers enjoy under international law.[60] The ICJ identified no basis in customary international law that would allow for any form of exception to the rule according immunity from criminal jurisdiction and inviolability to sitting ministers of foreign affairs, even when they are suspected of war crimes and crimes against humanity.[61] Although the Court claimed it "extensively examined State practice, including national legislation and those few decisions of national highest courts" the judgment itself seems to be poorly explained providing little references to examples of such state practice and legislation, apart from citing *Pinoche* (UK) and *Ghadafi* (France) cases.[62]

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[57] R. Brody, "The Prosecution of Hissene Habre – an "African Pinochet", *New England Law Review* 35/2001, 329–334. Hissene Habre ruled Chad from 1982 to 1990 when he escaped to Senegal after he was ousted from the power.

[58] See Human Rights Watch, *The Case against Hissene Habre, an "African Pinochet",Case Summary*, May 2008, *www.hrw.org/english/docs/2005/09/30/chad11786.htm* (last visited 23 March 2009).

[59] International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium*), CR 2000/32, Judgment of 14 February 2002 (hereinafter *Arrest Warrant*), *http://www.icj-cij.org/docket/files/121/8126.pdf.*

[60] *Ibid.,* para.71. The Court found, with several separate and dissenting opinions, that the mere issuance of the arrest warrant, even if no enforcement action was subsequently taken, infringed the Congolese minister's diplomatic immunity. *Ibid*, paras 70–71.

[61] *Arrest Warrant*, Judgment, para. 58.

[62] See *Ibid*. Some authors also criticized such a lack of argumentation remarking that immunity was "assumed by the Court, not established", see P. Sands, "International

There were submissions by the case parties that shared common positions, and this could be regarded as particularly reflective of their *opinio iuris* in relation to personal and functional immunities. Namely, certain arguments raised by Belgium indicated that it recognized immunity *ratione personae.*[63] *On the other side, the Congo acknowledged the existence of the international law principle deriving from the Nuremberg and Tokyo tribunals that official capacity of the accused at the time of crime did not exempt him from criminal responsibility before either international or domestic court.*[64]

The Court, which equated immunity of foreign ministers with that of Heads of State,[65] determined, in a key dictum of its judgment, only four situations in which immunities are not a bar to prosecution of highest state officials. Such persons may be prosecuted: *a)* by their own country, or *b)* by a foreign court, if the state they represent or have represented waive their immunity, or *c)* once they cease holding the office, but for acts committed prior or subsequent to the period in office, whereas for acts during the office only for those committed in *private* capacity, or *d)* by certain international courts, such as – in the Court's *exempli causa* enumeration – the ICTY and the ICTR, as well as the ICC.[66] These four possibilities for exercising jurisdiction over a foreign Head of State are of a very limited reach and, apart from the fourth situation, they do not bring much of a novelty to international law. The first situation is not an issue under international law, but rather an indisputable matter of state's internal affairs, whereas the second one is just a confirmation of what has already been well-established under international law – that immunity belongs to the sending state, not to an individual. As for the third situation, the Court did not indicate what would constitute a private act, which opens the door not only to construing the notion of such acts in line with the *Pinoche* decision – that acts are not official if amount to most serious international crimes, but also allows for recoiling back to more conservative and restrictive approaches. By referring to the fourth situation, the Court apparently defined the only niche where immunities, either functional or personal, cannot be a defense from prosecution – and that is before an international court. Although the Court also stated a principle that immunity from jurisdiction enjoyed by incumbent state officials does

Law Transformed? From Pinochet to Congo...?", *Leiden Journal of International Law* 16/2003, 46–47.

63 See *Arrest Warrant*, *Verbatim rec. CR 2000/34, available at http://www.icj-cij.org/docket/files/121/4237.pdf.*

64 *Arrest Warrant*, Judgment, para. 48.

65 *Ibid,* paras 51, 53 and 59.

66 *Arrest Warrant*, Judgment, para. 61.

not mean impunity,[67] it did not provide sufficient room for such a principle to be properly applied in practice, as the it reserved the right to disregard the immunity of a Head of State only for international courts.

The ICJ acknowledged the difference between immunity from criminal jurisdiction, as procedural in nature, and criminal responsibility, as a matter of substantive law,[68] but it failed to properly articulate difference between immunity *ratione materiae* and *ratione personae*.[69] The court also failed to recognize that functional immunity should be lifted, making, instead, the aforementioned distinction between acts in private capacity and official acts, which seems to have been abandoned in international law, at least with regard to international crimes.[70] The ICJ restated the *Arrest Warrant*'s holding that "Head of State enjoys full immunity from criminal jurisdiction" in a more recent case, *Djibouti v. France*, in which the parties themselves did not dispute personal immunity of Heads of States.[71]

The *Arrest Warrant* judgment has been widely criticized and considered a step back, especially if compared with the *Pinochet* decision, in determining the current status of state officials' immunity and for its restrictive list of exceptions to immunities from prosecution for most serious international crimes.[72] Although ICJ decisions are, in principle, binding only between the parties and in respect of the particular case,[73] this judgment, as all ICJ decisions, is considered an extrapolation of customary international law that unavoidably creates an authoritative precedent and influences practice of states and international or hybrid courts. It would certainly limit the role of national courts in prosecuting foreign Heads of States for international crimes. It may also made discussion on immunities confined only to the argumentation if a forum seized with a

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[67] *Ibid*, para. 60.

[68] *Ibid*.

[69] This has been criticized by some scholars. See A.Cassese, "When May Senior Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case", *European Journal of International Law* 13/2002, 862, J. Wouters, "The Judgment of the International Court of Justice in the Arrest Warrant case: some critical remarks", *Leiden Journal of International Law* 16/2003, 259–261.

[70] *Arrest Warrant*, Judgment, para.61. For criticism, see A. Casese, (2002), 867–870. See also *Pinochet III*.

[71] ICJ, *Case concerning certain questions of mutual assistance in criminal matters* (*Djibouti v. France)*, Judgment of 4 June 2008, available at *www.icj-cij.org/docket/files/136/14550.pdf* (last accessed 10 October 2009), para. 164–166, 170. The case was given rise by France sending witness summons addressed to Djibouti's Head of State.

[72] S.Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case", *European Journal of International Law* 13/2002, 881 and 890, J. Wouters, 259–261, P. Sands, 47–51, A. Casese, (2002), 862–866.

[73] Statute of the International Court of Justice, Article 59, available at *http://www.icj-cij.org/documents/index.php.*

concrete proceeding can be matched with one of the three courts that the judgment referred to – the ICTY, ICTR, or the ICC.

1.4.2. Hybrid courts and the Charles Taylor decision

Creation of the so called hybrid (mixed, internationalized) courts or tribunals further affirmed the exemptions from immunity.[74] The Statute of the Special Court for Sierra Leone has a provision on irrelevance of immunities identical to that from the ICTR and the ICTY statute respectively.[75] Regulation 2000/15 of the East Timor UN Transitional Administration, which established the East Timor Court (Serious Crimes Panels), contains an article on immunities mirroring Art 27(2) of the Rome Statute, explicitly denying both functional and procedural immunity to defendants.[76]

The Special Court of Sierra Leone (SCSL) ruled, in 2007, that no immunity was a bar to the prosecution of the ex-president of Liberia Charles Taylor before that court. Taylor contended that indicting an incumbent Head of State was contrary to international law, citing i.a. the *Arrest Warrant* judgment,[77] but, noticeably, even Taylor himself admitted that *ratione materiae* immunity would not protect him from responsibility for any international crime committed while in office.[78] The Special Court based its decision to reject Taylor's immunity arguments on the ICJ's standing that exceptions to immunity can only be made in prosecution before an international court.[79] There has been some criticism of the Spe-

[74] Currently, hybrid courts include the courts set up in Sierra Leone, East Timor and Cambodia, as well as the UNMIK/EULEX courts in Kosovo.

The hybrid court in Cambodia is bound by a norm on immunity very similar to those in the ICTY, ICTR and the Sierra Leone statutes, but this court deals with former Khmer Rouge leaders, who are all Cambodian nationals. See Law on the establishment of Extraordinary Chambers in the Courts of Cambodia, (*NS/RKM/1004/006*), Article 29(2), *www.derechos.org/human-rights/seasia/doc/krlaw.html.*

[75] Statute of the Special Court for Sierra Leone, annexed to the Agreement (16 January 2002), Article 6(2), *www.sc-sl.org/scsl-statute.html.*

[76] UNTAET, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, at *www.un.org/peace/etimor/untaetR/Reg0015E.pdf.*

[77] SCSL, *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, paras. 6–8, at *http://www.sc-sl.org/SCSL–03–01-I–059.pdf.*

[78] *Prosecutor v. Taylor*, Defense Preliminary Motion to Quash the Indictment and Arrest Warrant against Charles Ghankay Taylor, 23 July 2003. Taylor is indicted for crimes against humanity, war crimes and other serious violations of international humanitarian law committed in relation to the Sierra Leone conflict.

[79] *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, paras. 37–52, 53. Amicus brief by professor D. Orentlicher concluded that indicting Taylor was not in breach of the international norms governing immunity because the SCSL was of international character. See D.F. Orentlicher, *Submission of the Amicus Curiae on Head of*

cial Court's decision, which have argued that international features of the SCSL were not sufficient enough to make this court international in the sense of the *Arrest Warrant*'s reference to 'certain international courts'.[80] The critics suggest, instead, that the SCSL should have either substantiated its decision by invoking progressive emerging tendencies which remove immunity even for incumbent Heads of State if charged with international crimes,[81] or, what these authors see as better reflecting the current international law, the Taylor's immunity *ratione personae* should have been upheld, since this court was not entirely international in the ICJ's requirement sense.[82] In any instance, while non-application of functional immunity remained uncontested in the Taylor trial, in determining if personal immunity should prevail the decisive issue has boiled down to the question whether the particular court that tries a Head of State is national or international one.

2. STRIPING OFF IMMUNITIES: HOW FAR TO GO

In the past sixty years, international law governing Head of State immunity has undergone a tangible transformation from the uniquely accepted absolute privilege and protection of statesmen to its erosion in certain instances. The rules regulating this matter are not uniquely applied or with a definitive form and content, and they are still evolving. Customary international law has been a source where to seek guidance when dealing with a Head of State in a forum outside his/her own country. Certain treaties, especially the Genocide Convention and the Torture Convention, as well as the unanimously adopted 1946 General Assembly resolution and the authoritative 1996 ILC Draft, have all been reference points in formatting and determining customary law norms.[83] Conventional rules on the matter, however, are scarce, and customary law has been shaped not only by state practice, but also, and more extensively, through setting up of international criminal tribunals and the ICC.

State Immunity in the case of the Prosecutor v. Charles Ghankay Taylor, SCSL–2003–01–1, 14–22 and 26 (on file with the author). Another amicus brief, also argued that an international criminal court or tribunal, not necessarily Chapter VII based, may exercise jurisdiction over a serving Head of State. See *Prosecutor v. Charles Taylor,* Submissions of the Amicus Curiae on Head of State Immunity, paras. 56, 118, at *www.icc-cpi.int/library/organs/otp/Sands.pdf*.

[80] See S. Deen-Racsmany, 313–317. See also S. M. H. Nouwen, "The Special Court for Sierra Leone and the Immunity of Taylor: the *Arrest Warrant* Case Continued", *Leiden Journal of International Law*, 18/2005, 656–657.

[81] S. M. H. Nouwen, 664 and 668.

[82] S. Deen-Racsmany, 315–321 and S. M. H. Nouwen, 667–669.

[83] For the ICJ's confirmation of the role of international agreements in formation of customary law, see ICJ, *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, ICJ Report 1969, paras.60–74, *www.icj-cij.org/docket/files/52/5561.pdf.*

The statutes of the Nuremberg tribunal, the ICTY and the ICTR, taken together with some of their decisions, established or confirmed important principles and exerted a strong influence both on codification and progressive development of the rules on immunities, moving such rules towards the decline of any immunity in respect to international crimes. The ICTY and ICTR statutes emanate from customary international law and they are Chapter VII powered, yet the reach of these tribunals is limited to the particular territories, situations and actors. Although the Chapter VII origin certainly amplifies the role of the ICTY and the ICTR, including the *Milošević* precedent, the main argument as to the significance of the two *ad hoc* tribunals for the narrowing down Head of State immunity may be found in the drafting history of their statutes and in the assertion that they meant to embody pre-existing customary international law norms, including those on irrelevance of official immunity. The ICC Rome Statute seems to play a more important role, as a multilateral treaty, binding upon all the parties which agreed to abolish explicitly both functional and personal immunity in cases of international crimes dealt by the Court. The provisions set forth in the ICTY, ICTR and ICC statutes have also been copied and affirmed in the statutes of more recently established hybrid courts in East Timor, Sierra Leone, and Cambodia. High number of state parties to the Rome Statute is indicative of the willingness of the majority of countries to adhere to limitations of immunity and it supports contention that the ICC Statute has codified the rule that immunity of highest state officials, including Heads of State, can no longer be recognized for certain international crimes.[84] However, in situations in which the ICC does not exercise jurisdiction, the state parties still remain bound by general international law norms on immunity of officials.

The International Court of Justice also stepped in to arbitrate on the matter, and the exceptions to the prevailing rule of recognition of immunity that the *Arrest Warrant* determined either expose only official's private acts to prosecution before a foreign court (leaving the notion of 'private act' to be argued about), or empower only international courts to disregard immunities. While making a welcome verification that immunity is excluded before international courts, the ICJ has nonetheless introduced an unwarrantedly closed circle of possibilities for prosecution of highest state officials.

There has been a number of proceedings for international crimes against foreign officials before national courts, but only a very few against foreign Heads of State.[85] They show some disparities and implications of

[84] As of 21 July 2009 there are 110 state parties to the ICC Rome Statute (a list of ICC state parties available at *http://www.icc-cpi.int/Menus/ASP/states+parties/*, last visited 25 October 2009.

[85] See A. Casese, (2002), 870–871, for a brief list of prosecution of foreign officials (not only Heads of State) and practice of courts in Britain, France, the Netherlands, Israel, Spain, US, Italy and Mexico.

precedents at national level are not easy to identify and assess. The *Pinochet* case in the UK affirmed personal immunity, but gave rise to the claims that international law encounters a new customary rule which strips traditional immunity from the highest state officials who have committed the gravest human rights violations. Even though not much of a like state practice has been seen after the *Pinochet*,[86] this decision was a move ahead. Although seriously challenged by the ICJ's *Arrest Warrant* decision a few years ago, it has made a doctrinal influence as a model ruling, which defined official acts through the duty of a Head of State to protect his subjects, not to grossly violate their rights and widened a gap in protection of the dictators.

As early as before the ICC Statute was adopted, and the *Pinochet* and the *Arrest Warrant* decisions passed, there had been a range of doctrinal views distinguishing limitations to immunity of Heads of State. In Sir Arthur Watts' contention from his early nineties seminal work, personal liability of a Head of State who authorized or perpetrated serious international crimes was already a matter of customary international law.[87] In the same time, Watts considered such a body of rules, which had emerged, to be "in many respects still unsettled, and on which limited state practice sheds an uneven light".[88] There were also even more liberal views suggesting that the general rule of international customary law was that of non-immunity,[89] or, at least, that such rule exist in the context of human rights abuses.[90] On the other side, there were opposite views too, arguing that denial of immunity to Head of State, even in case of human rights violations, is both illegal and politically unwise.[91]

All the aforementioned developments taken together speak of the fact that the idea of holding Heads of State accountable for international crimes has been rising, followed slowly, but progressively, with corresponding rules. Genocide, crimes against humanity, war crimes, as well as torture (although before *Pinochet* case often not included in such a list), are international crimes that so far have been undisputedly recog-

86 For deliberation on state practice before and after the *Pinochet* see, for example, M.M. Penrose, "It's Good To be the King!: Prosecuting the Heads of State and Former Heads of State under International Law"*, Columbia Journal of Transnational Law* 39/2000.

87 A. Watts, (1994), 84

88 *Ibid.,* 52

89 H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', *British Yearbook of International Law* 28/1951.

90 J. Paust, "Draft Brief concerning Claims to Foreign Sovereign Immunity and Human Rights: Non-immunity for Violations of International Law under the FSIA", *Houston Journal of International Law* 8/1985, 51–54.

91 A. Zimmerman, "Sovereign Immunity and Violations of International *Jus Cogens* – Some Critical Remarks", 16 *Michigan Journal of International Law* 16/1995.

nized as those that may render immunity irrelevant. These are acts of such seriousness that they do not constitute merely international wrongs, but rather the crimes that offend the public order of the international community.[92] In other words, the gravity of these crimes warrants an exception to the general rule of immunity. As for international offences outside the aforementioned cluster of crimes, or for acts constituting what is colloquially called 'ordinary' crimes, there is no support in international law, as it stands now, that immunity can be denied in such situations as well.

The question still pulsating, however, is whether both types of immunity – functional and personal – can and should be removed in cases of the most serious international crimes, and which court is entitled to disregard these immunities. The answer is somewhere between rooting out impunity and preserving immunity.

2.1. Functional immunities

The prevailing rule today seems to be that immunity *ratione materiae* cannot shield anyone from prosecution for genocide, crimes against humanity, war crimes or torture. The statutory provisions of the ICC, ICTR, ICTY and hybrid tribunals, some of their decisions, as well as the norms of certain international treaties, draft treaties and resolutions have all explicitly or implicitly led to abolishing *ratione materiae* immunity of Head of State for such crimes. The holdings in certain cases before the national courts, or at least the approaches assumed by the courts, also confirm the move towards non-recognition of Head of State functional immunity.

Legal scholars have extensively argued against functional immunity for international crimes. Some authors submit that acts amounting to international crimes cannot be considered official acts,[93] others that prohibition of such acts, as peremptory norm, prevails over rules on immunity which have no *ius cogens* status.[94] Some authors reject such justifications and derive basis for exemption of immunity for official acts from provisions in the statutes of international courts and tribunals which do not recognize official capacity as a substantive defense from criminal responsibility and from the nature of universal jurisdiction which excludes functional immunity.[95]

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[92] See also A. Watts, (1994), 81.

[93] See, for example, A. Bianchi, "State Immunity to Violations of Human Rights', *Austrian Journal of Public International Law* 46/1994*,* 229.

[94] A. Bianchi, "Immunity Versus Human Rights: The Pinochet case', *European Jopurnal of International Law* 10/1999, 237– 265, A. Orakhelashvili, "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong", *European Journal of International Law* 18/2008, 964.

[95] D. Akande (2004), 414–415.

Immunity *ratione materiae* and international crimes are inherently incompatible. The labeling of gravest criminal acts as an exercise of state functions that entail immunity would go against the rationale and purpose of many international treaties, such as the Genocide Convention, the Geneva Conventions, or the Torture Convention, which laid down peremptory norms of international law that impose unconditioned prohibition of such acts. The purpose of these conventions would be especially frustrated if we wrap violations thereof into the meaning of 'official acts', particularly when bearing in mind that crimes against humanity or genocide are most often committed exactly as a part of execution of an official policy. Since the prohibition of such crimes represents *jus cogens,* it is of a higher value and ranking then the customary rule of immunity that obliges a state not to sit in judgment for head of another state, and for which no evidence can be found to confirm its *ius cogens* status. In addition to that, all these treaties require states to prosecute the responsible for crimes and, if appropriate, ascertain universal jurisdiction, and there is nothing in these norms that would allow for exceptions.[96] Such norms would be defeated if someone is exonerated from criminal responsibility for the mere reason that he/she belongs to the very top of the hierarchy.

Therefore, it can be said that customary international law allows for an exception to *ratione materiae* immunity in case of certain international crimes, not only in proceedings before international courts, but also in prosecution of foreign Heads of State before domestic courts.[97] However, at the current stage, there is neither wide, nor coherent practice of states to deny immunity to foreign former Heads of State before national courts. Hence, there is still no sufficient ground, especially after the *Arrest Warrant*, for a conclusion that the customary rule has petrified to a degree that obliges states to deny functional immunity to a foreign Head of State in case of international crimes. However, there is undoubtedly no longer an obligation to grant such immunity either. At best, states *may* and should deprive a former Head of State of his immunity, and such an act must not be considered as a violation of international law and internationally wrongful act encountering state responsibility.

2.2. Personal immunities

Whilst functional immunity is no longer a shield from criminal responsibility, immunity *ratione personae,* at the current stage of international law, continues to remain a defense from prosecution of

[96] See 1948 Genocide Convention, Article 6, 1949 Geneva Convention I, Article 49, Geneva Convention II, Art 50, Geneva Convention III, Article 129, Geneva Convention IV, Article 146, 1984 Torture Convention, Article 5.

[97] For similar opinions, see A. Casese,(2002), 870–874, S. Wirth, 877, A. Orekhelashvili, 964, P. Gaeta, (2002), 982, Bianci, 261. Also International Law Commission, para. 204.

Heads of States, as it follows from the provisions and jurisprudence analyzed so far. In absence of compelling evidence to the contrary, the exceptions to personal immunities appear to be confined to international tribunals and to the ICC and within the parameters of their respective mandates and jurisdictions.[98] No state practice has evinced so far that personal immunities can also be rendered irrelevant before national courts. Quite contrary, the preservation of Head of State personal immunity before national court has been upheld by domestic courts in the UK, Spain, France, US and other countries and, arguably in the most authoritative way, in the ICJ's *Arrest Warrant* judgment. Therefore, customary international law still does not allow for a departure from the rule that an incumbent Head of State cannot be prosecuted before a foreign court state however heinous are the crimes that the official is accused of.[99] The inviolability of personal immunity, as opposed to functional, which can no longer hold as defence, has been recognized even by some of the very progressive doctrinal documents such as the Princeton Principles on Universal Jurisdiction,[100] 2001 Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law, adopted by the Institut de Droit International,[101] or International Law Commission 2008 Memorandum.[102]

The main rationale for explaining why the state practice has not been permissible to departures from *ratione personae* immunity lies in the need to enable state officials to carry out their functions and represent their country without any foreign interference.[103] States tend to avoid diplomatic and political consequences of unilateral prosecution of other states' officials, and in the same time they want to protect their own highest officials from obstruction by other states. States still find personal immunity both as a binding norm and a rational choice conducive to the smooth conduct of international relations. To completely sweep out immunities and make possible for a national court to prosecute an incumbent foreign Head of State – however righteous such resort might seem to be – can open a door to arbitrary prosecution of foreign officials

[98] For contesting opinions, that even the Nuremberg Charter and the ICTR and ICTY statutes were not explicit enough to remove personal immunity as they did with functional immunity, see S. Houven, 661 and S. Deen-Racsmany, 315.

[99] See A. Casese, (2002), 865, P. Gaeta, (2002), 987– 988, S. M. H. Nouwen, 667, S. Deen-Racsmany, 313, D. Akande (2004), 411, S. Wirth, 877–893.

[100] Principle 5 of The Princeton Principles of Universal Jurisdiction, Princeton University Program in Law and Public Affairs, *The Princeton Principles of Universal Jurisdiction* 28/2001, *http://www1.umn.edu/humanrts/* (last visited 24 March 2009).

[101] Article 13(2) of the Resolution, according to H. Fox, "The Resolution of the on the Immunities of Heads of State and Government", *International Comparative Law Quarterly,* 51/2002, 121.

[102] International Law Commission, para.99, 148.

[103] *Arrest Warrant,* Judgment, para 53, also offers such an explanation.

and cause destabilization, retorts and many other unintended consequences for international relations. As a defense of procedural nature, personal immunity does not mean justice denied, but rather justice delayed – until the Head of State steps down. As a *temporary* sacrifice of justice for the good of stability and peaceful conduct of international relations, personal immunity before national courts should stay in place as a bulwark for serving Heads of State, same as for other incumbent high officials and diplomats, to avoid risks of opening a Pandora box of voluntarism of individual states taking justice on their own, even when acting with a good cause.

Therefore, an international tribunal or court remains the only option for prosecuting a serving Head of State, unless his/her own state decides to prosecute or waive the immunity for trial before a foreign court. How inclusive such an option can be will depend on what would be construed as an 'international' court. To suggest an answer to that question, first has to be highlighted why international court is considered the best or, so far, the only forum that can set aside personal immunity. The main rationale is that it does not compromise the principle that states do not judge on the conduct of each other (*par in parem non habet judicum*), which lies in the very foundation of equal sovereignty of states and international relations, and protects states from undue interference by other countries. States could hardly legitimize their refusal to accept jurisdiction of an international or internationalized body, which derives its mandate either from a treaty or from representative will of the international community, and which does not signify an exercise of unilateral sovereignty or other countries' arbitrary will.[104] Therefore, when international community is represented – trough the UN, or, possibly, through a regional organization – in the process of setting up such a court, it should be equated with international courts. The notion of international court that the ICJ points to in the *Arrest Warrant* should be, accordingly, interpreted broadly, not only to include the treaty based ICC, or the outgoing ICTY and ICTR, or some future Chapter VII based tribunals, but also a hybrid court or tribunal which disposes of significant international element, like the Special Court for Sierra Leone.

2.3. Flip side of the compromise

The parallel treatment of immunity – one by denying any immunity before an international court, and the other, embracing absolute immunity of an incumbent head of state before foreign courts – is also reflective of the long lasting tension between two perspectives: one, often regarded as human rights or accountability approach, which sees the primary purpose of the present time international law in protecting certain

[104] See *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, para 51.

values and individuals, and the other, that regards international law as mainly intended to service relations among states and uphold state sovereignty. Finding a difficult, but necessary balance between the two, which sometimes also amounts to a compromise between justice and interest of inter-state relations, is an open-end dilemma.

Judging on the immunity of a foreign Head of a State is almost always likely to be influenced by political considerations and even deference to political prerogatives. To promote justice through legal accountability of the leaders could sometimes go to the detriment of important political processes in countries where the crimes have taken place, in which such leaders are often key players, and threaten to destabilize their transition into democratic societies. On the other and, since immunity *ratione personae* shields only as long as a person is in the office, that may encourage dictators to be persistent in holding onto their power at all costs, since most serious international crimes are usually the legacy of the leaders and regimes that do not seek support at democratic elections; and once they step down, they often do so with amnesty-like political compromises keeping the threat of the recurrence of instability as their laissez-passer. This may leave victims waiting for justice indefinitely, since the ICC has its intrinsic temporal, territorial and personal limitations, whereas establishing an *ad hoc* international or hybrid court necessitates almost discouraging amount of good will of states, negotiation, agreement and resources. Furthermore, if states decide to strictly adhere to the ICJ's *Arrest Warrant* reading of the difference between private and official acts, the dictators could continue to be immune before foreign courts even after ceasing to hold the post, and this may keep maintaining already voluminous historical record of countries' tolerance, sometimes amounting to benevolence, towards foreign ex-dictators.

It is still mainly in the hands of the international courts, especially the ICC, to correct the reluctance or incapacity of states to try foreign leaders, but international law today is broadening its tools, making possible and realistic that even the highest ranking transgressors of humanitarian law and human rights norms at least do not enjoy their days after leaving the power. The emerging trends could be ushering us in the era when there would be less safe heavens for human rights oppressors. Head of State immunity, once the most reliable life vest for many dictators, seems to still keep them from sinking, but it is more and more holed.

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PUBLIC ADMINISTRATION AND E-GOVERNMENT IN SERBIA

In the context of a knowledge-based economy, the concept of e-government is taking effect in terms of efficiency, effectiveness, as well as in meeting the needs of democratic transition. Introducing e-government is an integral part of widespread public administration reforms that include "redefining" government. The main premise of e-government is that government information and services must be equally accessible to all citizens. Access to vital government information and rendering on-line public services (e.g. issuing permits, personal documents, submitting applications etc.) by an "open government" is creating a new quality of public services. Due to this, technical aspects of introducing e-government must seriously consider legal issues that arise from the new information and knowledge-based communication between government and citizen. In this model, the status of citizens as "customers" of e-government public services is prerequisite.

Keywords: *E-Government.– Public Administration.– Administrative Reform.*

1. INTRODUCTION

We live in an information society and a knowledge economy where information and knowledge management is essential.[1] "When we talk

[1] For Internet resources related to the field of knowledge-based economy and knowledge management in information societies, see: *http://www.enterweb.org/know.htm*, last visited 26 September 2009.

about the new economy, we're talking about a world in which people work with their brains instead of their hands. A world in which communication technology creates global competition. A world in which innovation is more important than mass production. A world in which investment buys new concepts or the means to create them, rather than new machines. A world in which rapid change is a constant. A world so different its emergence can only be described as a revolution."[2] As pointed out, "Innovation at present has become a key driver of sustainable economic growth and a necessary part of the response to many social needs all over the world. The changing nature of scientific research makes earlier distinctions between basic and applied research less clear and less policy-relevant. An effective interface between innovation and science systems is therefore more necessary than ever."[3] In this context, "Knowledge-based economy is not a branch of economy. It is rather a compatible system of legal and economical preconditions, as well as managerial and economical mechanisms together with modern technologies and human recourses. This system appears in the process of development of the market economy supported by the new technologies. The new growth opportunities can only be seized through a comprehensive strategy based on a policy mix that is suited for each region or country."[4]

In the environment of a knowledge-based economy, the idea of e-government is taking effect in terms of efficiency, effectiveness and in meeting the needs of "democratic transition". There are three basic elements of e-government:

- ensuring open government and transparency in the activities of government agencies;
- providing on-line services enabling citizens to use the Internet to pay taxes, access registries, make applications or undertake procedures, elect their representatives, express their opinions, as well as participate in the administrative decision-making processes, and
- interconnecting government agencies.

"With e-government a new box is being opened and one which might potentially further increase the problems of government use of

[2] Wired's Magazine Encyclopedia of the New Economy, *http://www.enterweb.org/know.htm*, last visited 26 September 2009.

[3] K. Krisciunas, "EU Enlargement and the Lisabon Process: Contemplation on Objectives and Realities of Knowlwdge Economy", *Juxtaposition of European Union Enlargement and Lisabon Processes (Proceedings)*, Kaunas University of Technology, Kaunas 2004, 6.

[4] R. Daugèlienè, K. Krisciunas, "Peculliarities of Knowledge-Based Economy's Assesment: Theoretical Approach", *Juxtaposition of European Union Enlargement and Lisabon Processes (Proceedings)*, Kaunas University of Technology, Kaunas 2004, 16.

technology – and it may be that we will see that the underlying tension of government technology is actually a legal tension: that is, that there is something about the legal nature of government which makes technology much more difficult to apply than it is in a commercial environment. This is obviously important; since the message of e-government is that the state should take the techniques and methodology of commerce and apply them to this new relationship of the ICT-based state and ICT-based citizen."[5]

2. ADMINISTRATIVE REFORM AND THE RULE OF LAW

Modern administrative systems and actions derive from a relatively non-differentiated organizational structure of the absolutistic states of the 17th century.[6] Reactions against the administration as the monarch's "personal instrument of government" were inspired by Locke's and Montesqueau's doctrines of the separation of powers and realized by revolutions at the end of the 18th century in Europe and America. However, as the administration steadily became an equal partner in the division of powers, the previous view of the administration as a "suspicious instrument of the monarch" started radically to change. Today, the experience of developed countries indicate that an administrative system cannot be conceived as an "instrument" or "apparatus" (e.g. of the ruling class), nor can modern administrative action be perceived only as a normative structure of legal procedures.

In Europe, the past decade has shown two fundamental processes: on one hand, integration of developed Western European countries within the framework of the European Union, and on the other hand, transition of Central and East European countries towards political pluralism, market economy, administrative efficiency, information technology application, democratization and human rights protection.

After the fall of the Berlin Wall in 1989, many former European communist countries, as they struggle to overcome the existing one-party political systems and closed command economies[7] found themselves going

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[5] *Cf.* P. Leith, "Legal Issues in e-Government", *http://www.lri.jur.uva.nl/~winkels/eGov2002/Leith.pdf*, last visited 27 September 2009.

[6] *Cf.* S. Lilić, "Turbulence in Administrative Transition: From Administration as Instrument of Government to Administration as Public Service", *Third International Conference of Administrative Sciences* (Beijing, 8–11 October 1996), International Institute of Administrative Sciences, Bruxelles 1996.

[7] *Cf.* J. M. Kovacs, M. Tardos, *Reform and Transformation in Eastern Europe: Soviet-Type Economics on the Threshold of Change*, Routledge, London/New York 1992.

through a period of – often rather turbulent – social and political transition.[8] These changes effect, *inter ali*a, the respective legal order and government organization of post-communist European countries, including the functional and organizational patterns of their administrative systems. As consequence, the existing legal frameworks and administrative action in these societies gave way to modern and democratic notions of government and administrative action that is supported by efficient functional and organizational structures and mechanisms of legal and political control and openness toward technological innovation.

The existing system of control over the administration in Central and East European post-communist countries had to restructure and orient itself towards politically accepting, legislatively formulating and procedurally implementing fundamental democratic standards that secure efficient safeguards of human rights, not only formally in constitutional and legal documents, but also in the everyday communication of the citizen with governmental and administrative authorities. On the other hand, the existing concepts of government and administrative control, were brought out of the pre-dominating system of authoritative control of the higher instance, into open and transparent forms of "good governance" and "access to justice", that include judicial review and ombudsman-type independent institutions. No real democratic reform of government and administration was possible without accepting human rights safeguards and control standards of administrative action embedded in the principle of the rule of law and democratic concepts of legitimate government and administrative action. No more could the government and its administration be viewed as a soviet-type instrument of "class repression", but had to be defined as a system of social regulation oriented towards rendering public services and protecting human rights.[9]

Administrative reform and reorganization of existing administrative systems in European countries moved in the direction of strengthening democratic control over state administration, increasing its accountability to democratic elected bodies, de-centralizing and de-concentrating the central government structures, while maintaining the administrative system under the strict principles of the rule of law and protection of human rights. The need to modernize the administrative systems and administrative action in Europe goes much beyond subjecting it to provisions of legal documents. "The challenge with which public administration is faced in Central and

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8 *Cf.* J. M. Kovacs (Ed), *Transition to Capitalism: The Communist Legacy in Eastern Europe*, Transaction Publishers, New Brunswick/London 1994.

9 S. Lilić, *Influence of the Soviet Doctrine of State and Law on Theory of Administrative Law in Serbia*., http://www.slilic.com/upload/docs/SLilic%20Soviet%20Doctrine%20and%20Serbian%20 Administrative%20Law.pdf, last visited 27 September 2009.

Eastern Europe is to redefine even its role in society, or, more concretely, its relations with politics, the economy and civil community. It is, therefore, worthwhile to recall that the dynamics of administrative transformation are intimately linked to changes in the political, legal, social and economic environment in which public institutions operate and on whose material and immaterial inputs they crucially depend. Legitimacy, authority, legality, acceptance and finance are amongst the most important resources required for effective administrative activity and they cannot be generated by the public administration itself. Accordingly, the outcome of politics aimed at public sector reform is decisively shaped albeit predetermined, by political, legal, social and economic developments."[10]

Countries in Europe still on levels of mid and late industrial development, as well as those in early stages of high technology developments, will doubtlessly need to consider present European integration tendencies, not only in respect to their general social and economic development strategies, but also in regard to their administrative systems and administrative actions as well. Administrative legislation reforms and administrative system compatibility with European integration processes should be the basis for the future technological transformation of the respective administrative systems and their organizational and functional development.[11] Comparatively speaking, the transformation of administrative systems should also be aimed at undertaking functional and organizational,[12] as well as technological[13] and personnel[14] reforms that are in line with achieving higher standards of administrative efficiency and human rights protection, particularly in regard to the issues of privacy[15] and data protection.[16]

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10 *Cf.* J. J. Hesse (Ed), *Administrative Transformation in Central and Eastern Europe: Towards Public Sector Reform in Post-Communist Societies*, Blackwell Publishers, Oxford 1993.

11 *Cf.* S. Lilić, *European Integration, Administrative Legislation Reform and Administrative System Compatibility* (Report), International Institute of Administration Sciences, International Conference: "Administrative Implication of Regional Economic Integration", Madrid 1990.

12 *Cf.* J. Emery (Ed), *Organizational Planning and Control Systems – Theory and Technology*, Columbia University, Collier-Macmillan Limited, London 1969.

13 *Cf.* J. Baquiast, *Nouvelles Technologies et Reforme Administrative*, Revue Français d' Administration Publique, No. 37, Paris 1986.

14 *Cf.* H. Reinemann, "Organization and Information Management", *New Technologies and Management – Training The Public Service For Information Management*, IIAS, Brussels 1987.

15 *Cf.* J. Michael, *Privacy and Human Rights: An International and Comparative Study with Special References to Developed Information Technology*, Dartmouth, UNESCO Publishing, Hampshire 1994.

16 *Cf.* C. Bennet, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States*, Cornell University Press, Ithaca/London 1992.

Transition and integration processes in Europe also have a significant impact on the perception and quality of human rights, which should be taken into account in the present and future reforms of administrative systems.[17] The legalistic principle of legality, expressed through the ideal “that all citizens are equal before the law”, has historically played a crucial role in institutionalizing (particularly in regard to judicial and administrative procedure), the relation between the citizen and the state (administration):[18] the greatest moral value and practical effect of the “equality” principle being the (legal) protection of the citizen from the foul actions of the state. Today, however this traditional principle is considered one-sided and obsolete: it is argued that, for the principle of legality to be legitimate in a modern administrative environment, apart from the law, the consent of the citizen is also needed. This is the result of the higher level of information and knowledge the citizen has access to, as well as ideological and interest independence of the citizen in communicating with the government and the administrative system.

3. E-GOVERNMENT AND EU STANDARDS

Introducing e-government is an essential part of widespread public administration reform that includes the redefining of the role of modern government.[19] The advantages are obvious. “First, e-government aims to be more customer-oriented. Governments can get rid of a lot of red tape by using computers. Instead of going to a tax office or a municipal bureau, citizens can download the necessary brochures and forms immediately, 24-hours a day and 7 days a week directly from the Internet. Second, public administration becomes more efficient with e-government. Both money and paper can be saved when public administration connects to the Internet. Procedures and routines are automated in order to save on expensive civil servants. Third, e-government modernizes public administration.”[20]

E-government is closely linked to concepts (e.g. New Public Management) that are to ensure a new quality in managing complex social environments, particularly in view of a knowledge-based economy. The main premise of e-government is that information and services must be

[17] *Cf.* A. Rosas, J. Helgesen, D. Gomien, *Human Rights In a Changing East-West Perspective*, Printer Publishers, London/New York 1990.

[18] *Cf.* S. Lilić, *Information Technology and Public Administration – The Citizen's Influence*, Information Age, Vol. 12, No. 1, London 1990.

[19] S. Lilić, M. Marković, P. Dimitrijević, *Nauka o upravljanju (Administrative Science),* Chapter on E-government, Beograd 2001, 368–375.

[20] S. Zouridis, M. Thaens, “Reflections on the Anatomy of E-government”, *The Informationa Ecology of E-government – E-government as Institutional and Techological Innovation in Public Administration*, (eds. V. Bekkers, V. Homburg), IOS Press 2005, 26.

accessible to all citizens without personal privilege or discrimination. However, this also means that some information is classified and that these protected zones must be under strict legal control. The global phenomenon in using information and communication technology (ICT), the Internet, personal computers, mobile telephones and digital television has transformed many aspect of government. Access to information and rendering on-line public services (e.g. issuing of permits, personal documents and applications) by an "open government" is creating a new quality of public services. This kind of communication offers the citizen many new forms of participating in democratic processes and decision-making. The potentials of information and communication technology enabled governments to develop the concept of e-government. Many governments today offer and distribute information through their web pages, create digital databases and render public services on-line.[21]

The e-government topic became part of governmental agendas with big visibility, because "societies have realized the importance of using ICT within public administration."[22] The United Nations define e-government as the capacity and will of the public sector to develop the use of information and communication technology in order to up-grade rendering of public services to the citizens. Of the 179 countries, that according to the 2005 UN Report, have implemented some form of e-government, the highest rate of implementation has been achieved by the US, Denmark, Sweden and the UK. In the region of South Eastern Europe, Slovenia holds position 26, Croatia 47, while Serbia and Montenegro hold an embarrassing 156th position.[23]

E-government is a concept in which information and communication technology is used in all fields of public and political administration and on the basis of which public administration is transformed and redefined as a civil service. E-government is not a one-step process and cannot be implemented as a single project. It involves multiple stages or phases of development. United Nations Online Network in Public Administration (UNPAN) presents five stages of introducing e-government:

– emerging web presence,
– enhanced web presence,
– interactive web presence,

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[21] J. Morison, *E-government: a New Architecture of Government and a New Challenge for Learning and Teaching Public Law*, *http://www.unizar.es/derecho/fyd/lefis/documentos/JMfinaldraft.pdf*, last visited 27 September 2009.

[22] A. M. de Cunha, P. M. Costa, "Towards Key Business Process for e-Government", *Building the e-Service Society*, (eds. W. Lamersdorf, V. Tschammer, S. Amarger), Kluwer Academic Publishers 2004, 6.

[23] UN Department of Economic and Social Affairs, Division for Public Administration and Development Management, *UN Global e-Government Readiness Report 2005 – From e-Government to e-Inclusion*, New York 2005, 13.

– transactional web presence, and

– fully integrated web presence.

“The ‘emerging’ stage includes a formal but limited web presence through independent government web-sites with static organizational or political information. The ‘enhanced’ presence refers to the expansion of web-sites with content of dynamic and specialized information and links to other official pages including government publications, legislation newsletters. The ‘interactive’ presence includes a sophisticated level of formal interactions between citizens and service providers such as e-mail and post comments areas. The capacity to search specialized databases and download forms and applications or submit them is also available. The ‘transactional’ presence offers secure transactions like obtaining visas, passports, birth and death records, licenses, and permits. The ‘fully integrated’ or seamless presence refers to the stage where lines of demarcation are removed in cyberspace.”[24]

Regarding the legal framework, the EU document on the “Interoperable Delivery of Pan-European e-Government Services to Public Administrations, Businesses and Citizens – IDABC” (April 2004), *inter alia*, states (Art. 8–11): The European Council, meeting in Lisbon in March 2000, adopted conclusions aimed at preparing the transition of the European Union by 2010 to the world’s most competitive, dynamic, and knowledge-based economy, capable of sustainable economic growth with more and better jobs and greater social cohesion. The European Council, meeting in Brussels in March 2003, drew attention to the importance of connecting Europe and so strengthening the internal market and underlined that electronic communications are a powerful engine for growth, competitiveness and jobs in the European Union and that action should be taken to consolidate this strength and to contribute to the achievement of the Lisbon goals. To this end, the development and establishment of pan-European e-government Services and the underlying telematic networks should be supported and promoted. The elimination of obstacles to electronic communications between public administrations at all levels and with businesses, as well as with citizens, contributes to improving the European business environment, lowering the administrative burden and reducing red tape. It may also encourage businesses and citizens of the European Union to reap the benefits of the information society and to interact electronically with public administrations. Enhanced delivery of e-government services enables businesses and citizens to interact with public administrations without special information technology skills or prior knowledge of the internal functional organization of a public administration.[25]

[24] J. Lee, “Searching for Stage Theory in e-Government Development”, *Developments in e-Government*, (eds. D. Griffin *et al*.), IOS Press 2007, 34.

[25] *Decision 2004/387/EC of The European Parliament and of The Council of 21 April 2004 on the Interoperable Delivery of pan-European e-Government Services*

Creating an e-government means the application of ICT in the functioning of public administration as a whole (including central, local and regional public services), thus modernizing and increasing the efficiency of administrative procedures by promoting the use of the Internet in public administration.[26] The interaction between e-government and ICT result in new concepts in the communication between the government and the citizen, as the citizen as customer "buys" public services by means of a "Single Window Government" or "One-Stop Shop". This offers many advantages, such as information sharing, network connections, e-mail, direct submission of e-applications to administrative agencies, continuous workflow, on-line questions and answers, public terminals (e.g. for voting) and so on.[27] In satisfying the needs of the citizen, ITC plays a crucial role. The citizens want to enjoy the benefits of a simple, comfortable, modern and secure public service. They also want to be well informed and to participate in public policy matters, and not just to be "subjects".[28] Thus, as paradox, the "human touch" in the communication between citizens and the administration becomes a reality with the introduction of ICT which practically eliminates direct citizen-bureaucrat communication. From a conceptual aspect, e-government is capable of reducing entropy and sustaining a positive workflow in the administration and economy.

4. E-GOVERNMENT IN SERBIA

4.1. Legal Framework

The present legal framework of introducing e-government in Serbia is contained in *The Public Administration Reform Strategy* (adopted in November 2004)[29] and *The Strategy of Development of an Information Society* (adopted in October 2006).[30] Also, since 2004, several significant laws in this field were enacted, including: *Law on Electric Signature,*[31]

to Public Administrations, Businesses and Citizens (IDABC), Official Journal of the European Union, L 181/25, 18.5.2004.

26 *Cf.* D. Prlja, S. Lilić, M. Savović, *Internet vodič za pravnike (Internet Guide for Lawyers),* LawDem, Beograd 2006.

27 *Cf.* P. Dimitrijević, *Elektronska vlada* (E-Government), Pravni život, No. 9, Beograd 2001.

28 *Cf.* S. Lilić, *Pravna informatike (Legal Informatics),* Beograd 2006.

29 Government of the Republic of Serbia, Public Administration Reform Strategy of the Republic of Serbia, (Strategija reforme državne uprave Republike Srbije), *http://www.rzii.sr.gov.yu*, last visited 28 September 2009.

30 Government of the Republic of Serbia, Strategy of Development of an Information Society of the Republic of Serbia, (Strategija razvoja informacionog društva Republike Srbije), *http://www.rzii.sr.gov.yu*, last visited 28 September 2009.

31 Law on Electronic Signature (Zakon o elektronskom potpisu), *"Official Gazette of the Republic of Serbia",* No. 135/04.

Law on Free Access Information of Public Importance,[32] *Law on Registration of Economic Subjects,*[33] *Law on Organizations and Responsibilities of Government Agencies against Cyber Crime,*[34]*, and Law on Protection of Personal Data.*[35]

According to the Serbian *Action Plan for Serbian Public Administration Reform Implementation 2009–2012*: "The electronic government can advance the quality of life of citizens in a multiple manner and can make big savings in both the time-related and economic aspects. The project of electronic government is directly linked to the changes at the level of organization in the public sector, as well as directly linked to the changes at the level of the state. It is well known that ICT has a potential to integrate data into structurally comprehensive forms, easily accessible for different kinds of analyses, research and services, and these advantages represents one of the preconditions for a good quality public administration reform, on both central and local level."[36]

The laws of the Republic of Serbia enacted during the last several years, and to a large extent harmonized with EU legislation, (e.g. Law on Registration of Economic Subjects, Law on Free Access to Information of Public Importance, Law on Electric Signature, with respective bylaws) contain significant elements of e-government including: electronic signatures and electronic certificates, possibilities for submitting requests of citizens and economic entities (users) in electronic form, rendering Internet services to users, communication of users and authorities by electronic mail, etc.[37]

In 2009 a number of documents have been adopted, which significantly contribute to the development of e-government in Serbia, including the Law on Electronic Document[38], Law on Electronic Com-

[32] Law on Free Access Information of Public Importance, (Zakon o slobodnom pristupu informacijama od javnog značaja), *"Official Gazette of the Republic of Serbia"* no 124/04.

[33] Law on Registration of Economic Subjects, (Zakon o registraciji privrednih subjekata), *"Official Gazette of the Republic of Serbia"*, No. 55/04.

[34] Law on the Organizations and Responsibilities of Government Agencies against Cyber Crime, (Zakon o organizaciji i nadležnosti državnih organa za borbu protiv visokotehnološkog kriminala), *"Official Gazette of the Republic of Serbia"*, No. 61/05.

[35] Law on Protection of Personal Data, (Zakon o zaštiti podataka o ličnosti), *"Official Gazette of the Republic of Serbia"*, No. 97/08.

[36] Ministry of Public Administration and Local Self-Government, *Public Administration Reform Strategy in the Republic of Serbia – Action Plan for Serbian Public Administration Reform Implementation 2009–2012*, Belgrade, 2009, 31. See: *http://www.drzavnauprava.gov.rs/view_file. php?file_ id=463*, last visited 2 October 2009.

[37] *Cf.* D. Prlja, Legal Regulation of Electronic Government, Legal information, No. 12, Belgrade 2008, *http://www.informator.co.yu/tekstovi/pravna_1208.htm*, last visited 28 September 2009.

[38] Law on Electronic Document, (Zakon o elektronskom dokumentu), "*Official Gazette of the Republic of Serbia*", No. 51/09.

merce[39] and supporting regulation (e.g. Regulation on Electronic Offer Procedures and Procedure of Conducting Electronic Auction in Public Procurement Procedures,[40] Decision on Signing of Electronic Documents which Banks Submit to the National Bank of Serbia,[41] etc.).

The Law on Electronic Document has introduced innovation, as numerous matters have been standardized. This Law regulates the conditions and the procedure of validating an electronic document in property, administrative, judicial and other legal procedures. It regulates the rights, duties and responsibilities of companies, legal persons, entrepreneurs and natural persons, agencies, territorial autonomy bodies and local government units, which have been accredited with public administrative authority, in regard to electronic documents. As defined by this Law, an electronic document is a set of data which consists of letters, numbers and symbols, as well as graphic, sound and video recordings contained in an account, agreement, legal document or any other document written by a legal or natural person or by agencies for use in property, administrative, judicial or any other procedure before authorities, if it is electronically written, digitalized, sent, received, saved and filed into electronic, magnetic, optical or any other medium. An electronic document can not be doubted for its validity and evidence strength just because it is in electronic form (Art. 4, Para. 1).[42] The conception of an electronic document was standardized by the Law on Electronic Signature and defined as a document in electronic form used in legal documents and in conducting legal affairs, as well as in administrative, judicial and other procedures before authorities (Art. 2, Para. 1, Item 1).[43]

If legal norms require a written form as a condition for the validity of a legal document, conducting legal affairs or for another legal activity, a proper electronic document is to be signed by a qualified electronic signature in accordance with the law which regulates electronic signature. Exceptions occur with legal documents or affairs, which by means of some specific law explicitly mandate the use of an autograph signature on

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[39] Law on Electronic Commerce, (Zakon o elektronskoj trgovini), "*Official Gazette of the Republic of the Republic of Serbia*", No. 51/09.

[40] Regulation on Electronic Offer Procedures and Procedure of Conducting Electronic Auction in Public Procurement Procedures (Pravilniku o načinu postupanja sa elektronskim ponudama i načinu sprovođenja elektronske licitacije u postupcima javnih nabavki), "*Official Gazette of the Republic of Serbia",* No. 50/09.

[41] Decision on Signing of Electronic Documents which Banks Submit to the National Bank of Serbia (Odluka o elektronskom potpisivanju dokumenata koje banke dostavljaju Narodnoj banci Srbije), "*Official Gazette of the Republic of Serbia* ", No. 28/09.

[42] Law on Electronic Document, (Zakon o elektronskom dokumentu), "*Official Gazette of the Republic of Serbia* ", No. 51/09.

[43] Law on Electronic Signature, (Zakon o elektronskom potpisu), *"Official Gazette of the Republic of Serbia*", No. 51/04.

paper documents (e.g. legal documents used for transfer of property rights on real estate).

An electronic document, originally created in electronic form, is considered to be the original. A confirmation on the receipt of an electronic document is proof that the document has been received by the recipient. Each received electronic document is considered to be a specific document, except if the same document has been received many times and the recipient had known that or must have known the document was the same.

However, there exist discrepancies in regard to the use of electronic documents and electronic signatures in Serbian legislation. For example, according to the present Serbian Law on General Administrative Procedure,[44] "petition" (Art. 51), means 'request', 'proposal', 'application', 'complaint', 'appeal' or 'any other communication by which citizens or legal persons address the authorities'. In administrative procedures in Serbia 'a petition can be submitted directly to the agency or posted in a written form or it can be orally dictated'.[45] *Sticto sensu*, this would mean that electronic documents could not be used in administrative procedures, as the Law on General Administrative Procedure contains no provisions prescribing this.

However, this situation is overcome by a significant innovation introduced by the Law on Electronic Document which regulates the matter of delivering electronic documents between the authorities and parties (Art. 10 and 11).[46] This Law prescribes that a 'petition' is an electronic document created and delivered to the authorities by natural and legal persons (parties), by means of electronic mail to the electronic mail address chosen by the authorities, for the reception of electronic petitions. The authorities which receive a petition by electronic mail, without delay, notify the party on the reception of the petition. Petitions, agreements or any other documents created by the authorities may be electronically delivered to parties upon request. The authorities deliver the electronic document to a party to an electronic mail address, chosen by the party for reception of electronic documents. Delivery of electronic documents between the authorities is conducted by means of electronic mail or in other electronic form, in accordance with a specific regulation.

"There is an expressed need for enacting a law on electronic government, by means of which a unique frame for electronic government introduction in the Republic of Serbia would be determined, and starting

44 Law on General Administrative Procedure (Zakon o opštem upravnom postupku), *Official Journal of the Federal Republic of Yugoslavia,* No. 33/97.

45 For comparison, the Law on General Administrative Procedure of Montenegro (2003) contains provisions regarding "electronic petitions" (Art. 53).

46 Law on Electronic Document, (Zakon o elektronskom dokumentu),*"Official Gazette of the Republic of Serbia",* No. 51/09.

points and the acting rules of the subjects in this area would be established. Enacting the law would satisfy the need for equalized and articulate regulating of relations between the authorities, as service for service supply, and the citizens and economic subjects – the users of services."[47]

4.2. Serbian e-Government Web-Portal

The key element in introducing an effective e-government, as part of developing an information society, is the establishment of an e-government web-portal. An e-government web-portal is a location on the Internet offering electronic public services. The Serbian Government has established it e-government web-portal at "www.euprava.gov.rs".[48] This web-portal enables citizens and legal persons to satisfy some their needs for particular information and documents by means of electronic communication instead of going to an agency's office.

The services available to the citizens include: 1) tax submissions, 2) employment support, 3) social assistance (for unemployed, family aid, medical care, student stipends), 4) personal documents (passports, identification cards, driver's license), 5) construction permits, 6) motor vehicle registration (new and used), 7) police assistance (thefts etc.), 8) public libraries (catalog search), 9) register certificates (birth, marriage and death certificates, citizenship, residence), 10) school enrollment and education, 11) address change, 12) health services (council, check-ups).

The services for the economic subjects (companies) include: 1) social benefits for employed, 2) profit tax (submission, information), 3) value added tax – VAT (submission, information), 4) registering a new company, 5) statistic data submission, 6) customs declarations, 7) permits regarding environmental protection, 8) public procurement.

Citizens and legal persons requesting information, endorsements, certificates, etc., from the authorities now can use the web-portal and request public services by means of their personal 'qualified electronic certificates' by which the identify themselves electronically. Presently in Serbia, qualified certificates are being issued only by the Post Office. However, arrangements are being made for placing the electronic certificate in the chip of the new identity card.

An e-government web-portal will provide significant benefits not only for the citizens, but also for the government itself, for instance:

– reduction of the number of officers for issuing certificates, endorsements, permits, etc.;

[47] Government of the Republic of Serbia, Strategy of Development of an Information Society of the Republic of Serbia, (Strategija razvoja informacionog društva Republike Srbije), *http://www.rzii.sr.gov.yu*, last visited 28 September 2009.

[48] See: *http://www.euprava.gov.rs/*, last visited 28 September 2009.

- increase of government efficiency in delivering public services,
- shortening deadlines for reply and delivery (e.g. of certificates and endorsements,
- increase of citizens and legal persons' satisfaction with government.

5. CONCLUSION

E-government reforming and modernization, based on the wide use of information communication technology (ICT), presents of the key elements of the transition of the Republic of Serbia into a modern information society. The ICT has high possibilities in terms of public government modernization and improving its public services. Introduction of high-tech information systems increases the quality of services and improves efficiency, transparency, responsibility and efficiency of government. Modern telecommunications infrastructure enables easy information circulation between government agencies, thus providing citizens and the economy with better access to public services at a lower cost.

E-government presents a crucial change of traditional manner for conducting administrative and other legal processes. This means that citizens do not need to be physically present and go from one office to another and waste time and money on collecting documents needed for processing a request. Instead of this, e-government administrative procedures, on one hand, enable the integration of geographically allocated agencies, and on the other enable the citizens to satisfy their needs efficiently (e.g. by using the e-government web-portal). E-government provides efficient, transparent and responsible public services adapted and responsive to the needs to the citizens and economy.

Concluding, we can underline some key main features of e-government.

E-government is an open government with instant access to information made available via the Internet web-portal.

E-government provides efficient public services, saving time and money both for the citizens and the government. The citizens is not a "subject", but a "customer" of e-government public services

E-government introduction needs to seriously consider legal issues that arise from new information technology and knowledge-based communications. In Serbia, the first steps regarding the e-government legal framework have recently been made (e.g. Law on Electric Signature, Law on Electronic Document, etc.). However, for e-government to be successful both political will and technical expertise is the precondition.

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THE SECURITY COUNCIL`S TARGETED SANCTIONS IN THE LIGHT OF RECENT DEVELOPMENTS OCCURRING IN THE EU CONTEXT

The shift from economic sanctions against whole nations to sanctions targeted at individuals brought a new dimension to the focus of international law: the contradiction between (procedural) standards of human rights protection and the authority of the UN Security Council acting pursuant to the UN Charter Chapter VII. The encounter of the UNSC targeted sanctions with the EU and ECHR system of human rights protection, as articulated in recent ECJ decisions, not only affirms the EU as a gradually appearing sovereign legal system with strong human rights safeguards, but also clarifies the authority of the UNSC with respect to maintaining peace and security in the world.

Key Words: *Economic sanctions. – Targeted sanctions. – Resolution 1267. – Yusuf and Kadi case.*

1. INTRODUCTION

The United Nations Security Council (referred to herein as "UNSC") has gradually adopted targeted financial and travel sanctions[1] against individuals in the past decade, which has widely been regarded as a step forward from economic sanctions[2] that it had been using against certain nations.

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[1] Such individually targeted sanctions have also been referred to as "smart" or "designer", due to the fact their negative effects are limited to the very group of individuals from which a certain threat originates, instead to a nation as a whole.

[2] The UN Charter does not contain the term "sanctions" at all, but refers to measures that may be adopted in response to identified threats to the peace, breaches of the peace and acts of aggression.

However, the narrowing of the scope of UN sanctions and putting individuals into the sanctions' crosshairs instead of whole nations has given room to wide spread criticism from the perspective of human rights protection.

For the benefit of addressing the global, and still growing, threat of international terrorism in accordance with the level of political and legal standards pertinent to developed democracies, certain distinctions among the arguments raised in connection with the targeted sanctions need to be put forth from the perspective of international law. A particular attention is paid to differentiating the objections to targeted sanctions coming from the human rights perspective between those that question of the validity of these acts *per se*, on the international law level, and those that are grounded in the standards of human rights protection of sovereign supranational and national legal systems.

2. ECONOMIC SANCTIONS

Economic sanctions can be defined as a political act which uses economic tools to exert a presure on a third State in order to obtain a change of its behavior. [3]

Within the United Nations framework, economic sanctions have been implemented by the Security Council[4] with the aim of maintaining peace, pursuant to the Chapter VII of the UN Charter. Though effectiveness of the Security Council was limited during the Cold War, the 1990s saw a great expansion in its activity.[5] Since 1990 the UN Security Council has imposed ten arms embargoes in an effort to limit local conflicts,[6]

[3] See: M. Milojević, "Sankcije u međunarodnom pravu", *Anali Pravnog fakulteta u Beogradu*, 4–6/97, 435–440; T. de Wilde d'Estamel, "The Use of Economic Tools in Support of Foreign Policy Goals: the Linkage between EC and CFSP in the European Union Framework", Discussion Paper prepared for the ECSA's Fifth Biennial International Conference, Seattle, 29 May 1997, 5; G. C. Hufbauer, B. Oegg, "Targeted Sanctions: A Policy Alternative?" *http://www.iie.com/publications/papers/paper.cfm?ResearchID=371*, last visited 15 October 2009.

[4] M. Kreća, S. Avramov, *Međunarodno javno pravo*, Beograd 1997, 11.

[5] S. Chesterman, "The UN Security Council and the Rule of Law", Public Law & Legal Research Paper Series Working Paper No. 08–57, November 2008, *http://ssrn.com/abstract=1279849*, last visited 15 October 2009. Between 1946 and 1989 the Security Council met 2,903 times and adopted 646 resolutions, averaging fewer than 15 year; in the following decade it met 1,183 times and adopted 638 resolutions, an average of about 64 per year. In its first 44 years, 24 Security Council resolutions cited or used the enforcement powers contained in Chapter VII of the UN Charter; by 1993 the Council was adopting that many such resolutions every day. *Ibid.*

[6] Iraq (1990), Yugoslavia (1991), Somalia (1992, Libya (1992), Liberia (1992), Haiti (1993), Angola (1993), Rwanda (1994), Sierra Leone (1998) and again against the Federal Republic of Yugoslavia (1998) over the Kosovo conflict.

and in total has imposed sanctions on 16 countries: Afghanistan, Angola, Eritrea, Ethiopia, Haiti, Iraq, Liberia, Libya, Rwanda, Sierra Leone, Somalia, South Africa, Southern Rhodesia (now Zimbabwe), Sudan, the Federal Republic of Yugoslavia (FRY) and the Socialist Federal Republic of Yugoslavia.[7]

Economic sanctions against whole nations have been widely criticized as both ineffective and disproportional, i.e. as inflicting too much collateral damage while producing too few results. [8] Such economic sanctions have been found to harm civilian population of the targeted country instead of the leaders of the regime in power.[9] The inadequacy of such general approach is intensified whenever sanctions are targeted at a country whose political system lacks democratic transmission of electorate's will upon political leadership, since it is hard to justify infliction of harm upon population that lacks capacity to influence the behavior of its political leaders. Oftentimes even a contrary effect can take place, so that broad economic sanctions in fact "may play into the hands of 'hardliners' in the target country....The effect would tend to entrench the target's objectionable policy."[10] Another argument against broad economic sanctions, this time grounded in legitimate interests outside the target country, would be that such sanctions put a heavy burden on international commerce, harming the international companies that transact with the target country.[11]

Criticism of the broad economic sanctions, grounded on their non-discriminative character, ineffectiveness and arbitrariness of the UNSC, led to the formation of the UN Working Group on General Issues of Sanctions, with the aim of defining a framework for imposing sanctions by the UNSC. A draft report was presented to group members in February 2001, who then decided to defer the consideration of the report by the UNSC indefinitely. The report nevertheless influenced the practice of the UNSC in several important respects, e.g. by the fact that time-limited sanctions have been introduced, excluding arbitrariness of the UNSC with respect

[7] I. Anthony, "Sanctions applied by the European Union and the United Nations", *SIPRI Yearbook 2002: Armaments, Disarmament and International Security,* 204.

[8] In his 1997 report on the work of the United Nations, Secretary General Kofi Annan stressed the importance of economic sanctions: the Security Council's tool to bring pressure without recourse to force. At the same time, Annan expressed concern because of the harm economic sanctions inflict upon civilian population, as well as for the collateral damage to third states. He acknowledged that "it is increasingly accepted that the design and implementation of sanctions mandated by the Security Council need to be improved, and their humanitarian costs to civilian populations reduced as far as possible." Annual Report of the Secretary-General on the Work of the Organization (1997), A/52/1

[9] M. D. Evans, *International Law,* Oxford University Press, 2003, 526.

[10] W.H. Kaempfer, A.D. Lowenberg, "Targeted Sanctions – Motivating Policy Change", *Harvard International Review,* Fall 2007, 69.

[11] W.H. Kaempfer, A.D. Lowenberg, 68.

to indefinite prolongation of the staying in force of sanctions against a particular country.[12]

3. TARGETED SANCTIONS

Partly in response to criticism aimed at general economic sanctions, and partly due to specific historical circumstances (impossibility to target any particular nation in retribution for terrorist attacks of 11 September 2001), targeted sanctions have appeared with greater frequency in the past decade. Their main aim has been to put pressure on specific individuals and limit their ability to undermine international peace and security, while limiting the collateral impact on general population of the country at hand. The specific forms through which the individuals who have so far been targeted by UN Security Council sanctions had threatened international peace have been financing of terrorism and proliferation of weapons of mass destruction.[13] Targeted sanctions can include travel bans, arms embargoes, or financial sanctions such as the freezing of assets[14]. Application of targeted sanctions has been intensified particularly after the terrorist attacks on the US soil on 11 September 2001.[15]

The first targeted sanctions were introduced in 1997 and 1998 against the UNITA political party in Angola. The most comprehensive system of targeted sanctions so far was put in place by UNSC Resolution 1267 of 1999, that established a sanctions regime against individuals and entities associated with *Al-Qaida*, Osama bin-Laden and/or the Taliban

[12] I. Anthony, "Sanctions applied by the European Union and the United Nations", *SIPRI Yearbook 2002: Armaments, Disarmament and International Security,* 206–210.

[13] Resolutions 1373 of 28 September 2001 on the fight against terrorism, 1540 of 28 April 2004 on the non-proliferation of weapons of mass destruction; L. Van Den Herik, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual", *Leiden Journal of International Law*, 20/2007, 798.

[14] Travel restrictions and/or freezing of financial assets concerning persons designated ('listed') by a Committee of the Security Council have been imposed by a number of UNSC resolutions in the following cases: Sierra Leone, resolutions 1132 of 8 October 1997 and 1171 of 5 June 1998; Afghanistan; Taliban, Al-Qaida, resolutions 1267 of 15 October 1999, 1333 of 19 December 2000, 1390 of 16 January 2002, 1455 of 17 January 2003, 1526 of 30 January 2004, 1617 of 29 July 2005, 1735 of 22 December 2006; Iraq, Resolution 1483 of 22 May 2003; Liberia, resolutions 1521 of 22 December 2003, 1532 of 12 March 2004; Côte d'Ivoire, resolutions 1572 of 15 November 2004, 1584 of 1 February 2005, 1643 of 15 December 2005; Sudan (Darfur), Resolution 1591 of 29 March 2005; DRC, resolutions 1596 of 18 April 2005, 1649 of 21 December 2005, 1698 of 31 July 2006; Lebanon, Resolution 1636 of 31 October 2005; North Korea, Resolution 1718 of 14 October 2006; Iran, resolutions 1737 of 23 December 2006, 1747 of 24 March 2007.

[15] I. Anthony, "Sanctions applied by the European Union and the United Nations", *SIPRI Yearbook 2002: Armaments, Disarmament and International Security*, 203.

wherever located. The system has since been modified by more than 10 UNSC resolutions.

Two modalities may be observed in respect of how UNSC resolutions that have introduced targeted sanctions so far have been structured: the above mentioned UNSC Resolution 1276 comprised a list of targeted individuals drafted by a special UNSC Committee, whereas the UNSC Resolution 1373, of 2001, adopted in the wake of terrorist attacks on 11 September 2001, did not comprise such a list, leaving the determination of the targeted individuals' identities up to the will of member states, as well as to the results of their cooperation in fighting terrorism, and at the same time versting the member states with certain monitoring and reporting obligations. The latter model, called by some authors as "autonomous listing at the lower level",[16] has not been repeated however, and may be regarded as an exception that had been provoked by the gravity of the threat of terrorism in 2001.

Another important benchmark within the body of targeted sanctions was the UNSC Resolution 1390 of January 2002, which renewed the Taliban and *Al-Qaida* blacklists started by the Resolution 1267, and which was and so far has remained the only one without direct territorial connection.

A general agreement with respect to effectiveness of targeted sanctions so far has not been reached.[17]

4. CONFLICTING PERSPECTIVES ON TARGETED SANCTIONS

It has been widely acknowledged that targeted sanctions in general successfully reduce negative humanitarian consequences of sanctions as a tool of international relations, but this regime has been receiving criticism for the manner in which individuals may come to be selected for such coercion without either transparency or the possibility of formal review.

The repositioning of the sanctions' cross hairs from nations to individuals has thus raised a chorus of criticism on the grounds of human rights, both from the academic perspective, as well as from the perspective of national and supranational legal systems required to implement such UNSC resolutions.

Leaving aside the paradoxicality of the phenomenon that targeting specific (and only few) individuals has raised considerably more theoretical

[16] M. Bothe, "Security Council's Targeted Sanctions Against Presumed Terrorists", *Journal of International Criminal Justice,* 6/2008, 545.

[17] I. Cameron, "UN Targeted Sanctions, Legal Safeguards, and the European Convention on Human Rights", *Nordic Journal of International Law,* 72/2003, 160.

objections than targeting whole nations by economic sanctions, such objections need to be understood from the perspective of international law.

The shift in targeting from whole nations to individuals meant that the theatre of the sanctions' operations moved in many cases from the purely international law environment to more complex ones, because the targeted individuals very often were nationals of states with strong standards of human rights protection. As a consequence, conflicts have been arising, both in intellectual perception and in the course of practical enforcement, between the UNSC resolutions on targeted sanctions and sovereign supranational and national legal systems required to implement such sanctions.

Besides criticism from the perspective of sovereign legal systems and their human rights protection mechanisms, a wide stream of academic thought declared the targeted sanctions inappropriate at the UN level as well.[18]

The core of the arguments pointed to the lack of due process safeguards in the UNSC treatment of individuals.[19] This line of thought is

[18] "The structure and competences of the Security Council, on the basis of the Charter, as well as of the practice, makes it impossible for the Council to deal with specific concrete cases concerning individuals. The Council is too distant from day-to-day reality in the field, and its mandate is essentialy to deal with funadamental political choices relating to a situation, to an inter-state scenario; it has to deal with broader general interests and cannot decide over issues concerning one specific individual...", "There is little doubt that the Security Council is entitled and has the ability to take policy decisions which entail more progressive or more restrictive policies concerning fundamental rights – what it cannot and should not do is to engage in actions of concrete and specific balancing of interests (and even less individual rights) in cases concerning individuals – this for two reasons: 1. there are no procedures which allow the Council to gather details about the specificities of each individual case; 2. there is no mechanism whereby individuals can exercise their rights before the Council. Of course, if such mechanisms were to be created the evaluation could be different and the prospects for human rights protection vis-a-vis Security Council measures could improve", S. Zappala, "Reviewing Security Council Measures under International Human rights Prinicples", *Course on Human Rights Law, Academy of European Law Twentieth Session, 24–25 June 2009, Reading Materials*, 1–4.

[19] I. Cameron, 173; three reports to the UNSC and Assembly General are of particular importance:

i. The European Convention on Human Rights, Due Process and UN Security Council Counter-Terrorism Sanctions, Report prepared by Iain Cameron, Council of Europe, Restricted Document, 6 February 2006;

ii. Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter, Report by Bardo Fassbender, Institute of Public International Law at the Humboldt University, Berlin, Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006;

iii. Strengthening Targeted Sanctions through Fair and Clear Procedures, White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006, 21; for a detailed outline of academic and international organizations' papers

grounded in the opinion that the UNSC is bound by certain standards of human rights protection that have become part of international law – *jus cogens*, and/or that it is bound by the standards of human rights protection that form part of the "purposes and principles of the United Nations Charter", since the Charter in Article 24(2) expressly stipulates the obligation of the UNSC to act in accordance with the latter.[20] Some authors claim that human rights standards from two UN covenants on human rights limit the UNSC although UN itself is not a party to these covenants, as well as that UNSC is bound by constitutional values and traditions common to UN members.[21]

By the same token, the apex of the criticism is usually aimed at arguing for establishment of an independent administrative mechanism for reviewing both the listing and de-listing decisions made by the UNSC. Certain authors claim even that states exist who have been showing increasing hesitation in co-operating with the *Al Qaeda*/Taliban Sanctions Committee and submitting new names for listing, precisely because of the procedural flaws.[22]

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calling for the reforms of the system of targeted sanctions in the direction of greater human rights protection see M. Bothe, 546–547; See: M. Kreća, "Apsolutno obavezujuće norme *(Jus cogens)* u međunarodnom javnom pravu", Beograd 1989; B. M. Rakić, "Fragmentation of International Law and European Law – Something new on the Western front", *Anali Pravnog fakulteta u Beogradu* 1/2009, 122–147.

[20] An excellent example of this line of approach to interpreting the UN Charter is given by D. Halberstam and E. Stein who, after pointing out to the presence of human rights protection in the purposes and principles of the Charter, admits that "Security Council has considerable leeway under Chapter VII to compromise certain interests generally protected under international law", but then proceeds to argue in favor of introduction of an evolving approach to the UN Charter: " The UN Charter, which was meant to govern in the wake of the development of stronger international legal regimes, including human rights, must be interpreted with an evolving human rights referent in mind.", concluding that this means that even though there is some truth in the idea that "peace takes precedence over justice" under the Charter, Chapter VII measures cannot legally disregard the concerns embodied in basic international human rights and humanitarian law." D. Halberstam, E. Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order", *Jean Monnet Working Paper* 02/2009, *www.jeanmonnet-program.org*, last visited 15 October 2009. A similar dynamical view on the Charter is proposed by B. Fassbender: "Following the adoption of the Charter, human rights, which at the international level in 1945 were still moral postulates and political principles only, have become legal obligations of States under international treaty and customary law." B. Fassbender,"Targeted Sanctions Imposed by the UN Security Council and Due Process Rights", *International Organizations Law Review*, 3/2006, 472.

[21] "Arguably, the core contents of the two covenants on human rights are authoritative interpretations of the UNC and are in effect binding on the Security Council as such, but this is naturally open to debate." I. Cameron, 167.

[22] L. Van Den Herik, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual", *Leiden Journal of International Law* 20/2007, 804.

A palpable outcome of the plethora of criticisms originating from the human rights perspective was the call to the UNSC, contained in a 2005 General Assembly resolution, "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions."[23] The relative insecurity surrounding the question of what is exactly the content of the human rights standards that bind the UNSC is visible from further developments in connection with the cited General Assembly call. The study commissioned thereupon found that the UNSC should provide for the individuals' right to be informed, right to be heard, right to an effective remedy and for a periodical review of the sanctions imposed. The Secretary General, in its letter to the UNSC in June 2006, adopted the framework proposed by the study, though considerably weakening it's crucial point by replacing the third right by "the right to review by an effective review mechanism". The UNSC however, in the Presidential Statement of 22 June 2006, simply reiterated the need for "fair and clear procedures."[24]

A contrasting view on the matter would be that maintenance of peace is the primary purpose of the UN Charter and the protection of human rights only a secondary one, and that the standards of human rights protection as part of customary international law cannot be deemed as having been accepted by members as subsequent practice amending the Charter.[25] This view goes hand in hand with the claim that actions of the UNSC are political in nature, which makes it sufficient that they may be addressed by employing diplomatic remedies before the Sanctions Committee and the UNSC, instead by raising legal remedies that can be brought before the UNSC.[26]

5. IMPROVEMENTS IN THE PROCEDURAL FRAMEWORK FOR ENACTMENT OF TARGETED SANCTIONS BY THE UN

Several adjustments may be noticed in more recent UNSC resolutions, all leaning towards adoption of recommendations and criticisms coming from the human rights perspective.

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23 World Summit Outcome Document, UN General Assembly Resolution 60/1, paragraph 109

24 B. Fassbender,"Targeted Sanctions Imposed by the UN Security Council and Due Process Rights", *International Organizations Law Review* 3/2006, 437–438.

25 G. Lysen, "Targeted UN Sanctions: Application of Legal Sources and Procedural Matters", *Nordic Journal of International Law* 72/2003, 295.

26 G. Lysen, 303.

A specific reference to human rights considerations was first made in Resolution 1456 of 2003, stating that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law."

Thereafter a number of resolutions established a method of review of listing decisions, as well as de-listing procedures: Resolution 1617 of 2005, Res. 1730 of 2006 and Res. 1735 of the same year. The Sanctions Committees have elaborated guidelines for such procedures: Guidelines for the Guidelines of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning *Al-Qaida* and the Taliban, adopted on 7 November 2002, as amended; and Guidelines of the Committee Established Pursuant to Resolution 1636 (2005).

The importance of the Resolution 1617 (2005) is that it was the first one that contained criteria on how the term "associated with" (*Al-Qaida*/the Taliban) should be interpreted.

Resolution 1730 (2006), because it obliged the Secretary General to establish a "Focal Point" within the Secretariat – an address to which concerned individuals can direct their request for delisting. Furthermore, Resolution 1735 (2006), among other elaborations of listing and de-listing procedures, required that a state proposing listing of an individual should state the case and provide specific information in what way the concerned individual met the criteria from the Res. 1617.[27]

6. IMPORTANT RECENT DECISIONS OF THE CFI AND ECJ

By far the most exciting encounter that the UNSC targeted sanctions resolutions experience in the course of their implementation is the one with the legal system of the European Union. Not only is the EU the focal point of the enforcement of the European Human Rights Convention, but it is also a supranational legal system right in the midst of claiming sovereignty in its own right.

Having in mind the two possible structurings of UNSC targeted sanctions that have appeared so far – one with the list of targeted individuals enacted by the UNSC and the open-ended one, which leaves the drawing of the list to member states – two groups of cases appeared on the horizon of the EU courts' practice.

[27] L. van den Herik, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual", *Leiden Journal of International Law* 20/2007, 804–805; M. Bothe, 546–547.

A somewhat easier task the European Court of First Instance (hereinafter referred to as "CFI") faced in cases *Mujaheddeen* and *Sison*[28], in which it decided upon claims by the *Mujaheddeen* organization and a Dutch resident of Philippine nationality *Sison* for delisting from lists established by the Council of the European Union pursuant to the open-ended Resolution 1373. The CFI annulled the Council's acts on grounds of failure to disclose reasons for de-listing, as well as for the deprivation of the right to fair hearing. The EU Council thereafter improved its procedure in line with the court's opinion and had the same entities listed again.[29] Since the disputed listings had been put in place by the EU Council and not the UNSC, the court in these cases was never in position to review a UNSC decision.

Consequently, more complex issues have been faced by the EU courts in two cases which involved individuals listed originally by the UNSC – *Yusuf* and *Kadi*[30] – two Swedish nationals who were both placed on the list adopted by UNSC Resolution 1333 (2000) and subsequently on an EU list annexed to Regulation (EC) No 467/2001. The theoretical approaches and actual findings of the CFI and the European Court of Justice (hereinafter referred to as "ECJ") in these cases crisscrossed each other. While the CFI held that the UNSC is bound human rights standards that form part of *jus cogens*, and that thus review of its decisions on such grounds is possible, it found that no violations of these standards have been committed in the cases at hand. Conversely, the ECJ failed to tackle the question of the enforceability of *jus cogens* either to UNSC resolutions or to EU Council decisions, but held that the EU Council's decisions, notwithstanding their grounding in UNSC resolutions, were subject to human rights standards of the EU law. Consequently, the ECJ annulled the listings, but left them in force for three additional months so that EU Council would have time to comply with the procedural requirements set forth as grounds for annulment and repeat the listings. The finding of the ECJ was that the EU Council decisions breached certain basic rights of the plaintiffs that form part of basic rights of community law – right to be heard in a fair

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[28] CFI, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*, Case T–228/02, Judgment, 12 December 2006; CFI, *Jose Maria Sison v. Council of the European Union*, Case T–47/03, Judgement, 11 July 2007.

[29] L. van den Herik, 803.

[30] CFI, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005; ECJ, *Yassin Abdullah Kadi v. Council,* Appeal against Judgment of the Court of First Instance of 21 September 2005, Case C–402/05 P, 24 November 2005; ECJ, *Yusuf and Al Barakaat International Foundation v. Council and Commission,* Appeal against Judgment of the Court of First Instance of 21 September 2005, Case C–415/05 P, 1 December 2005; R. A. Wessel, "Editorial: The UN, the EU and *Jus Cogens*", *IOLR* 3/2006, 1.

trial, right to property, principle of proportionality, right to an effective remedy.[31]

7. CONCLUSION

Notwitshtanding the first impression that the ECJ in *Kadi* has affirmed the validity of human rights standards in the context of international law and UNSC practice, it may be argued that in fact this decision also reaffirmed the present system by preserving the practice of "indirect review" on EU, or any other sub-UN level for that matter by way of analogy – which was in the case at hand done on the grounds of human rights protection on the EU, at the same time formally leaving the proper UNSC decisions free from review on such grounds.

Such a perspective effectively prolongs the traditional understanding of the role of the UNSC as the political body primarily in charge of maintaining international peace and security, while at the same time it contributes to gradual affirmation of the procedural human rights standards by affirming their applicability even to UNSC-originating acts by way of indirect review on sub-UN levels, as within the legal system of the EU in *Kadi* case.

Moreover, it should be noted that none of the EU courts has at any point implied that substantive review of the EU acts enacted in the course of implementation of UNSC resolutions was imaginable.

Since the standards of human rights protection within the Council of Europe and the EU spearhead the development of this area of law globally, it is inevitable that the adjustments made within EU legal system to UNSC acts in the course of their implementation will have strong bearing on the procedural standards that UNSC will adhere to in the future. The practical implication of such approach, consisting in the need that the UNSC acts comply with basic standards of due process if they are to be

[31] See more in: B. M. Rakić, "Evropski sud pravde između ljudskih prava i borbe protiv terorizma", *Anali Pravnog fakulteta u Beogradu* 2/2009, forthcoming; M. T. Karayigit, "The *Yusuf* and *Kadi* Judgments: The Scope of the EC Competences in Respect of Restrictive Measures", *Legal Issues of Economic Integration* 33(4), *Kluwer Law International*, Leiden 2006, 379–404; M. Bulterman, "Fundamental Rights and the United Nations Financial Sanctions Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities", *Leiden Journal of International Law* 19/2006, 753–772.; E. de Wet, "Holding the United Nations Security Council Accountable for Human Rights violations through Domestic and Regional Courts: A Case of "Be careful What You Wish For?", expert lecture on invitation of the University of Oxford Public International Law Discussion Group, 24 April 2008, Oxford; A. Ciampi, "Individual remedies Against Security Council Targeted Sanctions", *Italian Yearbook of International Law* 2008, 55–77.

implemented within legal systems with reliable human rights safeguards, can only be beneficial for the growth of scope, efficiency and acceptance of future UNSC targeted sanctions aimed at eradicating international terrorism, proliferation of weapons of mass destruction and other threats to world peace and security.

In other words, the probable influence of the EU position on the need to have procedural human rights safeguards in place when issuing targeted sanctions, coupled with already undertaken improvements of listing and delisting procedures, shall probably lead to a system that with the same level efficiency in combating global threats, but with increased transparency, accountability and compliance with human rights standards that form part of customary international law.

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BOOK REVIEWS

Dr. Biljana Djuričin*

Austrian Bankruptcy Act
(ed. A. Konecny, U. Reisch),
Neuer Wissenschaftlicher Verlag, Vienna-Graz 2008, 245 pp, + 33 pp.
Glossary, ISBN 978-3-7083-0541-7

During the last ten years bankruptcy law as a field for academic and professional concern has grown rapidly, especially in Central East and Southeast Europe. New theoretical works have been published, case studies have been produced, and new bankruptcy codes have been adopted. Law schools offer mandatory or optional courses on bankruptcy law. Consulting firms now do the same in the corporate world.

This book provides an excellent approach to the Austrian Bankruptcy Act and its role in insolvency proceedings. The book has a high practical value for practitioners and students who in professional life may be called upon to understand the historical and legal basics of Austrian bankruptcy law, to apply it in the course of bankruptcy proceedings and to observe how Austrian insolvency law has proven it in practice.

In the preface, the authors explain the importance of the EC Regulation on Insolvency Proceedings for the Member States of the European Union, which came into force on 31st May 2002. In particular, the authors explain how the Regulation provides substantive legal norms in the matter of national insolvency laws. The authors emphasize that Austria has developed a strong economy with numerous commercial connections and investments within Europe. It has led to a rise in the number of insolvency cases with international aspects. The authors write in their conclusion, „To ensure Austria's international professional standing in insolvency matters, this volume presents an English translation of the Austrian bankruptcy code, which is preceded by a brief introduction to Austrian bankruptcy law. Together, these should facilitate international cooperation for all concerned in cross-border insolvency cases relating to Austria".

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The book includes three divisions: Introduction to the Austrian Bankruptcy Law; Bankruptcy Act; and Glossary.

Professor at the University of Vienna Law Faculty Andreas Konecny, who is a well-known expert on bankruptcy law in the European Union, has written the Introduction to the Austrian Bankruptcy Law.

Chapter I, entitled as *Introduction*, has also three parts. The first covers the following areas: historical development of Austrian bankruptcy law, with the most important changes from 1993 until today; insolvency principles; the facts of insolvency that constitute inability to pay debts and over-indebtedness; insolvency objectives that are not regulated specifically; bankruptcy and composition versus unitary procedure; the activities of associations for the protection of creditors' rights and agencies for debt counselling; intensive use of information technology in bankruptcy proceedings; and international insolvency law. This chapter states in general that insolvency proceedings sometimes provide for disempowerment of the debtor in the appointment of an administrator, while at times the debtor remains in possession. On the other hand, in Austria there are two differences. First, in the bankruptcy of an enterprise the debtor loses his right to dispose of his asserts; this right is vested in the bankruptcy administrator. Secondly, in debt settlement proceedings for non-entrepreneurs the debtor remains in possession for reasons of cost. The author emphasizes that the insolvency court has the authority to decide on all essential questions. It is in accordance with the tradition in Austrian civil court proceedings to give the judge a strong and clear position that has its historical background in the unedifying experiences of earlier creditor-dominated bankruptcies.

In the second part of the chapter, the author presents a brief description of the course of bankruptcy proceedings, without going into details or specific features. It covers the following areas: commencement of proceedings; course of proceeding; substantive bankruptcy law; the procedural handling of bankruptcy proceedings; reorganization plans; and special features concerning natural persons.

The third part is concerned with statistical data on proceedings in 2007. These statistics provide information on how Austrian insolvency law has implemented itself in practice.

The subject matter of Chapter II is the Austrian Bankruptcy Act itself. The Act includes five parts: Law of Bankruptcy; Bankruptcy Proceedings; Special Provision for Natural Parties; International Insolvency Law; and Final and Transition Provisions. The text of the Bankruptcy Act is very well translated, with specific legal terms in precise and understandable English. The translation of this book is an attempt to provide a concise, jet comprehensive overview of most issues that currently affect bankruptcy practice for practitioners and students in the civil law, as well

as in the common law system. Mrs. Lecia-Ann Mettam is to be commended for her translation and editorial assistance.

Chapter III contains a Glossary concerned with translation of insolvency-specific legal terms from German to English language.

One of the merits of book for readers is also illustrated well in chapter 1, which contains questions and comments as a basis for discussion for those practising and lecturing in this area. The book contains all the necessary basic information, presented in a lucid and systematic way, with detailed and sometimes expansive footnotes for those who wish to pursue the issues further. Although the space in a review does not permit in depth analyses of each of the myriad of issues raised, the reader hopefully will find useful resources through the references and cases at the footnotes.

This is an excellent book and a most valuable source for both practitioners and students in bankruptcy law. The book is clearly written, well documented, and provides a useful and comprehensive coverage of an important topic. It should prove a welcome addition to the library of any bankruptcy law practitioner and any respectable law school.

Dr. Slobodan Panov*

Oliver Antić, *Serbia&Montenegro: Family Law and Inheritance Law (Law of Succession)*,
International Encyclopedia of Laws (ed. R. Blanpain), Kluwer Law International, Alphen aan den Rijn 2006, p. 294.

To the benefit of comparative lawyers and to the honor of the author's home institution, the University of Belgrade Faculty of Law, the study on family and inheritance law of the then united Republic of Serbia and Montenegro by Oliver Antić was released by the prestigious Kluwer Law International publishing house.

Oliver Antić has been teaching civil law at the University of Belgrade Faculty of Law since 1975, when he was elected as a junior faculty member. He is a tenured professor since 1996. Among other duties, he has served as a Dean of the University of Belgrade Faculty of Law (1998–2000), and as a Director of the Institute for Comparative Law in Belgrade (1997–2001). He spent a semester at the University of Michigan Law School (1987–1988) as Fulbright scholar. He was engaged in drafting numerous laws in Serbia, especially the existing Law on Inheritance of the Republic of Serbia (2003). Therefore, it was the right choice of the publisher to offer him to present the expertise in family and inheritance law of his country.

The author offers a complete overview of the legal system of Serbia and Montenegro, as well as of its roots and history. In the introductory part he depicts in the main lines evolution of law since the first Serbian Kingdom began to emerge in 12th century; informs the readers about the famous Serbian medieval tsar *Dushan's code* of 1349 and 1354; mentions prestigious 19th century legal tradition marked by the *Serbian Civil Code* of 1844 (belonging to the group of the first civil codifications in Europe) and *General Property Code for for the Principality of Montenegro* of 1888 modeled by famous scholar of the time, Valtazar Bogišić;

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norms of the Serbian Orthodox Church; ineffective attempts to codify civil law of the Kingdom of Yugoslavia before the Second World War. He is ending the general introduction with the development of private law and legislation after the Second World War, which had changed thoroughly the social and legal system.

The main topic of this book is, of course, development of contemporary family and inheritance law. In the first part of the book, the author analyzes present-day family law of Serbia and Montenegro, its sources and main institutions. This volume represents the first profound academic elaboration of family law of Serbia and Montenegro in English since the new Family Act of Serbia was adopted in 2005. The author offers detailed analysis of the concept of marriage, principles of marriage law, termination of marriage. He also draws attention to influences of some concepts of the common law marriage, showing his comprehensive knowlegde of comparative law. In addition, the author examines relations between parents and children, protection of the child without parental care, as well as matrimonial property relations and protection against domestic violence. This part of the book contains not only description of the new legislation, but it often takes an opposing standing, criticizing some solutions and suggesting different approach. The author offers complex analysis of all the institutions of the existing rules of family law and its differences to the earlier family law legislation, and explains characteristics of the newly introduced legal institutions (such as marital agreement, family violence, and new corpus of children rights).

In the second part of this volume, the author scrutinizes the main topics of inheritance law in a concise but overwhelming manner. The analysis starts with legal sources of inheritance law, requirements for inheriting and basic principles of inheritance law, intestate succession, the rules on wills and testamentary succession, inheritance law contracts, liability of heirs for debts, and procedural inheritance aspects. Overall impression of that part of the book is that it is writen in exceptionally analitic, knowledgeable, profound and reliable manner. No wonder, as the author has reputation of leading Serbian scholars in the field of inheritance law.

Previous books and manuals of the author written on the numerous civil law topics, gave him the highest reputation among Serbian civil lawyers, and qualified him to draft the contemporary Inheritance Act of Serbia of 2003, as well as to participate in the Commission for drafting the new Civil Code of Serbia. His abundant and influential comments of court decisions were quoted and accepted not only in Serbia, but in other ex-Yugoslav countries as well. His entire activity shaped Serbian legal system in many ways, but the field of inheritance law is the one where his contribution was the most influential. Therefore, it is understandable that

the book reveals not only the overview of the legislation, but also the author's specific approach and understanding of inheritance issues. Cautious conservatism as a permanent striving for harmony of moderation, courage and wisdom are reflected in the affirmation of the centuries-long civil law formulas and values, with moderate adjustment to the modern needs. One may say that the author's method may be compared to the scientific routine of his Belgrade forerunners, law professors such as Živojin Perić, Lazar Marković or Mihailo Konstantinović. Similarly, the author inclines to steady and firm roots of classical legal theory, applying the same stable and constant methodology both in the parts (Family law, Inheritance law, Property law and law of Obligations) and in whole (Civil law).

The book is a valuable guideline for a comparative scholar who wants to get acquainted with the legal system of Serbia and Montenegro, countries which formed a state union at the time when the legislation in inheritance matters was enacted in Serbia. Although the state union of Serbia and Montenegro is now dissolved, their legal systems – and particularly the rules of family and inheritance law – are still quite close to each other, so the book did not lose its actuality and significance. It is especially important for those interested in the Serbian legal system, as it contains a thorough analysis of Serbian contemporary family and inheritance law. The book is also precious for those who are interested in general legal topics connected to the law of inheritance and some of its controversial institutions. It shows all the intellectual capability of the author, his excellent insight in legal theory and literature, and his readiness to be innovative. Therefore, in many instances it is not only a book about the particular legal system of Serbia and Montenegro, but a unique study of fundamental issues and institutions of inheritance and family law. Therefore, this book will be very useful to those who are working on current legislations in family and inheritance law in their countries. And, of course, the book may serve as an important signpost to comparative lawyers, as the influence of the author in Southeastern European law of inheritance crosses the borders of his own country.

Dr. Vladan Petrov*

Mélanges en l'honneur de Slobodan Milacic, Démocratie et liberté: tension, dialogue, confrontation
(ed. Jean du Bois de Gaudusson et al.), Bruylant 2007, p. 1148.

There is a fine tradition among French scholars to prepare collections of papers (*Mélanges*) in honour of great professors, regarding the academic areas they were engaged in, and in which they left a lasting and significant trace. Somewhat older generation of public law professors speak with special respect of exquisite collections which were published in honour of legal science doyens, such as Carré de Malberg, Maurice Hauriou and Georges Burdeau.

In 2007 such collection of papers was prepared in honour of Slobodan Milačić, professor of the Faculty of Law in Bordeaux. Milačić was born in Belgrade, and he acquired legal education at the Faculty of Law in Bordeaux, where he was appointed Assistant Lecturer in 1968. Since 1975, Slobodan Milačić has been professor at this influential law school. He is the author and co-author of numerous studies on constitutional law and related areas, particularly of *L'intégration européenne et la révolution de l'Europe de l'Est* (1992)*, La démocratie représentative devant un défi historique* (2006), as well as the writer of almost fifty articles and several prefaces, participant in numerous of international conferences, renowned lecturer and a member of the International Academy of Constitutional Law.

Review of professor Milačić's papers shows his versatile interests. He was not concerned only with constitutional law issues, but he also covered the topics which refer to the political theory and political philosophy. Further to classical themes on constitution, elections, separation of powers, rule of law, various forms of democracy and obstacles which modern democracy encounters, Milačić gave full attention to issues of establishing constitutional democracy in the so-called post Communist

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states in a great number of his papers. Title of the collection dedicated to him confirms this fact: *Slobodan Milačić – Democracy and freedom: tension, dialogue and confrontation*.

This collection of papers leaves a strong impression not only for its volume, but also for its contents. The collection is divided into three considerable parts. The first bears the title „Constitutionalism, democratic structure and freedoms" (*Le constitutionnalisme, la construction démocratique et les libertés*); the second part is „Spaces of Democracy" (*Les espaces de la démocratie*), and the third one is named „Democracy, times and politics" (*La démocratie, le temps et le politique*).

Many authors whose names and work has significance in the recent constitutional law theory, have contributed to this volume by writing in honour of Professor Milačić. Francis Delpérée writes on freedom, Antal Adam on fundamental legal values, Phillip Lauvaux contributes on evolution of modern parliamentarism in Europe, together with nearly forty other authors (colleagues, friends and former students of Professor Milačić). There are two Serbian authors among them – Professor Pavle Nikolić, retired professsor of the University of Belgrade Faculty of Law and Dragoljub Popović, judge of the European Court of Human Rights, and a former professor at the same Faculty. Nikolić offers the analysis of judicial review of laws in the system of the rule of law (*Le contrôle juridictionnel de la constitutionnalité des lois dans le système de l'État de droit. Esquisse pour une approche globalisante*), whereas Popović examines the issue of strengthening judicial power in the new democracies (*La raison comparatiste et la liberté. Problème de renforcement du pouvoir judiciaire dans les nouvelles démocraties*).

This collection of papers is considerably diverse. It is a sheer mixture (a real *mélange*) of constitutional law, political theory, political philosophy and political sociology. There are papers dealing with classical issues such as separation of powers, parliamentarism, the British constitution; some of them are analyzing significant and somewhat new issues, such as protection of human rights and constitutional courts (comparatively and by giving examples of particular countries); also, there are papers devoted to present and future structure of the European Union, changes in hierarchy of legal norms, etc. One may particularly recommend the paper of Professor Kostas Mavrias to the experts on parliamentary law, relating to evolution of democratic principle in Greek parliamentary law. To those who (do not) know that a good Constitution presents much more than just a constitution wording, one should point to the paper by Professor Jean du Bois de Gaudusson, regarding reasons for relative failure of modern constitutionalism and the importance of constitution culture (*Constitution sans culture constitutionnelle n'est que ruine du constitutionalisme*). As often, there are some papers with titles more

interesting than their content, which is, to the certain extent, an expression of contemporary tendencies in legal (and not only legal) science, as a part of academic marketing. As the brand sells goods on the market, the title and the author's name may deceive many readers, but not the thoughtful ones.

The greatest value of this collection of papers rests in the fact that it confirms the actuality of certain universal topics, which do not lose their significance, but ask for constant care and elaboration. Democracy and freedom, as well as their relation, present lasting questions and challenges. The answers to these issues may be brilliant at certain level; however, they are usually temporary and imperfect, always subject to criticism and re-examination. Several very important innovative answers are offered in some contributions, raising the rank of the collection as a whole very high, and making it an important literature for readers of different orientation.

In addition to this general intelectual and scholarly virtue of the book, it offers two extra messages to the Serbian academic community. Firstly, it should warn younger colleagues that top-class professors, whose fruitful academic and public work was lasting for several decades, deserve to be crowned by a similar collection of papers. Unfortunatelly, this became a forgoten practice in the last decades at the University of Belgrade Faculty of Law. Secondly, this collection of papers may encourage young scholars to work hard and follow the way of Professor Milačić, starting from a small country like Serbia, up to the briliant career of a distinguished professor of Constitutional Law in France, a country which has been the cradle of modern European constitutions.

Marko Jovanović, LLM*

Rodoljub Etinski, Ivana Krstić, *EU Law on Elimination of Discrimination*,
POGESTEI Editions, Maribor-Belgrade 2009, pp. 443,
ISBN 978-86-7630-150-8

The term „discrimination" is frequently used in everyday language but, unfortunately, rare are those who fully understand its precise meaning. This is not surprising, since discrimination is a very complex phenomenon comprised of historic, sociological, religious, ethical, psychological, political, economic, legal, and many other elements.

Even if limited to only one aspect, namely the legal one, the study of elimination of discrimination still entails serious problems, as this issue is regulated by a maze of international, regional and national sources of law. Professors Rodoljub Etinski from the University of Novi Sad and Ivana Krstić from the University of Belgrade therefore undertook a particularly challenging task when deciding to present EU rules on elimination of discrimination.

Although the book *EU Law on Elimination of Discrimination* is primarily intended to serve as background literature for the course organized within the POGESTEI Tempus Master Program in European Integration at the University of Belgrade Faculty of Law, this volume goes much beyond its inital goal. Firstly, by putting the EU law on elimination of discrimination in the context of general theory of elimination of discrimination and international regulatory framework, this book represents a noteworthy theoretic contribution to the research of interdependence and interaction between various legal mechanisms designed to prevent and eliminate discrimination. Secondly, this book is suitable to be used by practitioners as a guide to correct application of the rules on elimination of discrimination, since it presents and discusses the abundant discrimination-related caseload of the world's leading adjudicatory bodies: Europe-

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an Court of Justice (and the Court of First Instance), European Court of Human Rights, International Court of Justice (and the former Permanent Court of International Justice), Human Rights Committee. Naturally, a special attention is given to the jurisprudence of the European Court of Justice and the European Court of Human Rights, as these two institutions represent the foremost European judicial authorities in the field of protection of human rights. Finally, the case studies of implementation of the EU anti-discriminatory rules into national legal systems are likely to attract a special interest as they may provide very practical and useful guidelines with respect to the way in which harmonization of the Serbian law with the *acquis communautaire* should be performed.

The book is divided into eleven chapters. Chapters I-III contain general considerations on basic principles of elimination of discrimination, organization and hierarchy of legal sources, as well as the explanations of basic terms used in this branch of law. Their purpose is also to set the scene for a more thorough research. In this part of the book the reader is introduced to, among other things, the evolution of the theoretic concept of discrimination, the difference between the rules on non-discrimination and the anti-discrimination law, the relation between equality and non-discrimination. After having acquired the basic knowledge of general theory of law on elimination of discrimination, the reader is not only prepared but also intrigued to move on to following chapters which are dedicated to the specific forms of discrimination. These chapters constitute the central part of the book.

Chapter IV focuses on prohibition of discrimination based on nationality, which was one of the first major achievements of the European integration in fight against discrimination. The prohibition of discrimination based on nationality was contained already in the first version of the Treaty establishing the European Economic Community signed in Rome in 1957. What is more, these provisions became increasingly important within the frame of free movement of workers after the great enlargement of the EU in 2004. This chapter also announces new dimensions that the prohibition of this kind of discrimination will acquire after the entry into force of the Lisbon Treaty.

Chapter V deals with the discrimination based on gender and puts a special emphasis on sociological and economic aspects of this problem: access to employment, rules governing maternity/paternity leave and part-time work, right to equal pay and social action aimed at removing the substantial lack of equality between men and women in modern societies. The authors also give a concise overview of the conserdable body of legislation and the soft law measures adopted in this area.

Chapter VI examines a highly sensitive form of discrimination – discrimination based on sexual orientation. With respect to this issue, the

authors present and explain the provisions of EU legislation regarding the prohibition of discrimination based on sexual orientation in areas of employment or occupation, family life, penal procedure, immigration and in other fields. It is important to note that, in spite of the fact that they discuss a highly controversial topic, the authors manage to remain neutral and objective at all times. They only present the content and the meaning of provisions on prohibition of this kind of discrimination, as well as the relevant case-law, and it is entirely up to the reader to form his or her opinion with respect to the desirability and pertinence of these rules.

Chapter VII is dedicated to the discrimination based on racial or ethnic origin, which has become a growing concern of the European Union due to the increased number of racist and ethnic incidents. Even though the discussion about the need for introduction of special rules on elimination of discrimination based on racial or ethnic origin commenced back in 1980, it was not until the entry into force of the Treaty of Amsterdam that the European Union actually acquired the competence to draft and apply legislative measures in this area. Notwithstanding the relatively short history of EU law on elimination of racial or ethnic discrimination, the achievements are noticeable. The authors are especially interested in the effects of the „Race Directive“, the functioning of the EU Agency for Fundamental Rights and the opeation of the EU policy framework with respect to the Roma population. Heterogeneous ethnic structure of the EU population entails religious diversity, which can also give rise to discrimination. Therefore, Chapter VIII discusses both explicit and hidden forms of discrimination based on religion or belief. The starting point of this Chapter is the explanation of the relevant provisions of the Framework Directive. A special attention is given to Islamophobia, which is considered as a serious concern in the Community of 27, since Muslims represent the second largest religious group in the EU.

Chapters IX and X are dedicated to the problem of discrimination against groups of population with special needs. Chapter IX focuses on discrimination based on disability. Bearing in mind the sociological origins of this type of discrimination, the authors put forward the thesis that the successful fight against discrimination based on disability does not only require the existence of efficient legal mechanisms but also the social action aimed at elimination of deeply rooted stereotypes according to which people with disabilities are seen as less worthy. Somewhat connected to the discrimination based on disability is the discrimination based on age, covered in Chapter X. Apart from the legal sources containing provisions against this kind of discrimination and the relevant case-law, the authors explain economic, ethical and sociological repercussions of this problem.

Finally, Chapter XI presents the mechanisms of judicial protection against discrimination and shows that right to equality is not just a *nudum*

ius but, rather, that there are efficient ways of putting hard-and-fast rules on elimination of discrimination into practice. The authors do not hide that there is still much to be done in the field of elimination of discrimination in the EU and that the situation is far from being perfect. One of the possible solutions would be the accession of the European Communities (or the European Union, after the entry into force of the Lisbon Treaty) to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In any event, a special attention must be given to the harmonization of the national laws of candidate and potential candidate States with the EU law on elimination of discrimination.

EU Law on Elimination of Discrimination should not be read only with open eyes but also with open mind. By presenting the complexity of rules on elimination of discrimination and the limits to their efficiency, this book conveys an implicit message that the battle against discrimination does not begin in Brussels, in the buildings of the European Parliament and the European Commission, nor is it fought with regulations, directives or communications. It begins in the minds of each one of us and it depends on the way we act in our respective communities and societies. Therefore, this book does not only seek to enhance theoretical knowledge of law students or to serve as a useful tool for practitioners, but also to awake or reaffirm the social awareness of all its readers. With this in mind, it is to be expected that *EU Law on Elimination of Discrimination* will be welcomed and appreciated by a large audience.

Marko Jovanović, LLM*

Miodrag Jovanović, Dragica Vujadinović, Rodoljub Etinski,
Democracy and Human Rights in the European Union
POGESTEI Editions
Maribor-Belgrade 2009, pp. 389, ISBN 978-86-7630-180-5

The former U.S. State Secretary Henry Kissinger once famously asked: "*If I want to speak to Europe, who do I call?*". This witty aphorism, however, hides a very serious and important concern. Indeed, how are EU common policies and political positions formed? This initial question is closely related to many problems and dilemmas. How are the peoples of Europe and the Member States represented in European institutions? What kind of control do they exercise over the work of their representatives? How can the democratic deficit of the EU be restituted? How does the European Union protect and promote the common values upon which it is founded: human dignity, freedom, equality and solidarity?

Understanding the political structure of the Union of 27 is obviously not an easy task. Explaining it to students who often learn about the political aspect of the European integration for the first time seems even harder. Professors Miodrag Jovanović, Dragica Vujadinović and Rodoljub Etinski should therefore be commended for their audacious decision to combine different scientific backgrounds, interests and theoretical approaches in order to present a thorough legal, political, sociological and historical analysis of the protection of human rights and the implementation of democratic principles in the European institutions and the European society. More than an ordinary textbook, *Democracy and Human Rights in the European Union* is a comprehensive and well-structured study of some of the most debated and the most controversial aspects of the political integration within the EU.

The first part of the book, *The European Union as a Democratic Polity*, examines the problem of democratic legitimacy of the EU. The starting point for the analysis of this issue is the famous Brunner case. In

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that case the constitutionality of the changes made to the German legal system after the adoption of the Maastricht Treaty was challenged before the German Constitutional Court and the arguments presented at that occasion gave rise to many interesting theoretical and conceptual debates. The first problem is how to classify the "Euro-Polity" and define its main features. It seems uncontested that the European Union is a *sui generis* polity, but the author tries to explain the peculiarities of its democratic structure in more detail, in the light of several possible approaches: EU as a mixed Commonwealth, EU of Nation-States and EU as a Cosmopolis. Alongside the democratic legitimacy of its institutional structure, an important element for establishing the European Union as a democratic polity is the existence of the European identity. The peoples of Europe are supposed to be "united in diversity", as the motto of the Union says, but this goal is far from being easily achievable in practice. Professor Miodrag Jovanović identifies and analyzes three possible concepts of building the European identity: ethnocultural, civic and pluralistic which, bearing in mind the specific nature of the EU, seems to be the most suitable one. The legitimacy of the EU as a whole can be explained by three possible models: the international organizations' type, the technocratic type and the liberal-democratic type. In the last chapter of the first part, the author comes back to the initial problem of democratic deficit of the EU, which undoubtedly exists. In spite of the uncontested success in creating an efficient legal framework for enjoyment, promotion and protection of the four fundamental freedoms, the EU must still improve its 'institutional architecture" in order to overcome the apparent lack of its democratic legitimacy.

The second part of the book explains the necessity of creation of an integrated European civil society. The author of this part, Professor Dragica Vujadinović, starts off by providing a detailed theoretical-political framework of the place and role of the civil society in contemporary political discourse. She then elucidates the very concept of civil society and presents its contemporary appearances and interpretations. However, the central chapter of this part of this book is chapter III which is dedicated to the European civil society. The author suggests that there is a strong connection between the role of civil society in contemporary world and the problem of democratic legitimacy deficit in EU. Namely, the European civil society "[...] *is a normative project based on universal human rights, on citizens' activism and public pressure attempting to control and counter-balance each possible and/or actual power-monopoly acts of the European Union's political institutions*" (p. 129). A distinction is made between institutionalized and un-institutionalized form of appearance of the European civil society, especially on the plan of their roles and methods. In any event, the civil society activism, in whichever form it appears, represents a mighty instrument for overcoming the democratic deficit of the EU and helps defending and promoting human rights and fundamental freedoms of the European citizens.

The third part of the book, written by Professor Rodoljub Etinski, discusses the problem of protection of human rights in the European Union. Until fairly recently, the European Union did not have its own legal instrument exclusively dedicated to the protection of human rights. Unlike the Council of Europe, which adopted the European Convention for Protection of Human Rights and Fundamental Freedoms already in 1950, only one year after it had been created, the action of the European Communities in the sphere of the protection of human rights for the first 30 years was limited to the existence of a few provisions in the Founding Treaties and a meagre jurisprudence of the European Court of Justice. The turning point in the constitutional protection of human rights in the European Union was the adoption of the Maastricht Treaty which introduced the respect for human rights as a guiding principle of the common policies in all three pillars of the Union. The Charter of Human Rights of the European Union, proclaimed in late 2000, is the first EU legal act solely concerned with the protection of human rights. Even though it never became legally binding, it is a very symbolic and highly influential document, which will probably become even more relevant after the entry into force of the Lisbon Treaty. Human rights are particularly important for the functioning of the European society. The author therefore extensively discusses the specific forms of protection of particular rights and freedoms: human dignity, personal freedoms, right to equality, citizens' rights and protection of parties involved in judicial proceedings.

Finally, the last part of the book deals with the issue of protection of minorities in the European Union. As a principle, the protection of minorities is put in the context of the protection of human rights in general, but certain particular characteristics of the concept of minority rights are not neglected. The protection of minority rights is especially important in the context of the enlargement of the European Union as it is contained in the so-called Copenhagen criteria for accession to the EU. Due to their specific relevance for the proper functioning of the EU and its institutions, some aspects of minority rights are discussed in more details: the immigrant integration, the protection of Roma population and the problem of linguistic minorities.

Rather than giving definite answers to the dilemmas concerning the democratic structure and legitimacy of the EU, this book invites to further thinking. Therefore, it seems that the conclusion to *Democracy and Human Rights in the European Union* is yet to be written. It will surely be contained in some of the provisions of the Lisbon Treaty once this document enters into force but, more importantly, it will also be written by all of us, present and future citizens of the European Union. After all, responsible institutions and responsible citizenship is what democracy and human rights in the European Union are all about.

STUDENT PAPERS

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CAPITAL INVESTMENTS AND THE SOVEREIGN PREROGATIVE: A DEFENSE OF INVESTOR-STATE ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCE

Since the establishment of a more globalized capital market in the late Nineteenth and early Twentieth Centuries, opportunities for private investment in developing nations have spurred a number of successful partnerships between foreign investors and host states seeking capital improvements. A challenge emerges at international law, however, in adjudicating the interests of foreign investors who have witnessed the expropriation of their investments by host states which either lack longstanding protections for private property rights or, alternatively, the political will to enforce existing investment guarantees. In light of the absence of an effective international legal regime designed to ensure that the claims of foreign investors have the chance to be fairly considered in an impartial setting, this article advocates for the expansion of the investor-state arbitration process as the most suitable means for settling disputes between private investors and the host governments which have allegedly expropriated their investments.

Key Words: *Bilateral Investment Treaty. — Arbitration. — Expropriation. — NAFTA. — Developing Nation. — Neocolonialism.*

1. INTRODUCTION

On a humid summer day in 1619, the Kingdoms of Bantam and Jacatra declared war on a small settlement on the western coast of Java.[1]

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[1] J. Crawfurd, *History of the Indian Archipelago (Vol. II)*, George Ramsay & Co., Edinburgh 1820, 515

Seeking deliverance from this fearsome attack, the settlement quickly sent word of its distress to Jan Pieterszoon Coen who arrived shortly thereafter with a fleet of sixteen battleships and 1,200 soldiers.[2] Within forty-eight hours of their arrival, Coen's forces had inflicted such a devastating defeat on the settlement's attackers that, after razing the enemy capital of Jacatra to the ground, he wrote "[i]n this manner, we have become foot and master in the territory of Java. The foundation of the long-wished-for rendezvous is laid."[3]

While the story of Coen's victory against the armies of Java would hardly stand out in the annals of military lore, his conquest is notable for one particularly unique reason. Unlike the vast majority of armed conflicts which have taken place throughout recorded history, Coen's forces did not fight under the flag of a sovereign nation such as France, The Netherlands, or Spain, but rather under the red, white, and blue banner of the Dutch East India Company—a privately owned corporation then headquartered in Amsterdam.[4] Organized to take advantage of the newly discovered Asiatic trading routes, this enterprise had the power to declare war, erect fortresses, coin money, and to appoint administrators and judicial officials to maintain order inside its territories.[5] At the height of its power and glory, it ruled all of modern Indonesia, parts of southern Africa, and numerous other provinces scattered throughout the Far East.[6]

It goes without saying that, unlike the Dutch East India Company, it would be the rare commercial enterprise today that would have the political strength and financial clout to challenge the authority of a sovereign nation—much less the ability to defeat one militarily. With the rise of the State as the principal actor in international relations, multinational commercial organizations have, to a substantial extent, become subordinated to the policies, passions, and dictates of the national governments under which they operate.[7] Whether this state of affairs is the most efficient—or even the most desirable—arrangement for facilitating transna-

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[2] P. J. Blok, *History of the People of the Netherlands*, G.P. Putnam's Sons, New York 1900, 492.

[3] *Ibid.*

[4] The company was initially established with a capital investment of approximately $2.5 million and was managed by a Governor-General—the aforementioned Coen serving in this capacity—and a council comprised of representatives "chosen indirectly from a list selected by the chief stockholders of each city." W.C. Webster, *A General History of Commerce*, Athenæum Press, Boston 1918, 155.

[5] *Ibid.*

[6] *Ibid.*, 156.

[7] M. Alagappa, T. Inoguchi, *International Security Management and the United Nations*, United Nations University Press, New York 1999, 80 (noting from a review of Twentieth Century trends that "it is clear that the nation-state is also set to underwrite the structure and define the operation of the international system beyond this century.").

tional commerce is a question best left to other minds; it is enough for one to appreciate that this is the world of international business as it currently exists.[8]

Given the primacy of the nation-state in the current geopolitical order, how is one to react when a dispute arises between a private economic concern and the host state in which it operates? Shall a company which has seen its assets expropriated without warning petition the courts of the offending government for an effective redress? What chance of recovery can an enterprise expect when the courts of its own nation dismiss its claim against the foreign government on grounds of sovereign immunity? Short of sending a fleet of sixteen battleships and 1,200 soldiers to burn the offending government's capital, what recourse does an investing party have against a host state which chooses to rewrite the rules in the middle of the game?

In light of the challenges and diplomatic headaches these disputes have the potential to create, it is the position of this article that the answer to such a dilemma can be found through agreements to submit certain disputes to binding arbitration and that, with respect to most international business transactions involving private concerns and sovereign entities, such agreements should be the preferred means of international dispute settlement. In support of this position, Part I of this article will address the historical balance of power between foreign investors and their host states, Part II will consider the rise of bilateral and multilateral investment treaties with particular regard to the North American Free Trade Agreement, Part III will respond to certain criticisms which have been leveled against arbitration as a means of international dispute settlement, and Part IV will offer concluding remarks about the state of commercial arbitration and why it is a superior alternative to litigation in national courts.

2. TIERRA, LIBERTAD, AND THE AFTERMATH OF WESTERN COLONIALISM

Since the days of Andrew Jackson, the phrase "to the victor belong the spoils" has been a popular political expression.[9] While the United States' seventh President may be credited with articulating the statement, however, the sentiment itself reflects a much older and more pervasive principle. Seen through the lens of the Global South's collective experience with foreign powers and their instrumentalities, an understanding of this principle's economic consequences and the social ramifications stemming therefrom

[8] *Ibid.*

[9] W.G. Sumner, *Andrew Jackson*, The Riverside Press, Cambridge 1899, viii.

has the potential to go a long way toward explaining much of the controversy surrounding investor-state arbitration agreements.

Using the colonization of Central and South America as archetypes for the historical experiences encountered by many of the world's developing nations, it is clear that, to a large extent, modern opposition to investor-state arbitration agreements bears a strong correlation with a much older set of political experiences lodged in the developing world's collective conscience. Consequently, before one can begin to make an accurate defense of investor-state arbitration agreements, one must first consider the history of Western influence as it has been felt by the influenced parties or, phrased differently, the history of colonialism as it has been seen through the eyes of the colonized.

While any number of notable examples such as the destruction of Tenochtitlan[10] or the conquest of Peru[11] could be considered in reviewing the history of Western colonial ventures, an illustration from the expedition of Gonzalo Ximenes de Quesada provides a particularly telling synopsis of the early relationship between the European powers and the aboriginal populations they encountered.[12] After entering the region of Cundinamarca in present-day Colombia in 1537, Quesada's forces learned of a great city named Bogota where, they were told, "emeralds and gold . . . were abundant."[13] As recorded by Hawthorne:

> A battle with the Bogota people ensued; they were defeated; but in their scattering flight they took their gold and emeralds with them. Where the treasure was hidden the Spaniards could not discover. But at length a rival chief directed them to the stronghold of the Tunja tribe, and Quesada surprised the principal Tunja chiefs in their council-house; a fight followed, and the Tunjas got the worst of it. And here, at last, was treasure in plenty: so big a pile of gold and gems that a man on horseback could be hidden behind it. Probably as much as was obtained had been carried off or concealed; but about a million dollars' worth of gold, and nearly two thousand emeralds, were collected.[14]

Although the exact monetary value of Quesada's conquest is impossible to establish with any level of precision—particularly if Hawthorne's valuation is inaccurate—a crude estimation of the value of the

[10] A.H. Noll, *From Empire to Republic*, A.C. McClurg & Co., Chicago 1903, 1.

[11] W.H. Prescott, *History of the Conquest of Peru*, Phillips, Sampson & Co., Boston 1858, 319.

[12] While recognizing that not all European nations conducted colonization efforts with the same level of zeal and punitive cruelty which many aboriginal groups experienced in Central and South America, this section is meant to highlight the overall political relationship which typically existed between the colonizers and the colonized rather than on the relative means employed by one colonizing power over another.

[13] J. Hawthorne, *Spanish America*, Peter Fenelon Collier, New York 1899, 221.

[14] *Ibid.*

gold taken from the slain Tunjan chiefs comes to more than forty-six million dollars.[15] Factoring in the loss of the emeralds and other priceless relics taken from the local populace, the amount of economic harm caused by Quesada's forces is even greater.

In view of Quesada's defeat of the Bogotan natives and the subsequent plundering of the Tunjan people, one may very well ask by what right these actions occurred. By what authority did Quesada have the power to demand the wealth of a city and, when it was not forthcoming, to destroy its inhabitants for their failure to surrender it? What justification could be provided for the massacre of a group of tribal chiefs who merely sought to protect that which was rightfully theirs? To steal from a man in Castile subjected a highway robber to an instant death sentence,[16] and yet to steal from an entire tribe in Cundinamarca warranted a Conquistador the honor of founding a new Spanish city.[17] Whatever justification Quesada's forces might have offered, the fact remained that the wealth of the native population had been taken by force and many of its guardians had been destroyed in the process—a theme which would become tragically repetitive.

Three hundred years later, the military might of the Conquistadors had been replaced by the economic power of the Dons. As described by M. Palacio Faxar in his account to the Royal Institution of Great Britain, "[t]he plantations of cocoa-trees, sugar canes, Indian corn, Jatropha manioc, banana-trees, and various sorts of peas, scarcely require the hand of man to cultivate them, for they produce almost spontaneously the most delicious fruits in abundance."[18] As for the "stronghold of the Tunja tribe" conquered by Quesada, Faxar noted that "[t]he province of Tunja contains a population of two hundred thousand persons . . . Tunja is the [provincial] capital, and still displays the pride of its founder, in the heavy magnificence of its buildings."[19] As for the owners of the plantations, it was observed that "the planters themselves, who being too proud to take the management of their plantations into their own hands, generally commit

15 Taking the price of gold per ounce as it stood at the end of the Nineteenth Century ($20.68, *see* R.P. Falkner, *Annals of the American Academy of Political and Social Science (Vol. VII)*, Philadelphia Jan.-June 1896, 37) divided by $1,000,000 approximated from Hawthorne's analysis, one arrives at an estimated 48,356 ounces of gold. Multiplied by the price per ounce of gold quoted for contracts entered on March 23, 2009 ($952.10, *see http://finance.yahoo.com/q?s=GCH09.CMX*), this produces the sum of $46,039,747.60. This assumes, of course, that Hawthorne's figures were reasonably close to being accurate.

16 J.M. White, *A New Collection of Laws, Charters and Local Ordinances of the Governments of Great Britain, France and Spain*, T. & J.W. Johnson, Law Booksellers, Philadelphia 1839, 254.

17 Hawthorne, *supra* note 13.

18 *The Journal of Science and the Arts (No. V, Vol. III)*, James Eastburn & Co., New York 1818, 338.

19 *Ibid.*

them to overseers; residing in towns, and living above their income, they seldom visit their plantations above once a-year."[20] Lest any absentee owner be burdened with the costs of running such a large-scale operation, however, it was noted that "the agriculturalist in this country has an excellent method of availing himself of the services of his slaves, almost free of any expense."[21]

With the independence movements that swept through the Western hemisphere in the late Eighteenth and early Nineteenth Centuries, a redistribution of power began to occur. In South America, Simón Bolívar—El Libertador—decreed "the confiscation of all Spanish property, and [ordered] the division of 'national property' amongst the republican army."[22] In North America, a similar confiscation was attempted some forty years earlier when, on March 1, 1778, the colonial government of Georgia "issued an act of attainder to bolster depreciating state notes by obtaining hard cash. This act set up a complex mechanism whereby the state could obtain collateral through confiscation of real and personal property of 117 [loyalists]" charged with high treason.[23] Upon taking an inventory of the confiscated assets, "the commissioners were to sell the property; all money accrued would go to the government."[24]

With the signing of the Treaty of Paris in 1783, the American Revolution came to an official end and a new period of diplomatic exchange began.[25] Even though the guns had stopped firing, however, all was not settled between the two sides. After eleven years of an uneasy peace, the United States dispatched John Jay to London to avert a second war which threatened to break out over unresolved border issues and debt settlements.[26] The Loyalists had not forgotten the indignities they had suffered when their properties had been expropriated, and now, with the full support of the British Crown, they were prepared to obtain redress.[27]

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[20] J. Bell, *A System of Geography, Popular and Scientific, or A Physical, Political, and Statistical Account of the World and its Various Divisions (Vol. VI)*, Archibald Fullarton & Co., Glasgow 1832, 50.

[21] *Ibid.*

[22] F.L. Petre, *Simon Bolivar "El Libertador"*, John Lane Co., New York 1910, 194.

[23] L. Hall, *Land & Allegiance in Revolutionary Georgia*, University of Georgia Press 2001, 69. Georgia was hardly alone in passing expropriation measures against loyalist property, however. *Ibid.*, 71.

[24] *Ibid.*, 70.

[25] Interestingly enough, as recently as November 1, 2007, the U.S. Department of State still acknowledged Article 1 of the Treaty of Paris (recognizing the independence of the thirteen former colonies) as a "Treaty in Force" between the United States and the United Kingdom. *http://www.state.gov/documents/treaties/83046.pdf*.

[26] A.W. Young, *The American Statesman*, J.C. Derby, New York 1855, 137.

[27] Quoting the sixth article of the Treaty, "it is alledged [sic] by divers British merchants and others his Majesty's subjects, that debts . . . still remain owing to them by citi-

In drafting what would become known as the Jay Treaty, the parties did not establish that one or the other nation's courts would be tasked with determining the value of the Loyalists' claims, but instead chose to include a somewhat unique provision for the ascertainment of loss:

> five commissioners shall be appointed, and authorized to meet and act in the manner following, viz. Two of them shall be appointed by his Majesty, two of them by the President of the United States . . . and the fifth by the unanimous voice of the other four; and if they should not agree in such choice, then the commissioners named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by lot, in the presence of the four original commissioners. . . . Three of the said commissioners shall constitute a board, and shall have power to do any act appertaining to the said commission, provided that one of the commissioners named on each side, and the fifth commissioner shall be present, and all decisions shall be made by the majority of the voices of the commissioners then present.[28]

As a final rebuke to the state legislatures, the Treaty also affirmed that no assets should "ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents."[29]

Unjust and impolitic though it might have been from the perspective of the foreign party, the following years nevertheless saw a widespread increase in the number of expropriations conducted by newly-empowered populist governments. In revolutionary France, the National Convention—shortly after executing Louis XVI—passed a law "sweep-

zens or inhabitants of the United States . . . [which] the British creditors cannot now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained." Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, Nov. 19, 1794, 8 Stat. 116.

[28] *Ibid.* Arbitrators chosen to serve on this panel had to swear the following oath: "I will honestly, diligently, impartially, and carefully examine, and to the best of my judgment, according to justice and equity, decide all such complaints, as under the said article shall be preferred to the said commissioners: and that I will forbear to act as a commissioner, in any case in which I may be personally interested." *Ibid.*

[29] *Ibid.* at art. X. As noted by Brower, this quasi-diplomatic settlement regime was not a true arbitration tribunal as understood in the modern sense, and, "[a]fter the claims proved much larger than expected by the United States . . . doctrinal and interpersonal quarrels broke out among the commissioners, causing the American members to withdraw, thereby bringing a halt to the proceedings in July 1799." C. Brower, II, "The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law", *Duke Journal of Comparative. & International Law* 18/2008 259, 268. Ultimately, the United States settled the remaining British claims for $2,664,000. For all of its failings, however, "[v]irtually all writers trace the modern history of international tribunals" back to it. *Ibid.*, 266.

ing away without compensation the whole feudal system, including many money dues which had been purchased, and as it was believed secured, by the most legitimate contracts."[30] Not to be outdone, the government of Prussia in turn issued an edict in 1811 "order[ing] the attachment and confiscation of all colonial, and other merchandize, which have been considered English,"[31] while the government of Egypt went even further by decreeing that "the State can expropriate non-Moslem proprietors by ordering their transfer without their consent."[32]

As the Nineteenth Century gave way to the Twentieth, the amount of commercial expropriations continued to rise. Under the rallying cry of "tierra y libertad"[33] Carranza's *revolución liberal* in Mexico nationalized the railways in 1914—exiling many of the "pernicious foreigners"[34] at the same time—while in proletarian Russia the Constituent Assembly quickly moved to "nationalize the banks and to annul the debts of the nation" while also "adopt[ing] a number of resolutions . . . abolishing 'forever . . . the right to privately own land,' [and] placing all land, mines, forests, and waters" under the control of the State in order to thwart the imperialist ambitions of foreign capitalists.[35] The ability to expropriate increasingly began to be seen as the sovereign prerogative of the State[36] and was even granted the imprimatur of the Permanent Court of International Jus-

[30] W.E.H. Lecky, H.E. Bourne, *The French Revolution*, D. Appleton & Co. 1904, 100. In addition to seizing substantial quantities of what would now be considered commercial paper, the Convention also burned castles "in order to destroy the muniment rooms and the title deeds they contained," in order to frustrate the claims of those who might claim an interest in the properties.

[31] W. Cobbett, *Cobbett's Political Register (Vol. XIX, Apr. 24, 1811)*, G. Houston, London 1811, 991. Under Articles I and II of the edict, "[a]ny ship or ships wherever built, and to whatever nation belonging, the cargo of which consists of what has been considered the produce of England, either by growth or manufacture, must in pursuance of the Continental System, be seized the moment it reaches our harbours . . . The penalty of confiscation follows such seizure without the necessity of any further legal formality . . . ." *Ibid.*, 992.

[32] Y. Bey, *The Right of Landed Property in Egypt*, Wyman & Sons, London 1885, 17. In fairness to Egypt, however, the government did "not admit that the powers that be or authorities have a right to expropriate save in the single case where the expropriation is profitable to the public interest." *Id.* Even concerning "non-Moslems," expropriation could "be ordered only for two well-defined reasons, namely: 1st. If the non-Moslems to be transferred have not themselves sufficient strength to defend themselves against the aggressions of enemies inhabiting adjacent countries. [Or] 2nd. If the Moslem State have reason to fear the treason of these non-Moslems." *Ibid.*, 18.

[33] M. Bonilla, *Diez Años de Guerra*, Imprenta Avendaño, S.A., Mazatlan 1922, 237.

[34] W. Thompson, *Trading with Mexico*, Dodd, Mead & Co., New York 1921, 63.

[35] N. Lenin, L. Trotzky, *The Proletarian Revolution in Russia*, The Communist Press 1918, 305–07.

[36] C.D. Wallace, *The Multinational Enterprise and Legal Control*, Martinus Nijhoff Publishers 2002, 976.

tice in the *Factory at Chorzów* case.[37] Against the backdrop of international state practice, the ability of national governments—often the recent victors in revolutionary struggles—to claim the spoils of foreign entities operating inside their territories began to gain an almost unquestioned, if not respectable, amount of political legitimacy.[38]

3. REDEFINING THE STATUS QUO

Recognizing the unpleasant truth that "[i]nternational law offered foreign investors little effective protection"[39] against uncompensated expropriations, capital-exporting regimes soon began to adopt measures to protect their economic nationals from the harms being inflicted by contumacious host states. In 1959, the governments of West Germany and Pakistan signed the first bilateral investment treaty and by 1989 more than 300 similar accords had been negotiated—a figure which, as of 2009, has risen to include some 2,500 treaties.[40] As described by Professor Salacuse, "the nations of the world fashioned an instrument of public international law to create rules for private foreign investments, an area that, despite western nations' claim to the contrary, has few generally accepted principles of customary international law."[41]

Central to these new instruments of public international law were provisions to submit investment disputes which could not be resolved by negotiation or consultation with the host state to independent arbitration panels for final resolution. While recognizing that host states could expropriate foreign investments as long as the expropriation was for a public purpose and was conducted in a non-discriminatory manner in accordance with due process of law—with prompt, adequate, and effective com-

[37] "After determining in 1926 that Poland's expropriation of a German-owned nitrate concern violated the terms of the convention on Upper Silesia, the PCIJ in 1928 [held that . . .] Under general international law, the measure of damages in cases of expropriation would have been based on the book value of the property at the time of its dispossession, plus interest . . . [but] while this standard might be appropriate to a legal expropriation, it did not adequately remedy an illegal one." N. Jasentuliyana, *Perspectives on International Law*, Martinus Nijhoff Publishers 1995, 25.

[38] *Ibid.* This is not to suggest that domestic concerns were never expropriated, but merely that foreign entities, particularly in capital-intensive industries, usually made for more convenient political targets. *See supra* note 34.

[39] J.W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries", *International Lawyer* 24/1990, 655, 659.

[40] *Ibid.*, 655. *See also* U.N. Conference on Trade and Development, World Investment Report 2006—FDI from Developing and Transition Economies: Implications for Development xix (2006).

[41] *Ibid.*

pensation to be made to the aggrieved party—the negotiating states also recognized that questions would inevitably arise as to whether a particular state party had satisfied its obligations.[42]

With respect to this last point, judicial experience had demonstrated that investing parties could routinely be frustrated in their attempts to obtain redress if left to the mercy of domestic legal institutions. As the U.S. Supreme Court declared in *Oetjen v. Central Leather Co.*:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'[43]

Lest a lawsuit brought against the expropriating state "imperil the amicable relations between governments," the Court ruled that "[i]t is not necessary to consider . . . the validity of the [act of the foreign government] *since the subject is not open to re-examination by this or any other American court*. The remedy . . . must be found in the courts of [the expropriating state] or through diplomatic agencies of the political department of our government."[44] Consequently, injured parties would have to sue in the courts of the expropriating nation in order to obtain redress since the Act of State doctrine prevented such a recovery in a domestic forum.

Given that the courts of the expropriating state would likely be disinclined to rule in the foreign investor's favor as a matter of practice and that courts in the investing party's home state would generally be unable or unwilling to hear the claim for reasons of international comity, the available fora in which to bring a claim—narrow though they might be—contracted even further when one considered that "[n]o supranational courts possess mandatory jurisdiction to decide the appropriate indemnity for nationalized assets."[45] Although the political branches of a government might bring diplomatic resources to bear in dealing with politically significant claims—such as the United States did with the Iran-U.S. Claims Tribunal[46]—one can imagine any number of smaller claims fall-

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[42] *See* Article 6 of the United States' 2004 Model Bilateral Investment Treaty, last visited May 1, 2009, *http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf*.

[43] 246 U.S. 297, 303–04 (1918).

[44] *Ibid.*, 304 (emphasis added).

[45] W.W. Park, *Arbitration of International Business Disputes*, Oxford University Press, Oxford 2006, 327.

[46] C.R. Drahozal, C.S. Gibson, *The Iran-U.S. Claims Tribunal at 25*, Oxford University Press, Oxford 2007, 375.

ing through the diplomatic cracks because the investing party either lacked the clout to raise the issue with its national government or because the amount in controversy was simply too insignificant to fight over.

In response to this generally troublesome state of affairs, arbitration clauses in bilateral investment treaties began to be seen as an effective compromise since they provided a forum “that is more neutral than host country courts, both politically and procedurally” while at the same time managing to avoid the political awkwardness which could come from having to repeatedly present a series of diplomatic inquiries to a foreign state over relatively small claims.[47] Furthermore, the “relative impartiality of international tribunals [would] bolster[] investor confidence and inspire[] greater certainty that the [investment] contract [would] be interpreted in line with the parties’ shared *ex ante* expectations.”[48] As a result, articles providing for the binding arbitration of disputes between investing parties and their host governments began to be incorporated more frequently in bilateral treaty negotiations—even becoming the default position of the Model Investment Treaties of the United States,[49] Norway,[50] the United Kingdom,[51] China,[52] and Brazil,[53] to name just five specific nations. Although customary international law was less than ideal for capital investors *ab initio*, diplomatic pressures could be brought to bear to force a change in this situation through bilateral treaties.[54] By providing “a way to level the playing field and to reduce the prospect of ‘hometown justice,’” arbitration clauses provided an attractive means for businesses to safeguard their assets while still allowing them to operate in states which might lack longstanding legal commitments to property rights.[55]

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47 Park, *supra* note 45, at 327.

48 *Ibid.*

49 *See supra* note 42.

50 *See* Article 15 of the Norwegian Model Treaty, last visited May 1, 2009, *http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc*.

51 *See* Article 9 of the Agreement between the U.K. and Moldova for illustration, last visited May 1, 2009 *http://www.fco.gov.uk/resources/en/pdf/pdf21/fco_ref_cm4260_moldovaippa*.

52 *See* Article 7 of the Agreement between the People’s Republic of China and the government of Albania, last visited May 1, 2009, *http://www.unctad.org/sections/dite/iia/docs/bits/china_albania.pdf*.

53 *See* Artigo 7 (Article 7) of the Agreement between Brazil and Cuba, last visited May 1, 2009, *http://www.unctad.org/sections/dite/iia/docs/bits/Brazil_cuba_por.pdf*.

54 Given the widespread use these treaties enjoy—with particular regard to the provisions governing (and defining) permissible expropriations—one could argue that customary international law has been redefined on this point. Such an argument goes beyond the scope of this article, however, and will be considered only in passing.

55 Park, *supra* note 45, at 326.

In recent years, the North American Free Trade Agreement—a tri-lateral treaty between the governments of Canada, Mexico, and the United States—has attracted a substantial amount of attention with respect to its investment chapter and, more specifically, its dispute resolution components. Under Chapter Eleven of the Agreement, private investors have "the right to seek compensation directly from a NAFTA party-government for enacting certain measures that adversely affect their investments in the host country."[56] Since the treaty has been in existence for over fifteen years and its constituent governments form the world's largest trading bloc in terms of GDP,[57] an evaluation of the NAFTA regime as a procedural case study in international investment arbitration is a useful endeavor. Looking to the text of Chapter Eleven itself, Article 1122 of the treaty holds that "[e]ach [State] Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."[58] Unless otherwise agreed by the disputing parties, "the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties."[59]

While affirming that expropriations could still occur, Article 1110 solidified the position of the United States and other capital-exporting nations by mirroring the language of the model bilateral investment treaties with respect to what constituted a permissible expropriation: "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6."[60] In

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[56] C. Tollefson, "Games Without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime", *Yale Journal of International Law* 27/2002, 143.

[57] H. Siebert, *The World Economy*, Routledge 2007[3], 307.

[58] *http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=142#A1102*, last visited May 1, 2009.

[59] *Ibid.* at art. 1123.

[60] *Ibid.* at art. 1110. While the language of Article 1110 may not appear all that remarkable at first, it is, as noted by Tali Levy, an important change in Mexico's official position on the subject. "In NAFTA, Mexico has finally accepted what is essentially the 'prompt, adequate and effective' standard of compensation for expropriated foreign properties. Although NAFTA does not specifically mention the words 'prompt,' 'adequate,' or 'effective,' NAFTA's expropriation provision requires compensation on the terms traditionally demanded by the United States. This standard has been asserted by the United States, and refuted by Mexico, since the 1938 exchange of diplomatic notes in response to the Mexican expropriation of U.S.-owned property. The fact that Mexico acceded, some fifty years later, to U.S. terms illustrates changing global economic realities and Mexico's interest in making concessions to attract U.S. investment." T. Levy, "NAFTA's Provision

the event a foreign enterprise believed its rights had been violated in some manner by one of the NAFTA parties, it could, after satisfying the conditions precedent under Article 1121, "submit to arbitration under [Article 1116] a claim that another Party has breached an obligation . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach."[61]

In the case of *Metalclad Corp. v. United Mexican States*,[62] an American corporation constructing a hazardous waste landfill in the Mexican state of San Luis Potosi put NAFTA's arbitral procedures to the test when it alleged that the Mexican government had unlawfully expropriated its investment.[63] After securing the personal support of the governor of San Luis Potosi and the necessary construction permits from the National Ecological Institute to construct the aforementioned landfill, Metalclad's progress was thwarted when the municipality of Guadalcazar denied it a local construction permit.[64] Choosing to rely "on the apparent acquiescence of government officials," however, Metalclad "continued with the construction of the landfill for five months until Guadalcazar issued a stop-work order, claiming that Metalclad did not have the necessary municipal building permit."[65] Since "federal officials . . . had assured it, prior to the order, that no such municipal construction permit was necessary," Metalclad believed it had the right to proceed with the landfill's construction, but "was ultimately obstructed by state and local officials, as well as demonstrators."[66]

"After attempting to resolve the issue through negotiation, Metalclad filed a claim under NAFTA, alleging that the Mexican government

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for Compensation in the Event of Expropriation: A Reassessment of the 'Prompt, Adequate and Effective' Standard", *Stanford Journal International Law* 31/1995, 424.

[61] *See supra* note 58. Claims are prohibited, however, "if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach . . . or damage." *Ibid.*

[62] *ICSID Rev.-Foreign Investment Law Journal* 16/2001, 179.

[63] B. Olsen, "International Local Government Law: The Effect of NAFTA Chapter 11 on Local Land Use Planning", *Brigham Young University International Law & Management Review* 4/2007, 65. As noted by Olsen, "[t]he *Metalclad* case came under the jurisdiction of NAFTA because COTERIN [a Mexican corporation responsible for actually managing the project] was a subsidiary of Metalclad, a U.S. corporation." *Ibid.*

[64] *Ibid.*, 65.

[65] *Ibid.*, 66.

[66] *Ibid.* While the casual observer might argue that Metalclad's business posture and its decision to continue with the landfill's construction could appear to have been unjustified in light of the municipality of Guadalcazar's opposition and repeated denials of the "necessary" paperwork, Metalclad's position does not appear to have been entirely without support since "[t]he [federal] officials dismissed the order of the municipality and reassured Metalclad that it had all the necessary permits to go forward on its landfill project." *Ibid.*

had unlawfully expropriated its investment."[67] At the heart of its argument was the assertion that, by prohibiting it from completing the landfill and thereby depriving it of the benefit of its operation, the Mexican government had "taken a measure tantamount to expropriation," so that compensation was due under Article 1110.[68] After hearing the contentions presented by both sides, the arbitral tribunal agreed with Metalclad's position and "opined that expropriation under Article 1110 includes not only an 'outright seizure' of property, but also 'covert or incidental interference with the use of property.'"[69] In a significant decision for capital investors, Metalclad—a private economic entity—was awarded an enforceable judgment against a sovereign nation which was obtained without having to resort to endless litigation in either the Mexican courts or those of the United States.[70]

Although *Metalclad* is but one of the many cases which could be cited for the principle that states have some implicit duty to compensate foreign investors when an expropriation has occurred,[71] its true significance comes from the recognition that multilateral investment treaties can offer an effective mechanism for dispute resolution which would ordinarily be unavailable to private parties.[72] With the political fortunes of capital-importing states shifting during the decolonization era to a position of relative national strength vis-à-vis foreign investors—as opposed to their positions of relative weakness and exploitation under the colonial system—the potential for legitimate foreign investments to be harmed through populist redistributions took on a risk which was historically less likely to have occurred. Rather than being entirely at the mercy of the expropriating nation, however, investor-state arbitration proceedings offered investors a viable way to ensure that their claims had a fair chance of being equitably considered.

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67 *Ibid.*

68 *Ibid.* Under American law, this action would have been appropriately categorized as a regulatory taking. *Ibid.*, 65.

69 *Ibid.*, 66. This is an admittedly simplified account of the *Metalclad* decision, but it is the form of the resolution rather than its particular factual substance that is of greatest interest in the immediate instance.

70 It should be noted that "[t]he *Metalclad* tribunal's decision was partially set aside by the British Columbia Supreme Court in Canada, which has jurisdiction to review arbitration decisions when the legal seat of arbitration is in British Columbia. The court rules that the tribunal had improperly imposed a requirement of 'transparency' into Chapter 11 of NAFTA . . . [but] the court did not set aside the tribunal's separate finding that the Ecological Decree was an expropriation." *International Investment Law, Understanding Concepts and Tracking Innovation*, OECD Publishing 2008, 155.

71 Keeping in mind, however, that "[t[here are few if any issues in international law today on which opinion seems to be so divided as the limitations on the state's power to expropriate the property of aliens." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

72 *See supra* note 45.

4. CRITICS, CRITICISMS, AND REPONSES THERETO

In light of the sweeping changes investment treaty arbitration clauses have made to the relational status of capital investors vis-à-vis their sovereign hosts, it is unsurprising that various interest groups and affected parties would protest what they might regard as an unfavorable shift in the socioeconomic winds. While one may readily concede that investor-state arbitration agreements do not offer the perfect solution to every problem and that—like any traditional form of dispute resolution—the process is not entirely free of error, it is the opinion of this author that, in view of the unique challenges investor-state arbitration provisions were originally designed to solve, it is still the best method for resolving disputes between foreign investors and their host states. As such, this section will address many of the common criticisms which have been leveled against arbitration as a means of international dispute settlement so that one might better understand the controversy surrounding its use and why it is nevertheless the superior means of conflict resolution in the investment context.

Before delving into the specific objections critics have voiced against the investor-state arbitration process, it is important to recognize that all criticisms are not created equal. While some commentators have offered substantive policy recommendations designed to provide practical solutions to investment arbitration's perceived inadequacies,[73] others have resorted to the use of half-truths, factually-unsupported assertions, and politically-charged innuendo to attack a process which they do not view as being legitimate without offering any alternative—let alone superior—solutions. Although this section will examine to an extent the diatribes and misinformation circulated by the latter, it will focus primarily on responding to the substantive policy critiques and commentary offered by the former.

It should also be noted as another analytical caveat that since the earliest days of the industrial era, capital investments have generally been seen as either one of the greatest engines of social progress,[74] or alternatively, as one of the greatest tools of popular oppression.[75] While much can be said about the relative merits of either position, it cannot be denied

[73] For a particularly articulate and well-reasoned examination of the many ways in which investor-state arbitration tribunals could be improved, see Susan D. Franck's "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", *Fordham Law Review* 73/2005, 1521.

[74] E.T. Devine, *Economics*, The Macmillan Co., New York 1902, 360 ("The accumulation of capital is essential to social progress").

[75] *Public Opinion and the Steel Strike*, Harcourt, Brace & Co., New York 1921, 290 ("Capital, through oppression, exploitation and high cost of living, is pressing harder than ever upon the rights of men.").

that these political and economic overtones still exist in some form or fashion today.[76] Thus, any critique of the criticisms made against investor-state arbitration agreements or, more abstractly, the juxtaposition of the so-called "moneyed interests" versus "the people,"[77] cannot be divorced from the historical connotations these parties necessarily bring to the table. When combined with the occasional undercurrent of popular xenophobia, such an analysis becomes even more challenging.[78]

While conceding, as mentioned before, that some criticism of investor-state arbitration agreements is entirely well-founded and deserved, a substantial portion of the commentary currently circulating in both academic circles and the popular media consists of nothing more than worst-case scenarios predicated on the irrational and the absurd. In an essay written by Guillermo Aguilar Alvarez and William W. Park, it was noted that a publication sponsored by Ralph Nader's "Public Citizen's Global Trade Watch":

> referred to [a] possible extension of a NAFTA provision permitting "foreign corporations to sue the federal government in secret tribunals, demanding our tax dollars as payment for complying with U.S. health, safety, and pollution laws." The advertisement continued that foreign manufacturers of toxic chemicals could use "private courts" (i.e. arbitration) "to sue U.S. taxpayers . . . if zoning rules kept them from building a chemical plant near a school."[79]

Even though one may shudder to think of the conversations occurring in smoke-filled boardrooms across the world as the directors of foreign corporations plot devious ways to loot the national treasury after they have finished exposing local school children to carcinogenic toxins, the fact remains that under the current formulation of NAFTA's Chapter 11 provisions and similar chapters in most bilateral investment treaties, the aforementioned scenario would likely never happen. Looking to Article 1114:

> (1) Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

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[76] H.J. Walberg, J.L. Bast, *Education and Capitalism*, Hoover Institution Press, Stanford 2003, 128.

[77] J.D. Works, *Man's Duty to Man*, The Neale Publishing Co., New York 1919, 187.

[78] M. Bruno, B. Pleskovic, *Annual World Bank Conference on Development Economics*, World Bank Publications 1996, 278.

[79] G.A. Alvarez, W.W. Park, "The New Face of Investment Arbitration", in *International Commercial Arbitration: Important Contemporary Questions*, Kluwer Law International 2003, 408–09.

> (2) The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from . . . such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.[80]

While parents and school children alike may all breathe a collective sigh of relief in the face of NAFTA's Article 1114, this same interest group also released a second report designed to highlight the looming financial threat foreign investors' claims presented to the wallets of North American taxpayers. In *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy*, it was announced with the utmost solemnity that "[o]f the 15 [arbitration] cases reviewed in this report, the damages claimed by the companies add up to more than U.S. $13 billion."[81] Although this assertion was entirely correct, it should be noted that in a much more subdued follow-up report the actual value of the judgments issued against NAFTA State Parties over the Treaty's fifteen-year history was a humble $69 million—or a grand .53%—of the damages initially sought.[82]

Given that the U.S. Department of Agriculture took a $90 million direct loan write-off for its rural housing insurance fund in the 2006 fiscal year alone,[83] it would appear that fears of runaway arbitration tribunals "bankrupting" democracy "with [their] powers to award an unlimited amount of taxpayer dollars to corporations"[84] are somewhat premature. On the contrary, a review of fifty-nine arbitration claims filed under NAFTA's Chapter 11 through January 2009 revealed that only eighteen cases actually made it to the point of arbitration and, of these, only six resulted in awards against NAFTA parties.[85] Thus, rather than serving as "private courts" designed to funnel copious sums of money to foreign corporations, arbitration tribunals have instead ruled *against* the claims of foreign investors by a margin of two to one.[86]

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[80] *See http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=142#A1114*, last visited May 1, 2009. As stated in Article 1101(4), "[n]othing in this Chapter shall be construed to prevent a Party from . . . performing a function such as . . . social welfare [and . . .] health" in a manner that is not inconsistent with this Chapter. *Ibid.*

[81] *See http://www.citizen.org/documents/ACF186.PDF* at iii, last visited May 1, 2009.

[82] *See http://www.citizen.org/documents/Ch11CasesChart–2009.pdf*, last visited May 1, 2009.

[83] *See http://www.gpoaccess.gov/USbudget/fy08/pdf/spec.pdf* at 94, last visited May 1, 2009.

[84] *http://www.citizen.org/trade/nafta/CH__11/*, last visited May 1, 2009.

[85] *See supra* note 82.

[86] *Ibid.*

This record of practice also holds true in investor-state arbitration proceedings conducted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID). In a review of ninety cases concluded under the ICSID since January 2000, forty-five of these disputes were settled or otherwise disposed of by the parties, and, of the remaining forty-five in which an award of some type was rendered, a random sample of twenty of these awards indicates that state parties received favorable judgments in sixty-five percent of the decisions—again, a margin approaching a ratio of two to one.[87] Thus, while many nations, developed or developing, could face "billions and billions' of dollars" of claims which could severely impact their national treasuries[88]—even possibly leading to true fears of bankruptcy—the probability of such an award actually being rendered is comparatively small.[89]

Although the record of investor-state arbitrations suggests that critics' fears of tribunals awarding unlimited judgments to investors on the basis of frivolous claims are unsubstantiated or, at a minimum, in need of a significant probabilistic discount,[90] there are still those who criticize arbitration for its procedural nature in addition to its substantive results. In an article appearing in the Vanderbilt Journal of Transnational Law, Professor Barnali Choudhury decried what she regarded as arbitration's contribution to the "democratic deficit."[91] Arguing that "investment treaties have gradually transformed into weapons with which investors can 'attack' the acts of host states," Choudhury concluded that arbitrators "are not accountable to the public and not independent and may, therefore, be viewed publicly as illegitimate."[92]

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[87] *See http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded.*

[88] *See* S.D. Franck, "The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future", *U.C. Davis Journal of International Law & Policy* 12/2005, 49.

[89] While certainly unscientific, a statistical analysis of the aforementioned ICSID decisions suggests that the probability of any claim actually resulting in an award against a sovereign is less than eighteen percent.

[90] This is not to diminish the economic severity or harsh political impact certain judgments against sovereign parties have had on their public finances, but rather to point out that the likelihood of such devastating awards being rendered for meritless claims is in fact rather small. Although there may be the occasional decision which draws headlines for the sheer size of its award—notably the $355 million judgment awarded against the Czech Republic in 2003 which was equivalent to half its annual healthcare budget—*see* G. van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press 2007, 7, the body of evidence as reflected through NAFTA and ICSID decisions suggests that these awards should be considered to be the exception rather than the rule.

[91] B. Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", *Vanderbilt Journal of Transnational Law* 41/2008, 785.

[92] *Ibid.*, 782–819.

Ignoring for the moment that—with respect to NAFTA, at least—investment treaty arbitrations have only been used to successfully "'attack' the acts of host states" in six out of fifty-nine instances,[93] Choudhury's larger point about investor-state arbitration tribunals being undemocratic and therefore illegitimate warrants a thorough response. Looking to the belief that "correcting the democratic deficit that investment arbitration creates . . . involves concepts of legitimacy, which requires the inclusion of core democratic values in the investment arbitration process,"[94] this statement glosses over much of the unpleasant history which gave rise to the need for these agreements in the first place. As Corwin notes in his critique of the early legislatures, absent sufficient due process guarantees, "democratic values" often equated to little more than mob rule:

> [they] were prone, during the early years of our constitutional history . . . to [pass] all sorts of "special legislation" so called; that is, enactments setting aside judgments, suspending the general law for the benefit of individuals, interpreting the law for particular cases, and so on and so forth. So long, of course, as there were [foreigners] to attaint of treason this species of legislative activity had some excuse, but hardly was this necessity past than it came into great disrepute even with some of the best friends of democracy, by whom it was denounced not only as oppressive but as not properly within legislative power at all.[95]

In view of the due process protections which have existed in Western legal theory for much of the last three centuries, it is easy to forget that there are many states which do not have longstanding protections for private property rights and which may, in the absence of negotiated investment treaties, take without compensation any foreign investment the majority of the people wish to seize.[96] Thus, before demanding the inclusion of "core democratic values," it must first be established that these values include sufficient due process protections which respect individual rights and the firm rule of law.[97]

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93 *See supra* note 82.

94 Choudhury, *supra* note 91, at 807–08 (emphasis added).

95 E.S. Corwin, "The Doctrine of Due Process of Law before the Civil War", *Harvard Law Review* 24/1911, 375.

96 *See* Banco Nacional de Cuba v. Sabbatino, *supra* note 71.

97 Given that most of the uncompensated expropriations of the Twentieth Century were done by ostensibly democratic societies acting in the name of the people, *see supra* notes 33–38, it may well be argued that "core democratic values" are in fact the cause of, rather than the solution to, investor-state arbitration agreements. Thus, it is questionable that injecting *more* democratic elements into the process will necessarily address the reason for arbitration's use. Rather than automatically deferring to the principle that popular "might makes right" as articulated by some philosophical sources, *see* T. Sorell, L. Foisneau, *Leviathan After 350 Years*, Oxford University Press, Oxford 2004, 68, it could be argued that investor-state arbitration instead seeks to pursue the more Lincolnian approach

As for the arguments that "the international arbitration system enjoys a form of undemocratic supremacy"[98] and has "the potential to create significant problems for citizens' basic and most essential rights,"[99] it must not be forgotten that "[f]oreign investment constitutes the single largest source of external financing for developing countries [and a]ccordingly, *developing countries have sought ways to encourage* this form of financing from foreign investors."[100] Unlike Quesada's raid on the Tunjan chiefs or the days of slave-driven profits being repatriated by absentee plantation owners, it must be recognized that host states today make the conscious choice to enter into bilateral or multilateral investment treaties and that, before the first investor-state arbitration claim can ever be brought, state officials must negotiate the terms of the agreement, debate the merits of its provisions, and then choose to accept whatever terms they ultimately deem to be satisfactory.[101]

Consequently, although the citizens of Guadalcazar might complain that their interests were not properly consulted in deciding whether to arbitrate the *Metalclad* case, their complaint should not go against the investor-state arbitration tribunal, but rather against their federal government which determined after a substantial amount of negotiation and democratic debate that investor-state arbitration agreements were in the national interests of the Mexican people. By arguing that a system using "unelected and unappointed arbitrators is not consistent with basic principles of democracy,"[102] critics who ascribe to this view ignore the reality

of "right makes might." *See* F.D. Tandy, *An Anthology of the Epigrams and Sayings of Abraham Lincoln*, Francis D. Tandy Co., New York 1908, 4.

[98] Choudhury, *supra* note 91, at 789.

[99] *Ibid.*, 803.

[100] *Ibid.*, 779–80 (emphasis added).

[101] "[W]hen NAFTA was being negotiated, . . . [t]he business community's long-standing hesitation toward foreign litigation made it vital to bolster confidence that investors would receive a 'fair shake' in the event of controversy with the host government. . . . For Mexico to accept arbitration of investment disputes within its borders, Canada and the United States had to respect a similar dispute resolution process." Park, *supra* note 45, at 329. Although it may be argued that, rather than being the product of serious bargaining, bilateral investment treaties bear a closer resemblance to "take it or leave it" contracts of adhesion, *see* K.P. Sauvant, *Appeals Mechanism in International Investment Disputes*, Oxford University Press, Oxford 2008, 19, state parties seeking to impose unreasonable terms must be careful, lest their own treaty provisions be used against them. As noted by Alvarez and Park, "[a]s the first Chapter 11 cases were filed *against the United States and Canada*, voices began to be heard saying that investment arbitration infringes national prerogatives," the same national prerogatives, of course, which citizens in developing nations had traditionally asserted as being violated by Western claims. Alvarez & Park, *supra* note 79, at 408.

[102] One wonders what is meant by the use of the phrase "unappointed arbitrators" since, by the very framework of the investor-state arbitration process, the host state gets to appoint an arbitrator of its choosing. *See supra* note 59.

that many democratically-elected governments willfully choose to enter into such settlement regimes.

This premise that investor-state arbitration tribunals are somehow illegitimate because local governments lack the power to pass judgment on the merits of the decision is a recurring theme throughout many critics' opposition. As articulated by Andrew Shapren, "[s]uch a practice greatly undermines local control as not only is the tribunal deciding issues of local concern, but those affected cannot even represent their own interests."[103] This contention ignores, however, the fact that citizens and municipal governments have routinely been denied "local control" in matters affecting national treaty responsibilities. In *Asakura v. City of Seattle*, the U.S. Supreme Court unanimously reversed the Washington Supreme Court's ruling that the City of Seattle could pass an ordinance making it unlawful for noncitizens to operate pawnshops.[104] Finding that the ordinance in question violated the Treaty of Commerce and Navigation between the United States and the Empire of Japan,[105] the Court held:

> A treaty made under the authority of the United States 'shall be the supreme law of the land; and the judges in every state shall be bound thereby,' . . . The treaty was made to strengthen friendly relations between the two nations. . . . The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.[106]

Thus, to the extent local governments might lose the ability to pass certain regulations because an investment treaty mandates a different result, questions of democratic legitimacy should hardly be implicated since, under Article VI of the U.S. Constitution and, for illustrative purposes, Article 133 of the Mexican Constitution, treaties generally become

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[103] A.J. Shapren, "NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?", *Temple International & Comparative Law Journal* 17/2003, 348. While the instances of local parties having a chance to directly raise issues impacting their interests to arbitration tribunals are certainly few and far between, the practice of local organizations filing amicus briefs is not entirely without precedent. In the Glamis Gold matter, an arbitration case filed against the United States relating to certain open-pit mining restrictions passed in the state of California, the Quechan Indian Nation, an indigenous population whose sacred sites were near the area affected by the mining operations, was allowed to file a supplemental amicus brief with the tribunal advising it of the impact the decision would have on their tribal interests. Although it is unclear what, if any, impact this submission might have had on the tribunal's deliberative process, the mere fact that it was considered suggests a possible approach local organizations may take in the future. *See http://www.state.gov/documents/organization/75016.pdf*, last visited May 1, 2009.

[104] 265 U.S. 332 (1924).

[105] *See* 37 Stat. 1504 (Apr. 5, 1911).

[106] 265 U.S. at 341.

the supreme law of the land which trump any local government actions taken to the contrary.[107]

As for the more insidious argument that capital investment treaties and, by association, investor-state arbitration agreements, constitute a form of neocolonialist control over the economies of capital-importing nations, generalized statements demonizing investment protocols as tools of imperialist powers are susceptible to challenge on two key points. First, in viewing the neocolonialist regime as a system designed to foster economic under-development "making former dependencies still poorer,"[108] critics who claim that "economic subservience continued after the end of formal colonial rule because foreign companies maintained their domination in alliance with the new indigenous rulers," forget that, in many instances, foreign companies were the first to be dispossessed of their property in the decolonization process. In post-independence Burma, for instance, "all foreign and private national banks were nationalized on 23 February 1963 under the Nationalization of Banking Business Ordinance"[109] while in the former French West African country of Benin, nationalizations "culminat[ed] in the eventual centralization in state hands of much of the economy."[110] Thus, far from dominating local affairs through "alliance[s] with the new indigenous rulers," many foreign enterprises have instead found themselves to be the immediate targets of the new indigenous rulers.[111]

Secondly, even in states in which foreign investors were able to retain their capital investments and bilateral investment treaties were concluded with the former colony's historical parent, there are other explanations beyond the presence of foreign colonial holdouts which account for the underdeveloped state of their economies. As discussed by Godfrey Mwakikagile in his economic analysis on the subject, "[s]ince 1965, the per capita incomes of southeast Asia grew 11 times faster than those of sub-Saharan Africa. The question is why [there is] such a huge gap in economic performance between the two regions, both of which emerged from colonial rule roughly around the same time during the post-World War II era."[112] While acknowledging the existence of a variety of reasons,

[107] Quoting Article 133 of the Mexican Constitution, "treaties . . . shall be the supreme law of the whole Union." *http://www.gob.mx/wb/egobierno/egob_1917_Mexican_Constitution*, last visited May 1, 2009.

[108] P. Burroughs, A.J. Stockwell, *Managing the Business of Empire*, Frank Cass, Portland 1998, 138.

[109] E. Kaynak et al., *Global Business, Asia-Pacific Dimensions*, Routledge 1989, 356.

[110] J. Markakis, M. Waller, *Military Marxist Regimes in Africa*, Routledge 1986, 137.

[111] *Ibid.*

[112] G. Mwakikagile, *Investment Opportunities and Private Sector Growth in Africa*, Godfrey Mwakikagile 2007, 24.

Mwakikagile continued his analysis with a comparative review of the political models and savings rates of the former Asian and African colonies. With respect to the former, it was noted that the East Asian states, "especially the most successful ones, avoided socialism. . . . Through the decades, socialism proved to be a disastrous failure round the globe, and African countries were among those which suffered the most."[113] As to the issue of personal savings, Mwakikagile noted:

> Savings is another factor which has played a vital role in the rapid economic growth of East Asian nations. Savings are needed to finance new [indigenously owned] factories and [to] provide capital for investments that stimulate economic growth. . . . national savings rates have been much higher in Asia, averaging more than 30 percent of the gross domestic product, than in Africa whose savings rate on average is about only 12 percent. . . . [a]nd many Africans are well aware of the problem. As Professor Samuel Ndomba at the University of Kisangani in Congo stated: "Our problem is that we don't save. When people get a bit of money, they just spend it to buy a beer."[114]

In a further comparison of the divergence of economic fortunes between the former East Asian and African colonies, Mwakikagile also recognized the important role a responsible bureaucratic civil service could play in fostering economic growth. Contrasting resource-poor South Korea with the resource-abundant Democratic Republic of the Congo:

> Congo became one of the poorest countries in the world under the kleptocratic regime of Mobutu. Yet it is potentially one of the world's richest even without a national culture of savings. . . . Back in the 1950's, when this country and several others in Africa were at the same income level as South Korea and while blessed with far more natural resources, it might have seemed reasonable that Africa would soon leave Asia in the dust. Now (resource-poor) South Korea has a per capita income of about $10,000 a year (1997 statistics) and (mineral-rich) Congo stands at $150 per person.[115]

Even though one cannot ignore the fact that certain cultural practices and economic connections to the parent state will continue to remain in force after a colony gains its independence—thus providing some evidentiary support for proponents of neocolonialist theory—it cannot be argued that investment treaties by themselves are singularly responsible for perpetuating the economic conditions many developing nations find themselves in. Prior to gaining independence from Britain, the territories of Singapore and Burma were primarily known for producing agricultural products such as spices in the former[116] and teak in

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[113] *Ibid.*, 25.

[114] *Ibid.*, 25–26.

[115] *Ibid.*, 26.

[116] H.N. Ridley, J.B. Carruthers, *Agricultural Bulletin of the Straights and Federated Malay States (Vol. V)*, Government Printing Office, Singapore 1906, 93.

the latter.[117] Today, Singapore—which heavily embraced foreign investment treaties after its independence—exports consumer electronics and pharmaceuticals while enjoying one of the highest standards of living in the world.[118] In contrast, Burma, a state which expropriated many of its early foreign investments and which continues to reject calls for economic reforms, is still primarily exporting teak, and, as of 2007, was tied with Somalia for the title of most corrupt regime in the world.[119]

Consequently, while critics might offer anecdotal evidence of bilateral investment treaties being used to perpetuate colonial patterns of economic exploitation, a review of states which have attained their independence within the last sixty years suggests that localized factors such as the rate of savings, the ideological philosophy of the political system, and a history of past corruption on the part of government officials contribute substantially more in determining whether two countries with the same initial level of resources will experience development or underdevelopment. Thus, while some might argue that former colonies are the target of a disproportionate amount of investment treaties which appear to render them poor and oppressed, one must remember the old adage that correlation does not automatically equal causation.

5. CONCLUSION

Although investor-state arbitration agreements may not constitute a perfect means of international dispute settlement, history has demonstrated the need for impartial adjudicatory systems and, with respect to foreign capital investments which face the risk of national expropriation, it is difficult to envision a dispute resolution regime which is superior in both process and results. As the experiences of foreign investors operating at various times in countries as diverse as the United States, France, Mexico, Russia, Prussia, and Egypt can attest, it is an easy thing for a national government to expropriate a foreign investor's property[120] and a much more difficult thing for a private entity to receive an adequate measure of compensation for it.[121]

To the extent critics of investor-state arbitration agreements attack the process for being a shadowy exercise of power by undemocratic, anti-

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[117] The London Chamber of Commerce, *The Chamber of Commerce Journal (Vol. XXVI)*, London 1907, 171.

[118] *https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html*, last visited May 1, 2009.

[119] *http://www.irrawaddy.org/article.php?art_id=8738*, last visited May 1, 2009.

[120] *See supra* notes 29–36.

[121] *See supra* note 43.

government "private courts" operating in the service of foreign corporations, the record of actual practice in the matter suggests that arbitration tribunals have a low degree of tolerance for frivolous claims and—in the rare instances foreign investors are actually awarded a judgment against a state party—the value of these judgments is usually rather small and disappointing.[122] Thus, rather than bankrupting democracy with runaway judgments, the record of investor-state arbitration tribunals suggests instead a relatively clear pattern of economic restraint.[123] Furthermore, critics who attack the arbitration process as being illegitimate due to its "undemocratic" nature forget that these agreements are not created in a vacuum but often emerge from a lengthy and contentious series of negotiations and debates orchestrated by state officials and elected national legislatures.[124]

Given the challenges capital investors face in attempting to litigate their claims in either their domestic courts or the courts of their host states, along with the fact that it would be exceedingly rare—and generally undesirable—to find a modern-day Dutch East India Company which would have the power to openly resist a host state's move to expropriate its property, investor-state arbitration agreements serve a useful purpose by providing an adjudicatory forum "more neutral than host country courts" that both parties can trust.[125] As suggested by Terrence Corcoran, investor-state arbitration agreements are valuable tools of international commerce since they can protect capital investors "from arbitrary regulation, abusive bureaucracies, banana-republic laws, and back-room protectionism—all the stuff that passes for good government" in many parts of the developing world.[126]

By forcing investors to forgo the investor-state arbitration process on account of concerns of perceived democratic illegitimacy, neocolonialist ambitions, or other unsavory historical connotations, capital-importing regimes may find themselves needlessly losing valuable investment opportunities which could have enhanced the lives of their citizens and the health of their overall economies. Investor-state arbitration agreements may not be perfect, but given the historical events which produced the need for them, they nevertheless serve a critically-important role in international commerce which should not be derogated on account of ill-conceived majoritarian fears or unsubstantiated economic rumors. Rather than viewing investment treaties as a means of extorting wealth from a

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[122] *See supra* note 82.

[123] *Ibid.*

[124] *See supra* note 101.

[125] *See supra* note 47.

[126] T. Corcoran, "Chapter 11: It Works", *National Post*, Apr. 11, 2000, at 1, LEXIS, News Group File.

native population à la Gonzalo Quesada, host states should instead view the process as a means of obtaining a lower overall cost of capital in exchange for providing foreign investors with the assurance that, in the event of a dispute, their claims will be adjudicated by impartial third parties beholden to neither side's exclusive interest.

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