

# Arbitrating International Disputes

*Experiences of the International Chamber of Commerce are related; pitfalls told, suggestions given*

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Arbitration plays an important role in resolving international business disputes. The needs to which international commercial arbitration responds exist in the field of industrial and intellectual property rights as much as they exist in other areas of international business. These include the need to find a quick solution at limited costs, rendered by unbiased and independent judges. But even more appealing in the industrial property area are two other factors: the confidentiality of the arbitration process and the qualifications of the arbitrators.

Confidentiality is vital since industrial property rights consist of valuable and sensitive information that is not always protected by patents and other rights. Unprotected know-how sometimes represents a greater value than protected patent rights. A dispute settled by court proceedings entails the risk that sensitive information might be divulged to outside parties, whereas in arbitration only the parties to the dispute have access to the files and proceedings.

The arbitrators may be appointed by the parties, who thus have a much greater control over who decides the dispute than when the parties bring their claim to an ordinary court of law. Judges may not have the technical skills or be familiar with the branch of business in which the parties are dealing. In arbitration the parties can choose the person that they know has the necessary qualifications and experience.

Just as in any other dispute, at least one of the parties to an industrial property transaction will not feel comfortable being before a judge in a foreign country having the same nationality as its opponent party. Furthermore, it is likely that the procedures used in a foreign court will be unknown, different and difficult to understand to one of the parties. It is also likely that in court the dispute will be decided according to a domestic legal system, created to resolve disputes between parties belonging to the same system, without considering the international aspects of the relationship. Finally, the award rendered by arbitrators will often be more easily enforced abroad than a decision made by a

court.

Over recent years licensing disputes have comprised approximately 10% of the more than 300 new cases registered annually by the ICC Court of Arbitration. Consequently, the ICC has gathered considerable experience in the field of licensing-disputes resolution. It is the object of this paper to give an account of the ICC Court of Arbitration, its structure, people and procedures, and to depict some recent developments with particular regard to licensing disputes.

## THE ICC COURT OF ARBITRATION

The Court of Arbitration of the International Chamber of Commerce is an international institution that offers arbitration services to the international business community. The ICC Court was originally established in 1923. It is a private organization, completely independent of government control and support. The creation of a permanent body offering services on a regular basis for the private settlement of international business disputes was seen as a useful part of the ICC's efforts to facilitate and promote the flow of international commerce and investment.

From its beginning, more than 60 years ago, the ICC Court grew steadily until World War II interrupted its work. After 1945 its growth and expansion resumed, and during the past decade the caseload of the Court has dramatically increased.

In 1986, the total caseload varied between 600 and 650 cases at any one time and involved claims and counter-claims totaling almost \$9 billion. The breakdown of these cases by economic sector was as follows:

Foreign trade	33%
Construction	28
Licensing	13
Joint Venture	5
Agency	7
Financing	1
Others (Maritime, transport, etc.)	13
	<hr/>
	100%

Over the past year approximately: 1/6 of the parties to ICC arbitration were governmental or para-statal entities, and 1/3 of the parties were from developing countries. In 1985, over 90 parties from beyond Europe and North America were claimants in ICC arbitrations, reflecting an increasing resort to ICC arbitration by developing countries.

## Function of the Court

The words "Court of Arbitration" may seem misleading. The Court is not a judicial court, nor does the Court arbitrate disputes. Neither parties nor their lawyers

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appear before the Court, and the substantive arbitration proceedings carried on under its auspices are often held in a city far distant from the seat of the Court in Paris. In the arbitration process the Court never decides a dispute; it never gives a judgment in a case nor does it act as an appellate court to hear an appeal from a decision or award made by an arbitral tribunal.

Instead, the Court offers the international business community the services of an administrative agency that provides institutional "supervision" of the arbitration of business disputes. The permanent institutional elements of ICC arbitration are the Court, the Secretariat and the National Committees of the ICC. The Court and the Secretariat are located in the headquarters of the ICC in Paris. The National Committees of the ICC are constituted by the respective national organizations and enterprises that are members of the ICC. There are some 60 National Committees, spread throughout the world.

#### Composition of the Court

Each National Committee of the ICC has the right to nominate one member of the Court for a three-year term. Currently the Court has 40 members coming from all continents. More precisely the members come from the following countries:

Australia	Colombia
Austria	Cyprus
Belgium	Denmark
Brazil	Egypt
Canada	Finland
France	Mexico
Federal Republic of Germany	Morocco
Greece	Netherlands
Iceland	Nigeria
India	Norway
Iran	Portugal
Ireland	Singapore
Israel	Spain
Italy	Sweden
Ivory Coast	Switzerland
Japan	Turkey
Jordan	United Kingdom
Lebanon	United States
Luxembourg	Venezuela
Madagascar	Yugoslavia

In addition to these national members, the Court has a Chairman, five Vice-Chairmen, a Secretary General, and a General Counsel. Currently, these officials come from France, Lebanon, India, Mexico, Sweden, Switzerland and the United States of America, respectively.

The composition of the Court contributes to its neutrality and to the international character of ICC arbitration. Its structure assures that a party to an ICC arbitration will neither enjoy an advantage nor suffer a disadvantage by reason of his nationality.

#### Internal Procedures

The functions of the Court are governed by the "Rules for the ICC Court of Arbitration," the "Statutes of the Court" and the "Internal Rules" (ICC Publication No. 291). Under Article 4 of the Internal Rules, six members are required for a quorum to conduct the business of the Court in plenary session. Generally about 15 members attend the regular monthly sessions. The most active members tend to be those who live in or near Paris.

In addition to the plenary sessions, the Court meets twice a month in a limited composition: the "Committee of the Court." This committee is empowered to make

unanimous decisions on all matters within the jurisdiction of the Court, except for: (i) challenge of arbitrators, (ii) allegations of failure to fulfill arbitral functions and (iii) approval of draft awards other than those awards made with the consent of the parties. The decisions reached by the Committee are communicated to the Court at its next plenary session. If the committee cannot reach a decision or decides to abstain, the particular case is submitted to the next plenary session (Art. 11 of the Internal Rules).

The Committee of the Court consists of two members of the Court and the Chairman. The membership of this Committee is rotated among the members of the Court.

#### The Secretariat

The Secretariat of the Court prepares and presents the cases and other matters that come before the Court.

Under the Chairman of the Court, the Secretary General of the Court has responsibility for the administration of the ICC arbitration process. The Staff of the Secretariat, which includes five attorneys trained in different legal systems, has been enlarged and reorganized, and the international character of ICC arbitration is reflected in the background of the present staff. Members come from Brazil, the Federal Republic of Germany, France, Lebanon, Mexico, Nigeria, Spain, Sweden, the United Kingdom and the United States of America (20 staff members altogether).

### MAIN FEATURES OF THE ICC ARBITRAL PROCEDURE

#### Jurisdiction and Request for Arbitration

Over what cases does the ICC Court of Arbitration have jurisdiction? The answer is to be found in Article 1, paragraph 1 of the Rules for the ICC Court of Arbitration, where it is said that the function of the Court is to provide for the settlement by arbitration of business disputes of an international character.

There are thus two criteria: the dispute must be of a business character and it must be international. The Court's Rules do not define these criteria and allows for a wide interpretation in the interest of parties who have agreed to submit their dispute to the ICC. Article 1 of the Court's Internal Rules even derogates from the international requisite, by stipulating that the Court "may accept jurisdiction over business disputes not of an international business nature, if it has jurisdiction by reason of an arbitration agreement." In the past the Court has thus accepted disputes between parties having the same nationality. Employment cases are borderline as far as the business criterion is concerned, and some have been accepted when the employment contract is related to a business project, such as the appointment of a site engineer on a construction site.

As soon as the claimant has paid US\$2,000 as an advance toward administrative costs, the Secretariat opens up a file. The Secretariat then checks whether a prima facie agreement to arbitrate, designating the ICC, has been concluded (Article 7 of the Court's rules); if such is the case, the Secretariat sends a copy of the request to the defendant. The latter has 30 days to reply to the request and is free to lodge a counterclaim at the same time (Article 5 of the Court's Rules).

Article 8 of the Court's Rules stipulates that the prima

facie existence of an agreement to arbitrate under the ICC Rules gives the Court the power to decide that the arbitration shall proceed. In such a case any decision as to the arbitrator's jurisdiction shall be made by the arbitrator himself (Article 8.3 of the Rules of the ICC Court of Arbitration).

### *The Role and Authority of the Arbitrator*

Those who act as commercial arbitrators within the framework of the ICC Rules undertake serious responsibilities to the parties and to the ICC. Whether they have been appointed on the proposal of the parties or other arbitrators or directly by the Court of Arbitration, the arbitrators remain responsible to the Court.

Each arbitrator must be independent from the parties to the arbitration. An arbitrator proposed by a party has, no doubt, an interest in favor of the party who nominated him, but he must, nonetheless, act fairly and impartially.

Arbitrators selected by the parties should not consider themselves the agents or advocates of the party who proposed them. Once appointed by the Court (Article 2, Sections 3 and 4), the arbitrators have the duty of deciding impartially between the parties, and they will be looked upon as acting improperly if they act as agents or take instructions from either side. Such a situation may lead to a challenge of the arbitration according to Article 2, Section 7 or to a decision that the arbitrator is not fulfilling his functions in accordance with the Rules, Article 2, Section 8.

An arbitrator appointed by one of the parties must not confer with the party who appointed him, or attend conferences with solicitors or counsel.

### **Written Statement**

Each arbitrator will be asked to provide the Court with a written statement of his independence, disclosing all facts that might create an appearance of possible conflict of interest. A nomination will not be submitted to the Court prior to the receipt of this statement.

When the arbitral tribunal is composed of three members, all three arbitrators form a collegium and they must deliberate together, at the same time and place. Where arbitrators live far from each other, a continued exchange of views may be had by way of correspondence, provided that a first oral deliberation has taken place, covering all main points of issue and, furthermore, provided that the applicable rules allow for such a mode of deliberation.

In ICC arbitration the third arbitrator is neither an "umpire" — who acts alone and only after the two co-arbitrators fail to agree — nor a "*tiers arbitre*" — who renders a decision by aligning to the opinion expressed by one of the two co-arbitrators.

When the tribunal is composed of three members, unanimity is always desirable; failing unanimity, the decisions are made by a majority vote. If no majority is reached, the Chairman decides alone (Article 19).

### *Choice of Arbitrators*

In the case of minor disputes, the parties often prefer, for reasons of economy, to have a single arbitrator. As soon as the amount in dispute reaches a certain level, the parties seem to prefer three arbitrators, each party

appointing one of them. If the parties have not specified the number of arbitrators, the ruling principle is that a single arbitrator is appointed, unless the dispute justifies having three arbitrators (Article 2.5 of the Court's Rules).

As a rule of thumb, and where no other circumstances indicate a preference for one or three arbitrators, the Court appoints a single arbitrator where the amount in dispute is less than \$1 million and three arbitrators when the amount is higher. Parties originating from Eastern socialist countries almost invariably request the appointment of three arbitrators. The Court normally accepts such requests, also where the amount in dispute is lower than \$1 million, in the interest of affording confidence to the party, that there be at least one arbitrator who fully understands the law, language and culture of the party.

The number of arbitrators must be uneven. The delicate issue in the composition of any arbitral tribunal is the nomination of the one arbitrator on whom the decision may finally depend. It frequently happens that the arbitrators appointed by the parties agree on the choice of the chairman. But in practice it is mostly left to the Court of Arbitration to appoint the chairman of the arbitral tribunal.

Which criteria are taken into consideration? The Court checks in each case the particulars of the dispute, the nationalities of the parties, the law applicable to the dispute, the languages in which the contract, the request for arbitration and the defendant's answer are drafted, the nationality of the arbitrators proposed by the parties, and then turns to an ICC National Committee with a request to submit to the Court of Arbitration, a nomination in view of the appointment of a chairman or a sole arbitrator, as the case may be.

### **First Decision**

The first decision, therefore, consists of choosing the National Committee to which the Secretariat will address itself. This choice will naturally be made in favor of a Committee that can be considered as "neutral" in view of the nationalities of the parties.

If a place of arbitration has been agreed upon by the parties, the Court would normally ask the National Committee of that country to propose an arbitrator. This rule does not apply if the place is in the country of one of the parties; to ask the National Committee in that country would violate the rule that the arbitrator come from a country which is neutral in view of the parties' nationalities.

In two cases out of three, the parties have agreed on the place of arbitration. In the remaining one-third of cases only, the Court has to make a choice. The following example may help to illustrate how the Court's choice is made.

Let us assume that the two parties come from the Federal Republic of Germany and Yugoslavia. In the absence of any particular indications, the Court theoretically can ask any National Committee (except the German and Yugoslav National Committees) to propose the sole or third arbitrator.

The choice becomes more limited when other factors are considered. If the parties had agreed on an applicable law to govern their contractual relations, it is likely

that the Court would ask a National Committee from that country to propose the arbitrator (except where the law is that of Germany or Yugoslavia).

Where no law has been agreed on, the language of the contract or of the request may be the determining factor. Let us imagine that in our example the German and Yugoslav parties had no agreement on the law applicable to the contract and that the contract was in the German language. The Court would then probably invite the Austrian or Swiss Committee of the ICC to propose a German-speaking arbitrator.

Going one step further, we may suppose that each of the parties has appointed one arbitrator of the same nationality as that of the parties. The Court's choice would still be between the Austrian and Swiss National Committee. If, however, the Yugoslav party had appointed a Swiss arbitrator and the German party, a German arbitrator, the Court's likely choice for the third arbitrator would be Austrian.

But what if both parties have nominated Swiss arbitrators? The likely choice then seems to be to invite the Swiss National Committee of the ICC to propose the chairman, so that we would end up with an arbitral tribunal of three Swiss arbitrators. Alternatively, and this is not an unlikely case, we may imagine that both parties have nominated two arbitrators of the same nationality as that of one of the parties, e.g. two Yugoslav arbitrators. In such a case the Court could not invite the Yugoslav National Committee to propose the third arbitrator unless none of the parties objected to the idea that the third arbitrator be of the same nationality as that of one of the parties (Article 2.6 of the Court's rules).

If an objection is raised, the Court's choice would again be between the Austrian and Swiss Committees of the ICC; and the arbitration tribunal would consist of two Yugoslav co-arbitrators with, e.g., a Swiss chairman. Finally, where no other criteria offer guidance, the nationality of the parties' counsel may influence the Court's choice.

### Second Decision

The second — and probably even more important — decision concerns the choice by the relevant National Committee of a person who could be entrusted with the chairmanship of the arbitral tribunal that is being set up. Here there are no hard-and-fast rules. It is left to each Secretary General of the National Committee in question to decide who should be nominated among the various competent persons known to him.

Each National Committee has its own system for identifying potential arbitrators. For example, in Belgium, India, Korea and Switzerland, the National Committees of the ICC have agreements with national arbitration organizations for advice and assistance in selecting a nominee. The United Kingdom National Committee has an adviser who assists in the selection of a nominee. Other National Committees maintain lists of qualified professionals, and in the United States and France the ICC National Committee has established a special nomination committee to provide advice in the selection process.

Thanks to a central index established in 1984, the Court's Secretariat has immediate access to data on all arbitrators acting in ICC cases. This index enables the

Court to know at any moment the number of cases any given arbitrator has handled in the past, the number of cases he or she has on hand, whether he or she is acting as a sole arbitrator, as a chairman or as a co-arbitrator, the time spent by the arbitrator for the completion of the finished cases, his or her language skills, professional specialities, etc.

Before appointing an arbitrator proposed by a National Committee of the ICC, the Court's secretariat screens the index and advises the Court of the arbitrator's record. Thereby, the court can avoid the nomination of an arbitrator more frequently than is desirable in view of their workload of current ICC cases.

### Place of Arbitration

The place of arbitration will be chosen, having regard to the convenience of the parties and the effectiveness that could be expected to be given to an award rendered at the place of arbitration. However, since the parties themselves agree on a place of arbitration to an increasing extent, the Court now intervenes less and less.

What criteria do the ICC rules stipulate and what happens in practice when the Court fixes the place of arbitration? Article 12 of the Court's Rules gives no indications as to how the choice should be made. The Court's practice can again best be explained by taking some examples. First, where a chairman or a sole arbitrator has already been appointed or agreed upon by the parties, the Court would normally fix the place of arbitration in the country of that arbitrator. Where no chairman or sole arbitrator has been appointed, the court would consider what nationality the arbitrator would be likely to have; then the choice of the place of arbitration and of the presiding arbitrator are undertaken simultaneously.

Secondly, the effectiveness of the ultimate award must be ascertained and possible places of arbitration are screened with respect to their adherence to bilateral, multilateral or international conventions recognizing commercial arbitration and enforcement of arbitral awards.

Thirdly, the Court's choice of place will be influenced by the attitude of local courts. Where these tend to intervene in the arbitration process unnecessarily and offer a party in bad faith an opportunity to obstruct the arbitration, the ICC Court is likely to go elsewhere when fixing the place of arbitration.

Fourthly, the availability of adequate support services (secretaries, conference rooms, hotels, libraries, etc.) are taken into account.

Hearings are generally held at the place of arbitration. However, the arbitrators are at liberty to hold hearings elsewhere as the circumstances require (to hear certain witnesses, to visit a site...).

International arbitrators must, unlike national judges, be prepared to travel to different countries in the exercise of their functions.

### Advance Payments, Fees and Other Costs

Under the ICC arbitration system, the arbitrator's fee and the administrative charges of the ICC are based on the amount in dispute and are calculated according to published schedules (Appendix III to the Court's Rules).

With respect to fees and other costs, the ICC system is designed to avoid financial negotiations between ar-

bitrators and the parties. At the beginning of a case, the Court, taking into account the amount in dispute, estimates the probable cost of the arbitration and then fixes a sum for an advance payment, which must be paid directly to the ICC. Advance payments (according to Article 9 of the Rules and Article 19 of the Internal Rules) are deposited with the ICC at prescribed stages in the proceedings. The ICC is responsible for paying fees and other costs, and if the parties do not make the required advance payments, the proceedings are suspended.

A final determination of costs is made by the Court at the end of the proceedings. Arbitrator's fees are set within a range prescribed in Appendix III to the Court's Rules, which is based on the amount in dispute. Fees are determined by the Court, taking into consideration the time spent by the arbitrators, the duration of the proceedings and the complexity of the dispute (Article 23 of the Internal Rules).

### *Terms of Reference*

Each case submitted to arbitration is based on a private, contractual agreement: the arbitration clause. The arbitrators are entrusted with their task on the basis of this agreement between the parties. Between the parties and the arbitrators there is, therefore, a legal relationship, the details of which must be put down in writing in the interest of a clear and unambiguous fulfillment of the arbitrator's tasks.

The instrument defining and limiting this legal relationship is called in English, "Terms of Reference"; in French, "*Acte de Mission*" (Article 13 of the Court's Rules).

In some countries there is a theory that such a limitation *in limine litis* of the arbitrator's task imposes an unwelcome restriction on the arbitral procedure. The parties should remain free to submit to the arbitrators any aspect of their differences of opinion, even if they could not have foreseen it at the start of the proceedings.

On the other hand, the drafting of Terms of Reference seems so important for a clear course of the proceedings that the advantages of such a document far exceed its theoretical shortcomings. Such is the attitude of the ICC Rules, which demand that Terms of Reference be drawn up. There is no doubt that the parties at the beginning of the proceedings should be given sufficient room for further moves, allowing them to comment at a later stage on unknown or unclear aspects of their case. This has been provided for in the ICC Rules (Article 16 of the Court's Rules).

The Terms of Reference shall help the arbitrator and the parties to plan the proceedings and the Court to check that the arbitrator's award deals only with the claims defined. The drafting of the Terms of Reference affords an (initial) opportunity for the parties and the arbitrator to meet, and may result in a settlement of the dispute at an early stage.

How should the Terms of Reference be drafted? They must include:

- (a) a summary of the case.
- (b) the parties' respective claims.
- (c) the issues to be determined by the arbitrators.
- (d) the place of arbitration.
- (e) the procedural rules and the language(s) to be used.

The summary of the case should only contain facts which both parties acknowledge to be objectively estab-

lished. This includes, e.g. the date of signature of the contract, the undisputed contents of this agreement, the dates and places when and where the parties have had meetings, the uncontested dates and contents of the letters that were exchanged, etc. In this section there may not be, on any account, quotations of what was alleged by one party but questioned by the other one.

The second part of the Terms of Reference contains the parties' respective claims. Contrary to the first part, each party may and must set out here its claims against the other and formulate its requests, so that the amount of the dispute and its elements appear clearly.

Lastly, a further section must contain the formal description of the issues submitted to the arbitrators. In this respect it is advisable not to frame the issues in such a narrow way as to disallow room for additional aspects of the dispute if these appeared as a consequence of an, as yet, unforeseen extension of the proceedings.

The Terms of Reference must be signed by the parties as well as by the arbitrators.

In this context, a few words should be added about the case when one of the parties refuse to sign the Terms of Reference. This is one possible opportunity for a party to obstruct the proceedings. The ICC Rules provide that in such a case the Court of Arbitration shall decide if the document is to be approved, and the Court will set a time limit for the signature of the statement by the defaulting party, on the expiry of which limit the arbitration shall proceed, with or without the defaulting party's signature.

### *The Arbitral Proceedings*

As set forth in Article 11 of the Rules, the parties are free to agree upon the rules of the proceedings, provided the ICC Rules of Arbitration and the mandatory provisions of the national law of the place of arbitration applicable to international arbitration are respected. If the parties fail to agree on the rules of the proceedings, the arbitrators shall decide them. Details of these rules shall be set forth in the Terms of Reference.

The arbitrators may avail themselves of the flexibility of Article 11 in the choice of rules when the parties are nationals of countries with legal systems showing marked differences: common law and civil law for instance. An arbitrator is, therefore, in a position to draw up rules providing a middle road between the two systems, especially regarding the production of proof or the admission of a discovery procedure, admission of examination and cross-examination of witnesses by the parties' advocates. The arbitrator should, however, reserve the right to set aside questions he regards as irrelevant and to ask those he regards as appropriate.

During the whole of the proceedings, the arbitrators and, in particular, the chairman of the arbitral tribunal, must show a sense of psychology as well as authority. The arbitrators should not accept passively that the parties or their counsel can, without valid reason, delay the various stages of the proceedings, or not comply with deadlines or not fulfill the tasks they have assigned to them. It is part of the formal duties of an impartial arbitrator to make both parties abide by their commitments.

Any negligence *vis-a-vis* one party may damage the interests of the other one. Arbitral proceedings under the ICC Rules bring face-to-face two or several approach-

es frequently marked by ways of thinking which differ fundamentally. An arbitrator must bridge the gap that may be very deep between these mentalities. A prerequisite to such handling is that the arbitrator understands without any difficulty the two, or more, mentalities. Each party to the arbitration must feel that it is being well and fully understood. If the parties are to carry out voluntarily the award bringing their dispute to an end, they must not be under the impression that the principles underlying their pleadings have not been properly understood and considered by the arbitrators.

#### Experts

Under Article 14.2 of the Rules arbitrators are free to appoint one or more experts, either on their own initiative, or at the request of the parties. Selection of a person to be the qualified expert is made by the arbitrators in consultation with the parties. The function of the expert in the case is defined by the Tribunal, and the expert is responsible to the Tribunal.

Arbitrators may apply to the ICC International Centre for Technical Expertise for qualified experts, if they wish.

Arbitrators are advised to forward the expert's report to the parties and to set a time-limit for comments. It may also be advisable to summon the parties and the expert with a view to discussing the report.

#### Rendering of the Award

The arbitrator must make his award within six months of the date of signing the Terms of Reference (Article 18.1 of the Court's Rules). The Court requires that the arbitrator sets forth the reasons in the award. Before signing the award, the arbitrator must submit the draft to the Court of Arbitration in Paris (Article 21 of the Court's Rules).

The Court gives its approval after scrutiny both of the form of the award and of the merits of the case. The Court is empowered to stipulate amendments only with the form of the award, although it may draw the arbitrator's attention to points concerning the merits of the case.

Where the Court deems an award not to be sufficiently clear, it may send it back to the arbitrator with its comments, requiring modifications in form and or calling further consideration of the reasoning on specified points by the arbitrator who remains free to decide. Sometimes the Court approves the award, subject to certain modifications being made by the arbitrator. This control of the Court undoubtedly accounts for the high rate of voluntary performance of ICC awards, the small number of challenges to them and infrequent setting aside of them by national courts.

The award is final (Article 24 of the Court's Rules) and the parties are deemed to have undertaken to carry it out without delay. In particular, they must waive their right to any form of appeal, in-so-far as such a waiver can validly be made.

#### The Supervision by the Court — What Does it Imply?

It has been stated above, that the ICC Court provides "supervision" of the arbitration of business disputes. What, in reality, is this supervision, and how does it affect the arbitration cases?

The most important aspect is the regular screening of

the development of each case. After an arbitral tribunal has been set up and half of the advance to cover the costs of the arbitration has been paid, the arbitrators have two months to draft the Terms of Reference.

Before the expiry of the two months, the case is presented to the Court's committee, for scrutiny and possible prolongation of the time. In most cases the Terms of Reference are not drawn up and signed within the stipulated time of two months and an extension is granted by the Court. A more normal time is, in reality, four months before the Terms of Reference are submitted to the Court, which takes note thereof.

Once the Terms of Reference exist and the full advance on costs has been paid, the arbitrators have six months to render the award. The Court's supervision during this second stage of the proceedings aims at ensuring that the arbitrators do not delay the rendering of the award without good reason.

Therefore, before the expiry of the six-month period, the case is presented to the Court by the Secretariat, giving an account of where the arbitrators are in the arbitration process and when they expect to deliver the draft award for the Court's scrutiny. Where circumstances so justify, the Court extends the time for rendering the award by three months, and where there are good reasons for it, at the expiry of the first prolongation, another three-month period and so on.

Consequently, each case is reviewed every two months until the Terms of Reference have been signed and, thereafter, every three months until the award is drafted. Arbitrators who cannot justify a delay (illness, parties' request to hold the case in suspense, etc.) are ultimately replaced so that the case can be terminate.

#### Publication of Awards

Being strictly confidential, the awards in arbitration disputes are not known to persons outside the parties, their counsel or the arbitrators. This is in the interests of the businessmen who have legitimate reasons for not bringing their commercial disputes into the open but is detrimental to the general knowledge of business law and its development.

To correct for this, a selection of abstracts of ICC arbitral awards can be found in the *Yearbook of Commercial Arbitration* (in English), and the *Journal du Droit International* (in French).

#### RECENT EXPERIENCES RELATING TO LICENSING DISPUTES

In this section a review will be made of a number of arbitration awards rendered in the domain of licensing disputes.

#### Scope of the Arbitration Agreement

Does a dispute exist? Arbitration agreements usually refer to the existence of a dispute, meaning that an arbitrator will have jurisdiction only if a dispute exists at the time a request is made. It is unusual, although not excluded, that the defendant admits the claim, and it happens in practice that the reasons for nonpayment are as simple as a lack of funds or the impossibility to obtain a government authorization to transfer money abroad.

This was the case in ICC arbitration no. 4705 (unpub-

lished). A French company had granted a license to a Portuguese company. The latter did not pay royalties as they fell due. The respondent did not dispute the sum claimed or the liability to pay interest thereon. The only reason for not having paid was financial difficulties. The arbitrator — a sole English arbitrator sitting in Lisbon — defined the issue to be determined in the arbitration as “the manner in which the admitted debt and interest should be discharged.” If the arbitrator had not retained jurisdiction, the claimant party would have been left with the alternative of seeking payment in court, and the court would have had to decide whether it had jurisdiction in spite of the existence of the arbitration clause.

#### *Arbitrator's Jurisdiction*

Some types of dispute cannot be decided by means of arbitration but only by courts of law. In international business relations it is generally accepted that the arbitrators themselves have a wide authority to decide their own jurisdiction. The arbitrator's freedom to decide on his own jurisdiction does not exclude court control. This can be exercised either during an arbitration or later when a party seeks recognition or enforcement of the arbitral award. The extent to which the courts at the place of arbitration may intervene varies from country to country; for example, a partial award on jurisdiction made in Switzerland may be challenged in a Swiss Court.

The courts at the place of enforcement of an arbitral award will exercise control over the arbitrability of the dispute. Some subjects are generally considered to be non-arbitrable: contracts *contra bonos mores*, fraud, competition and antitrust issues, patents and trademarks, bankruptcy, securities, and public order issues. The judges of some countries may apply a wider definition of arbitrable matters to international (as compared to national) business disputes.

United States courts in recent years have taken a more favorable attitude to the arbitrability of disputes such as patent validity, antitrust and RICO claims.

#### *Patents — Are Questions Relating to the Validity of Patents Arbitrable?*

In early 1987 the first United States patent controversy submitted to the ICC Court of Arbitration was decided by three American arbitrators sitting in New York.

#### *The Facts*

In 1974 a U.S. corporation appointed a German individual as exclusive dealer of heavy-duty commercial laundry machinery for Austria, Switzerland, West Germany, East Germany and Spain. The agreement was of the usual type, imposing a best-efforts undertaking, setting up of engineering services, after-sales service, right to use trade names, a minimum purchase obligation and noncompetition. A license was granted, covering the U.S. corporation's patent rights for the use and sale of the equipment.

However, during the term of the agreement, the dealer became associated with another U.S. corporation. The dealer started to manufacture another, similar washing machine, which it then sold in Germany at the same time as the licensor's machines. When the first U.S. corporation (the licensor) applied in Germany for a patent

covering its washing machine, the dealer filed an objection on the grounds that it did not possess the requisite novelty; it was too similar to a washing machine that the dealer had exhibited at a fair in Germany.

The agency and license agreement contained a clause as follows:

Any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration in accordance with the rules of the International Chamber of Commerce of Paris, by a panel sitting (in) New York, New York, U.S.A. and judgment upon the Award rendered may be entered in any court having jurisdiction thereof.

The Claimant submitted a request for arbitration against the dealer. While the arbitration was still in its early stages, the parties were informed of a lawsuit pending in Texas, partly raising the same issues as the arbitration and also issues regarding the patent on which the license was based. The lawsuit involved as a party the second U.S. corporation which was not a party to the Agency and license agreement. Thereafter, the three parties agreed to consolidate all their controversies into a single proceeding to be submitted to the same arbitral tribunal.

In the arbitration the first U.S. corporation claimed damages from the dealer for breach of obligations and from the second U.S. corporation for patent infringement. The latter counterclaimed, holding the patent to be invalid. The amounts sought were in the order of \$6.8 million, by Claimant, and \$1.6 million by Defendant.

#### *The Award*

The arbitrability of the patent issue was decided by the arbitrators in the following terms:

The issues of validity and infringement of United States patents have expressly been arbitrable only since enactment in 1982 of the revised United States Patent Code, including 35 U.S.C. §294, and this case appears to be the first United States patent controversy submitted to arbitration under the rules of the ICC Court of Arbitration. It is appropriate therefore that the Tribunal spell out its understanding of its role.

The Tribunal saw its role in the patent phase of this controversy as essentially the same as that of a U.S. District Court hearing a controversy concerning the validity and/or infringement of a United States patent, though possibly with greater responsibility in that no appeal lies from the award of this Tribunal. Under §294, the Award is binding only on the parties; in all other respects, however, the substantive aspects of United States patent law are the same in an arbitration as in a judicial proceeding, and the Tribunal sought to ascertain the facts and to interpret them in accordance with prevailing United States law.

In a well-reasoned award of 72 pages, the arbitrators upheld the validity of the patent, decided that the second U.S. corporation's washer did not infringe upon the licensor's patent and that no damages were due from the claimant to the respondents, or vice versa.

Each party was to bear its own costs plus half of the arbitration costs. These amounted to \$29,000 in fees for the ICC and approximately \$140,000 for the three arbitrators together. The award was rendered in one year and nine months.

The arbitrator's traditional approach to questions of validity and scope of patents is, however, to stay away from them. In ICC case 4300 (not published) three arbitrators sitting in Paris were asked to resolve a dispute between Lebanese and British claimants against a Jap-

anese defendant. Alleging that the Japanese party had violated the license agreement for the manufacture of teleprinters by using the claimant's patented technology in deliveries to its other customers without asking the claimants' permission, the claimants sought a declaration of patent infringement. The Japanese party objected that the arbitrators lacked jurisdiction to do this, since it would necessitate an examination of the patent law of the country where the patent had been granted. The arbitrators declined jurisdiction, holding that only national courts of law can decide upon the validity and scope of an issued patent.

#### Choice of Applicable Law

The ICC rules provide that the parties are free to determine the law to be applied by the arbitrator on the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict he deems appropriate.

If the parties have not chosen the substantive law applicable to the contract, the arbitrators will thus determine the national law or laws pursuant to which the agreement should be interpreted and its performance weighed. A review of current ICC arbitration practice reveals that the following methods are the most frequently used by arbitrators to determine the proper law of the contract.

- (i) application of the choice of law system in force at the seat;
- (ii) cumulative application of the choice of law system of the countries having a relation with the dispute;
- (iii) application of general principles of conflict of laws; and
- (iv) application of a rule of conflict chosen directly by the arbitrator.

The arbitrator is not required to follow the choice-of-law rules of the seat of arbitration, but he may use these rules if he finds them appropriate for the particular dispute at hand. There may be no significant relationship between the seat and the parties to the dispute; this is frequently the case where the Court of Arbitration fixes the place of arbitration. In such cases, there is little reason for applying the conflict-of-laws system at the seat of the arbitration.

The principal method used by ICC arbitrators to choose an appropriate conflict-of-laws rule is the *cumulative application of the different rules of conflict* of the countries having a relation to the dispute. The approach is particularly satisfying to arbitrators when the different relevant conflict systems yield the same result. By examining various choice-of-law rules, the arbitrator may find that they all point to the same law to be applied on the merits and that there is no real conflict of choice. For example, an arbitrator sitting in Sweden to decide a license dispute between a U.S. and a French party might find that if the choice-of-law rules of the U.S., France or Sweden were applied successively, the law of the licensor's country would always be chosen.

In ICC case no. 4695 (not published) an English, a Scotch and a German arbitrator, sitting in Brussels to decide a dispute regarding a license and hotel management contract, were faced with the following contrac-

tual provisions (which are of a somewhat unusual nature in ICC practice):

...The Arbitration shall be conducted in Brussels in the English language; the arbitrators shall be guided by the canons of interpretation generally applied in the English-speaking countries and by the precedents of their courts...

The arbitrators were of the opinion that the clause indicated an agreement of the parties as to what rules of conflict should apply and, consequently, decided on the English types of conflict. Thereupon, they continued:

Under the rules of English Private International Law, the proper law of the License Agreement is, in the opinion of the Tribunal, German law for the following reasons:

- (i) The contract's main object is the operation and management of a hotel in Germany and the services to be rendered were intended to assist in this object.
- (ii) The contract is expressed in the German language although the standard Licensor's agreement is in English.
- (iii) The contract is linked with a so-called Management Contract (illustrated, *inter alia*, by Article 9.1 of the License Agreement) which makes the termination of either trigger the termination of the other, and Article 23.1 of the said Management Contract contains an express choice of law clause in favour of German law.
- (iv) The foregoing three considerations appear to the Tribunal to outweigh the fact that the canons of interpretation to be used in construing the contract are those applied in English-speaking countries.

#### Comments

One may express surprise over the arbitrators' interpretation of the contract provision. It is very seldom that a contract contains agreement regarding which rules of conflict should be applied. Where an agreement is reached, it usually related to the law applicable to the merits of the case, whereby it is understood that the *renvoi* rules of the chosen material law shall not be applied. "The canons of interpretation" is an unusual expression in articles seeking to define an applicable law, and its meaning is not very clear. It seems, however, that even the arbitrators lean toward an interpretation according to which the clause is to be understood as an agreement on the law to be applied on the merits, and not as a choice-of-law rule. Their decision seems rather dictated by a precaution not to have to apply two different laws, English on the license agreement and German on the management contract, which would otherwise have been the result, since the choice of German law in the management contract did not leave room for any doubt.

In ICC case no. 4599 (not published) regarding a license granted by a licensor in New South Wales, Australia, to a licensee in the Netherlands, the three arbitrators (Canadian, Dutch and English) sitting in London (which place had been fixed by the ICC) applied the "classical" cumulative approach and held:

The tribunal has determined that the proper law of the license agreement and the law applicable to the merits of the dispute is the law of New South Wales.

Reasons:

1. This is not a situation where there is any indication by the parties as to the applicable law.
2. By virtue of the three systems of the conflict of laws which the Tribunal could deem appropriate (English, New South Wales, the Netherlands), the same conclusions would be reached.
3. Under Dutch conflict-of-laws rules, there is a rebuttable presumption in favour of the Law of the party who has to deliver the most characteristic performance. We find that the most characteristic performance, if it can

be established at all, would be that of the licensor, namely to provide the know-how; otherwise the contract is most closely connected with New South Wales.

### Comment

Would it be correct to think that, in general, the most characteristic performance in a licensing relationship is that of the licensor and that the above principle can be considered as a rule of universal application to decide the applicable law?

### The Duty to Act in Good Faith

Arbitrators deciding cases under the ICC rules are anxious to see that international business parties act in good faith. Good faith is the norm that is applied to judge parties' behavior when carrying out their respective obligations, particularly where a situation arises that was not expressly provided for in the contract, if one can speak of an international case law, a *Lex Mercatoria* as some prefer to call it (Prof. Goldman, Paris and others), the duty to act in good faith is certainly part of it.

This principle may be illustrated by ICC case, no. 4496 (not published).

### The Facts

A French manufacturer of "haute couture" made an agreement with an Italian manufacturer according to which the Italian should manufacture and sell under license a new line of women's ready-to-wear dresses. According to the license agreement, the licensee was granted an exclusive right to develop the new line, to manufacture it in Italy and to sell it all over the world, using the licensor's trademark. The licensor was to be responsible for the creation and styling of new collections and for their presentation in Paris every year. The contract was governed by French law.

Difficulties arose: the licensee was late with deliveries; the quality was unsatisfactory; customers complained and there was a large turnover in the licensee's personnel. Finally, the licensor addressed a letter to the licensee in which it reproached the licensee for not having fulfilled its undertaking to change the structure of his organization by a certain date as it had been agreed. The licensor gave notice of termination of the contract taking effect, "as it is customary," six months after receipt. The licensee objected to the termination.

The licensor requested in the arbitration a declaration that its termination was valid.

The dispute was submitted to a sole arbitrator of Swiss nationality. The arbitration took place in Paris.

### The Award

After having defined the relationship between the parties as a franchise — rather than license agreement — the arbitrator established that the contract was made for a period of three years, renewable on request of the licensee and that it made no provisions regarding termination, except where minimum royalties were not paid. The arbitrator held that the general dissatisfaction on the part of the licensor was not a sufficient reason to terminate since "the licensee had not made a good-faith performance impossible nor shown any attitude not to be willing to perform the contract or committed any acts that were contrary to good faith." If the licensor was

dissatisfied, he should have given the licensee a fair chance to improve by issuing a warning and fixing a period within which changes had to be carried through. But to terminate without warning was not correct, and the arbitrator declared the termination void.

Another example where the arbitrator held an action by a party to be contrary to good faith, is ICC case no. 4150 (not published).

A company in Liechtenstein had granted a German company an exclusive manufacture and sales license for Germany for a product protected by patent.

To make all efforts to implement the invention, such as reporting to the licensor on the manufacture and marketing efforts, or making the licensor aware of difficulties in the exploitation of the invention, was, in the arbitrator's opinion, an obligation on the part of the licensee that stemmed from the concept of good faith. However, as the licensee instead developed a procedure, in competition with the licensed procedure and during the term of the agreement, the arbitrator awarded damages to the licensor for the sales lost in the territory and the time lost in exploitation of the invention.

ICC Case no. 4374 (not published) is yet another example of the parties' duty to act in good faith, on which arbitrators rely. In a dispute between a U.S. claimant and a Hungarian trading company, the three arbitrators (one American appointed by the claimant; one Hungarian, appointed by the defendant; and one Swiss attorney, proposed by the Swiss National Committee of the ICC), had to decide on claims in the order of \$1,630,000 arising from an agreement for the exploitation of an invention, allegedly protected by a patent.

The parties had stipulated in their agreement that Zurich, Switzerland, was to be the place of arbitration. According to the agency agreement, the U.S. party should "prepare the groundwork for licensing agreements for the exploitation of the invention (X), protected by a U.S. patent no. (000)," owned by the Hungarian party.

### Express Doubts

During the term of the agreement, the U.S. party became aware that some prospective licensees, which he had approached, expressed doubts as to the value and the strength of the patent. Earlier patent applications had been published before the (000) U.S. patent had been applied for and constituted prior art which would render part of the patent (000) invalid. This view was supported by U.S. patent counsel, and the U.S. claimant then sought arbitration for the loss suffered for his lengthy and time-consuming efforts, on the expectation that the patent was valid and would earn substantial royalty income. The claimant held that the agency agreement was null and void because invalidity *ab initio* of the underlying U.S. patent and that he had been induced by error to conclude the agency agreement. Defendant therefore, so the Claimant argued, committed *culpa in contrahendo*.

The agency agreement was submitted to the "Swiss substantial Law on Obligations, with the exception of renvoi."

After a careful analysis of the agency agreement, the arbitrators defined the question to be answered as follows: If the licensor was unaware of the prior patent

applications (which put the validity of patent no. (000) in question), did it still constitute a breach of good faith to make no effort to discover them and, in consequence, leave the licensee in ignorance? In doing so the arbitrators referred to the Swiss Code of Obligations, Art. 24. After presentation of evidence the arbitrators found that the U.S. licensee and claimant had accepted the agency agreement with full knowledge of the defectiveness of patent (000), and they dismissed the claim.

The claimant was condemned to bear 7/9 of the arbitration costs, which amounted to \$17,750 in administrative charges to the ICC, \$27,000 in fees for the chairman and \$18,000 for each of the co-arbitrators. The total costs, including expenses, amounted to \$93,000, not including lawyers' fees. The parties were represented by Swiss and Hungarian counsel; the arbitrators had received two written opinions dealing with the patent issue, had heard two witnesses and listened to oral arguments by parties. From the initial request to the ICC until the award was delivered, the arbitration lasted just over two years, and the award covered 48 typewritten pages, plus a dissenting opinion of one of the arbitrators of nine pages.

### Nonperformance

Defendants sometimes pretend that national laws and regulations prevent them from performing a contract. ICC "case law" is unequivocal on this point: Where the party does not inform its foreign partner of possible difficulties regarding the obtaining of necessary governmental authorizations and/or does not do anything in his power to obtain such authorizations, he does not act in good faith.

In case 3724 (not published), a U.S. company had granted a Mexican company a manufacturing license against payment of royalties. Against the licensor's royalty claims in the arbitration, the licensee objected that the Mexican government had not approved the contract and that it, therefore, was of no effect.

The sole arbitrator, of Colombian nationality, sitting in Bogota, dismissed the objection since the Mexican regulations had been introduced after the signature of the license agreement. The contract was therefore clearly valid both during the time before the law was introduced, and also afterwards, since the licensee had not been active in trying to obtain the necessary approvals, even though it was the licensee's duty to do so at its own risk. Therefore, the licensee could not in good faith rely on its own lack of diligence in order to escape from the obligations under the contract.

### The Place of Arbitration

The choice of the place of arbitration may be decisive for the outcome of a licensing dispute. This hard fact was what the Claimant in one recent ICC arbitration learned.

### The Facts

By a licensing agreement of 1965, a Finnish corporation granted a license to an Australian corporation to manufacture certain products. The agreement continued, according to its terms, from its date until December 31, 1968. If six month's notice of cancellation had not been given by either party, the agreement would have

continued for a further two years, subject to earlier termination by the licensor on the licensee's default. Possible disagreements were to be decided by the "International Chamber of Commerce (London) with both parties abiding by this decision." In February 1970 the licensee made a last royalty payment in respect of the period ending June 30, 1969. Three letters were written in 1970 and one in 1971 demanding accounts and payment of royalties. In December 1976 the licensor wrote a letter which purported to cancel the licensing agreement.

In August 1982 the licensor made a written request for arbitration to the ICC.

### Parties' Claims

The licensor claimed an account of the number of products with his design manufactured by the licensee, together with the payment of royalties due under the agreement. He also claimed an account of the number of products manufactured *after* the determination of the agreement, together with orders restraining further manufacture, plus compensation for products sold after the determination.

The licensee contested the jurisdiction of the ICC on the grounds, *inter alia*, that if the ICC had jurisdiction, the claims, insofar as they related to matters before the determination of the agreement were statute barred.

The arbitrator held that the question of applicability of the English Limitation Act was not a matter he could raise but must be raised and proved by the defendant. He found that the licensee relied on the Limitation Acts and held:

The plaintiff submits that the defendant cannot do so because Finnish law is the relevant law, and that, as there is no Limitation Act under Finnish law, no question of the claim being barred arises. However, the arbitration is taking place in London, and English law is the *lex fori*. In questions of limitation the provisions of the *lex fori* must be taken into account — see for example *British Linen Co. v Drummond* 10 B. & C. 903 at p. 912. The Limitation Act 1980 applies the Act and any other limitation enactment to English arbitrations. I must apply the Limitation Act 1980 even though Finnish law has no such enactment — assuming for this purpose, that Finnish law is the proper law of the licensing agreement. The relevant period for a contractual claim or for an account is six years from the date on which the cause of action accrued; sections 5 and 23 of the Limitation Act 1980. The arbitration must therefore have been commenced within six years of the date when the cause of action accrued. Section 34 of the Limitation Act 1980 contains provisions relating to arbitrations and subsections (3) and (4) prescribe when the arbitration is deemed to have commenced. Those provisions require notice to be served on the proposed defendant requiring him to take some step. Strictly speaking no such notice has been served in the present case, but, in my view, the parties having agreed an ICC arbitration, it is the Rules for the ICC Court of Arbitration that override the statutory provisions and, under Article 3(1), the date when the Request for Arbitration was received is deemed to be the date of commencement of the arbitral proceedings. I do not have the precise date, but as the Request was dated August 24, 1982, I can take it that it would have been received by August 31, 1982. Thus the relevant question for me is whether or not the plaintiff's cause of action or causes of action for royalties under the licensing agreement arose prior to August 31, 1976.

The arbitrator found that all claims for royalties payable before July 1976 were statute barred and that the plaintiff might have had a cause of action for

royalties due from July 1, 1976, until the termination of the licensing agreement if it had been in existence in December 1976. However, since the licensing agreement was automatically continued for an additional two years and there was nothing that could be construed as providing for the further continuation of the agreement after December 31, 1970, it followed that the agreement came to an end on December 31, 1970. All claims by plaintiff for royalties or other relief under the licensing agreement were thus long since statute barred.

The licensor's claim failed.

#### Comment

The choice of a place of arbitration has considerable consequences. It is usually thought of as a choice involving the rules relevant for the conduct of the reference, the interplay between courts and arbitrators, such as for the appointment, removal and challenge of arbitrators, the possibility of obtaining interim or conservatory measures, the arbitrability of certain disputes with regard to national requirements of a public policy character, etc., but less seldom perhaps as influencing the outcome of the case on its merits.

Parties who define the applicable law to govern their contractual relations and decide on a place of arbitration in their contract will be well advised to examine whether the two choices are compatible with each other. Generally speaking, it is probably surprising for a party used to a continental legal system to find that time-bar is a procedural question rather than a matter of substance, and vice versa for a party with a common-law background.

The choice of London as the place of arbitration was, in this case, made by the parties. The licensor presumably had a good claim for accrued payments under the law, allegedly agreed upon in the contract. By agreeing to London as a place of arbitration before any dispute arose, the parties, presumably, took into account that the Limitation Act would eventually apply.

If, on the other hand, the place of arbitration had not been agreed on by the parties, the ICC Court would have fixed it (Article 12). When a case is presented to the ICC Court, it may or may not be evident that the success of a party's claim will depend on the question of time-bar, and the Court may or may not have knowledge thereof when fixing the place of arbitration. It is a heavy task for an institution (or for an arbitrator under *ad hoc* rules)

to decide the seat when this choice may decide the outcome of the case!

The above case raises the interesting question *de lege ferenda*, whether in an international arbitration the arbitrator is bound to, or, if not, whether he ought to apply the *lex fori* to qualify a matter of time-bar in a dispute where the parties have agreed on a *lex causa*. If the arbitrator does apply the *lex fori* rules, his qualification may lead to a decision that is in conflict with the provisions of a *lex causa*, which may contain a longer statute of limitation than *lex fori* or no limitation period at all. Should not the application of *lex fori* be confined to confirming the existence of the parties' autonomy to agree on a *lex causa* and should not the arbitrator apply *lex causa* only, except for provisions in *lex fori* clearly of a public policy character? The application of *lex fori* rules which are incompatible with *lex causa* would, generally speaking, be less desirable in an international dispute, particularly in a case where both parties are foreign. In limiting the application of *lex fori* to provisions of a mandatory nature, the importance of the choice of place of an international commercial arbitration would be reduced.

The above case, no. 4491, was published in the *Journal of International Arbitration*, 1985.)

#### CONCLUSIONS

It would be wrong to assert that arbitration is never without problems and that it is always better than litigation as a forum to settle licensing disputes. Its main advantages for parties involved in the transfer and use of technological and industrial property are its confidential character and the possibility to select precisely those persons as arbitrators in whom parties have confidence.

The above review hints to a number of pitfalls of which parties should be aware and able to avoid by careful drafting (choice of applicable law and of a place for arbitration).

ICC arbitrators apply the law. They draft detailed awards, explaining their reasoning, which is a guarantee to the parties that decisions are not arbitrary. Arbitration is no escape for parties seeking to avoid the effects of antitrust and competition law; on the contrary, arbitrators are prepared to retain jurisdiction and apply such laws.