

THE COMMERCIAL ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE AND ENFORCEMENT OF ITS AWARDS IN TURKEY AND U. S.

by

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I. INTRODUCTION

Since the beginning of this century, particularly since the end of World War II, international commercial relations have increased hugely. International trade has recognized no national boundaries nor restrictions, neither iron nor bamboo curtains. Parallel to this increase, commercial disputes of an international character have increased as well. The ordinary and national dispute settlement bodies, such as courts and administrative agencies, have not been sufficient to maintain the fluctuation of international trade. Arbitration was a remedy to eliminate the jurisdiction of national courts and get the benefits of its speedy and economic procedure. In fact, the parties of an international trade contract are usually thousands of miles away from each other and to go before the national courts of the other party would be so burdensome that sometimes winning the cases would be meaningless. In addition, in certain cases where the wealth and vital interests of a small town or even a small country are involved, impartiality of the national courts may be doubtful.

In order to eliminate all such consequences, the institution of arbitration was grasped at by businessmen as a safeguard. However arbitration, too, was not free of disadvantages. At first, there was

no internationally uniform arbitration; all the rules and legal provisions dealing with arbitration were national laws. As a consequence of this, arbitration according to this or that law sometimes created very sharp differences. Therefore, businessmen again faced national laws and their peculiarities. Of course, this was one thing they tried to eliminate. On the other hand, a large number of national laws on arbitration were not sufficient to satisfy the needs of international trade. The only way to solve the problem was to create permanent arbitration institutions to replace *ad hoc* arbitration. And the possibility of being able to learn their rules before using their arbitration clauses was a great advantage to businessmen. Many arbitration institutions are to run arbitration for settling domestic disputes as well as international ones, such as the London Court of Arbitration, the American Arbitration Association, etc. But the arbitration institution created by the International Chamber of Commerce (hereafter referred to as ICC), devotes its time and work to settling the disputes arising from international trade operations. The Arbitration of ICC was established in 1923 for this purpose and ICC has been offering its assistance to businessmen on this matter ever since. The Rules of Conciliation and Arbitration of ICC — which have been amended several times and are the present version in force since June 1, 1955 — are the Rules which govern ICC arbitration. By virtue of this, the parties of an international contract using the ICC arbitration clause may foresee the procedure which is to be followed in the event of a dispute arising. Furthermore, by virtue of the schedule added to the Rules, the parties may count the arbitration costs before using the ICC arbitration clause, and in the event of a dispute, they may select the most experienced and skillful arbitrators from the permanent panels of ICC.

But, of course, everything related to ICC arbitration is not covered by the Rules. However, with the guidance of the Rules it is not very difficult to find out the other legal provisions such as the law applicable to the arbitration proceedings, to the interim measures, and so forth. The most serious disadvantage for a lawyer, when asked by his client about the possible consequences of using the ICC arbitration clause, is the absence of legal literature on ICC arbitration. Owing perhaps to the traditional non-publication of

arbitral awards by ICC, extremely few legal writings may be found in English and almost none in other languages.

I cannot help but hope that in the coming years this gap will be filled by legal scholars of several countries, and I believe that this will be the leading effort in the development of international institutional commercial arbitration.

II. THE COMMERCIAL ARBITRATION OF ICC

A. Nature of Disputes

The disputes to be settled by the arbitration of the International Chamber of Commerce must be of an international character and of a commercial nature.

The Arbitration Rules (hereafter referred to as the Rules), of ICC state expressly that all of these disputes must be "business disputes of an international character" (*Rules* 1. sec. 1; 6. sec. 1)¹. But of course, merely stating this does not automatically solve the problem. In fact, the immediate problem we may face is: (1) what is international character; and, (2) what is a commercial or business dispute? Even in the Guide to ICC Arbitration (hereafter referred to as the Guide), published by the ICC and in the Rules, the terminology is not uniform. Since the Rules do not use the word commercial instead of business, the Guide speaks about the commercial nature of disputes.

The Rules do not give us a criterion by which to distinguish the commercial or business nature of disputes whereas the Guide does, and even tries to give two. These criteria "are the nationality or place of residence of the parties in question; and the international nature of the operation which is the subject of the contract in dispute of the interests in question"².

The Guide also gives us an example and states that a contract between two concerns in the same country but involving a trans-

1) Rules of Conciliation and Arbitration of the International Chamber of Commerce, in force on 1st June 1955.

2) Guide to ICC Arbitration, a study by International Headquarters of the ICC, 1963, p. 16.

action to be effected in another country might be regarded as being of an international nature. So we can see that the criterion for deciding whether a dispute is international in character or not, is not a strict one. ICC tries to expand its jurisdiction to cover every dispute which may involve an international element or impact. Indeed an appendix published subsequently to the Guide states that the Court does not construe the phrase "of an international character" in any narrow sense³. For example "A in Spain has ordered goods from B in England. C also in England has supplied these goods. If A finds the good delivered by C to be defective, the dispute between B and C as C's rights may well be considered to be an international dispute because of the repercussions which this dispute has on the dispute between A and B"⁴.

As to the commercial nature of the disputes, we again face the same problems of interpretation. The Guide gives us only a negative example of this problem and states that "relations between employer and staff are excluded". And, of course, as Professor Cohn points out, also mere family disputes⁵. But this does not mean that the clause cannot be inserted into a business agreement concluded between members of one and the same family; a family dispute may well be at the same time a business dispute⁶. Despite lack of criterion for commercial nature in the Guide, the Appendix tries to give some examples of commercial nature in an empirical manner. These examples are the disputes the commercial nature of which often are doubtful. In any case, the Appendix expressly states that (a) differences between private persons and State or State controlled bodies; (b) differences arising out of contracts or concessions involving capital investments; (c) differences arising out of contracts for the construction of public works; and (d) differences arising out of contracts for the industrial equipment of new regions, are all qualified to be settled by arbitration of ICC⁷.

3) Appendix to the Guide, Art. 4.

4) **Cohn, E. J.**, *The Rules of Arbitration of the International Chamber of Commerce* 14th International and Comparative Law Quarterly, 138 (January 1965).

5) *Ibid.*

6) *Ibid.*

7) Appendix, 3.

The Appendix also tells us that the word "commercial" does not mean that the ICC arbitration will deal only with differences arising out of trading contracts. "The Arbitration Clause of the ICC is therefore suitable for inclusion and is in fact frequently included in contracts covering a much wider field than ordinary trading"⁸.

B. T H E A R B I T R A T I O N A G R E E M E N T

Owing to the voluntary nature of arbitration, an agreement before or after the dispute is necessary to a request for arbitration of the ICC. The parties^{8bis} may enter into an arbitration agreement either in advance (by arbitration clause) or after (by submission to arbitration) the dispute has arisen. In most cases, parties refer to ICC arbitration by inserting the standard arbitration clause of ICC in their contract long before the disputes arise.

The suggested arbitration clause of ICC, written in five languages, reads as follows :

All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules.

Tous différends découlant du présent contrat seront tranchés définitivement suivant le Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale par un ou plusieurs arbitres nommés conformément à ce Règlement.

Alle aus gegenwärtigen Verträge sich ergebenden Streitigkeiten werden nach der Vergleichs- und Schiedsgerichtsordnung der Internationalen Handelskammer von einem oder mehreren gemäss Ordnung ernannten Schiedsrichtern endgültig entschieden.

Tutte le controversie eventualmente derivanti dal presente contratto saranno risolte in via definitiva, secondo il Regolamento di Conciliazione e d'Arbitrato della Camera di Commercio Internazionale, da uno o più arbitri nominati in conformità a detto Regolamento.

8) Appendix, 3 and 3.

8bis) "Recourse to the ICC Arbitration Clause is not the prerogative of members of the ICC. The Clause is applicable not only between firms which are not members but also between governments and individuals, as well as between parties in Western Europe and parties in Eastern Europe". Guide, p. 15.

Todas las desavenencias que deriven de este contrato serán resueltas definitivamente de acuerdo con el Reglamento de Conciliación y Arbitraje de la Cámara de Comercio Internacional por uno o más arbitros nombradoos conforme a este Reglamento.

Of course, an arbitration clause written in any language other than these would have the same effect. But in order not to create sources for misinterpretation due to the peculiarities of the different languages, it is suggested that one of the languages used in the Rules be employed. On the other hand, parties may insert additional clauses as to place of Arbitration, number of Arbitrators, etc. The place of Arbitration, is of particular importance to the parties who are residents of the United States of America. If one of the parties resides in the U.S., or is an American citizen, and if the parties do not agree in advance on the place of arbitration, ICC recommends an ICC-AAA joint clause which is read in the following :

All disputes arising in connection with the present contract shall be finally settled by arbitration. Arbitration to be held outside the United States of America shall be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce, unless by written agreement the parties adopt the Rules of the American Arbitration Association. Arbitration to be held in the United States of America shall be conducted in accordance with the Rules of the American Arbitration Association, unless by written agreement the parties adopt the Rules of Arbitration of the International Chamber of Commerce.

Judgment upon the award rendered may be entered in any Court having jurisdiction or application may be made to such Court for a judicial acceptance of the award and an order of enforcement, as the case may be.

When the parties have not indicated in the clause where the arbitration is to be held or have not agreed on this point in writing, such decision shall be taken by a joint Arbitration Committee set up by the International Chamber of Commerce and American Arbitration Association.

If the parties have agreed upon the place of arbitration, the clause suggested is as follows :

All disputes arising in connection with the present contract shall be finally settled by arbitration.

The arbitration shall be held at _____, and conducted in accordance with the Rules of the American Arbitration(*) International Chamber of Commerce(**).

Judgment upon the award rendered may be entered in any Court having jurisdiction or application may be made to such Court for a judicial acceptance of the award and an order of enforcement, as the case may be.

These joint clause of ICC-AAA were established by the agreement between ICC and American Arbitration Association in 1939 and revised in 1947⁹. Also, same kind of a joint clause ICC-IACAC(**) is available where one of the parties is a resident or a national of a Latin American country. These clauses are exactly the same as those in the former clauses provided for U.S. citizens. These joint clauses give the parties an opportunity to have ICC arbitration facilities under the rules of their own arbitration institutions, in order to encourage referments to arbitration in international trade and to eliminate the fear of foreign rules and especially to let the parties use the arbitration facilities of both arbitration institutions^{9bis}.

ICC also recommends that national laws which require acceptance of arbitration clauses in a precise and particular manner be regarded. For example, in Austria, an arbitration agreement must be in writing and on stamped paper^{9ter}.

Furthermore, the parties should regard national laws which reserve exclusive jurisdiction in certain cases such as personal status, bankruptcy, public property, etc., or the laws which bar the capacity to enter into an arbitration agreement of certain entities such as State and other public corporate bodies in some countries¹⁰.

(*) The rules of either of these two institutions must be selected.

(**) Inter-American Commercial Arbitration Commission.

9) **Kellor, Frances**, American Arbitration, 149 (1948).

9bis) **Domke, Martin**, Commercial Arbitration, 103 (1965).

9ter) ICC, Commercial Arbitration and Law throughout the World, "Austria" 3 (1949).

10) Guide, p: 17.

C. The Permanent Bodies of the ICC Arbitration

Owing to its being institutional in nature, ICC arbitration is governed by permanent bodies : the Court of Arbitration, its Secretariat and the National Committees. We will deal here only with the Court of Arbitration. The Secretariat and National Committees as subsidiary bodies are not within our direct concern.

As Professor Cohn points out¹¹, the term "Court" is very inappropriate. In fact, the Court of Arbitration is not a body for the settling of disputes; in other words, it is not a court in the proper sense. Section I. of Rule 7 expressly states that "The Court of Arbitration does not itself settle disputes". Its function in general is "to provide means for settlement by arbitration of business disputes of an international character". Therefore, as Carabiber¹², states, and Cohn¹³ agrees to this, the term Court of Arbitration is to be construed merely as a "centre d'arbitrage". Cohn suggests the term, "Board of Arbitration" in English¹⁴.

As a supervisory body the Court organizes and supervises the settlement of disputes by means of administrative nearness.

As we shall give further emphasis to some of these measures later, the cases where the Court may intervene can be summed up in the following manner. As the Guide points out, the Court is to intervene in order to :

- "1) Make all necessary arrangements for the appointment, replacement, or challenging of Arbitrators;
- 2) Fix the place of arbitration when the parties have made no provision to this effects;
- 3) Check, in the event of the matter being disputed, whether any arbitration clause binding the parties exists **prima facie**;
- 4) Examine the terms of reference;
- 5) Fix the time-limit offer which the proceedings will be resumed notwithstanding a party's refusal to sign the terms of reference;

11) Cohn, op: cit., 140.

12) Carabiber, Charles. L'Arbitrage international de droit privé, 27-28 (1960).

13) Cohn, op: cit., 140, 12.

14) Ibid.

- 6) Decide any extension of the period necessary for the pronouncement of the award;
- 7) Examine the draft award with a view towards ordering modifications of form and/or draw the arbitrator's attention to matters concerning the substance of the draft, while scrupulously respecting his freedom of decision;
- 8) Fix the amount of deposits at the commencement of proceeding, and then determine arbitration costs within the conditions indicated in the schedule appended to the Rules"¹⁵.

All documents of the Court of Arbitration are confidential except the list of its members and lists of the arbitrators. Furthermore, extracts from the minutes may be placed at the disposal of the courts of law as proof of the decisions reached, if such proof is necessary. In addition to the above-mentioned, the Court makes any decisions necessary to fill in the blanks which are, deliberately¹⁶ or not, left open by the clause.

D. Preliminary Arbitration Procedure

1. Choice of Arbitrators

Normally, the parties inserting arbitration clauses in their contracts fix the number of arbitrators. However, cases of their failure to do so are not rare. An even number of arbitrators are accepted only if the parties expressly agree to this. If the parties have made no agreement as to the number of arbitrators, the Court appoints a sole arbitrator. However, each party may request a panel of arbitrators arguing the complexity and the nature of the dispute. But, the Court has absolute discretion as to whether to accept this request or not unless both parties so agree.

If the parties have agreed on a sole arbitrator, they must nominate him by common agreement for "confirmation" by the Court. Failing agreement between the parties within a period of thirty days from the notification of request for arbitration to the opposite party, the arbitrator shall be appointed by the Court (Rule 7, sec. 2).

15) Guide, p: 21; Cohn sees a similarity between the Court and the Praetors of Roman Law, op: cit., 142.

16) Cohn, op: cit., 143-144.

If the reference is to be to three arbitrators, each party nominates an arbitrator in the foregoing manner and the third is appointed by the Court (Rule 7, sec. 2). As it can be seen, the Rules do not accept the time-consuming system of a third arbitrator choice by other arbitrators; instead they give plain and express power to the Court.

The Rules establish the principle that sole arbitrators and third arbitrators must be nationals of countries other than those of the parties involved in the dispute.

Before the Rules of 1955, the third arbitrator was merely an umpire and not supposed to be an arbitrator. The difference is that an umpire decides alone, and the other two arbitrators are like attorneys for the parties in arbitration process and they merely make suggestions to him. But under the new version, as expressly stated in Art. 24, awards must be given by majority decision; the umpire system no longer has any place in the ICC arbitration.

This change was made because of the intense dislike of the umpire system in the Continental European Countries¹⁷. But Cohn points out that the variety of notes in the new system create a difficult problem. Let me illustrate the case by giving Cohn's own example. "Arbitrator A wants to hold Y liable to pay to X 5,000. Arbitrator B wishes to reject the claim brought by X against Y and arbitrator C is of the opinion that Y has to pay 2,500 but only if and when X will have returned to Y goods received from him"¹⁸. Only in this case may the third arbitrator decide alone (Rule 24), namely as an umpire. I believe, with the new version a better system is created in order to eliminate deadlocks.

The Court of Arbitration finally decides the challenges of arbitrators made by the parties.

2. Request and Reply

a. Request and Reply

In accordance with Rule 8 sec. 1, a party or parties desiring recourse to arbitration must present a request for same in writing

17) Cohn, *op. cit.*, 143-144.

18) *Ibid.*

directly to the Secretariat of the Court or through their National Committees.

The matters which such a request must contain are expressly set forth in section 2. of the same page. It reads as follows :

The request for arbitration shall contain :

- a) Names in full of the parties and their addresses;
- b) Statement of claimant's case;
- c) Originals (or copies certified true by claimant) of all contracts, more especially of the document evidencing the arbitral agreement, and of correspondence having passed between the parties, and any other documents or information relied upon;
- d) All relevant particulars of the number of arbitrators and their choice in accordance with the provisions of Article 7 above.

Cohn¹⁹ points out that the "statement of the case" must be written in the continental system; therefore, it must contain all the facts and legal arguments on which the party will rely. And this "statement" should not be merely a preliminary one which would be considered sufficient for the London Court of Arbitration. I agree to the point that the request must contain a detailed statement of the case but I disagree with Cohn's opinion that it should contain also the names of the witnesses, experts, etc., an appreciation of the evidence, and so forth. I do not believe that the Rules go so far. In any case, as peculiar to arbitration proceedings, no sanctions are provided in the Rules for failure to make a "statement" of the case.

The Secretariat, as the administrative body, like a Court office transmits the request to the other party. Despite the absence of any provision as to which language the request must be written, the Guide strongly suggests that it be either English or French, which are the official languages of ICC.

The defendant must reply to the request within thirty days after its receipt, and in his answer, he must furnish a statement of the case and supply all documents supporting his answer (Rule 9).

19) Cohn, *op: cit.*, 145-146

This period of thirty days is not preclusive however; it is intended to enable the Court and the arbitrators to pursue proceedings in the event of the defendant's failing to reply²⁰. A reply may contain a counter-claim which must be written in the form and must contain the matters set down in article 8 of the Rules .

b. Validity of Arbitration Clause

Obviously one of the most important and vital steps in initiation of arbitration is determination of the validity of the arbitration clause. If in fact there is no arbitration clause between parties, or if the existing clause does not refer to ICC arbitration, the Secretariat or in more serious cases of doubt, the Court²¹ upon the defendant's decline or failure to reply, inform the applicant that the case cannot be referred to ICC arbitration (Rule 12). On the other hand, if one of the parties claims the invalidity of the arbitration clause but the Court has satisfied itself of the *prima facie* existence of the clause, the Court may, without prejudice to the claim, order the arbitration to proceed. In this case the arbitrators *themselves* decide on their jurisdiction (Rule 13). With this Rule, the Rules adopt the so-called German *Kompetenz - Kompetenz* theory²² for the determination of the validity of arbitration clauses.

Section 4. of Rule 13 sets down an interesting principle and states that :

Unless otherwise stipulated, the arbitrator shall not cease to have jurisdiction by reason of an allegation that contract is null and void or non-existent. If he upholds the validity of the arbitration clause he shall continue to have jurisdiction...

This principle is similar to a well-known New York case which held that unless a contract is against public policy on its face, the validity of the contract necessarily must fall within the exclusive jurisdiction of the arbitration²³. In addition to this, Professor Domke, citing no case, is of the opinion that an arbitration clause may be given effect even if the commercial contract which contains the

20) Guide, p: 20

21) Cohn, op: cit, 146.

22) Schinitzer, A., "Arbitrage", Fiches Juridique Suisses, 946, p: 2.

clause is contrary to public policy²⁴. He gives us the following example to illustrate his opinion :

The general manager of Smith's factory is about to resign. Thinking that the manager intends to enter into competition with him, Smith makes an agreement whereby his employee promises not to compete with him for a period of two years. This covenant not to compete is likely to be against the public policy of the state, but an arbitration clause in the covenant will sometimes be effective to force the employee to arbitrate because it is a contractual duty undertaken by the employee (in return for a settlement).

To summarize, the Rules does not accept as New York law the principle that invalidity of the main contract does not *per se* result in the invalidity of the clause.

c. Submission of the Case to the Arbitrator

The Secretariat submits the case to the arbitrator immediately upon receipt of the defendant's reply or, at the latest, upon the expiration of the period of thirty days. The Secretariat may, before doing so, require the parties or one of them to pay the ICC a sum covering the costs of the arbitration. These costs include the fees of the arbitrators plus administrative charges. The numbers given in the appendix of the Rules are the following :

	Sum Under Dispute	Costs
under	\$10,000-	30-100 per mille
	10,000 50,000	15- 50 " "
	50,000- 200,000	8- 20 " "
	200,000- 600,000	5- 10 " "
	600,000-1,500,000	3- 6 " "
	1,500,000-3,000,000	2- 4 " "
over	\$3,000,000	1- 3 " "

23) *Godman v. Lazrus*, 15 AD 2d 530, 222 NYS 2d 891 (1961).

24) *Domke*, op: cit., 45-46.

The general practise of the Court is that each party is invited to pay half of the deposit without prejudice to the final appropriation of the arbitration costs.

d. Interim Measures

"The parties may in the case of urgency, whether prior to or during the proceedings before the arbitrator, apply to any competent judicial authority for interim measures of protection..." (Rule 13 sec. 5). But when a party has applied for such an interim measure to a court, the other party cannot apply for a stay of these proceedings in reliance upon the ICC clause.

E. Arbitration Procedure before the Arbitrator

1. Law Applicable to the Procedure :

Article 16 of the Rules sets down that the proceedings at first will be governed by the Rules but, in the event of the lack of provision in them, the law chosen by the parties to be applied to the procedure will be the governing law. However, if the parties have not chosen any law to this effect, the law of the country in which the arbitrator holds the proceedings will govern.

A quite difficult problem to determine on this point is whether the law chosen by the parties as the applicable law to the contract is to be applied to the arbitration procedure as well, or whether the parties may determine a law other than this as to procedure. For example, may the parties agree that the governing law of the contract shall be New York law even though the law applicable to the procedure should be the Swiss Law? Such an agreement was held valid by the English Courts²⁵. Cohn says that the validity of such an agreement in civil law countries would be doubtful²⁶. The subject is beyond the limits of this paper but I daresay that at least in Tur-

25) *Hamlyn v. Tallisher*, A. C. 202 (1894); *Spurrier v. La Cloche*, A. C. 446 (p:c.) (1902), all cited by Cohn, op: cit, 150 30.

26) Cohn, op: cit., 150.

kish Law such an agreement would be completely valid within the limits of Turkish "ordre public"²⁷.

On the other hand, if the parties have chosen a certain law applicable to the contract, will this law necessarily be applicable law to the procedure of arbitration in the event of their failing to decide upon the law of the procedure? In England the House of Lords gave to this question an affirmative answer²⁸. But this decision was criticized by Cheshire²⁹ and he stated that the result should depend on the particular circumstances of the case. Also, the *Corte di Cassazione* of Italy in *Ditta Rizzuto v. Società Anonima Odino* case expressly held that it is not necessarily considered that the parties automatically agreed on the law which is applicable to the contract, or the law of the arbitration place, as applicable law to procedure as well³⁰. ICC Rules of Arbitration takes a contrary view. In fact, Rule 16 sets down the principle that if the parties have not chosen any law as to applicable law to the procedure the law of the country in which the arbitrator holds the proceedings (*lex loci arbitrationis*) will be applicable. Therefore, in the absence of an agreement between the parties this law automatically assumes applicability.

But if the parties have not even determined the place of the arbitration, it is determined by the Court itself (Rule 18). As we see, in this event the Rules enable the Court to determine indirectly the applicable law to the procedure³¹. But in my opinion the Court must take into account the law of the country where the prospective award will be enforced, from the viewpoint of public policy and

27) **Koral, Rabi N.** Türk Devletler Hususî Hukukunda Hakemlik, reprinted from Ord. Prof. Muammer Raşit Seviğ'e Armağan, 11 ff. (1956) and **Berki, Osman Fazıl,** Türk Hukukunda Kanun İhtilâfları, 245 (1962).

28) *Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co., A.C.* (1927) 604.

29) **Cheshire, Geoffuy Chevalier.** International Contracts, p: 40, cited by **Klein, Frédéric-Edouard,** Considérations sur l'Arbitrage en droit international privé, 246, 2 (1955).

30) *Giurisprudenza Italiana, parte prima,* 130 ff. (1950).

31) **Fouchard, Philippe,** L'Arbitrage Commercial International 375 (1965).

the rules of challenging a foreign arbitral award^{31bis}. Moreover, Article 31 of the Rules sets forth that in any circumstances not specifically provided in the rules, the Court and the arbitrator shall act on the basis of the Rules and make their best efforts for the award to be enforceable at law.

2. "Amiable Composition"

The "Amiable Composition" which is a characteristic institution of French Law and other Continental laws means giving by the parties to the arbitrator the permission to decide *ex aequo et bono* and in disregard of all rules of law, except those relating to morality and public policy. This procedural institution is unknown in both English³² and American Law³³, but is quite common in the Continental European Countries. Section 3 of Rule 19 states that "the Court... shall not give the arbitrator power to act as 'amiable compositeur' unless the parties agree thereto...". Under the late version of the Rules the parties had to decide whether the arbitrators were to act as "amiables compositeurs" or not. But under the present version arbitrators will as a rule have to decide in accordance with law unless the parties agree otherwise³⁴.

3. Terms of Reference of the Arbitrator:

In accordance with Rule 19, the arbitrator, or arbitrators, before passing to the phase of hearing must make a certain state-

31bis) **Uluç, M. R.** Kanunlar İhtilâfı Meseleleri Açısından Hakemlik, unpublished research paper, 1964 (University of Istanbul). The opinion expressed there in 1964 was also defended by **Fouchard** in his recent book, op: cit., 382.

32) **Cohn**, op: cit., 156-157.

33) **Domke, Martin**, "United States", in International Commercial Arbitration, published by Union International des Avocats, p: 215; however, in the draft for a Uniform Law on Inter-American Commercial Arbitration, the "Amiable Compositeur" was mentioned (Art. 16). And, the Inter-American Bar Association supported the Draft Uniform Law at its Dallas Conference on April 27, 1956, and recommended its adoption by the American Republics; **Sanders, Pieter**, Arbitration Law in Western Europe - A Comparative Survey, in International Trade Arbitration, edited by **Domke, Martin**, p: 144 and 28 (1958).

34) **Cohn**, op: cit., 158.

ment which contains their terms of reference. This statement must include :

- a) Names in full of the parties;
- b) Adresses of the parties to which all notifications shall be made during the arbitration;
- c) Brief statement of the parties' claims;
- d) Terms of reference, statement of the case, indication of the points at issue to be determined;
- e) Name in full of the arbitrator with his address; etc.;
- f) Place of the arbitration proceedings;
- g) All other matters required in order that the award when made shall be enforceable at law, or which in the opinion of the Court of Arbitration and the arbitrator, it is desirable to specify.

(Rule 19 sec. 1)

It is obvious that this statement is very helpful to the arbitrator, and it is vital for a speedy procedure. But, of course it could not be said that in every case the parties will participate in its preparation and sign it. In order to eliminate the delays and deadlocks, the Rules give the arbitrator the power to proceed and to render the award regardless of the recalcitrant party's refusal, after the expiring of the period granted by the Court to the arbitrator for obtaining the signature of the party concerned (Rule 19 sec. 2).

If both parties sign the statement, the arbitrator adds his signature to it and submits it to the Court for approval (Rule 19 sec. 2).

4. *H e a r i n g*

Rule 20 states that "the arbitrator shall... ascertain the facts relating to the case". Therefore, the arbitrator acts under the Rules just as a continental European judge does. However, in common law countries arbitrators passively await the evidence submitted by the parties and act on it and nothing else³⁵. For example, such a provision which enables the arbitrator to ascertain the facts is not to be found in the Commercial Arbitration Rules of the AAA³⁶.

35) *Ibid.*

36) Commercial Arbitration Rules of the American Arbitration Association, as amended and in effect June 1, 1964.

Furthermore, the arbitrator according to the Rules has the power to hear witnesses³⁷ and may appoint experts for getting reports on technical or legal issues within the limits of his terms of reference. Owing to the possibility of arbitrators being non-lawyers, the Rules give them the power to appoint experts in order to get information on legal issues as well as technical ones.

The subsequent article gives the arbitrator the power to decide on the sole basis of the documents unless the parties request a hearing. And at the request of the parties or on his own initiative the arbitrator may summon the parties before him. In the event of one party's failing to appear, the arbitrator may, after satisfying himself that the summons was duly served and the party is absent without a valid excuse, proceed as if all the parties were present (Rule 21 sec. 3).

The parties may be represented by counsels as well as appearing in person. Despite the fact that in some English arbitral tribunals the parties are not permitted to be represented by counsel³⁸, the New York Law³⁹ and the Commercial Arbitration Rules of the AAA⁴⁰ expressly permit them to do so.

At the phase of the hearing, new claims and counter-claims can also be made by the parties, but unless the other party agrees to its acceptance into the proceedings, the arbitrator may only take cognizance of them within his terms of reference.

Because of the private nature of the ICC arbitration, all hearings are private (Rule 21 sec. 4).

37) The Rules have no provision whether arbitrators may administer oath or not. In several continental European countries (including Turkey) arbitrators may not administer oath, but they can merely ask it from the competent court. It might be suggested that the arbitrators, before administering an oath, should check the public policy principles of the country where the prospective award will probably be enforced, even if the law applicable to the procedure gives them the power to administer it.

38) Cohn, *op. cit.*, 160.

39) New York Civil Practice Law and Rules § 7506 (d); Bar Association of the New York City, *An Outline of Procedure under the New York Arbitration Law*, 20 (1965).

40) Commercial Arbitration Rules of AAA., sec. 21 (1964 version).

5. The Law Applicable to the Substance

Despite the fact that this subject is beyond the limits of this article I should like to say a few words about it because of its importance. The Rules make no provision for determining the law applicable to the substance of the case. The problem is how the arbitrators can determine what law is applicable. As Cohn points out "to refer them to the generally recognized rules of private international law means giving them stones in lieu of bread"⁴¹. The principles of autonomy of parties, *locus regit actum* in the limits of requirements of *lex loci executionis*, are, of course, helpful but not enough to solve all problems. A commonly accepted principle is that the arbitrator must use the choice of law rules of the place of arbitration. But in order to illustrate unexpected consequences of this principle I shall mention the unpublished case given by Cohn⁴². Briefly, a dispute arose between a German and an English firm, and the arbitration agreement gave an international body the power to appoint an arbitrator. The chosen arbitrator was a Swiss national and he, in accordance with the power given him in the agreement, selected Switzerland as the place of arbitration. Under both English and German law, the English municipal law was applicable in this case. However, the Swiss private international law referred to German law, so the parties faced an unexpected law as the applicable law to the substance.

But it is fair to say that this case was a rare and exceptional one. I do not believe that it leads us to change the principle. Therefore, as the *lex substantiae* the arbitrator first must apply the law upon which has been agreed by the parties and in the absence of this, he must use the choice of law rules of *locus arbitrationis* in order to determine the applicable law.

F. The Award

The final stage of the ICC Arbitration is making the award settling the dispute. As I mentioned above, in case of three arbitrators the award must be given on a majority decision, but in the

41) Cohn, op: cit., 162.

42) Ibid.

event of failure to arrive at a majority decision, the chairman of the arbitral tribunal, to-wit the third arbitrator, makes the award alone (Rule 24). The award must also contain a decision on the costs of the arbitration as to the manner in which they are to be divided between the parties (Rule 25).

The award must be made within sixty days from the day of signature of the parties of the statement defining the arbitrator's terms of reference. However, the Rules give the Court the power to extend this sixty-day period when it considers it necessary (Rule 23 sec. 2).

Before completing the award the arbitrator must submit it to the Court for approval. The Court may lay down modifications as to form as well as call the arbitrator's attention to points connected with the merits of the case. However, the Court must respect the arbitrator's freedom of decision. Rule 26 explicitly sets forth that "no award shall under any circumstances be issued until approved as to its form by the Court of Arbitrators". This supervision of the Court on the form of the award is a vital point in ICC Arbitration. In fact, the Court will give to the award the form which renders it best capable of enforcement in the Country where very probably the award is to be enforced⁴³.

The Arbitrator must make a sole award on all the points of the main dispute as well as on his own jurisdiction. But in some exceptional cases the arbitrator may, with the approval of the Court, waive this principle⁴⁴. As examples⁴⁵ of such exceptional cases, the Guide gives us the cases where two defendants raise the objection that the arbitrator should have no jurisdiction, which objection is acknowledged in the case of one but not the other, and where a defendant and counter-claimant delay supplying evidence to support his claim with the result that the allocation of compensation to the other party is also considerably delayed.

The Rules lay down no further provision or requirement as to the form of awards. The only thing required is that the award must be written. On the other hand, of course, the parties may agree upon the form of the award. In this event the arbitrator must re-

43) **Cohn**, op: cit., 163.

44) **Guide**, 31.

45) **Ibid**.

gard and render the award in accordance with the provisions concerning the form agreed upon by the parties.

Rule 27 sets down the principle that an arbitral award must be deemed to be made at the place of the arbitration and on the date of the signing by the arbitrator. Therefore, in conformity with this rule the award might be considered to be rendered in *locus arbitrationis* even if it were not rendered there. But in my opinion the arbitrator and the parties must not lean too heavily upon this provision if they desire to secure enforcement of the award.

When the award has been made, the Secretariat communicates the arbitrator's signed text to the parties (Rule 28 sec. 1). But it is also provided that this notification cannot take place until after the entire costs of the arbitration have been settled by the parties, or by one of them.

Section 2 of Rule 28 sets forth that additional copies of an award shall be available to the parties at all times, "but to no one else". This provision reveals the private nature of the ICC Arbitration. But as Cohn points out⁴⁶, this privacy of awards is a great disadvantage to scholars who are interested in international commercial arbitration. I believe that the unfortunate lack of legal literature on institutional commercial arbitration, particularly on the ICC Arbitration, is due to this privacy. It might be suggested that after every arbitral this would fill a considerable part of the gap in the legal literature in the area.

Section 1 of Rule 30 clearly sets forth that "the arbitral award shall be final". This means that the ICC does not provide any appellate body for the revising of awards. The Rules not only set down the finality of awards but also they intend to exclude any appeal even before a national tribunal. In fact, Section 2 of said article reads as follows :

By submitting their dispute to ICC Arbitration, the parties undertake to carry out subsequent award without delay and waive their right to any form of appeal, insofar as such waiver may be valid.

This is a provision in order to enforce the "speed, convenience and economy" principles of arbitration, particularly the ICC Arbi-

46) Cohn, op: cit., 165.

tration⁶⁷. It has recently been held by an English Court decision that this clause constitutes an ouster of jurisdiction⁴⁸.

G. Restrictions of the Contractual Derogations from the Rules

Owing to the private and voluntary nature of the ICC arbitration, the parties, in principle, may freely make contractual derogations from the Rules. However, some derogations, which are incompatible with the institutional nature of ICC arbitration, are, of course, not possible. While the Rules provide no criterion for finding out which derogations are acceptable and which are not, the Guide does. In fact, the Guide again in an empirical manner sums up some derogations, such as the parties involved cannot omit the statement defining the arbitrator's terms of reference and its approval by the Court; also, they cannot reserve the right to fix the time limit for the pronouncement of the award nor can they invest the arbitrators with this right; the parties can neither appoint arbitrators without the approval of the Court nor set aside the provisions concerning the previous examinations of the award, the filing of the award at the Secretariat, and notification of same by the latter to the parties; and finally, the parties cannot make any agreement upon the costs or give the arbitrators advances on costs or fees; *a fortiori* no party may pay special fees to the arbitrators.

H. Enforcement of the Award

1. In General

Naturally, the most important step in any arbitration proceeding is its enforcement. Indeed an unenforceable arbitral award would have no meaning other than its contribution to the legal literature. Of course, the parties are more interested in its results than in anything else.

47) Ibid.

48) E. Fotheray & Sons, Ltd. v. Carlo Boderick & Co. (1961) 1 Lloyd's Rep. 200, cited by Cohn, *op. cit.*, 168-62.

The Guide sets forth that the arbitral award is final and enforceable and that this means that the parties, by submitting to the Rules, undertake to carry out the subsequent award. Of course, this is no more than an aspiration.

The Arbitral Award of ICC is usually considered a foreign arbitral award in the country of enforcement. Regarding this, the Guide, in the event of failure on the part of one or other party to comply spontaneously with the decisions of the arbitrator, refers to the 1958 New York Convention, the 1927 Geneva Convention, or finally to *de facto* reciprocity as the basis for the enforcement of foreign awards. The Guide also indicates that the Secretariat give the parties every assistance in their effort to comply with the enforcements, procedures and requirements of their respective countries.

Furthmore, the ICC not only by legal means but also by virtue of its close collaboration with the Chambers of Commerce in the different countries may compel the recalcitrant party to carry out the arbitral award.

2. Enforcement of the ICC Arbitral Awards in the U.S.

An ICC Arbitral Award rendered outside of the U.S. is, of course, a foreign arbitral award with respect to the American courts of law. Neither the Federal Arbitration Act nor the Uniform Arbitration Act include any provision for the enforcement of foreign arbitration awards⁴⁹. The U.S. is not a party to any multilateral treaty concerning enforcement of foreign arbitral awards. Particularly, she is not signatory to either the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, or the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, foreign arbitral awards are generally enforceable in the United States without any reference to the concept of reciprocity⁵⁰. Particularly in the New York Law it is well-settled that the validity of an award depends on compliance with

49) **Domke, Martin**. Enforcement of Foreign Arbitral Awards in the United States, 13th Arbitration Journal 92 (1958).

50) *Ibid.*; **Domke**, Commercial Arbitration, 104.

the law of the place where the award was rendered⁵¹. Therefore, the New York Courts enforcing an ICC arbitral award will regard only the law of the country where the arbitral award was made.

Moreover, the U.S. has entered into several bilateral Treaties of Friendship, Commerce and Navigation⁵² which provide for the enforcement of arbitration agreements and of awards in disputes between nationals and the aspirations of the respective countries. Of course, the arbitral award made in one of the countries which is a party to such bilateral treaties are much more secured for enforcement in the U.S.

As an example of one of the most recent ones, Paragraph 6 of Article III of the Treaty of Friendship, Establishment and Navigation between the U.S. and Belgium, dated February 21, 1961, and in force since October 3, 1963, reads as follows :

Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement by the authorities of either Party merely on the grounds that the place where such award was rendered is outside the territories of such Party or that the nationality of one or more of the arbitrators is not that of such Party⁵³.

According to this agreement, not only the awards rendered in Belgium but also awards made anywhere else would be enfor-

51) *Gilbert v. Burnstine*, 225 NY 348, 174 NE 706 (1931); *Sargant v. Monroe*, 268 AD 123, 49 NYS 2d 546 (1944); *Oilcakes and Oilseeds Trading Co. Ltd. v. Sinason Teicher Inter-American Grain Corp.*, 8 NY 2d 852, 203 NYS 2d 905 (1960).

52) The Treaties of Friendship, Commerce and Navigation with Belgium, Denmark, Federal Republic of Germany, France, Greece, Iran, Ireland, Israel, Italy, Japan, Luxembourg, Korea, the Netherlands, Nicaragua, Pakistan and Vietnam, contain such provisions as to enforcement of foreign arbitral awards.

53) Quoted by **Domke**, *supra*, 103-104.

ceable in the U. S. under the auspices of the Treaty, if the parties of the arbitration agreement are Belgian and American nationals or companies.

The only American court decision I have found on the validity of an ICC arbitral award is the decision of the Tenth Circuit⁵⁴. In this *Standard Magnesium Corporation v. Otto Fuchs K. G. Metallwerke* case, the parties entered into a contract upon purchase of approximately 100 metric tons of raw magnesium by the German firm in 1954. The contract contained the aforementioned ICC Arbitration Clause. After receiving the goods a dispute arose as to whether they had conformed to the contract and Fuchs invoked the Arbitration Clause of the contract. A form of submission was sent to Standard for signature in accordance with the late version of the Rules, but Standard refused to sign it and refused to arbitrate. In conformity with the provision which had the same meaning as Rule 13 sec. 2 of the present Rules, the Court of Arbitration proceeded, notwithstanding Standard's refusal and non-participation in the proceedings. Then the Court, on December 15, 1954, appointed an arbitrator and designated Oslo, Norway, as the place of arbitration. The arbitrator proceeded *ex parte* and made an award of \$12,371.28. Following the award, Fuchs brought a common law action before the U.S. District Court for the Northern District of Oklahoma, seeking a judgment upon the award. But the defendant, Standard, referred to section 4 of the United States Arbitration Act, which reads as follows :

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement of arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial court at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided in such agreement...

and asserted that when it refused to arbitrate, an order under § 4 of the Act, directing the parties to proceed with the terms of

54) *Standard Magnesium Corporation v. Otto Fuchs K. G. Metallwerke* 251 Fed. 455.

the agreement was a prerequisite to the power of the arbitrator to proceed with the arbitration and make a valid award. The trial court denied this allegation, citing several cases. On appeal, the Circuit Court, affirming the decision stated :

If the agreement provides that where one party refuses or fails to submit to arbitration that an arbitrator may be appointed and that the arbitration may proceed *ex parte*, and further provides for the procedure to be followed in such an *ex parte* proceeding, there is no occasion to invoke the remedy of § 4. Such a remedy is necessary only in those cases where one party refuses to participate in the arbitration and a court order is necessary in order for the arbitration to proceed *ex parte*⁵⁵.

The Court also added that, in this construction, the defendant in the proceeding to enforce the award may assert any claim against the contract of arbitration which he as at law or in equity. No party made a petition for *certiorari* after this decision. In this case the Treaty of Friendship, Commerce and Navigation between the U.S. and Germany was not applicable because of the priority of the arbitration agreement to the Treaty.

3. Enforcement of the ICC Arbitral Awards in Turkey

Also in Turkey the ICC Arbitral Awards must be considered as foreign arbitral awards and must undergo the procedure followed by Turkish Courts for the enforcement of such awards. Any arbitral award which contains a "foreign element" must be considered a foreign arbitral award under Turkish law⁵⁶.

Turkey is not a signatory to the 1927 Geneva Convention. She is, however, signatory to the 1958 New York Convention, although this convention has not yet been ratified. Moreover, as in American Law, domestic laws, such as the Code of Civil Procedure, do not contain any provision for the enforcement of foreign awards. However, this lack of statutory provisions does not mean that foreign arbitral awards are not enforceable in Turkey. The law on the en-

55) Ibid.

56) **Uluç**, op: cit.

forcement of foreign arbitral awards is a law created by the decisions of the Supreme Court of Turkey (Yargıtay). This judge-made law was not uniform until November, 7, 1951, when the Joint Session of Civil Matters of the Supreme Court (Yargıtay Hukuk Genel Kurulu) rendered its decision on this matter. In fact, the Session of Commercial Matters of the Supreme Court in two cases held that foreign arbitral awards must be compared with foreign judgments and therefore an order of *exequatur* was necessary for their enforcement^{56bis}. However, the Session of the Matters on Execution and Bankruptcy took the opposite view and, affirming the decision of the trial court which gave a foreign arbitral award the same force which Turkish arbitral awards would have been given, held that "The *exequatur* procedure is not applicable to the arbitral awards even if they have been made by foreign arbitrators"⁵⁷. And this decision was followed by the same session in a subsequent case⁵⁸.

But this good approach of the Session of Matters on Execution and Bankruptcy was overruled by the decision of the Joint Session of Civil Matters of the Supreme Court on November 7, 1951. In this case an arbitral award was made in Argentina by Argentine arbitrators, in accordance with Argentine Law, and the winner was seeking enforcement in conformity with the aforementioned decisions of the Session of Matters on Execution and Bankruptcy. The trial court rendered its decision in favor of the Plaintiff. But the Joint Session, reversing its judgment, held that "The Code of Civil Procedure gives enforcement to only the arbitral awards made in accordance with Turkish Law; a foreign arbitral award can be enforced only upon an order of *exequatur* rendered by the Turkish Courts of Law"⁵⁹. Several judges dissented. The Session of Commercial Matters, in a subsequent case in connection with an arbitral award made by the Foreign Trade Arbitration Commission of

56bis) Yargıtay Ticaret Dairesi, (Cassation Court. Commercial Division), 23.3.1949, E. 48/470, K. 1495; 22.4.1949, E. 48/4733, K. 2042

57) Yargıtay İcra ve İflâs Dairesi, 4.3.1948, E. 2614, K. 2931.

58) Yargıtay İcra ve İflâs Dairesi 11.7.1950, E. 1919 K. 3354.

59) Yargıtay Hukuk Genel Kurulu 7.11.1951, E. 126, K. 109 1 Türk İçtihatlar Külliyyatı 409 (1952).

the U.S.S.R. Chamber of Commerce in Moscow, followed the decision of the Joint Session and required an order of *exequatur*⁶⁰.

This new approach of the Supreme Court has been strongly criticized and attacked by Professor Rabi N. Koral, a well-known professor law at the University of Istanbul and world-famous arbitration specialist⁶¹. He is of the opinion that the action for enforcement of foreign arbitral award is *ex contractu* in nature. Therefore, the court giving its decision should not require more than the validity of the award in accordance with the applicable law to the arbitration proceedings⁶². The opinion on the contractual nature of an arbitral award had previously been defended by Professors Belgesay, S. Ş. Ansay, Belbez and Judge Erkuyumcu⁶³. The basic difference between the opinions of these scholars and Koral is that Koral does not say, as they say, that a foreign arbitral award should be enforced the same as Turkish awards, but he states that a foreign award is a sufficient basis for bringing an *ex contractu* action before a Turkish Court.

Whatever the value of these opinions may be, the fact remains that the Supreme Court has not changed its opinion since 1951. Therefore, as a requirement of law, an *order of exequatur* is necessary for enforcement of foreign arbitral awards, particularly ICC awards.

The actual procedure for *exequatur* upon foreign arbitral awards may be explained very briefly in the following words :

First, if the country of the party who is seeking enforcement is either Italy or Austria, the order will be rendered in accordance with the treaties between Turkey and those countries.

Second, if there is no treaty, the *exequatur* procedure of the Code Civil Procedure must be followed. The first requirement is the finality of the arbitral award⁶⁴. In the case of an ICC Award;

60) Yargıtay Ticaret Dairesi, 21.1.1952, E. 6320, K. 955, 2 Türk İçtihatlar Külliyesi 407 (1953).

61) Koral, Rabi N. Hususi Hukukta Milletlerarası Hakem Kararlarının İcrası (L'exécution des sentences arbitrales étrangères en Turquie) 48-71 (1958).

62) Koral, supra 71.

63) Koral, supra, 77.

64) Yelmer, Necdet, "Turkey" in International Commercial Ar-

Article 29; section 2 of the Rules concerning the waiver of the rights of parties to appeal must be taken into account. If, in accordance with the law applicable to arbitration, such waiver is valid, the ICC award must be considered final in conformity with the Turkish Code of Civil Procedure. The second requirement is reciprocity. This means that in the country of the person who is seeking enforcement, Turkish arbitral awards must be given effect for enforcement. I agree with the opinion of Ansay⁶⁵ that this reciprocity must be an actual reciprocity, not an agreement reciprocity between that country and Turkey.

The third requirement is that the subject matter of the arbitral award must not be within the exclusive jurisdiction of the Turkish Courts. For example, any arbitral award upon the personal status of a Turkish national or upon an issue of family law cannot be enforced in Turkey. And of course, if the subject matter of the arbitration is against the rules of public law or public order or the provisions of the Turkish Constitution, such an award is not enforceable. The last is procedural requirements: Article 540 of the Code Civil Procedure requires that "the judgment rendered" must be held by a court which has jurisdiction. As to arbitral awards, we must look at the arbitrability of the matter in accordance with the applicable law to the arbitration. If the answer is affirmative, the requirement of the article is complied with. Article 540 also requires that the parties must be duly notified and legally represented. This requirement does not bar the enforcement of an ICC award rendered *ex parte* in accordance with Rule 13, just as was done in the *Standard Magnesium* case. In fact, the Turkish Code requires that each party must be given full opportunity to appear or be represented; if, however, a party does not profit from this opportunity, he cannot claim the denial of his right to be represented in order to bar the enforcement of the award.

If the party seeking enforcement does not reside or is not domiciled in Turkey, the request for an order of *exequatur* must be

bitration, supra, p: 479 and; **Ansay, Tuğrul**. Jurisdiction and Enforcement of Foreign Judgments in the United States and Turkey, unpublished thesis for LL.M. degree (C.U.) p: 58 ff.

65) **Ansay**, op: cit., 62.

Istanbul. And this request must be accompanied by a certified translation addressed to the Civil Court of the First Instance of Ankara or transcript of the ICC arbitral award and also a certified translation of same in Turkish. The former is done by the Secretariat of the Court; the latter, by a notary public in Turkey, or by Turkish consulates abroad.

III. CONCLUSION

As we have seen, the ICC is one of the most important and the biggest arbitration centers for the settling of international commercial disputes. ICC has proved its reliability and its experience in the past 45 years. For this reason, in many commercial contracts between European businessmen, or between businessmen from other continents, all these people prefer using the ICC Arbitration Clause for the settlement of any possible dispute. Statistics prove that so far ICC has realized its goals of speed, economy and privacy. Particularly the two former can be well-understood when compared with the costs and speed of proceedings before ordinary tribunals.

Of course, it cannot be said that the Rules of Conciliation and Arbitration of ICC are as yet ideal and that they eliminate every dispute on procedural issues. But they are quite sufficient for the present to put into work a good institutional arbitration system for settling international commercial disputes. On the other hand, its sufficiency for today does not necessarily mean the same for tomorrow. As commercial transactions are being changed in form and substance day by day, the devices and institutions for the settling of disputes will certainly also need some changes. This will be possible if, and only if, enough legal literature is written on this subject. Unfortunately at present this is not encouraging. Naturally, any scholar who is interested in this subject will need material as a basis for his research. This material at first must be the ICC arbitral awards.

I reiterate, the Court of Arbitration must, in the future ask, in every case, the parties' consent to publication of their awards. I do believe that, in most to the cases, the parties will not mind having the awards published. This procedure will help the legal doctrine

and the development of international commercial arbitration, especially ICC arbitration, without causing any harm to the privacy of ICC Arbitration. On the other hand, I do not believe that, in view of the Rules and the past of the ICC Arbitration, publication of the awards would create precedents which would restrict the arbitrator's freedom to decide freely in future cases⁶⁶. Owing to its continental character and free nature, the ICC Arbitration would be far from an arbitral case law.

66) **Cherne, Leo**, Should Arbitration Awards be Published? *1* Arbitration Journal 75 (1946).