International Arbitration: Selected Preliminary Topics

Submitted By

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As a public international lawyer, more accustomed to the subtleties and sometimes the schizophrenic niceties of this branch of Law, I will appear to you as an alien amidst private international lawyers and International Commercial Arbitration specialists. Hence, I will start by begging your pardon if my exposé should turn out to be not in synchrony with regard to some of the main topics of the colloquium.

A. *International Arbitration, notably as opposed to other means of dispute settlement*

From the outset, we are thus bound to circumscribe our field of investigation. Lest to surprise and deceive the audience, we have to stress that we will deal exclusively with international, better, interstate arbitration, leaving aside, to other and more competent speakers, matters relating to non-state international arbitration. In the same vein, we will not discuss, due to time constraint, of international arbitration between International (say: Intergovernmental) Organizations, the latter being subjects of Public International Law can likely enter, albeit not very often, into commercial transactions and thus experience litigation arising therefrom.

According to Article 2 § 3 of the United Nations Charter, sometimes referred to as the material constitution of the International Community, States are under the obligation to settle their disputes by way of peaceful means[1].

Admittedly International Arbitration represents one of the oldest means of dispute settlement which are generally divided into two categories, namely the jurisdictional *and* non-jurisdictional means. The criterion lies in the presence or lack of the jurisdictional aspect of dispute settlement. As this term – "iuris-dicere" -, of Latin roots, easily denotes, jurisdiction means "to say the Law". What is then relevant is the rôle of the Law in the solution which is adopted in order to settle the litigation[2]. Jurisdictional means are those means, roughly speaking *arbitral* and *judicial*, which rest on positive law, for the settlement of dispute. In short, the solution is founded on applicable law. On the contrary, non-jurisdictional means refer, by way of negative definition, to those means which are not based, entirely or partially, on applicable law in order to solve the dispute. Among those means, also known in public

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(1) North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark: Federal Republic of Germany/Netherlands), Judgement of 20 February 1969: *I.C.J. Reports 1969*, § 87, pp. 47-48: "As the Permanent Court of International Justice said in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex,* the judicial settlement of international disputes "is simply an alternative to the direct and friendly settlement of such disputes between the parties" (P.C.I.J., *Series A, No. 22,* at p. 13). On defining the content of the obligation to negotiate, the Permanent Court, in its Advisory Opinion in the case of *Railway Traffic between Lithuania and Poland,* said that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate did not imply an obligation to reach agreement (*P.C.I.J., Series A/B, No. 42,* 1931, at p. 116)".

(2) "The Tribunal's duty is to state the law", Saudi Arabia *v.* Arabian American Oil Company (ARAMCO), Arbitral award of August 23rd, 1958, *International Law Reports*, vol. 27 (1953), p. 148.

international law language as political or diplomatic means, we can enumerate: direct negotiation between the parties, good offices, mediation, conciliation and, as Article 33 of the United Nations Charter recites, "other peaceful means of their [the Parties] choice".

Before focussing on Arbitration, we would like to spend some words on non-jurisdictional means so as to reveal the differences between the two groups. With this aim, we should start by discussing of "conciliation" which, being nonetheless legally distinct from arbitration, it displays some similarities. Given its importance and its flexible way of operation, this means of dispute settlement is often stipulated in recent international treaties. To mention only one, the 1965 Washington Convention establishing the ICSID (International Centre for Settlement of Investment Disputes) whose articles 34 and 35 envisage a Conciliation proceeding:

"It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties"[3]

In this respect, this definition, relevant for investment disputes arising between States and between States and individuals or corporations alike, is consistent with other general definitions of conciliation applicable to public international law disputes. Main features are: a) the intervention of a Third (the conciliator); b) the non-binding character of the outcome of the proceedings (thus aptly labelled as "recommendations"), unless the Parties voluntarily accept them.

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[3] Article 34 of the aforementioned Convention: http://icsid.worldbank.org/ICSID/FrontServlet.

Hence, conciliation seems to enjoy a wide recognition by State practice as well as in international treaties. Indeed, international agreements do not seldom contain provisions related to this means of dispute settlement[4]. The superseded ICC Rules of Conciliation and Arbitration (replaced by the 2001 current Rules of Arbitration) contained a preamble which so recited: "Settlement is a desirable solution for business disputes of an international character. The International Chamber of Commerce therefore sets out these Rules of Optional Conciliation in order to facilitate the amicable settlement of such disputes". Likewise, articles 12 to 18 of the Euro-Arab Chambers Commerce Rules of Conciliation, Arbitration and Expertise provide for a conciliation process prior to the arbitral stage if Parties so desire.

Reviewing another means of dispute settlement, some authors purport to distinguish conciliation from the mediation. In public international law the latter finds its classical definition in a well-known text of one of the founding fathers of this branch of Law, the Swiss jurist Vattel:

"Mediation, in which a common friend interposes his good offices, frequently proves efficacious in engaging the contending parties to meet each other halfway, — to come to a good understanding, — to enter into an agreement or compromise respecting their rights, and, if the question relates to an injury, to offer and accept a reasonable satisfaction. The office of mediator requires as great a degree of integrity, as of prudence and address. He ought to observe a strict impartiality; he should soften the reproaches of the disputants,

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[4] See also: 1980 UNCITRAL Conciliation Rules enshrined in the United Nations General Assembly Resolution 35/52. The IACAC (Inter-American Commercial Arbitration Commission) has adopted the UNCITRAL Conciliation Rules which provides for a conciliation procedure prior to arbitration if parties so agree.

calm their resentments, and dispose their minds to reconciliation. His duty is to favour well-founded claims, and to effect the restoration, to each party, of what belongs to him: but he ought not scrupulously to insist on rigid justice. He is a conciliator, and not a judge: his business is to procure peace; and he ought to induce him who has right on his side to relax something of his pretensions, if necessary, with a view to so great a blessing"[5]

The distinction we have outlined between these two non-jurisdictional means of dispute settlement lies on the premises that conciliator has been empowered, most of the time, to adopt a binding decision. On the other hand, while recalling that this is not always the case, nothing in law prevent the Parties from conferring such powers to a Mediator. Therefore, regardless of the label attached to the facilitator, what counts are the powers with which he has been vested in order to carry out its task.

Last but not the least among the non-jurisdictional means we have to mention the fact-finding (or enquiry), namely a commission set up in order to establish the factual reality which dwells at the origin of the dispute. This organ aims at elucidating the veracity, the material truthfulness of the facts which form the object of the litigation. As such, one has to ask whether the fact-finding process is a genuine means of dispute settlement by itself or, instead, represents a path which could lead to it through the clarification of the material facts. In sum, fact-finding mechanism becomes instrumental for the settlement of the litigation as it helps establish the facts, paving thus the way for the application of relevant international rules. As for the other means previously

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[5] VATTEL, Emer de, *Le droit des gens ou principes de la loi naturelle*, Amsterdam, 1758, Livre II, Ch. XVIII, § 328 (translated of the edition of 1758 into English by by Charles G. Fenwick, 1916)

reviewed, consent by the Parties is generally required for this fact-finding process to be set up. Numerous examples of fact-finding commissions can be cited in public international law. One of the most famous, though an old one, is the *Dogger Bank Case* (also known as the incident of Hull), which arose between the Russians and Japanese forces just before the Tso-Shima battle. With the aim of reinforcing its Pacific Fleet against the Japanese, the Russian Government sent a naval squadron from Saint-Petersburg. On its way through the English Channel, Russian naval forces, alerted by false intelligence reports, fired on and sunk 30 English fishing boats. This incident provoked a diplomatic strife between Russia and Great Britain whose public opinion was particularly angered by the behaviour of the Russian fleet commanders who did not rescue the survivors. Great Britain, which was a political ally of Japan, couldn't but react vigorously and chased the Russian fleet till the port of Vigo in Spain where the latter was blockaded until "satisfaction" was not given. The fact-finding commission established that lack of due diligence and several errors led the Russian sailors to mistake English fishing boats for Japanese military ships and thus opened fire on them. Following these findings, Russia paid 65.000 £, but it was too late for its naval fleet to reach the Pacific Ocean and its Pacific Fleet was severely beaten at the famous Tso-Shima battle (1905).

In addition to *ad hoc* fact-finding processes, such as in the previous case, we should mention institutional frameworks like for instance the "International Fact-Finding Commission" set up by the 1st Protocol to the 1949 Geneva Conventions on international humanitarian law. The task of this organ is to:

"i) inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol;[…][6]

The Commission, whose consent to operate has been given by States upon their ratification or accession to the Protocol, is hereby empowered to submit its final recommendations to the litigant States which are not nevertheless bound by them.

More akin to commercial arbitration, we can remind one of the quickest processes of dispute settlement, i.e. the "Expertise". As for the fact-finding, the Expertise appears more as an instrument towards the dispute settlement that a means itself. The "Expertise" is carried out through the nomination by the Parties or, in the absence of agreement between them, by the ICC International Centre for Expertise itself. The ICC Rules on Expertise insist on the independence of the Expert, a feature which appears to be naturally intrinsic with that of dispute settlement through the intervention of a third party. The mandate of the Expert and the legal character of its finding are so enunciated:

"The expert's main task is to make findings in a written expert's report within the limits set by the expert's mission after giving the parties the opportunity to be heard and/or to make written submissions. Unless otherwise agreed by all of the parties, the findings of the expert shall not be binding upon the parties"[7]

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(6) Article 90 § 2 lit. c) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
(7) Article 12 § 3 of the Rules for Expertise (in force as from the 1st of January 2003) of the International Chamber of Commerce.

B. *The Concept of International Arbitration: definition, composition and international public / private arbitration*

Leaving now aside non-jurisdiction means, let us turn our attention to International Arbitration. The latter does not represent the only jurisdictional means, since judicial means are quite naturally enlisted under this label. Hence, we have to distinguish judicial means from Arbitration. Before going into the differences, it is worth to examine their similarities: a) both of them rest on the applicable law, hence they are labelled "jurisdictional"; b) binding and definitive character of the decision (be it an arbitral award or a Judgement)[8], that is its *res iudicata character*[9]; c) impartial and independence of the jurisdictional organ (be it an Arbitration tribunal or a Court) vis-à-vis the Parties[10]. Once stressed their affinities, we ought to focus on their differences: a) treaty which creates the arbitration is bilateral, as opposed to multilateral for the judicial process; b) *ad hoc* character of the arbitration, as opposed to permanent for the judicial body; c) while the rules of organisation and procedures are enshrined in the multilateral treaty and cannot be changed by the Parties involved in the litigation, the Parties which establish the Arbitration tribunal choose in an almost complete freedom

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(8) See Articles 59 & 60 of the International Court of Justice Statute and Articles 30 & 32 of the "Model Rules on Arbitral Procedure", *Yearbook of International Law Commission*, 1958, vol. II, pp. 83-88.

(9) Dubai / Sharjah Border Arbitration Case, Court of Arbitration, Arbitral Award of 19 October 1981, *International Law Reports*, vol. 91, p. 572; "According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute", Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion of July 13th, 1954: *I.C.J. Reports 1954*, p. 53.

(10) Yet, some writers concede that an Arbitration tribunal enjoys, compared to a permanent court, a lesser independence from the Parties.

these rules, including, applicable law. With regard to the permanent character, it won't be appropriate to observe that, once the Arbitration tribunal has rendered its award, its task is thus achieved; hence, the arbitration tribunal does not exist any more after having settled the dispute.

In the light of the aforementioned, we can then distinguish between two definitions of arbitration in public international law, as the Permanent Court of the International Law has since long-time made clear:

"If the word « arbitration » is taken in a wide sense, characterized simply by the wording force of the pronouncement made by a third Party to whom the interested Parties have had recourse, it may well be said that the decision in question is an « arbitral award ». This term, on the other hand, would hardly be the right one, if the intention were to convey a common and more limited conception of arbitration, namely, that which has for its object the settlement of differences between States by *judges* of their own choice and *on the basis of respect for Law* (Hague Convention for the pacific settlement of disputes, dated October 18th, 1907, Article 37)" (11)

It follows then that when we refer to arbitration, in this exposé, we intend it according to the second, narrower sense: namely a tribunal of arbitrators appointed by the Parties prior or after the dispute has arisen, and vested with the power to settle the dispute according to the law. Albeit, as regards this last feature, we will see later on that positive law does not exclude the possibility for the arbitrator to rule in accordance with "what is just and good" (see *infra* C.). The International

(11) Article 3, Paragraph 2 of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory of November 21st, 1925: *P.C.I.J. Reports B 12*, p. 26. See likewise: Dubai / Sharjah Border Arbitration Case, *op.cit.*, p. 574.

Court of Justice in her Judgment on the Qatar / Bahrain Case enshrined this definition of arbitration when she declared:

"The Court observes in this respect that the word arbitration, for purposes of public international law, usually refers to "the settlement of differences between States by judges of their own choice, and on the basis of respect for law". This wording was adopted in Article 15 of the Hague Convention for the Pacific Settlement of International Disputes, dated 29 July 1899. It was repeated in Article 37 of the Hague Convention dated 18 October 1907, having the same object. It was adopted by the Permanent Court of International Justice in its Advisory Opinion of 21 November 1925, interpreting Article 3, paragraph 2, of the Treaty of Lausanne *(P.C. I. J., Series B, No. 12,* p. 26). It was reaffirmed in the work of the International Law Commission, which reserved the case where the parties might have decided that the requested decision should be taken *ex æquo et bono* (Report by Mr. Georges Scelle, Special Rapporteur of the Commission, Document A/CN.4/113, of 6 March 1958, *Yearbook of the International Law Commission,* 1958, Vol. II, p. 2)"

By all means as every thing which is created by Man is subject to evolution. Interstate Arbitration makes no exception as it has developed since its modern inception[12]. The latter can be dated back to the famous "Alabama Arbitration" between Great Britain and the United States of America which was settled in Geneva in September 14, 1872. Even though some of the procedural rules related to international arbitration have since then evolved, its hard-core remains unchanged.

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[12] "The rules of arbitral procedure have most certainly evolved with the passing of time and modern arbitration is not the same as that at the time which saw the light of day in the Jay Treaties or which was practised in the nineteenth century", Dubai / Sharjah Border Arbitration Case, *op.cit.*, p. 575

Until the end of XIX Century there were hardly any general rules – conventional or customary - pertaining to the establishment of arbitration process. One shall have to await the 1st 1899 Peace Conference at The Hague during which the Convention on the pacific settlement of disputes was concluded. Later on the latter was revised at the 2nd Conference convened in 1907 always at The Hague. This convention, as we have previously outlined – besides regulating "good offices", mediation and inquiry – establishes the first permanent arbitral organ which still exists today, the Permanent Court of Arbitration. According to this treaty, States parties are not bound to submit their disputes to the Court, but they esteem "desirable [...] as far as the circumstances permit"[13], to have recourse to arbitration for all litigations involving the interpretation and application of international treaties. The obligation to defer international disputes to an international body, jurisdictional or not, appears for the first time in the 1919 Covenant of the League of Nations:

"The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council ..."[14]

In the light of arbitral practice for more than a century, some general features related to public international law arbitration can be delineated. Most of these rules are codified in the aforementioned 1907 The Hague Convention. Arbitration can be thus established either on *ad hoc* basis or before a permanent international body, such as, for instance, the Permanent Court of Arbitration. In the first case, the Arbitration tribunal is set up by the Parties after the litigation

[13] Article 38 of the 1907 The Hague Convention for the Pacific Settlement of International Disputes.
[14] Article 12 of the 1919 Covenant of the League of Nations.

has already arisen, through the conclusion of an arbitral agreement (*compromise*) which not only enunciates the subject matter of the dispute but also the Tribunal's composition. The arbitration agreement is nearly always, for obvious reasons, a bilateral one. On the contrary, permanent arbitral bodies are instituted by a (bilateral or multilateral) treaty according to which States Parties agree, sometimes under certain circumstances, to submit their *future* litigations to a tribunal. In both cases, the arbitration agreement contains the necessary rules on composition, procedure and powers bestowed to the tribunal.

The composition of the Arbitration tribunal reflects the conventional basis of the process: each party nominates its own arbitrator (or arbitrators) and the latter choose the third (or the fifth) arbitrator (the *umpire*)[15] who acts as the President of the Tribunal[16]. If the arbitrators fail to reach an agreement on the President, then several systems are contemplated in order to obviate to this obstacle. One of the most frequent consists in resorting to the President of the International Court of Justice who will nominate him or her. Arbitrators must fulfil the requirements requested by this same Court for her judges[17].

The procedure before an international tribunal is generally articulated in two phase, written, first, and then oral. Parties can nominate their *counsels* and are represented by their

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[15] As the etymology clearly indicates the *umpire* (from a corruption of Middle English *noumpere*, itself from Latin through French: *non paire*, namely *not a peer*) is different from its *pairs*, and, furthermore, in case of parity of votes, its cast will decide, since it's superior to that of the others arbitrators.

[16] Sometimes, the President can be chosen directly and jointly by the Parties themselves.

[17] See Article 2 of the Statute of the International Court of Justice.

agents. The oral phase, during which Parties' arguments and theses are pleaded, is directed by the *umpire*.

In addition to *pure* public international law arbitration, it is generally, albeit not completely accurately, referred by this label to other jurisdictional *transnational* phenomena such as those between States and private individuals or corporations. These arbitrations between States and non public international law persons have been multiplying since the end of World War Two. Even though, the scope of our contribution is limited *only* to Interstate International Arbitrations, we ought to spend some words on this kind of international arbitration, let only to help us to distinguish more precisely the two species.

On a chronological level, the first arbitration of this kind arouse out of an oil concession, between a State and an oil company, containing an arbitration clause providing for arbitration[18]. At that time numerous authors[19] had discussed at length on the legal nature of such a compact: was it private or *quasi* public international law agreements? Then followed a series of arbitrations related to commercial transactions, such as the supply, execution of public and private works as well as investment in a foreign country. International practice has therefore developed a more elaborated specie of contract which often envisages: a) the choice of applicable law; b) a stabilization clause by which the parties prevent the contract to be modified by any of them and thus disrupt the original balance of performances set up by it; c) an international

[18] See, for instance: Petroleum Development Ltd. *v.* Sheikh of Abu Dhabi, September 1951 (Lord Asquith of Bishopstone, Umpire), *ILR*, vol. 18 (1951), pp. 144 and ff.

[19] See: VERDROSS, A., "Quasi international agreement and international economic transactions", in *The Yearbook of World Affairs*, 1964, pp. 230 and ff.; LALIVE, J.-F., "Contrats entre Etats ou entreprises étatiques et personnes privées: développements récents", *RCADI*, vol. 181 (1984), pp. 9-284.

arbitration clause through which the parties withdraw the contract from the jurisdiction of domestic courts. In spite of the foregoing, it happens, even though less often now than in the past, that the applicable law is not clearly defined in the contract between a State and a private corporation. In these cases, arbitrators find themselves in dire straits for they cannot, on one hand, ignore that one of the Parties is a sovereign State, and, on the other, that they are faced to a commercial contract.

This happened in the *Aramco* case where the American corporation of the same name, which held oil concessions in Saudi Arabia, complained about the decision, taken by the Saudi Government, granting a right of priority for the transport of Saudi Arab oil to a shipping society herein incorporated ("Satco") – and jointly constituted with the Greek ship-owner Mr. Onassis. Hence, the legal questions submitted to the Arbitrators was that of conflicting concessions delivered by Saudi Arabia at different dates, the first with *Aramco*, and the second, with Satco. In order to settle dispute, the Arbitration tribunal had to solve the highly controversial question of applicable law to the concession agreement signed between *Aramco* and the State of Saudi Arabia on May 29, 1933.

To this effect, the Arbitration tribunal noted, on a preliminary basis, that it was not bound to apply neither Saudi Arabia laws – since the Parties had convened in the concession agreement that all disputes arising therefrom should have been deferred to a Tribunal outside Saudi Arabia[20] – nor the American law, nor the Swiss law (the arbitration took place in Switzerland) for the jurisdictional immunity from which Saudi Arabia benefited as a State[21]. For this last reason, the

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[20] Aramco case, *op.cit.*, p. 154.
[21] Aramco case, *op.cit.*, pp. 155-156.

arbitration was to be submitted to public international law. Hence, the Tribunal decided that "the governing law should coincide with the economic milieu where the operation is to be carried out"[22]. As a consequence, the Tribunal ended by saying that the Aramco concession agreement was not prejudged by the subsequent agreement concluded by Saudi Arabia with Mr. Onassis and it recalled the acquired rights of the American corporation.

C. *The requirement of Consent*

What strikes more a lawyer accustomed exclusively to municipal legal orders is the lack in the international legal order of what is called the "judicial power". In other words, there is no compulsory jurisdiction, the only obligation being that, previously enunciated, requiring the States to settle a dispute by peaceful means[23]. As we will see, however, lack of power does not means lack of function since the latter is notwithstanding exercised, even though in a different manner. In fact, since States, which are directly and indirectly the lawmakers of public international law, haven't yet established judicial power, consent of the Parties to the dispute is required. Hence, as there is no public international law rule which empowers an organ, either establishes a legal mechanism or a procedure through which disputes are settled

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[22] Aramco case, *op.cit.*, p. 167. See *infra* D.

[23] « Whereas the judicial settlement of international disputes … is simply an alternative to the direct and friendly settlement of such disputes between the Parties;" Case of the Free Zone of Upper Savoy and the District of Gex (France / Switzerland), Order of August 19, 1929: *P.C.I.J. Reports A 22*, p. 13. Likewise: "There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted", North Sea Continental Shelf Cases, *op.cit.*, § 86, p. 47.

through the arbitration process, specific consent of the Parties only can avoid this structural deficiency.

This specific consent is generally enshrined in a legal text (a juristic act) which supports the Parties' will to defer the dispute to the arbitrator; in the legal lexicon the provision inserted in a treaty purporting this consent is called "arbitration clause", or using a French word "compromis". The latter constitutes the legal base upon which the tribunal will be established. Therefore, the Parties ought to devote a special care in the drafting such an agreement. The hard-core of any "compromis" has to contain *a minima:*

(a) The undertaking to arbitrate according to which the dispute is to be submitted to the arbitrators;

(b) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;

(c) The method of constituting the tribunal and the number of arbitrators"[24]

As in the international legal order there is no "compulsory jurisdiction" but free and voluntary arbitration,

"every Special Agreement, like every clause conferring jurisdiction upon the Court, must be interpreted strictly"[25]

Furthermore, according to a well-known general principle pertaining to the exercise of the arbitral function, the Tribunal possesses what it is called the *Kompetenzkompetenz*, namely the power to determine whether it has jurisdiction, if the latter is challenged by one of the Parties. In this respect, Article 9 of the Model Rules recites:

[24] Article 2 of the « Model Rules on Arbitral Procedure », see *supra* note 8.
[25] Free Zones case, *op.cit.*, pp. 138-139

"The Arbitration tribunal, which is the judge of its own competence, has the power to interpret the compromis and the other instruments on which that competence is based"

In the notorious and leading *Aramco* case, the Arbitration tribunal reaffirmed that:

"The Arbitration Tribunal fully accepts the rule which authorizes it to be the judge of its own competence and to interpret the *compromis*"[26]

This paramount procedural rule is one of the main legacies of the aforementioned *Alabama* arbitration. This rule enshrines then an implied power bestowed upon the arbitrator and it is inherent in its function. Therefore, even if it's not mentioned, as it was the case in the Alabama litigation, it is *implied* in the arbitration's powers without which the arbitrator couldn't carry out its function.

Indeed, to submit litigation before a compulsory arbitration entails a significally substantial restriction to State sovereignty, namely its specific power of law-determination. On the contrary, if the Tribunal would make an abusive interpretation of the *Compromis* thereby widening its powers, then this could lead to an *excès de pouvoir* which can constitute a ground for invoking the nullity of the award (*infra D*).

Consent of the Parties is vested therefore with an important role, that of empowering an Arbitration tribunal to settle the dispute. Jurisdiction then exists as long as the Parties have wanted it through their will; only the latter can found jurisdiction whose extent is determined by its scope. As the Permanent Court of International Justice wisely affirmed in

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[26] Aramco case, *op.cit.*, p. 146.

its aforementioned 1932 Judgement on the Free Zones between Switzerland and France:

"It is the Special Agreement which represents, so far as the Court is concerned, the joint will of the Parties. If the obstacle to fulfilling part of the mission which the Parties intended to submit to the Court results from the terms of the Special Agreement itself, it results directly from the will of the Parties and, therefore, cannot destroy the basis of the Court's jurisdiction for the reason that it was counter to the will of the Parties" [27]

As a result, consent and arbitration are so intimately intertwined that the International Court of Justice rightly affirmed that:

"[T]he word arbitration, for purposes of public international law, usually refers to "the settlement of differences between States by judges of their own choice, and on the basis of respect for law". This wording was adopted in Article 15 of the Hague Convention for the Pacific Settlement of International Disputes, dated 29 July 1899. It was repeated in Article 37 of the Hague Convention dated 18 October 1907, having the same object. It was adopted by the Permanent Court of International Justice in its Advisory Opinion of 21 November 1925, interpreting Article 3, paragraph 2, of the Treaty of Lausanne *(P.C. I. J., Series B,No. 12,* p. 26). It was reaffirmed in the work of the International Law Commission, which reserved the case where the parties might have decided that the requested decision should be taken *ex aequo et bono*..."[28]

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[27] Free Zones, *op.cit.*, p. 163.

[28] Case concerning Maritime delimitation and Territorial questions between Qatar and Bahrain (Qatar v. Bahrain), Judgement of 16 March 2001 (Merits): *I.C.J. Reports 2001*, § 113, pp. 76-77). In this respect, notably with regard to the application by the World Court of this same definition to

Article 37 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, to which subsequent doctrine and tribunals alike very often referred to, is thus worded:

"International Arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect of law. Recourse to arbitration implies an engagement to submit in good faith to the award"

The Arbitration tribunal is vested by the Parties with the power of settling a dispute through a law-finding process. Its task flows from the Parties' consent and is bound by it; it can neither exceed it nor be below it. As the International Court of Justice put rightly:

"Since the jurisdiction of the Court derives from the Special Agreement between the Parties, the definition of the task so conferred upon it is primarily a matter of ascertainment of the intention of the Parties by interpretation of the Special Agreement. The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent"[29]

Therefore, in a legal order devoided of the judicial power and where this function is nevertheless exercised by several means, among which precisely arbitration, the settlement of interstate disputes through this means is by far not the more common. States are more eager to resort to other processes of dispute settlement and more than often to direct negotiations between them.

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present case, see: DISTEFANO, G., *Border Disputes and their Resolution according to International Law: the Qatar-Bahrain Case*, ECSSR, Abu Dhabi, 2005 , n° 59, pp. 20-23.

[29] Case concerning the Continental Shelf (Libyan Arab Jamahiriya / Malta), Judgement of 3 June 1985: *I.C.J. Reports 1985*, § 19, p. 23.

Moreover, consent is not also instrumental in order to establish any Arbitration tribunal whatsoever, but it also plays – as we will see at once – a pivotal role downstream, namely at the stage of the definition of its applicable law.

D. *Applicable Law*

Since States' will lies at the roots of the Arbitration tribunal, the latter's jurisdiction is circumscribed by their consent's scope. The latter define thus not only the Arbitrator's powers but also applicable law. As Article 10 of the aforementioned "Model Rules on Arbitral Procedure" correctly envisages:

"1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall apply:
   (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   (b) International custom, as evidence of a general practice accepted as law;
   (c) The general principles of law recognized by civilized nations;
   (d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. If the agreement between the parties so provides, the tribunal may also decide ex aequo et bono"(30).

The public international lawyer will recognize at once in this provision the fatherhood of Article 38 of the Statute of the

(30) See *supra* note 8.

Permanent Court of International Justice which has become, since 1945 and with very minor modifications, of the International Court of Justice Statute.

This characteristic – which is quite common in municipal law arbitrations and even in non-State international arbitrations – has far-reaching consequences in inter-State arbitrations which are settled according to public international law. In fact, due to lack of legislative power, namely of a political organ vested with the power of law-making, like a Legislative Assembly within a State, this important function is dispersed among the primary subjects of this order, i.e. the States. The latter carry out this function through several processes among which the most important are treaties and customary law. These are hence considered the two important sources in the international legal order. In fact, unlike municipal law, where individuals and other subjects do create specific rights and obligations by the way of contracts or legal transactions, States can furthermore legislate, thus creating general and abstract norms. On the contrary, the power of creating such norms is vested exclusively with specific organs, as a Legislative assembly, while individuals are not allowed to legislate. By this expression we refer to unilateral act of law-making. In this vein, one cannot but remind what the World Court affirmed in this respect:

"Such conventions must, moreover, be seen against the *background of customary international law* and interpreted in its light"[31]

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[31] Case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment of 12 October 1984 by the Chamber of the International Court of Justice : I.C.J. Reports 1984, § 83, p. 291 [italics added].

Therefore, as international customary law rules are the only norms which bind since their inception all States without exception[32], any Arbitration tribunal will have to take them into account in order to settle the dispute before it. In addition, any other relevant conventional rule existing between the Parties can be part of applicable law if the former have thus decided in the arbitration agreement (or *compromis*).

Furthermore, States enjoy almost unlimited latitude in the choice of applicable law, save precisely *peremptory norms* which, by definition, cannot be departed from and thus cannot be derogated by the two parties. No compact or international treaty can be at variance with any of these rules which although are not numerous. If so, the treaty will be considered as being void, according to Article 53 of the Vienna Convention on the Law of Treaties.

Besides, States can empower the arbitrator to decide entirely or partially upon considerations of justice and equity, thus departing entirely or partially from positive law. In the aforementioned case between Qatar and Bahrain the Court aptly evoked the possibility of a ruling based *ex æquo et bono*, if the Parties had so decided[33]. In this case, due to the

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(32) See: North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark: Federal Republic of Germany/Netherlands), Judgement of 20 February 1969: *I.C.J. Reports 1969*, § 63, pp. 39-40: "general or customary law rules and obligations ..., by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".

(33) *Op.cit.*, § 114, p. 77. See Article 36 §2 of the International Court of Justice Statute. It ought nonetheless to be remembered that in Common Law countries arbitration based *ex aqequo et bono* is not admissible. For instance in the United Kingdom: "... it is the policy of the law in this country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognisable system of law", in *Lloyds Rep.*, 1962, 2 (quoted in

generally established tripartite construction of equity, *infra legem* (within the law), *praeter legem* (beyond the law) and *contra legem* (against the law), the arbitration tribunal is entitled to resort to the last two in order to settle dispute. In both cases, it is empowered by the parties to create specific rules of public international law, applicable between the two States. As two or more States can create new law and derogate from existing law (except for peremptory norms), they can delegate their legislative power to a tribunal in view of settling the dispute. On the contrary, if the arbitration tribunal is not vested with this power by the parties, then it cannot apply equity in these two meanings. However, it can or even should apply equity *infra legem*. In other terms, under positive public international law, any jurisdictional body, if faced to different interpretations or application of the same rule, has to opt for that which is more equitable. As the International Court of Justice wisely affirmed in 1974:

"It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law"[(34)]

More akin to the core of this colloquium, one cannot neglects what is called *lex mercatoria* that is a body of rules which do exist outside municipal and public international law as well[(35)]; namely, in other words, rules which find their place

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REDFERN, A., HUNTER, *Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 1986, p. 23).

(34) Fisheries Jurisdiction Case (United Kingdom *v.* Iceland), Judgement of 25 July 1974 (Merits): *I.C.J. Reports 1974*, § 78, p. 33.

(35) In the Yemen / Eritrea Case (Award delivered the 9th October 1998, *The Eritrean-Yemen Arbitration Awards 1998 and 1999*, Permanent Court of Arbitration Award Series, Meppel, T.M.C. Asser Press 2005), the Arbitration tribunal surprisingly, yet not erroneously, spoke about a « lex pescatoria » in the southern part of the Red Sea "maintained on a regional basis by those participating in fishing" (§ 340). A set of rules which neither belonged to Yemeni Law (let alone Eritrean ones) nor found in this State legal order their legality, and which are till nowadays applicable "to the conduct of the

outside these two legal orders. According to some authors, these rules are inferred from common usages, related to commercial law, pertaining from different countries around the globe. These usages would share a solid consistency and appear to be applied by economic actors in such a way that they prove a legal conviction of their binding character. These norms can thus form part of the applicable law which transnational Arbitration tribunals can rely upon in order to settle commercial disputes brought before them. The sole arbitrator referred, in the Texaco / Calasiatic Case between Libya and this same company, to an:

"ensemble de règles constitué par la « *lex mercatoria* », laquelle est issue des usages accumulés dans le domaine couvert par le contrat comme par les principes généraux de droit reconnus dans les systèmes juridiques nationaux et communs à toutes les nations »[36]

Yet, this set of rules which makes up the *lex mercatoria*, finds its origins outside State as well as international legal orders. That's why we call them simply *law* and not *order*.

In this respect, the lack of a legal order entails a fragmentation of the exercise of the judicial power, namely a patchwork of international arbitration. One cannot fail to observe, in the last two decades, a proliferation of international arbitration bodies, within or outside international

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trade of fishing". In this respect, see: DISTEFANO, G., « La sentence arbitrale du 9 octobre 1998 dans l'affaire du différend insulaire entre le Yémen et l'Erythrée », *Revue générale de droit international public*, vol. 103 (1994-4), pp. 883-886 ; *id.*, « La sentence arbitrale du 17 décembre 1999 sur la délimitation des frontières maritimes entre l'Erythrée et le Yémen : quelques observations complémentaires », *Annuaire français de droit international*, vol. 46 (2000), pp. 272-284.

[36] Texaco Calasiatic c. Gouvernement Libyen, sentence arbitrale au fond du 19 janvier 1977 : *Journal du droit international (Clunet)*, vol. 104 (1977), § 31.

organizations. In fact, besides the old phenomenon of international tribunals set up by States in order to settle a specific dispute or a series of disputes, new organs are created by international organizations, such as WTO – with its DSB (Dispute Settlement Body) – the OSCE (Organization for Security and Cooperation in Europe) - with its Court of Conciliation and Arbitration -, the European Union – with its Court of Justice -, the Organization of the Islamic Conference – with its International Islamic Court of Justice. Since States are not bound, by a general international law rule, to submit their disputes to a specific international arbitration body, they can "shop around" to find which among them is more suitable to their interests. Ultimately, if they don't find any, they can merely establish an Arbitration tribunal which will fit to them. Moreover, it can happen that, due to the lack of a judicial system, one State can, availing itself of an arbitration clause, defer the dispute before to a specific international body, while at the same time, the other State, through the same means, brings the same dispute to another tribunal, which could have then jurisdiction. Several problems could thereby arise which could undermine the stability of the international legal order, if no agreement is reached between the two States, since there is no general international law rules solving conflict of jurisdictions. The first pertains to the applicable law, since the two different arbitration bodies, may not apply the same set of rules. Therefore, even though, the facts are the same, since the rules might be different, there are good chances that this will lead to different determination of law and thus a different ruling? The second is related to the first one: which of the two rulings will prevail? Here too, the lack of institutional mechanisms jeopardizes the effectiveness of the judicial function. However, since there is no compulsory arbitration rule in international law, it's better to have a proliferation of arbitration bodies that their scarcity. Yet, one cannot but

mention that this multiplication of Montesquieu's "bouches de la Loi" engenders some risks.

The foregoing is relevant as far as *pure* international arbitration, i.e. arbitration between subjects of public international law, is concerned. On the contrary a different discourse must be made whenever the arbitration takes place between a State (and more generally another subject of public international law) and a private (even transnational) corporation or an individual. Without entering into details, we ought then to spend a few words on this aspect especially compared with international arbitration between subjects of public international law.

We should distinguish from the outset between the *legal order* to which the contract is linked and thanks to whom it produces its legal effects (see *supra* …), and *applicable law*, necessary in order to interpret and implement the contract. In other words we have to differentiate between the *institutional* aspect of the legal system and its *substantive* (material) aspect (the body of rules contained therein). In respect of the former, one can assert that an international contract *is not linked* to public international law, as a legal order, since one of the two contracting parties is not a subject of this system of law. Hence, even if the contract has transnational legal consequences, it cannot be deemed to be an international treaty for this sole reason. Only subjects of public international law possess what is called the *treaty-making power* (the old-fashioned *ius contrahendi*). Therefore, the reason why an international contract produces legal effects must be sought by recourse to the legal order to which it is *anchored*(37). For the

(37) As the Arbitration Tribunal wisely stated in the Aramco case (*op.cit.*, p. 165), "It is obvious that no contract can exist *in vacuo, i.e.*, without being based on a legal system … The contract *cannot even be conceived without a system of law under which it is created* " [italics added]. See also:

purposes of the present study, it is sufficient to recall in this regard that, whatever be the solution adopted, there exists a general principle of law, in the meaning of Art. 38 § 1 of the Statute of the International Court of Justice, according to which agreements (or any another kind of commitments entered into) must be respected: *pacta sunt servanda*. This principle itself isn't' but a corollary – in the field of the law of treaties (and more generally of international obligations) – of a paramount and somewhat metaphysical principle which is that of good faith:

"The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969"[38]

As for the substantive aspect of the law, namely the applicable law to the contract, one ought to start from the famous *dictum* of the Permanent Court of International Justice:

"Any contract which is not a contract between States in their capacity as subjects of international law, is based on the municipal law of some country"[39]

Unless otherwise specified, for instance an explicit reference to the *lex mercatoria* or the clear will, as in the Aramco case, to withdraw the contract from the application of

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"Diverted Cargoes" case (United Kingdom *v.* Greece), arbitral award of 10 June 1955, *Report of International Arbitral Awards*, Vol. XII, p.70; Article 2 § 1 lit a) of the 1969 Vienna Convention on the Law of Treaties.

(38) Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Judgement of 11 June 1998 (Preliminary Objections): *I.C.J. Reports 1998*, § 38, p. 296.

(39) Payment of Various Serbian Loans issued in France (Kingdom of Serbs, Croats and Slovenes / France), Judgement of July 12, 1929: *P.C.I.J. Series A 20*, p. 41.

municipal law, it is admittedly considered that the contract be subject, *by default*, to the municipal law of "some country". The reason which leads the doctrine and case-law to this conclusion is far from being dogmatic. On the contrary, this assertion is founded upon a general principle of the law by virtue of which, in all legal systems, the will of the parties is the true guide in order to determine the applicable law. Since the contract exists thanks to their will – it is a juristic act – then we have to resort to the latter so as to interprete which body of law the Parties have chosen to be applied to the contract. If no explicit reference is made by the Parties in the contract, then

"the law presumably intended by the parties is applicable. But this choice of a subsidiary law is not interpreted in the same way by the legal writings and the practice of the various States. Sometimes reference is made to the common *lex patriae* of the Parties, or to the *lex loci contractus*, or to the *lex domicilii debitoris*, or to the *lex loci executionis*, or to the law of the country with which the contract has the closest connection, or to the proper law of contract as determined objectively without resorting to the presumed intention of the parties […]. Sometimes the contract is split into different parts by legal practice and doctrines: capacity is governed by the *lex patriae* or the *lex domicilii* of the parties, the form of the contract by the law of the place where it is made, its essential validity by the *lex loci contractus* and its effects by the *lex loci solutionis*. Elsewhere this division of the contract rejected and the whole contract is governed by a single law"[40]

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[40] Aramco case, *op.cit.*, pp. 165-166. In the present case the Arbitration tribunal opted for the splitting of the contract, guided "objective considerations" according to which "the governing law should coincide with the economic milieu where the operation is to be carried out" (*ibid.*, p. 167).

Therefore, it seems that the decisive criterion, revealed by the parties' will, is that of coherence. In other words, the law which is more appropriate to different parts of the contract is to be determined in the light of its specificity. For example, it is incontrovertible that *lex patriae* ought to be applied whenever the legal capacity is at stake, since it is *only* this set of rules which naturally and objectively can settle any problems related hereto. Likewise, the *lex loci solutionis* ought to be applied in order to solve problems pertaining to the implementation of the contract, as the latter concretizes itself in a specific spatial dimension, namely the *locus*. And so forth.

Finally, closely related to the issue of applicable law, one has to mention a question which is commonly raised in this respect, namely that of the arbitrability of some kinds of State litigations As a matter of fact, the *arbitrability* character is normally raised as a procedural exception aiming to refute the arbitrator's jurisdiction and thus preventing him to enter into the merits of the dispute. Therefore, by asserting that the dispute is not *arbitrable*, the Party deems that the subject matter is not subject to be settled in accordance with relevant public international law rules(41). In these circumstances, one of the Parties deems that the dispute is not *arbitrable*, alleging various reasons among which are the lacunae of public international law or vital interests of a State(42). The former

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(41) See: Article 37 of the 18 October 1908 The Hague Convention on Settlement of Disputes.

(42) "The Tribunal cannot accept the view that questions affecting the exercise of sovereign rights of a State are, by their nature, incapable of being the subject matter of arbitration. Even in an era when international arbitration and judicial settlement of disputes between States were much less developed that they are nowadays, and when it was common practice for States to reserve, in their agreements on the subject, all disputes involving their vital interests, their honour or the interests of other States –

class of objections has been a familiar companion to international arbitration since its modern inception. Indeed, Parties to a dispute generally raise the argument by virtue of which, since the litigation presents extra-juridical aspects (i.e. political, ideological, and economical), it cannot be settled by a Tribunal:

"The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important"[43]

Later on, the same Court dismissed the "political character" objection, and reaffirmed that she has not bound:

"to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects and that the Court should not decline its essentially judicial task merely because the question before the Court is intertwined with political questions"[44]

In the same vein, as far as the alleged lacunae of the law are concerned, we ought to recall that, without deepening our analysis in this respect, Article 11 of the "Model Rules on Arbitral Procedure" clearly states that:

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even then disputes involving the sovereign functions of a State were settled by the decisions of international organs. The fact is established by a considerable body of international decisions", Aramco case, *op.cit.*, p. 152.

(43) Case concerning United States Diplomatic and Consular Staff (United States *v.* Iran), Judgement of 24 May: *I.C.J. Reports 1980*, § 36, p. 19.

(44) Case concerning Military and Paramilitary in and against Nicaragua (Nicaragua *v.* United States of America), Judgement of 26 November 1984 (Jurisdiction of the Court and Admissibility of the Application): *I.C.J. Reports 1984*, § 104, p. 439.

"The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied"[45]

E. The pathology of arbitral awards

One of the main Arbitration's assets is undoubtedly represented by the fact that the award:

"shall in respect of every point on which it rules, state the reasons on which it is based"[46]

The obligation binding upon the Arbitrator to clearly enunciate the *ratio decidendi* is admittedly an advantage for the States parties to the litigation, as they can realize the reasons which have motivated such a decision and, if need be, appeal against it. In this respect, the Arbitration tribunal is naturally vested with the power of interpreting the award it has rendered. This is the corollary of the paramount power the Arbitrator enjoys in the matter of determining its own jurisdiction (*supra C*). *A fortiori*, it can determine the precise meaning and scope of its decision which has been adopted in accordance with such jurisdiction. Besides, in conformity with a well-known general principle of law, rendered by the Latin maxim "*Eius est interpretare cuius condere*" (i.e. it his to interpret whose it is to enact), the exclusive power to interpret belongs to whom it creates the act[47]. Therefore, in the case

[45] See *supra* note 8. See also Article 1 § 2 of the 1907 Swiss Civil Code according to which, in order to prevent a *non liquet*, the judge can state the law as if he were the lawmaker. Although its far-reaching normative consequences, Swiss Civil Judges haven't but very rarely availed themselves of this provision.

[46] Article 29 of the Model Rules on Arbitral Procedure (see *supra* note 8).

[47] Article 33 of the Model Rules on Arbitral Procedure (see *supra* note 8) isn't but a specific application, namely in the jurisdictional field, of this general principle of law.

of a dispute arising between the Parties as to the meaning and extent of the Tribunal's award, the latter is empowered, by the arbitration agreement itself *and* by general international law to settle this new dispute. This power with which any Tribunal is vested[48] deploys its huge importance precisely when one of the Parties (and sometimes both of them at the same time) appeals against the award.

From the outset, we have to distinguish between an appeal contesting the merits and that pretending its nullity. These two formal categories of positive law do not need a specific and in-depth analysis as they are part of universal legal background. On the contrary, we ought to stress that there are different régimes which are relevant in public international law for each of the two claims. In fact, with regard to the first class of claims, that is to say on the merits, it's generally admitted that, unless provided for specifically in the *compromis* a tribunal cannot review the merits of an award through the appeals mechanism. As the International Court of Justice has rightly maintained:

"Before doing so, the Court will observe that the Award is not subject to appeal and that the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong. These and cognate considerations have no relevance to the function that the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect"[49]

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[48] See *supra C*.
[49] Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), Judgement of 18 November 1960: *I.C.J. Reports 1960*, p. 214.

"In this respect the Court would emphasize that, as the Parties were both agreed, these proceedings allege the inexistence and nullity of the Award rendered by the Arbitration Tribunal and are not by way of appeal from it or application for revision of it"[50]

Instead, the second class of claims, namely that concerning the nullity of the award, can be brought either to a tribunal (even the same tribunal which has rendered it) or to the International Court of Justice, provided that the latter has jurisdiction to do so. This requirement must be met since, as we have already evoked earlier, there is no compulsory jurisdiction in public international law. Its lack, as well the absence of a coordinated, let alone of an integrated judiciary system, calls for the need of specific consent by the States as the claim to be deferred to arbitration.

Leaving then aside the first class of claims, we will deal with the litigation relating to the validity of the award. This issue is, as we will see, closely intertwined with that of the effectiveness of the arbitration since the nullity of the award can, if established, jeopardizes its efficacy. While this is far from being disruptful with respect to legal relations in municipal systems, in public international law, on the contrary, this could represent a grave source of tensions and damages to States' legal interests as well as to international public order. Indeed, one of the main peculiarities of the international legal order is, as we have previously stressed, the lack of an integrated judicial system – itself a consequence of the absence of a jurisdictional power – and, hence, a quite rudimentary appeals system. Therefore, if the *compromis* does not envisage and regulate, like in the appeals case, this

[50] Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgement of 12 November 1991: *I.C.J. Reports 1991*, § 25, p. 62.

scenario Parties can stick to their own self-interpretations without giving in. They are left alone with a mere obligation binding upon them, that of pacific settlement of disputes. Of course, the Parties can agree beforehand and decide, in the *compromis*, to submit this dispute to the International Court of Justice which could then act like a Court of Cassation. The International Law Commission, on codifying – and surely developing international customary law rules related to Arbitral Procedures – did not hesitate at all to enunciate a principle according to which if:

"within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the International Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party"[51]

Indeed, the International Court of Justice has been faced twice, till now, to a case where the validity of an arbitral award had been alleged. It is worth to notice nonetheless that in both cases, the Court's jurisdiction was founded non on the *compromis* but on the two States' voluntary declarations of acceptance of the I.C.J.'s jurisdictions in accordance with Article 36 § 2 of its Statute. Hence, it can hardly be affirmed that the aforementioned "Model rule" providing for the I.C.J.'s jurisdiction in appeals case enjoys a customary international law feature. On the contrary, it seems, in the light of its case-law that the Court needs a separate title of competence in order for her to exercise her jurisdiction. Be that as it may, we have to review, although quickly, her contribution to the issue of the validity of arbitral awards.

(51) Article 36 § 1 of the Model Rules on Arbitral Procedure (see *supra* note 8).

In her first case, namely the *Case concerning the Arbitral Award rendered by the King of Spain*, one of the two Parties, Nicaragua, contended that the decision was null for several reasons. The latter alleged that: a) the requirement of the *compromis* had not been complied with the designation of the King of Spain as arbitrator; b) the *compromis* was terminated at the time when the King of Spain agreed to act as an arbitrator. The Court's *ratio decidendi* is two-fold. Firstly, she refutes the two arguments on the merits. As for the first allegation, she said that there was no proof of such contention, since the two Parties' representatives proceeded by common consent to the nomination of the King of Spain as the sole arbitrator thus complying with the provisions of the *compromis*. With respect of the second ground of invalidity invoked by Nicaragua, the Court urged to affirm that, since there was no specific provision in the *compromis* regarding its entry into force, then, according to general public international law[52], the former entered into force the day when the two States exchanged their ratifications. Well, when the King of Spain's acceptance to act as an arbitrator falls within this temporal scope.

The second line of the Court's review of the arbitral award's alleged invalidity lies downstream, namely that Nicaragua appeared to have accepted it as binding since it was rendered in 1906. In this respect, the Court rightly recalled that:

"Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any

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[52] This well-established rule of general international customary law is codified in Article 24 § 2 of the 1969 Vienna Convention on the Law of Treaties.

question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived. The attitude of the Nicaraguan authorities during that period was in conformity with Article VII of the Gámez-Bonilla Treaty which provided that the arbitral decision whatever it might be- and this, in the view of the Court, includes the decision of the King of Spain as arbitrator "shall be held as a perfect, binding and perpetual Treaty between the High Contracting Parties, and shall not be subject to appeal""[53].

Nicaragua's subsequent acquiescence, and even explicit acquiescence, bars her from contesting the arbitral award's presumed invalidity. Put it differently, and may be more correctly, Nicaragua's behaviour has cured over the time the asserted grounds of invalidity from which the award might have suffered.

Later on, the Court was faced with another dispute where the validity of an arbitral award – this time concerning a maritime delimitation – was at stake.

In the *Case concerning the Arbitral Award of 31 July 1989*, Guinea-Bissau raised two categories of grounds of invalidity of the arbitral award, both relative and absolute. As for the first one, it was alleged that the absence of one of the arbitrators – Mr. Gros – while the decision was read before the Parties had to be considered a legitimate ground of nullity. The Court recalled that Mr. Gros voted for the award which was then signed by the President. She therefore came to the conclusion that his absence – at the reading session – has no relevancy in respect of the validity of the arbitral decision. The reasoning of the Court can hardly be contested.

[53] Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, *op.cit.*, pp. 213-214.

The Court then reviewed the other allegations raised by Guinea-Bissau, which can be ascribed to the category of absolute invalidity. First of all, Guinea-Bissau contended that the arbitral award was not supported by a true majority since the President of the Tribunal, who nevertheless voted for the *Dispositif*, appended a declaration to it, making clear his thoughts in some matters of the award. Hence, Guinea-Bissau held that "President Barberis's declaration contradicted and invalidated his vote, thus leaving the Award unsupported by a real majority"[(54)]. Without analysing those reasons which led Guinea-Bissau to interpret the President's declaration as invalidating substantially, albeit not formally, the majority upon which rested the award, it is worth to reproduce what the Court affirmed in this respect:

"even if there had been any contradiction, for either of the two reasons relied on by Guinea-Bissau, between the view expressed by President Barberis and that stated in the Award, such contradiction could not prevail over the position which President Barberis had taken when voting for the Award. In agreeing to the Award, he definitively agreed to the decisions, which it incorporated [...] As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned, which are

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(54) *Case concerning the Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgement of 12 November 1991: *I.C.J. Reports 1991*, § 30, p. 64.

therefore without consequence for the decision of the tribunal"[55].

Furthermore, Guinea-Bissau asserted subsidiarily that any arbitral decision must be a reasoned one. Likewise, according to Article 9 of the *Compromis*, the Parties had specifically requested the Arbitration tribunal that "the Award shall state in full the reasons on which it is based". Yet, Guinea-Bissau contended that the award was fully reasoned and thus it was void. The Court objected and affirmed that:

"[the] reasoning is brief, and could doubtless have been developed further. But the references in paragraph 87 to the Tribunal's conclusions and to the wording of Article 2 of the Arbitration Agreement make it possible to determine, without difficulty the reasons why the Tribunal decided not to answer the second question"[56].

Finally, Guinea-Bissau challenged the validity of the Award on the basis that, according to Article 2 of the *Compromis*, it should have contained a map of the boundary. Yet, such drawing of the literary conclusions of the Tribunal is missing from the award. The Court was unable to uphold this argument as the Tribunal's description of the boundary line is clear enough that a pictographical representation would have been superfluous[57].

In 1875 the *Institut de droit international*, in its *Projet de règlement pour la procedure arbitrale internationale*, esteemed that there were four different grounds whom a State can avail itself of in order to challenge the validity of the award: nullity of the arbitration agreement, corruption of the arbitrator, excess of jurisdiction by the arbitrator, material error (i.e. on

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(55) *Ibid*., §§ 33, pp. 64-65.
(56) *Ibid*., § 43, pp. 67-68.
(57) *Ibid*., § 62, p. 73.

substantive law). Whilst the first two have but a theoretical interest, the two other ones are far more frequent (especially during the first period of modern public international law arbitration).Yet, event then the awards weren't considered as being void, but were merely submitted to revision.

More recently, Article 35 of the "Model Rules on Arbitral Procedure" enlists exhaustively those grounds which can be invoked by the Parties in order to challenge the validity of the arbitral award. Because of its importance, we ought to reproduce this provision in its entirety:

"The validity of an award may be challenged by either party on one or more of the following grounds:

(a) That the tribunal has exceeded its powers;

(b) That there was corruption on the part of a member of the tribunal;

(c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;

(d) That the undertaking to arbitrate or the compromise is a nullity"[58].

One can easily infer from the reading of this provision that all the grounds which can affect the validity of the Award, except the last one, refer to the Arbitration process for and in itself. In sum, the two previous cases, deferred to the International Court of Justice, dealt with one or more of them. On the other hand, the last subparagraph of Article 35 raises the somewhat rare situation when it's neither the arbitration process nor the award which can be contested, but the arbitration agreement (or *compromis*). By all means, it's logical and sound that if the validity of the *compromis* is challenged

(58) Article 35 of the Model Rules on Arbitral Procedure (see *supra* note 8).

and eventually established, then, following the "nullity path", the award is void too. Therefore, the latter's validity will indirectly suffer. Yet, one has to recall in this regard the extreme paucity of such cases. Be that as it may, the *compromis* being an international treaty the grounds which can entail its nullity have to be sought elsewhere than in the "Model Rules on Arbitral Procedure", that is to say in the 1969 Vienna Convention on the Law of Treaties.

At this stage of the analysis of international arbitration, one ought to ask whether international arbitration has fitted States' legitimate expectations for a quick, effective and practical justice. In other words, has international arbitration met States' needs within a peculiar legal order such as that of the international community?

In spite of the foregoing, States do usually resort to Arbitration in order to avoid the dispute being settled by the judge of the other State. Here lies the main rationale and attraction of the Arbitration process in International Law(59). In addition to this raison one can also raise other subsidiary assets of this means of dispute settlement such as its confidentiality and its shorter length in time as compared to the judicial process(60). Yet, one should also minimize the second advantage in so far as, according to recent figures, nearly 70 % of the arbitrations last more than two years and a substantial 30 % spans over a six-year period. Likewise, it ought to be remembered that an arbitral award may be appealed, thus extending the time period; besides, if the decision is to be implemented abroad, it has first to be

(59) See: REDFERN, A., HUNTER, M., *op.cit.*, p. 19.

(60) For statistics figures, see (as regards exclusively the International Chamber of Commerce) : CRAIG, W.C., PARK, W.W., PAULSSON, J., *International Chamber of Commerce Arbitration*, 3rd ed., New York, Oceana Publications Ltd., 2000 (notably Chapter 1).

recognized in this State and then actually put into force. As an English motto says, "Justice delayed is Justice denied".

Be that as it may, International Arbitration's assets far surpass its pitfalls and thus remain the main means of dispute settlement.