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HOW TO DEAL WITH MULTI – PARTY NOMINATIONS OF ARBITRATORS

IN INTERNATIONAL COMMERCIAL ARBITRATION –

A COMPARATIVE STUDY OF APPOINTMENT PROCEDURES WITH EMPHASIS

ON US – EUROPEAN COMMERCE BETWEEN PRIVATE ENTITIES

by

MARIE – BEATRIX TUPY

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

The nomination procedure for the Arbitral Tribunal in commercial arbitration is one of the crucial points in the arbitral procedure. Parties have to have in mind the provisions of the New York Convention regarding the setting aside of an award in case of a failure during the nomination procedure of the tribunal. Besides from the famous Dutco case on multi – party arbitrations and their nomination procedures have received highest interest within the international arbitral world.

As the thesis will comparatively show, all major arbitral institutions have updated

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by

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J.D. University of Vienna, Austria, 1977

A Thesis submitted to the Graduate Faculty of The University of Georgia in

Fulfillment of the Requirements for the Degree

Master of Laws

Athens, Georgia

August, 2006

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HOW TO DEAL WITH MULTI – PARTY NOMINATIONS OF ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION – A COMPARATIVE STUDY OF APPOINTMENT PROCEDURES WITH EMPHASIS ON US – EUROPEAN COMMERCE BETWEEN PRIVATE ENTITIES

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August 2006

To my Viennese grandfather Franz Michl and my Bohemian uncle Karel Tupy, who survived two World Wars, lost their fortunes twice but did not lose their strong characters, life – values and principles. Instead they built up a loving and caring family in whom they instilled the principle that disputes of any kind have to be resolved peacefully.

Acknowledgments

At the beginning was the idea of what the scope of this work should be, but between idea and realization of a work lay some miles including milestones of thoughts, emotions, studies, redirections, cancellations, postponements and obstacles due to outer influences, distress, hope and finally courage to go forward.

The author would like to thank Prof Wilner and Prof Ellington for their skill and excellence, advice and patience, listening and disputing, insightful comments and fostering; their assistants who finally had to be the links between the continents and overcame the different time - zones we are living in right now.

This pathway has been shared with some great, trustworthy and believing friends, without whose encouragement and loving participation this work would not have come to an end.

The author thanks from all her heart

Mr and Mrs Dietwolf Eckel, Manager Hewlett Packard, Enzesfeld, Austria, patiently bearing with her and encouraging her and

Mr and Mrs Truman Butler, Vice President Reliance Trust Company, Atlanta, GA, LLM colleague and friends,

all friends encouraging her to go ahead and realize her visions and goals.

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Clarifications:

This essay deals with one of the most significant questions in international commercial arbitration - the nomination of arbitrators. In international commercial arbitration whether held ad – hoc or institutional for many long years one main principle governed and that was Party Autonomy. When a party had nominated her arbitrator and no challenge against him/her was raised and the arbitrator had signed in his/her contract the nomination was valid. It was unheard of to think about eliminating or overturning such valid arbitrator nomination. If multiple parties have been involved under institutional arbitration parties had to jointly nominate their arbitrator; in case of failure to do so within the given time – frame, the Appointing Authority of the institution would step in and nominate the arbitrator for the defaulting parties. This procedure resulted in two different level appointments – one party appointment and one appointment coming from the Appointing Authority.

This principle governed until the French Dutco decision. In this decision the French Cour de Cassation (Supreme Court of France) set aside an award reasoning that arbitrators had not been appointed in similar/equal ways and thus the “fundamental principle of Equality of the Parties” had not been respected, which contradict French Public Law.

In this case one party appointed her arbitrator, the two Defendants in the arbitral proceeding could not agree on their jointly to be appointed arbitrator and the ICC had appointed their arbitrator according to the Rules instead. This nomination by the Institute for the defaulting parties was during this time stipulated in the Rules of the ICC, therefore ICC had taken over the

nomination procedure for the Defendants as stipulated in its Rules – more or less done what was expected that ICC would do. By setting aside this award the appointment methods of the several arbitration institutions came under scrutiny. The consequence from the Dutco case was that a valid party appointment of an arbitrator could diminish when a reluctant party failed to nominate its arbitrator. This court decision caused an earthquake in the world of international commercial arbitration in so far, that Institutions reviewed their Rules and stipulated many different new procedures for nominating the arbitrator/s.

jurisdiction on the subject matter (competence – competence of the tribunal), whether intervenors or impleaders, new parties and claims would be allowed. Therefore consolidated arbitration will not be dealt with. Instead all parties are looked at as “permissive co – parties according to Federal Rule 20” if speaking in US Federal Law terms.

Even UNCITRAL – the world’s leading comparative commercial entity to study the different approaches in international commercial arbitration - decided in its 32. Session during 17 May – 4 June 1999 that “…. this topic (multi - party nominations of arbitrators, author’s comment) should be accorded low priority, …. because ….. it would not be realistic to expect to achieve substantive progress in that area. …..”[1]

This work will “return to the roots of arbitration”, look at the relevant Conventions and laws as well as Rules/Constitutions of arbitral bodies and compare their stipulations for multi - party nominations of arbitrators, taking into consideration also the different wordings in use for the composition of the arbitral tribunal. The relevant wordings will be used when describing the methods of the different arbitration bodies.

Furthermore it was interesting to research whether 14 years after Dutco some other Supreme Court decisions were available, dealing exactly with the nomination procedure of arbitrators in multi – party arbitration. However - surprisingly enough – there are no further Supreme Court decisions reported so far discussing this theme in the countries dealt with in this work. There are decisions in the United States with respect to multi - party arbitration and the joinder of parties, but this is not the question of this work.

I/ Introduction:

A. The specific requests of international commercial arbitration

The rationale for agreeing on international commercial arbitration to settle disputes deriving from international commercial contracts, among others, include the following

- the speed - decisions are reached quickly and are one tier procedures – usually no appeal to a "second level arbitral tribunal" is agreed on;
- parties' autonomy expressed in a consensual agreement to arbitrate
  - to chose their venue to settle an eventual dispute;
  - to chose the arbitrator/s;
  - to chose the mode of arbitration – ad - hoc or institutional;
  - to chose the substantive law governing the contract;
  - to chose confidentiality over publicly accessable State Court dockets;
  - to chose almost worldwide enforcement of the final and binding award.

Because of these features, disputing parties often prefer arbitration to adjudication by a Court using Court procedure.

B. The reason of the importance of the nomination procedure and the influence of a famous case on the nomination procedures

The importance of the nomination procedure derives from the stipulations of the

[1] UNCITRAL document A/CN.9/460 paras 356 and 357.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) from 1958, which has been stipulated by the United Nations in New York and has been ratified by more than 135 States so far (NY Convention). [2]

This NY Convention does not stipulate any nomination procedures but states in Article V.1. that the " Recognition and enforcement of the award may be refused…(b) when the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator … or…(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place…."

Therefore all arbitration parties have the utmost interest that the nomination procedure is in accordance either with their own agreement or with the underlying procedural laws. Failure to satisfy this precondition creates the refusal of the recognition and enforcement of a final and binding award. As the award usually does not undergo appeals, it "has to fit" by the time of its rendering. Therefore parties insist of having the choice of arbitrator, because they usually select personalities with the specific legal and /or other expert knowledge which the case requires. [3] This demand of parties' autonomy in international commercial arbitration still exists – despite Dutco.

[2] United Nations Treaty Series, vol 330, p. 38, No. 4739 (1959); see also the UNCITRAL website for the recent status of States, who ratified the Convention – www.uncitral.org/uncitral/en/uncitraltexts.

[3] See among others James H Carter, The Selection of Arbitrators - Appendix, 9 AM Rev Int'l Arb 3, p97 in which article Mr Carter states that "…the reasons for this continuing preference for a system that includes two hand – picked, party - appointed arbitrators are not difficult to identify. In arbitration, parties accept virtually non – appealable finality of the arbitrators' decision largely in exchange for the ability to participate in the selection of their tribunal rather than accept an anonymous, governmentally chosen decision maker – a judge – whose rulings may be less predictable but generally are subject to appellate review. In such a setting, a party seeks maximum advantage from its right to control the identity of the decision makers and seeks to have as one of the members of the tribunal a person whose ability and general inclination of views can be assessed in advance. This is particularly

The Dutco[4] case scrutinized the ICC[5] arbitration procedure and finally led to the setting aside of the award by the French Cour de Cassation. The Cour reasoned that by applying the than recent Arbitration Rules of the ICC[6], the "fundamental principle of Equality of the Parties" had been neglected by the ICC Court which would counteract the French Public Law and set aside the award.

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important in an international arbitration, where arbitrators of three different nationalities may be chosen and each party may desire that one member of the tribunal be familiar with its own law and customs. Party – appointed arbitrators also may be expected to play a role in selecting the third arbitrator, bringing their judgment and experience to bear on this important task.

[4] The Dutco case – Siemens AG and BKMI Industrieanlagen GmbH v Dutco Construction Co (Dubai) – French Cour de Cassation decision of January 7, 1992, Revue de l' arbitrage 470 (1992); see also a full description of the situation at the ICC Court in Eric A Schwartz – the former Secretary General of the ICC Court – Multi – Party Arbitration and the ICC - in the Wake of Dutco – 15 Am Rev Intl Arb 133, p 9 ff

[5] ICC – International Chamber of Commerce – International Court of Arbitration

[6] ICC Rules of Conciliation and Arbitration in force as from January 1, 1988 stipulated that "…disputes may be settled by a sole arbitrator or by three arbitrators….." These Rules did not contain explicit stipulations regarding multi - party nominations of arbitrators. They followed the concept that more than one party on each side (Claimant or Defendant) had to jointly nominate one arbitrator in case that an arbitral tribunal composed of three arbitrators was agreed on or requested. (Article 2) If parties (Defendants) failed to jointly nominate their arbitrator within a given time limit, the Court would than nominate the arbitrator for them. This lead to the common situation that if one Claimant had validly nominated its arbitrator in the Statement of Claims and the two Defendants did not nominate jointly their arbitrator in their "Answer" - the Court would nominate the arbitrator for Defendants according to the stipulated procedure.

In case that the two arbitrators could not agree on the Chairman of the Tribunal the ICC Court would step in again and nominate the Chairman for the arbitrators. In such case one party appointed arbitrator would build the Tribunal with two ICC Court nominated arbitrators – which again could have led to the French Cour de Cassations discussion regarding the Equality of Parties. It has been however the rule also that all arbitrators had to be independent from parties (Art 2 par 7) which would guarantee sort of an equal status among the tribunal.

Also in case that parties had agreed on a sole arbitrator and did not agree on the respective person the ICC Court would supplement this agreement following its own Rules.

See also the above mentioned article by the former Secretary General of the ICC, Eric A Schwartz, in Multi-Party Abitration - in the Wake of Dutco, 15 Am Rev Intl Arb 133 ff, FN 2 – in which he states that "… such rules and laws are typically drafted as if only two parties participate in an arbitration…. This situation has not prevented ICC from setting in motion a substantial number of multi – party arbitration proceedings. (p 6) and on page 8 - Mr Schwartz states that "…it has been the long- standing ICC practice , prior to Dutco, to treat multi claimants or defendants as "one party" for the purposes of Art 9.2 …."

This opinion consequentially leads to joint nominations of arbitrators in case of multiple parties as Claimants or Defendants.

The mentioned article by Mr Schwartz gives an in – depth overview of the ICC practice regarding the nomination of arbitrators prior to the Dutco decision.

In this case Dutco had filed a statement of claims vs BKMI and Siemens before the ICC Court requesting remedies due to breaches of contract. Due to the underlying arbitration clause which requested the decision by an arbitral tribunal composed of three arbitrators, Dutco nominated its arbitrator according to the ICC Rules. Defendants failed to jointly nominate their arbitrator in the “Answer” and therefore the ICC Court substituted the appointment according to the mentioned Rules. After rendering the award Defendants started to set aside the award arguing that the principle of equality, which is stipulated in the French Public Law, has been violated by the different methods of nominations/appointments of the arbitrators - one arbitrator party nominated, one arbitrator appointed by the ICC Court for the defaulting Defendants. The Cour de Cassation followed this argumentation and set aside the award in January 1992, reasoning that the different nomination procedures applied would counteract French Public Law.

Usually before a permanent Arbitration Institution the arbitral procedure consists of three stages – the initial phase during which a claim is filed in with the Secretariat, the arbitral tribunal is composed and the provisional advance on costs is fixed, which is a mere administrative stage. After having agreed to accept the mandate the file is handed over to the arbitral tribunal - which is the judiciary stage being linked together with the scrutiny of the underlying contract under the substantive law, during which parties are “equal before the law”. After the tribunal rendered the award the file returns to the final stage to the Secretariat for finishing the handling – again the stage is merely administrative.

Deriving from the procedural stipulations of the Rules of the respective arbitration body very often Claimants have to bear the costs for arbitration proceedings, because reluctant

Defendants don't participate in cost advance payments, although invited by the Rules. Not participating in the payment of the costs is one of the dilatory tactics for reluctant parties; the Rules usually contain provisions against such defaulting parties. Claimant usually bears the advance payment of the costs just for not giving the reluctant party the possibility to hinder Claimant to exercise its right to arbitrate in the agreed on manner. Therefore the burden of getting the case before the arbitral tribunal is with the Claimant/s. Consequentially the principle of equality of parties certainly does not govern during the initial administrative stage but the right of Claimant to arbitrate has to prevail and to be protected.

Despite this Supreme Court's decision the principle of party's autonomy to chose the arbitrator still is a valid arbitration principle. The question this court decision rose was how to get party's autonomy and the court decision streamlined.

It took several years of discussions and discourses until the new ICC Rules of Arbitration were set in force in January 1, 1998[7]. These Rules deal in Art 10 with "Multiple Parties" and the appointment of the three arbitrators and request joint nominations by all Claimants or all Respondents (Art 10, par 1). In case of failure of the parties to appoint jointly the Court appoints each member of the Arbitral Tribunal (Art 10 par 2).[8]

[7] ICC Rules of Arbitration in force as from January 1,1998 – see the respective website for download: www.iccwbo.org

[8] see below, par. II.D.4

In the meantime also several other Institutions have changed their Rules for multi – party nominations and the results will be shown below. [9]

II/. The nomination procedure for multi – party nominations of arbitrators within the different types of international commercial arbitration procedures between private commercial entities and the role of the Appointing Authority in respect of the hierarchy of laws:

A. Multilateral Conventions with respect to international commercial arbitration between private entities:

1. New York 1958

As stated already in Introduction B, Article V.1. of the NY Convention states that the " Recognition and enforcement of the award may be refused…(b) when (the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator … or)… (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place…."

Prof Domke and Prof Sanders[10] have been members of the committee of the Conference of Plenipotentiaries, which met at the Headquarters of the United Nations

[9] There has to be mentioned also that for reasons of actuality the research had to be done by using the relevant web - sites of UNCITRAL, or the arbitration bodies, which are listed in the Index list.

[10] see Pieter Sanders, International Commercial Arbitration, vol II, p 293 ff (Martinus Nijhoff,1960)

in New York from May 20 to June 10, 1958, to finally stipulate the text of the New York Convention. From their comments better insight of the ideas behind the Convention and the reasons for the different stipulations can be gained. The Conference has been initialized by the International Chamber of Commerce to improve the stipulations of the former Geneva Convention 1927 – the predecessor Convention dealing with the enforcement of international commercial awards. The international commercial community realized the need to offer speedy enforcement through State Courts and the Conference adopted after in - depth discussion the recent text of the NY Convention, which still is valid.

The improvement over the Geneva Convention 1927 was that the party seeking enforcement of the award had to furnish the competent state court only the original of the award and the original arbitral agreement or the certified copies of said documents. (The Geneva Convention requested the exequatur). The NY Convention 1958 offers great security for enforcement, because the enforcement of the award may be refused only under very specific circumstances, one stipulated in Art V.1.d) - the failure in the composition of the tribunal.

Both commentators – Prof Domke as well as Prof Sanders – have expressed their view of the improvement in various occasions and also stated in their commentary[11] that "…. Parties enjoy a considerably greater freedom to have the arbitration conducted the way they like it. They can in the arbitral clause in their contract refer to existing arbitration rules or draft themselves elaborate rules for the arbitration proceedings and the nomination of arbitrators and be practically certain that the

arbitration, if conducted in the way they preferred it, shall be enforceable. It is only when they fail to do so that the law of the country where the arbitration takes place will apply. … " and further the commentators state[12] that ".. As it stands now the will of the parties as to the composition of the arbitral tribunal and the arbitral procedure is paramount. …. "

The commentators agree also that the scope of party' s freedom is determined by the procedural law of the country where arbitration is taking place.[13]

With this comment it can be shown, that it was in the original intent of the former law - makers to foster the importance of party's autonomy in international commercial arbitration. It has been always in the nature of international arbitration to give parties choices to compose their arbitration on a consensual basis and the respective tribunal as well as give security of enforceability.

It has to be mentioned that the NY Convention does not explicitly contain provisions for multi – party arbitration, but it does not prohibit it. Concluding from the general "favor arbitri" the NY Convention applies also to multi – party arbitration.[14]

Today the NY Convention has been ratified by more than 135 States [15] thus honoring the needs of security and speed and autonomy in international arbitration.

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[11] see Pieter Sanders, International Commercial Arbitration, vol II, p 297 (Martinus Nijhoff,1960)
[12] ibd, p 317
[13] ibd, p 317, last paragraph.
[14] A.v.d.Berg, The New York Arbitration Convention of 1958, (Kluwer, 1981), p 161 - 169

2. Geneva 1961: European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961[16]

The Geneva Convention 1961 is the work of the Economic Commission for Europe of the United Nations, who intended to promote European trade by "….. removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries, …. "[17], aiming to a high degree on the unification of the organization of arbitration for commercial disputes in arbitration agreements between the former East and West.[18].

Unlike the NY Convention, this Convention deals with the organization of arbitration (Art IV) including the composition of the tribunal and the role of the Appointing Authority, and among others also the enforcement of an award (Art IX)[19].

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[15] see the list of participating States on the "text" site of UCITRAL's website: www.uncitral.org
[16] United Nations, Treaty Series, vol. 484, p. 364 No. 7041 (1963 – 1964)
[17] Geneva Convention 1961, preambel
[18] Pointet in Sanders, International Commercial Arbitration, vol III, p 297 and 267, (Martinus Nijhoff, 1965); A.v.d.Berg, The New York Arbitration Convention of 1958, 1981, p 92, 93,(Kluwer, 1961)
[19] Geneva Convention 1961, Article IV - Organization of the arbitration**:**

1. The parties to an arbitration agreement shall be free to submit their disputes:
(a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution;
(b) to an ad hoc arbitral procedure; in this case, they shall be free inter alia
(i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;
(ii) to determine the place of arbitration; and
(iii) to lay down the procedure to be followed by the arbitrators.
2. Where the parties have agreed to submit any disputes to an ad hoc arbitration, and where within thirty days of the notification of the request for arbitration to the respondent one of the parties fails to appoint his arbitrator, the latter shall, unless otherwise provided, be appointed at the request of the other party by the President of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat at the time of the introduction of the request for arbitration. This paragraph shall also apply to the replacement of the arbitrator(s) appointed by one of the parties or by the President of the Chamber of Commerce above referred to.

3. Where the parties have agreed to submit any disputes to an ad hoc arbitration by one or more arbitrators and the arbitration agreement contains no indication regarding the organization of the arbitration, as mentioned in paragraph 1 of this article, the necessary steps shall be taken by the arbitrator(s) already appointed, unless the parties are able to agree thereon and without prejudice to the case referred to in paragraph 2 above. Where the parties cannot agree on the appointment of the sole arbitrator or where the arbitrators appointed cannot agree on the measures to be taken, the claimant shall apply for the necessary action, where the place of arbitration has been agreed upon by the parties, at his option to the President of the Chamber of Commerce of the place of arbitration agreed upon or to the President of the competent Chamber of Commerce of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration. Where such a place has not been agreed upon, the claimant shall be entitled at his option to apply for the necessary action either to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Special Committee whose composition and procedure are specified in the Annex to this Convention. Where the claimant fails to exercise the rights given to him under this paragraph the respondent or the arbitrator(s) shall be entitled to do so.
4. When seized of a request the President or the Special Committee shall be entitled as need be:
(a) to appoint the sole arbitrator, presiding arbitrator, umpire, or referee;
(b) to replace the arbitrator(s) appointed under any procedure other than that referred to in paragraph 2 above;
(c) to determine the place of arbitration, provided that the arbitrator(s) may fix another place of arbitration;
(d) to establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s), provided that the arbitrators have not established these rules themselves in the absence of any agreement thereon between the parties.
5. Where the parties have agreed to submit their disputes to a permanent arbitral institution without determining the institution in question and cannot agree thereon, the claimant may request the determination of such institution in conformity with the procedure referred to in paragraph 3 above.
6. Where the arbitration agreement does not specify the mode of arbitration (arbitration by a permanent arbitral institution or an ad hoc arbitration) to which the parties have agreed to submit their dispute, and where the parties cannot agree thereon, the claimant shall be entitled to have recourse in this case to the procedure referred to in paragraph 3 above to determine the question. The President of the competent Chamber of Commerce or the Special Committee, shall be entitled either to refer the parties to a permanent arbitral institution or to request the parties to appoint their arbitrators within such time-limits as the President of the competent Chamber of Commerce or the Special Committee may have fixed and to agree within such time-limits on the necessary measures for the functioning of the arbitration. In the latter case, the provisions of paragraphs 2, 3 and 4 of this Article shall apply.
7. Where within a period of sixty days from the moment when he was requested to fulfil one of the functions set out in paragraphs 2, 3, 4, 5 and 6 of this Article, the President of the Chamber of Commerce designated by virtue of these paragraphs has not fulfilled one of these functions, the party requesting shall be entitled to ask the Special Committee to do so.

Article IX - Setting aside of the arbitral award

1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:
(a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
(b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present

As has been the intention of the Economic Commission for Europe this Convention offers clear stipulations for the substitute composition of the arbitral tribunal in case parties cannot agree or parties are reluctant to bring forward the necessary request and thus assists in clarifying the nomination procedure.

This Convention strengthens party autonomy by explicitly declaring that " parties …. are free to submit their disputes to a permanent arbitral institution or to an ad - hoc arbitral procedure – referring in the latter case that parties will be free " … to establish the means for the appointment of their arbitrator…." (Art IV.1.b(I))[20]

Especially in ad – hoc arbitration a reluctant Defendant can cause major delays, when the Appointing Authority was not pre-stipulated. Here the Geneva Convention is very helpful, because it pre-stipulates already the Appointing Authority; it has to be the President of the Chamber of Commerce of the country of the defaulting party's habitual place, residence, or seat. (Art IV.2.)[21]

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his case; or
(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.
In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

[20] see ibd supra

[21] see ibd supra

In case that the ad - hoc arbitration agreement does not determine the number of arbitrators it is again up to the Appointing Authority to decide how many arbitrators will decide the respective case upon request of Claimant. (Art IV.3.)[22]

Under Article IV the rights of the President of the Chamber of Commerce are stipulated. Upon request of a party the President appoints the sole arbitrator as well as the chairman of a tribunal (referred to as "presiding arbitrator" in the Convention). The President also can replace an arbitrator (under specific circumstances); fixes provisionally the place of arbitration (the tribunal later can overrule this decision) and can refer the case to an arbitral institution.

Whether parties agreed on procedures of an arbitral institution and failed to nominate the institution (Art IV.5.), or the arbitration agreement fails to specify "the mode of arbitration" (ad – hoc or institutional, Art IV.6.), a Claimant is given the right to request the specification from the Appointing Authority, who is the President of the respective Chamber of Commerce.[23]

Although the Geneva Convention does not contain any stipulations in case of multi – party arbitration, the governing idea was that multiple parties on one side – Claimants and/or Defendants – will be looked at as one party. Multiple parties had to jointly nominate their arbitrator in case a tribunal of three arbitrators has been stipulated. The same would apply in a case parties had agreed on a sole arbitrator and multiple Claimants or Defendants would be participating then all parties have to agree on the

[22] see ibd supra
[23] see ibd supra

sole arbitrator. Should this procedure fail, the Appointing Authority steps in and substitutes the nomination.

This Convention is also directly linked with the NY Convention. (Art X) without substituting it. The Geneva Convention makes direct referral to the NY Convention in the reasons of refusing of the recognition and enforcement of an award (Art IX.1.(d))[24] – under this stipulation an award cannot be enforced " … when the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention. …."

The Geneva Convention limits the reasons for refusal of enforcement of the NY Convention (Art IX.2) thus giving even more certainty to parties that their final award really will be enforced, which turns out to be a real advantage. Generally speaking the Geneva Convention complements broadly the NY Convention, even using the same phrases (Art I (2) a Geneva Convention and Art II (2) New York regarding the arbitration agreement). [25]

Furthermore especially Pointet in his comment on the work of the working group initializing the Geneva Convention points out explicitly, that the "… fundamental principle recognized by the Convention was that of the autonomy of the will of the parties. …" and that the task of the Convention was "to supplement omissions in

[24] see ibd supra
[25] A.v.d.Berg, The New York Convention of 1958, p 95, (Kluwer, 1981)

Arbitration Agreements."[26] Also in the stipulations of the Convention regarding the organization of the arbitration (Art IV.3) it is the " …fundamental rule to respect the wishes of the parties…"[27].

Although the Geneva Convention offers lots of remedies versus reluctant Defendants this Convention was not ratified by as many states as the NY Convention. The reason for this can be seen in the stipulation that this Convention is open for ratification only for " … countries being members of the Economic Commission for Europe and countries admitted to the Commission in a consultative capacity." (Art X)[28] and on the other hand in the applicability of the Convention. The Geneva Convention applies to parties from member states only (Art I (1) a). Additionally parties need to have their habitual place of residence or their seat in different contracting states. Therefore the territorial scope of this Convention is tighter than that of the NY Convention.

B. UNCITRAL Model Law[29]

The intent of the UNCITRAL was to harmonize the legal provisions - worldwide[30] – on international commercial arbitration. Therefore the working group designed a model law that

[26] Pointet in Sanders, International Commercial Arbitration, vol III, p 295 f, (Martinus Nijhoff, 1961)
[27] Pointet in Sanders, supra, vol III, p 273
[28] see FN 17 supra and for the actual list of participating states seewww.juris.org/en/ins.
[29] United Nations Document A/40/17, Annex I, as adopted by the UN Commission on International Trade Law (UNCITRAL) on 21 June 1985
[30] see the Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, points 1,2.

is open to adoption by States[31] and applies to international commercial arbitration. (Art 1 (1)) [32]

According to a global study of the UNCITRAL Secretariat on the worldwide national procedural arbitration laws, there are "considerable disparities" in the different national laws on international commercial arbitration, which need harmonization. Some laws have been outdated, some are contrary to international standards, some take into consideration domestic commercial arbitration only and cannot be applied 1:1 on international arbitration. This disparity led to the conviction that harmonization of the national procedural laws would be justified by streamlining procedures to international standards.[33]

In Chapter III the Model Law deals with the composition of the tribunal, whereas under "tribunal" the Model Law understands a sole arbitrator as well as a panel of arbitrators (Art.2.(b). It is further stipulated that parties are free to agree on the number of arbitrators, in case such agreement is not reached, the Model Law states that the number of arbitrators is three. (Art 10.) Parties are free as well to agree on the appointment procedure (Art 11.(2).

In case parties could not agree on the appointment procedure the Model Law defines it. (Art 11(3). This article needs to be looked at a bit closer, because of the several case situations in

[31] see the recent list of States in the website of UNCITRAL, FN 15, www.uncitral.org

[32] Sanders points out that there is a possibility for States to adopt the Model Law also for domestic arbitration, just to avoid disputes which national law for arbitration would apply. Sanders, The Work of UNCITRAL on Arbitration and Conciliation, p 23, (Kluwer, 2001).
See also the Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration B.1.9 (see FN 30) – with the distinction that this Note speaks of "international" and "non – international" cases.

[33] Explanatory Note – see FN 30, pts 2 – 9.

which although the appointment procedure is missing parties agreed on the number of arbitrators who should decide their case.

If parties opted for a decision by a sole arbitrator and cannot agree on the person, than the Appointing Authority or the State Court would step in. (Art 11.(3) (b). If parties opted for a decision by an arbitral tribunal consisting of three arbitrators "each party" – meaning the group of Claimants and the group of Defendants - shall appoint one arbitrator. If such party does not nominate the arbitrator within the given time frame, again the Appointing Authority or the State Court would step in and supplement the appointment. (Art 11.(3)(a). The Model Law requests that the two arbitrators then agree on the third arbitrator who shall act as chairman of the tribunal. The next case scenario deals with the situation that the two arbitrators cannot agree on the third. Then again the Appointing Authority or the State Court will make the appointment. (Art 11(3)(a) 3 case)

The Appointing Authority referred to under the States Law can be the President of a Chamber of Commerce, or the respective State Court (Art6).[34]

In case parties <u>agreed on the appointment procedure</u> but could not agree on the sole arbitrator, or if a tribunal has to be appointed, party fails to nominate its arbitrator, or the arbitrators cannot agree on the chairman, or the Appointing Authority stipulated in the underlying law, "does not perform under the provisions of the procedure", <u>any party</u> of the

[34] With respect to the involvement of State Courts in international commercial arbitration the Model Law makes clear that "…no court shall intervene except where explicitly provided in this Law". It limits the actions allowed for a court to be taken to the appointment procedure, the competence of the tribunal and the setting aside of the award. (Art. 5 & 6 with reference to Art 11(3),11(4), 13(3), 14, 16(3) and 34(2)

procedure may request the substitution of the appointment measure from the State Court or the Appointing Authority. (Art 11(4).

The appointing decisions of Art 11(3) and 11(4) do explicitly not allow an appeal (Art.11(5). The respective Appointing Authority has to take into consideration the necessary qualifications of the arbitrator as well as the nationalities of the parties involved. It explicitly is stipulated that the sole arbitrator and the chairman of the tribunal shall not be of the same nationality as the parties involved (Art 11(5). In this context it should be mentioned that the Model Law also takes care of the fact, that due to nationality no person may be excluded from being appointed as arbitrator (Art 11(1).

Whereas nationality does not play any role, independence and impartiality as well as the respective qualifications needed for the specific arbitration are major factors in the selection of the arbitrator (Art 11(5).Lack of or “justifiable doubts of” independence, impartiality and qualifications also would be the reasons for challenging the appointed arbitrator, regardless who made the appointment – parties or Appointing Authority. Therefore arbitrators will disclose without delay such circumstances which could rise such doubts (Art 12).

Art 13 describes the challenge procedure and mentions that parties also are free to stipulate specific rules for the challenge of arbitrators. If the arbitration agreement does not mention such procedures for the challenge, the challenging party introduces its challenge within certain time - limits by written submission to the arbitral tribunal. After receipt of this challenge the challenged arbitrator can resign or the other party may agree to the challenge – both actions lead to the result that the arbitrator has to be supplemented/ replaced (Art 13).

If the arbitrator does not resign or the other party does not agree to the challenge the arbitral tribunal has to decide upon the challenge.

If the challenge has been “successful” – by either the arbitrator resigning or the tribunals decision upon the challenge - the appointing procedure starts afresh from the point, where it has been when appointing the arbitrator. If the appointing procedure has been with the parties – it goes back to the parties again; if the appointment procedure was with the Appointing Authority it goes back to it (Art 15).

If the challenge has not been successful but has been rejected by the arbitral tribunal, the challenging party can request a decision from the Appointing Authority or the State Court about the rejection of the challenge. This decision is not appellable but final and binding. During this procedure the challenged arbitral tribunal can proceed with the arbitral procedure and even render an award (Art 15(3).

The Model Law also takes care of the situation that an arbitrator becomes unable to perform (Art 14) or withdraws. Then the mandate terminates. In case of doubts whether the mandate was terminated or not, parties are given the right to request from the Appointing Authority or the State Court the respective decision (Art 14).

The Model Law also deals with the <u>setting aside of the award</u> by primarily using the same stipulations as the NY Convention, thus giving the appointment procedure of the arbitral tribunal again the outstanding importance for being a reason for the setting aside of the award (Art 34 (2)(iv).

A failure in the composition of the arbitral tribunal leads, like in the NY Convention, to a refusal of the recognition of the award (Art 36 (1)(a)(iv). Recognition or enforcement of the award is refused also, when the party seeking to oppose enforcement offers the court evidence that the award has been set - aside in the country of its origin. (Art 36(1)(a)(v) The Explanatory Note of the Secretariat gives a decisive hint that the reasons for the refusal of the recognition and enforcement aim at the country where enforcement is sought. Whereas the setting aside of the award in the country of its origin aims at the refusal of enforcement in all other states.[35]

Summing up the several scenarios one can state that whenever parties could not reach an agreement – be it on the procedure to appoint, be it on the number of arbitrators, or the nomination of the arbitrator the Appointing Authority or the State Court supplements the decision.

The operation of Rules can be illustrated in the following scenario: Imagine an international case with multiple parties on both sides who agreed on the resolution of arising disputes by means of arbitration in one of the member states of the UNCITRAL Model Law. No other stipulation is found in the arbitration clause with respect to the appointment procedure or the numbers of arbitrators. Then the number of arbitrators has to be three. (Art 10 (2) Claimants therefore have to agree on their arbitrator and come forward with the respective person. Parties can agree on the appointing procedure before filing in the claim. Therefore Claimants will invite Defendants to agree on such procedure within a time - frame. Defendants are

[35] see FN 30 above, pt7..b.44

reluctant and do not agree on the suggested appointing procedure. Therefore Art 11 (3)(a) steps in. In the given case three arbitrators have to be nominated, Claimants have agreed on their arbitrator, they invite Defendants to nominate their arbitrator in a given time - frame, again Defendants are reluctant and fail to nominate. Than Claimant addresses the Appointing Authority stated in the procedural laws of the venue of arbitration, which are in conformity with the UNCITRAL provisions. The Appointing Authority appoints one arbitrator for multiple Defendants. Both arbitrators have to agree on the third; they cannot reach an agreement and the Appointing Authority has to supplement again the nomination. Thus the arbitral tribunal consists of one party appointed arbitrator and two arbitrators appointed by the Appointing Authority. (Art 11 (3)(a&b)

During the procedure one party finds out a ground for challenging Claimants arbitrator, another party challenges Defendants arbitrator and parties failed to stipulate a procedure regarding the challenge of the arbitrators. The challenge procedure is the same, although the appointment of the two arbitrators differed. There are several possibilities to react: The two challenged arbitrators can resign; the respective other party can agree to the challenge or if this is not the case, the arbitral tribunal decides upon the challenges. (Art 13(2).

In case of resignation of the arbitrators or parties' agreement to the challenge the arbitrators have to be replaced. As Claimants arbitrator was party appointed, the Claimants have to agree again on their arbitrator; as the other arbitrator was appointed by the Appointing Authority this body has to appoint again. Thus the tribunal is set up with new members and starts afresh. (Art 15)

In case that the challenged arbitrators do not resign nor do the parties reach an agreement to the challenge, the arbitral tribunal itself decides upon the challenges. In this case it means that two challenged arbitrators have to decide upon the challenge of the respective other colleague, votes have to be two by three (majority votes govern). Under supposition that these challenges are dismissed, the challenging parties can request within a given time – frame from the Appointing Authority to decide upon the challenges. (Art 13 (3)

Second scenario – same as above but parties agreed on the appointment procedure. (Art 11 (4) The scenario is the same until the decision on the challenges by the Appointing Authority. In this case even the Appointing Authority my fail to decide upon the challenges (Art 11 (4)(c). Then either another Appointing Authority decides upon the challenges or the State Courts as provided in the respective procedural laws

It has to be mentioned that the Model Law does not explicitly contain any provisions for multi – party nominations of arbitrators.[36] Sanders comments that the working group was of opinion "that there was no real need to include a provision on consolidation in the Model Law"[37] but that some adopting States had woven in their national laws separate provisions to solve the problem." Grosso modo one school of thinking opts for court-ordered decisions on consolidations.[38] Other possibilities would be to more or less think through in casuistic mode all possibilities and offer stipulations for all of them or the way it is solved by most of the

[36] not even the Explanatory Notes mention multi – party nominations when dealing with the Composition of the arbitral tribunal , pt 3, see FN 30
[37] Sanders, The Work of UNCITRAL on Arbitration and Conciliation, (Kluwer,2001), p 59f
[38] Sanders, ibd p 60 - like in Canada

States to stay with the principle that multiple parties on one side have to jointly nominate their arbitrator. [39]

As the working group quite evidently had in mind cases dealing with consolidation and their very specific problems, it did not consider "natural" multi – parties, originating from one contract having to appoint arbitrators. Consolidated, joined, also connected arbitration emphasizes on different questions like whether it is possible to unify parties /to make parties join from multiple contracts for one project under one joined arbitration even if not all of the underlying contracts offer an arbitration clause, just to avoid multiple procedures with different outcome. Also van den Berg shows several scenarios with multiple parties and the consolidation problem. This author looks at "natural" multi - party arbitration from the point of the NY Convention and is of opinion that although the NY Convention does not deal explicitly with multi – party nominations the Convention would not hinder such arbitration. [40]

C. ad – hoc arbitration

1. Without pre - stipulated Rules[41]

In ad – hoc arbitration parties enjoy every freedom of arbitration according to the Conventions the State of the arbitration venue has ratified/adopted. The parameters for parties' autonomy are the respective laws of the country of the arbitration venue.

[39] see the Swiss laws and new Rule below in this work and the paragraphs on the different states
[40] Sanders, The Work of UNCITRAL on Arbitration and Conciliation, p 59, 60 (Kluwer 2001);
A v.d.Berg, The New York Arbitration Convention of 1958, 1981, pp 161 –169, (Kluwer 1981);
[41] For a list of possible ad – hoc clauses see Domke Comm Arbitration, par 5:12 (Rev Ed), (West Group 2001)

This freedom carries lots of advantages for the parties but also lots of dangers, especially during the appointment procedure of the respective arbitral tribunal. The advantage certainly is to tailor the arbitration agreement to the specific needs of the industry which intends to use arbitration for resolving disputes originating from an arbitrable contract, like major construction or energy projects or major distribution contracts; also insurance contracts of such projects could contain such arbitration clause.

The basis for the arbitration is the underlying arbitration clause. As practice shows very often arbitration is thought of only in the last minute before signing of contracts and very often also there is not enough time left for the stipulation of exactly worded arbitration clauses. Therefore it should be thought of referring to a quick sample clause to be added in any case to the contract. Responsible Legal Departments of major international commercial firms work out a list of arbitration clauses to be set up into almost every contract stipulated by the sales department of the respective firm.

Such arbitration clauses contain the venue of arbitration and the declaration that the disputes arising out of the underlying contract are referred to arbitration. Additionally the clause can contain the substantial law under which the contract has to be examined by the arbitrators and other procedural stipulations, of the number of arbitrators to decide the dispute, the appointment procedure of arbitrators and provisions regarding a defaulting party, or the qualifications of the arbitrators. If there

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Redfern, Hunter, Law and Practice of International Commercial Arbitration,1986, p 123 – 127 and p 155 – 160, (Sweet & Maxwell, 1986)

is a chance that there could be more than one party on each side – Claimant or Defendant – parties could come forward with respective provisions either.[42]

In ad – hoc arbitration parties not only exercise the utmost freedom but also have to be aware of being bound to consensus to reach their agreements. With respect to multi – party nominations of arbitrators in ad – hoc arbitration parties can stipulate in their arbitration clause that each party nominates its arbitrator and the so nominated should agree on a chairman of the tribunal. That could lead to arbitral tribunals with more than three arbitrators and even numbers of the tribunal, which makes majority votes within the tribunal difficult. For example two Claimants and three Defendants would have to nominate five arbitrators under this procedural provision and the five arbitrators than decide upon the chairman, which would be the sixth arbitrator; or the five nominated arbitrators select from among themselves the chairman. The latter construction would lead to the situation that a party appointed arbitrator also would sit as chairman and has to fulfill two tasks – being the party appointed arbitrator for the XY party as well as the chairman. This situation certainly could lead to conflicts of interest within the tribunal and should be avoided.

Another possibility would be to stipulate that all five parties in the above case consent on one sole arbitrator. The parties also need to make a provision taking care of the possibility that such agreement cannot be achieved. Parties can do so by prefixing the Appointing Authority and stipulate the duties of this Authority in the clause.[43]

[42] Redfern, Hunter, supra, 1986, p 37 ff, (Sweet & Maxwell, 1986);
Domke on Commercial Arbitration, (Rev.Ed.2001), vol 1, par 5:12, p 27 f, (West Group, 2001)

Multiple parties also can agree on the decision of their disputes by a tribunal consisting of three arbitrators, the group of Claimants and the group of Defendants are to agree on their arbitrator and the so selected arbitrators have to agree on the chairman of the tribunal. Another possibility could be that parties also agree on the chairman of the tribunal. Some parties might wish to agree on a clause providing the default possibility that in case Defendants do not nominate their arbitrator the right of nominations jumps over to Claimants, who than would substitute Defendants' appointment of their arbitrator.[44] The appointed arbitrators should agree on the third arbitrator. Parties also might wish to provide for a solution if the arbitrators cannot agree on the third one – might be one could discuss that then the right to nominate would go back to the parties – following the mentioned case. In any case again provisions should be stipulated for resolving default situations.

Sometimes parties stipulate that the arbitrators should be nominated from a list of arbitrators of a permanent Arbitration Center. In any of these cases it is highly recommendable to agree also on the Appointing Authority in case one of the parties is reluctant and fails to nominate the arbitrator.

With respect to the Appointing Authority it has to be mentioned that individual persons as well as arbitration bodies can be nominated or other agencies even. Taking into consideration that an individual person can refuse to work as Appointing Authority or can become unable to serve in such capacity, it seems to be more comfortable for

[43] Gary B Born, International Commercial Arbitration in the United States, 1994, p11, (Kluwer, 1994);
[44] Such case has been reviewed under the auspices that this provision would conflict with mandatory UNCITRAL Model Law provisions in Germany, the court stated that such provision by the parties

parties to opt for an arbitration body, a President of a Chamber of Commerce or of a given professional organization. Keeping in mind that parties refer to an Appointing Authority in case of default of another party one would not like to include the risk that the Appointing Authority itself diminishes.

Some procedural laws provide for defaulting appointments of State Courts in case parties did not agree on an Appointing Authority. (will be dealt with below, in the state by state listing)

Another point to consider when stipulating the arbitration clause is the situation of a challenge of an arbitrator or the situation when an arbitrator becomes unable to perform (due to sickness, death etc.). Than the arbitrator has to be replaced; the replacement procedure should be the same as the nomination procedure of an arbitrator. Parties might also wish to determine whether they could face a situation, when an arbitrator becomes unable to perform between the time the last oral hearing took place and the award is rendered. If parties need to replace the arbitrator this would lead to the situation, that not only a new arbitrator has to be chosen but also that the complete arbitral procedure before the arbitral tribunal would have to be repeated. In such case it might be wiser to accept a truncated tribunal, ie a tribunal without a replaced arbitrator.

In any of the shown possibilities parties need to reflect also the legal provisions of their chosen arbitral venue. There can be remedies available in case of default when

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was not contrary to the mandatory provisions of the Model Law. Clout case No 440, Germany, 22 Dec. 1999, UNCITRAL A/CN.9/563/Add.1

a party chooses a member state of the UNCITRAL Model Law where the Appointing Authority can substitute a missing procedural stipulation in case of default.[45]

The other aspect is the question of the costs of arbitration – one has to keep in mind, that all arbitrators have to be remunerated out of the pockets of the participating parties. As practice shows very often Claimant has to deposit in advance the complete costs of arbitration. Therefore very often the reluctant Defendants can participate in arbitral proceedings without having participated in sharing the costs – although the arbitral award will determine who has to pay the costs and arbitrators will have to make a decision with respect to reimbursement of costs. Therefore it seems that with respect to multi - party arbitration also some stipulations should go into the arbitration clause about the participation on costs.

2. under UNCITRAL Arbitration Rules[46]

a. ad – hoc

Taking into consideration the above mentioned situations which can occur in ad – hoc arbitration, UNCITRAL worked out a set of Arbitration Rules which went into force in

[45] See the country specific lists on the UNCITRAL web site, FN 15

[46] UNCITRAL Arbitration Rules may not be mixed up with the UNCITRAL Model Law – the Arbitration Rules have been set in force in Dec 1976 – see A/31/17 par 31/98; the Model Law was created in 1985, see document A/40/17, Annex I. The Rules aim at the harmonization of the provisions for the "settlement of disputes in ad hoc arbitration in countries with different legal, social and economic systems …" Whereas the Model law aims at establishing model legal provisions for adoption into the legal systems of the different States with different legal systems and provisions for arbitration. The Model Law assists States to harmonize their legal provisions for international commercial arbitration. It "… reflects a worldwide consensus on the principles and important issues of international arbitration practice. …"

1976 to be used in ad – hoc arbitration, which offer some pre - stipulated solutions for the mentioned points of trouble.

UNCITRAL set the international standard of harmonization of the international commercial arbitration rules by adopting the Arbitration Rules on 15 Dec 1976 after having discussed thoroughly the harmonization of the different legal provisions in East - West commerce regarding arbitration. The reflections and considerations of the members of the Working Group are shown in the "Travaux preparatoire"[47] of the Working Group dealing with international commercial arbitration. These Rules are still unaltered.[48]

Although negotiations and research for these Arbitration Rules started already in 1968, only in April 1976 were the Rules adopted by the UNCITRAL.[49] Considerations of the members of the Working Group regarding the autonomy of parties to chose their arbitration procedure, the appointment procedure and the respective Appointing Authority as well as dilatory tactics with respect to the appointment procedure are evidenced in the respective documents.[50]

Interestingly enough the questions regarding multi – party nominations of arbitrators were not discussed by the UNCITRAL Working Group during the basic work sessions

[47] See especially A/CN.9/9/C.2/SR.2; A/CN.9/9/C.2/SR.3; A/CN.9/9/C.2/SR.4; A/CN.9/9/C.2/SR.5; A/CN.9/9/C.2/SR.6; A/CN.9/9/C.2/SR.14; A/CN.9/9/C.2/SR. 15.
[48] UNCITRAL General Assembly Resolution 31/98, 15 Dec 1976
[49] UN Official Records of the General Assembly, Thirty-first Session, Supplement No. 17A/31/17
[50] UN Commission on International Trade Law, documents A/CN.9/9/C.2/SR.15; A/CN.9/9/C.2/SR.4, pts 8, 26, 27; A/CN.9/9/C.2/SR.3, pts 22 – 28.

until 1976[51]. These questions had been raised previously already in working groups of the International Chamber of Commerce (ICC) and the International Council of Commercial Arbitration (ICCA) without offering a specific clause for the appointment of arbitrators in multi – party arbitration.[52] Several suggestions were made regarding the consolidation of multi- party arbitration such as the possibility to limit the number of parties[53], but the ICC refrained explicitly on rendering model agreements for consolidation. It worked however on a draft of a multi – party arbitration clause [54] which can be considered as the model for the recent ICC Arbitration Rules' clause on multi – party appointments of arbitrators.[55] In these Rules the prevailing paramount idea is reflected that multiple parties on one side are considered as having to jointly appoint "their" arbitrator.

The different multi – layered working groups held close contact on these topics and the UNCITRAL Commission considered in 1986, that multi – party arbitration considered further study.[56] Until today the working group is pondering the questions of consolidation of arbitration and did not come up with recommendations for multi – party arbitration either.[57]

The UNCITRAL Arbitration Rules stipulate the provisions for the composition of the tribunal under Section II Articles 5 – 14. Although these Rules do not explicitly refer to

[51] See above documents and additionally A.CN.9/79;A.CN.9/9/7 plus addenda 1 – 4; A.CN.9/112 plus addendum 1; A.CN.9/113; A.CN.9/114.
[52] See document A/CN.9/280.
[53] See document A/CN.9/280 par B.1.15
[54] See A/CN.9/280, points 9 – 26.
[55] See below II.D.4.c
[56] see A/CN.9/280, points 9 – 26 and A/CN.9/278/Add.2, pt 58 and 67.
[57] See the Report of the UNCITRAL General Assembly A/54/17 from 1999.

multiple Claimants or Defendants these Articles apply also for multi - party arbitration - especially in view of the above mentioned discussions and prevailing opinions.[58]

Art 5 clarifies the number of arbitrators – it shall be a sole arbitrator or a tribunal composed of three arbitrators. This stipulation can be regarded as advantage over ad - hoc stipulations parties developed themselves, offering numerous numbers of arbitrators and therefore also offering multiple possibilities for delays. A sole arbitrator can be agreed on only, when both parties agree on the person within 15 days after service of the statement of claims to Defendant. Otherwise an arbitral tribunal consisting of three arbitrators will have to hear the case.

Under Art 6 parties can agree on the Appointing Authority, if they fail to agree on the Appointing Authority the Secretary General of the Permanent Court of Arbitration at The Hague will designate such Appointing Authority. This body uses a list - procedure to nominate the arbitrator/s.

Articles 6 and 7 provide the stipulations for the appointment of the tribunal. In case parties fail to agree on the sole arbitrator or fail to nominate their arbitrator, or the appointed arbitrators cannot agree on the "presiding" arbitrator, the Appointing Authority makes the default appointment. This body has to establish a list of presumptive arbitrators with at least three names, sends this identical list to parties who delete candidates from the list within a given time – frame thus also approving

[58] See also the opinions of the leading arbitration authorities like van den Berg, Redfern – Hunter, Craig-Park – Paulson, Sanders and Domke in their cited comments and books.

the other candidates. From these approved candidates the Appointing Authority appoints the missing arbitrator.

The Rules also provide for the case that the Appointing Authority fails to appoint or refuses to appoint; then the Secretary General of the Permanent Court of Arbitration at The Hague designates another Appointing Authority. (Art 7.2.b)

In case an arbitrator is challenged the substitute arbitrator is appointed in the same way as the successfully challenged. The Rules also provide for the possibility that in case of a challenge the other party may consent to the challenge or the arbitrator may withdraw from the appointment without accepting the reasons of the challenge. (Art 11.3) If an arbitrator becomes unable to perform a substitute arbitrator has to be appointed in equal mode as the replaced. (Art 13) If the sole arbitrator or the presiding arbitrator has to be replaced the complete hearings have to be repeated; if a member of the tribunal is substituted it is upon the discretion of the tribunal to decide whether hearings will have to be repeated or not. (Art 14)

All these pre – stipulated provisions of the UNCITRAL Arbitration Rules offer quicker solutions in case of default in the nomination procedure because they request actions from the involved within a given time – frame which adds to counterfeiting dilatory tactics of reluctant Defendants.

b. within “Administered” UNCITRAL Arbitration Procedures

The UNCITRAL Working Group has opened the use of the UNCITRAL Arbitration Rules not only in ad – hoc arbitration but also for the use within arbitration bodies, allowing some modifications to adapt these Rules to the settings of a permanent arbitration institute.[59] Such adapted Rules are offered for example by the American Arbitration Association (AAA), the ICC and the International Arbitral Center of the Federal Economic Chamber of Austria in Vienna (VIAC).

- AAA – Procedures for Cases under the UNCITRAL Arbitration Rules as Amended and Effective on Sept 15, 2005.

  These new procedures take into consideration that UNCITRAL Arbitration Rules are well accepted by the international commercial community and establish the AAA as Appointing Authority according to the UNCITRAL Rules. If parties so wish, AAA offers administrative services also. When the AAA works as Appointing Authority the nomination of arbitrator/s will be executed according to the UNCITRAL list procedure and take into consideration the AAA panel of international arbitrators.

  If an arbitrator is challenged the AAA will compose a special committee consisting of three persons to decide over such challenge under the guidelines of the Code of Ethics for Arbitrators in Commercial Disputes which has been agreed on between the AAA and the American Bar Association. When

appointing a substitute arbitrator the AAA feels bound to apply the same procedure as set forth for the appointing of an arbitrator.[60]

- ICC – Rules of ICC as Appointing Authority in UNCITRAL or other AD - Hoc Arbitration Proceedings as of Jan 1, 2004.

With these Rules the ICC is also taking over the role as Appointing Authority. The request for nomination can be filed by the parties, the Secretary - General of the Permanent Court of The Hague or otherwise. The ICC Court establishes a Special Committee consisting of the Chairman/Vice - Chairman of the Court and two other members of the Court. This body has to decide unanimously on this matter; is such decision not reached the Special Plenary Session of the Court will deal with the appointment or challenge.[61]

Article 3 of said Rules stipulates the mode for the Court to appoint an arbitrator - under this rule the Court shall follow the list procedure laid out by the UNCITRAL Rules, but has also the discretion to not follow the list procedure. In case the list procedure is used the Court comprises a list of at least three arbitrator – candidates, sends the list to parties who than delete names and number the remaining names. After return of these lists the Court finds the chosen arbitrator. If no agreement has been reached by parties the Court has the right to appoint under its own discretion the missing arbitrator.

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[59] See UNCITRAL A/CN.9/97 III.1.3.

[60] see AAA Procedures for Cases under the UNCITRAL Arbitration Rules , Sept 15,2005, paras 1 to 4 and introduction.

When making the appointment, the Court has to take into consideration the impartiality and independence, as well as the nationality (other than the parties') of the candidate.

In case a challenge is brought forward against an arbitrator the Court also deals with the challenge in a Special Plenary Session after the challenged arbitrator and the party concerned have given their statements. These statements are communicated to the other parties and members of the tribunal. The Court afterwards decides in its own discretion whether to follow the challenge or whether it has to be dismissed. The Court also acts to appoint the substitute arbitrator according to the Rules described above. [62]

3. Within bilateral agreements between Chambers of Commerce or other Arbitration Bodies

   a. VIAC – Vienna Arbitral Centre and the Hungarian Chamber of Commerce

      "Agreement concerning the Cooperation between the Federal Economic Chamber of Austria, Vienna, and the Hungarian Chamber of Industry and Commerce, Budapest, in matters concerning Commercial Arbitration (May/June 1998)" [63]

[61] ICC – Rules of ICC as Appointing Authority in UNCITRAL or other Ad Hoc Arbitration Proceedings as of Jan 1, 2004, Art 1, paras 1 – 3.
[62] See ibid Art 3, paras 1 – 6.
[63] The VIAC Agreement – author's translation see Appendix 1

This agreement stipulated for bilateral commercial arbitration that the UNCITRAL Arbitration Rules would be governing and that the Appointing Authorities would be the respective Presidents of the Economic Chambers of both countries. Both permanent Arbitration Centers (the VIAC and the Center in Budapest) would be administering these arbitration proceedings. Parties needed to have explicitly agreed on a procedure under such Agreement.

With respect to the substitute appointment of arbitrators it was agreed that the President of the Hungarian Chamber of Industry and Commerce would act as Appointing Authority in case Claimant was seated in Austria. In case a Hungarian party would need the services of an appointment the President of the Federal Economic Chamber of Austria would act in such capacity.

The UNCITRAL Arbitration Rules have been adapted to the permanent Arbitral Centers too – for instance the claims and responses had to be filed in with the respective Secretariats, which body would also assist in the composition of the tribunal and if needed involve also the Appointing Authorities.

A special list of arbitrators was agreed on which is binding for the Appointing Authority but non - binding for the parties.

Also here the modifications did not provide for specific regulations in multi – party arbitration. Thus taking into consideration the general opinion that multiple parties on one side would have to jointly nominate the arbitrator, or in case a sole

arbitrator is to be nominated, all parties have to agree on this person. This agreement therefore followed strictly the UNCITRAL provisions and established opinions.[64]

D. Checking selected National Laws and Rules/Constitutions of arbitral institutions in the United States and Europe – countrywise with respect to multi – party nominations of arbitrators:

1. United States:

a. Conventions ratified

With respect to arbitration the United States has ratified the New York Convention, the Panama Convention, the Montevideo Convention and the Washington Convention. For the scope of this work the New York Convention is relevant; the other conventions deal with North and South American Dispute Resolution and with the ICSID ADR (Washington Convention) involving States and private commercial entities.

As the New York Convention has been ratified, international commercial awards are enforceable in the United States as well as can be enforced in the member states of

[64] Agreement concerning the Cooperation between the Federal Economic Chamber of Austria, Vienna, and the Hungarian Chamber of Industry and Commerce, Budapest, in matters concerning Commercial Arbitration, Art 2. – see supra

the NY Convention.

b. Laws applicable

- The Federal Arbitration Act, first enacted Feb 12, 1925, with further amendments ever since.

This law is applicable to international commercial arbitration and deals with commercial arbitration "among the several States or with foreign nations" except maritime employment contracts.[65] It offers the possibility under ad-hoc arbitration that any US District Court under Title 28 has jurisdiction to order defaulting parties to arbitrate, or compel arbitration and make a default nomination for an arbitrator or arbitrators as required. In case parties did not fix the number of arbitrators in their agreement, a single arbitrator shall decide the case. The Court has jurisdiction also to fill a vacancy in the tribunal.[66]

The Federal Arbitration Act refers explicitly to the NY Convention and the enforcement of the international award (Chapter 2, Section 201). It is even deemed possible to address as an international case a matter between US citizens or entities which deals with property abroad, or needs enforcement abroad or has some other relation with foreign states. Under Section 206 the US District Court has jurisdiction to appoint arbitrators within the scope of the

[65] Federal Arbitration Act, Chapter 1, Section 1.
[66] Ibid, Section 5.

underlying arbitration agreement. The said Court also has jurisdiction to request parties to compel arbitration at any place named in the arbitration agreement be it "within or without" the US territory.

- Uniform Arbitration Act, adopted 1955, amended 1956, approved Aug.30, 1956.

The Uniform Arbitration Act has been enacted by most US federal states leaving room for the state to adapt it to the states preferences. Some states also stipulated some regulations regarding international commercial disputes into it, otherwise the UAA reflects to domestic arbitration only.

With respect to the interrelation between the FAA and the UAA it might be mentioned that the FAA preempts the UAA. Questions arise however in cases where the FAA does not offer a regulation, but a State's law does. Then this state law provision might have to be applied also in international commercial arbitration. Therefore the venue of arbitration should also be carefully considered with respect to the UAA of the Federal State in which arbitration might be held.[67]

- The UNCITRAL Model Law has not been adopted on Federal level. It has been

[67] Craig, Park Paulson, ICC Arbitration, 3rd edition, p 591 ff, (Oceana, 2000)

adopted in some of the Federal States only, including California and Illinois.

Therefore the constitution of an arbitral tribunal in ad – hoc arbitration can lead to different results in the territory of the United States.

c. Rules

– American Arbitration Association's International Centre for Dispute Resolution

This international branch of the AAA offers the administration of international arbitrations according to the International Dispute Resolution Procedures, amended and Effective 15 Sept 2005.

If parties did not include a stipulation regarding the number of arbitrators, the Procedures deem the decision by a sole arbitrator sufficient unless the specific circumstances of the case would justify the decision by a tribunal composed of three arbitrators.

With respect to the appointing procedure of the tribunal, these Procedures leave broad discretion for mutual parties' agreements on the appointment procedure as well as on the appointments about which the administrator simply has to be notified. When parties did not be able to reach such agreements the administrator is stepping in and makes the necessary appointments within a

given timeframe. (Art 6)

In case an arbitrator is challenged and withdraws from office or has to be replaced a substitute arbitrator is appointed according to the described procedure. (Articles 8 – 10).

These procedures also offer stipulations regarding the “truncated tribunal”. Here under a three arbitrators tribunal one of the arbitrators “fails to participate” in the arbitration due to other reasons than stipulated for the replacement of an arbitrator in Art 10. The two staying arbitrators make the decision, whether to proceed with the arbitration or whether to opt for a replacement of the failing arbitrator. In this case the staying arbitrators take into consideration the status of the arbitration and all other relevant matters of the specific arbitration. They can opt for not to have replaced the failing arbitrator as well. If they opt for the replacement of the failing arbitrator they have to notify the administrator, who has to declare the office vacant and than the failing arbitrator will be replaced as previously stipulated. (Art 11) If such substitute arbitrator has to be appointed, the tribunal has sole discretion to decide whether oral hearings will have to be repeated or not. (Art 11.2)

Although no explicit referral is made to <u>multi – party arbitration</u> the Rules are wide enough to allow multiple parties to participate in one arbitration, giving wide discretion to parties for their own stipulations for the appointment methods. It seems however that in case of default also this institute adhers to the method that multiple - parties on one side have to jointly appoint their arbitrator as

described above.[68] The introduction explains that party and arbitrator in singular also means parties and arbitrators.

- The AAA as Appointing Authority under UNCITRAL Arbitration Rules (as amended and effective on September 15, 2005)

The AAA also offers services as Appointing Authority under the UNCITRAL Arbitration Rules. (AAA Procedures for Cases under the UNCITRAL Arbitration Rules).

In case a sole arbitrator or the presiding arbitrator has to be appointed the AAA sets up a list of suitable candidates, composed of the roster of arbitrators which is available from the AAA. In this list the AAA includes candidates from the roster of distinguished practitioners from the respective fields of the case to be adjusted and takes into consideration also the nationality of the parties. The missing arbitrator will be of different nationality than the parties. This list is sent to parties who might chose from this list. In case of failure to do so, the arbitrator is appointed by the AAA. For the appointment of the "second" arbitrator the same list procedure is adhered to and taken into consideration the impartiality and independence of the arbitrator.

In case a challenge is filed versus an appointed arbitrator the AAA will decide

[68] Craig, Park, Paulsson, ICC Arbitration, 3rd edition, page 199, (Oceana, 2000)

upon it. Upon request of a party a special committee is arranged for consisting of three persons of different nationality to decide upon a contested challenge. In reviewing the challenge this body will apply the Code of Ethics for Arbitrators jointly adopted by the AAA and the American Bar Association.

2. Great Britain:[69]

a. Conventions ratified

Great Britain has ratified the NY Convention only. The UK awards are enforceable internationally as well as international awards are enforceable within the UK territory.

b. Laws applicable

- Great Britain also has adopted the UNCITRAL Model Law on a State level only for Scotland. Great Britain did not adopt the Model Law on Federal level.

- Arbitration Act 1996 (of England)

This law makes a separate statement in its introduction Section 1(b), that " …

[69] see the website of LCIA

parties are free to agree how their dispute is resolved … " and that " …the court should not intervene except as provided … "

By this stipulation the Arbitration Act gives strong authority to parties to negotiate their own arbitration clauses as well as the provisions for the appointment of arbitrators.

The Arbitration Act also takes into consideration that parties might consider to opt for two arbitrators or any other <u>even number</u> of arbitrators, thus expressing their intentions to have an additional arbitrator or chairman of the tribunal appointed. (Section 15(2). If parties do not elaborate on the numbers of arbitrators the Arbitration Act presumes that a sole arbitrator is to be deciding the case. (Section 15(3).

The tenor of the Arbitration Act is to give broad discretion to the parties. Parties have to jointly nominate the sole arbitrator (Section 16(3) or if the tribunal shall consist of three arbitrators, each party shall appoint one arbitrator and the so appointed arbitrators shall agree on the third, who will then be the chairman of the tribunal. (Section 16(5). The Arbitration Act also takes into consideration that parties might have opted for even numbers of arbitrators, in this case the parties are to appoint for each side an arbitrator and the appointed arbitrators have to agree on the chairman. (Section 16(4 and 6).

In case that one party is not appointing or participating in the appointment of the sole arbitrator the Arbitration Act provides for the stipulation that then the

arbitrator suggested by the other party might act as sole arbitrator, regardless whether the other party had agreed on this person or not. (Section 17(1 and 2b). However the defaulting party can then request the court to set aside this appointment. (Section 17(4).

To multiple parties the Arbitration Act refers only in case of default, then the court will step in and make the appointment/s (Section 16(7). The court also is given discretion to provide for directions to parties to reach appointments of arbitrators or to revoke appointments or to appoint arbitrators itself. (Section 18(3)

If parties agreed to have a chairman of a tribunal they are also free to fix the scope of his workload. In case nothing has been stipulated the chairman has to participate in the meetings and his opinion will prevail the opinions of the co - arbitrators in case they cannot reach unanimity. (Section 20). The Arbitration Act also knows the function of an "Umpire", whose position is not the same as the position of the chairman (Section 21). The umpire needs not attend the hearings unless the parties agreed so, and he does not necessarily have the power to make decisions or orders or awards unless the parties agreed so. In case there is no such agreement about his role however, the Arbitration Act requests that the umpire shall attend the meetings and be served with the same documents as the other arbitrators. In case the arbitrators cannot reach an agreement the case goes to the umpire, who then shall make the decision, orders or the award as sole arbitrator, replacing the former arbitrators. (Section 21)

The Arbitration Act also knows the revocation of an arbitrator. An arbitrator may be revoked by jointly acting parties or by an institution given the right to revoke an appointment. (Section 23). Also the court has the possibility to revoke an arbitrator in case of impartiality, missing qualifications to hear the case, incapability, or failure to conduct the proceedings. (Section 24) In case an arbitrator resigns he may wish to apply to the court for relief from any liability incurred by his resignation. (Section 25(3) Parties also are free to provide for stipulations regarding the procedures to be applied in case of a vacancy of an arbitrator. If they did not stipulate any procedures the original appointing schemes apply. (Section 27) In case a vacancy appeared after the arbitrators had assumed work already, the tribunal will consider whether hearings will have to be repeated or not. (Section 27(4)

c. Rules

– LCIA - London Court of International Arbitration, effective 1 January 1998

The LCIA Court has sole discretion to appoint the arbitrators. Parties might nominate an arbitrator but such nominee will have to undergo compliance rules according to Article 5.3. The nominee declares among others its independence and impartiality and adherence to ongoing disclosure. If the Court of the LCIA determines that the nominee is not suitable, independent or impartial the Court is entitled to refuse to appoint such person. (Article 7.1)The Court of the LCIA is given discretion to appoint an arbitrator also in case defendant is defaulting.

(Article 7.2). With respect to the number of arbitrators the Court can determine despite another parties' agreement that a sole arbitrator has to decide the case or that a tribunal consisting of three arbitrators decide the case. (Article 5.4)

The LCIA Rules contain a specific stipulation regarding multiple parties. In Art 8 the Rules refer to more than one party on one side as Claimants or Defendants. For reserving the right to nominate jointly the arbitrator/s these multiple parties have to agree in writing that the disputant parties represent two separate sides for the formation of the arbitral tribunal. In case such a written agreement is not in place, the LCIA Court shall appoint the tribunal without regarding parties' nominations. (Art 8)

In case of an arbitrator's resignation, the LCIA Court appoints the substitute arbitrator. If an arbitrator is challenged he is entitled to respond to the challenge or to withdraw. If the arbitrator responded to the challenge all other parties have to respond to the challenge as well. The decision upon the challenge is made by the LCIA Court. (Art 10) In replacing the arbitrator the LCIA Court has total discretion for an appointment. (Art 11)

Summing up the different stipulations the LCIA Court has broad discretion for the appointment of arbitrators regardless of parties' nominations.

– The LCIA as an Appointing Authority under UNCITRAL Arbitration Rules

The LCIA Court also acts as Appointing Authority under UNCITRAL Arbitration Rules and has laid out a respective arbitration clause. A specific set of Arbitration Rules when acting under UNCITRAL Arbitration Rules is however not available.[70]

3. Belgium[71]

a. Conventions ratified

Belgium has ratified the NY Convention thus the awards are enforceable internationally as well as international awards are enforceable within the UK territory, as well as the Geneva Convention.

b. Laws applicable

– Belgium did not adopt the UNCITRAL Model Arbitration Law.[72]

[70] see the web-site of the LCIA
[71] see the web-site of CEPANI
[72] see the web-site of UNCITRAL

– Belgian Judicial Code as of 19 May 1998

The Belgian Judicial Code accepts tribunals composed of a sole arbitrator or an odd number of arbitrators. If parties agreed on an even number of arbitrators the law requests that an additional arbitrator is appointed. If parties failed to agree on the number of arbitrators to be appointed the law requests the decision of an arbitral tribunal composed of three arbitrators. (Art 1681) In case of even numbers of arbitrators the already appointed arbitrators appoint the chairman of the tribunal. If the arbitrators cannot reach an agreement on the chairman the President of the Civil Court will appoint also the chairman of the tribunal. (Art 1685.1) In case of an odd number of arbitrators the appointed arbitrators chose from among themselves the chairman. If they fail to agree on the chairman, the President of the Civil Court will appoint the chairman. (Art 1685.2) The Judicial Code also contains regulations for the replacement of an arbitrator who passed away during pending procedures, or became unable to perform or failed to perform. Under such circumstances the substitute arbitrator shall be appointed in the same fashion as the first arbitrator has been appointed. In case that the Civil Court has become involved in the replacement of the arbitrator this Court makes the substitute appointment. (Art 1687.2)

Parties have full discretion to appoint an arbitrator or have a third person or institution appoint the arbitrator. If parties fail to appoint the arbitrator (sole or

tribunal) the President of the Civil Court makes the substitute appointment. (Art 1684)

Has an appointment been made and the appointed person accepted the mandate neither the appointing party nor the appointed person who had accepted the appointment can withdraw from office. (Articles 1689 and 1683.4) Arbitrators can be challenged due to reasons of impartiality or independence occurring after their appointment. (Art 1690) The challenge has to be sent to the arbitrators and other parties, if the challenged arbitrator does not withdraw. The tribunal orders a stay of the arbitral proceedings until the Civil Court has rendered a decision upon the challenge. Also an appeal is possible. (Art 1691) Does the Civil Court come to the conclusion that the challenge has to be upheld, the successfully challenged arbitrator is substituted in the same mode as was applied for his appointment. (Art 1691.3) Did the challenged arbitrator withdraw immediately after the challenge was brought forward, he is replaced in the same fashion as he was appointed. (Art 1691.3)

Summing up the stipulations of the Judicial Code no specific rules have been set up for multiple party settings but also nothing has been stated that would prohibit such procedures.

c. Rules

CEPANI Rules – Rules of the Belgian Center for Mediation and Arbitration

The CEPANI Rules emphasize on the independence and impartiality of the nominee and bind the arbitrator to disclosure. (Art 8) These Rules also make final and binding the decision of the Appointments Committee or the Chairman of the institute set up at CEPANI with respect of a challenge, a replacement of an arbitrator or the appointment and its approval.

If parties agreed on the dispute settlement by a sole arbitrator they shall agree on this person. If parties agreed on a decision by a tribunal of three arbitrators, each party nominates one arbitrator and the so chosen agree on the third arbitrator. In case of default the Appointments Committee or the Chairman appoint the arbitrators. (Art 9.3) In case of default the Appointments Committee or the Chairman of the institute will substitute the appointment. CEPANI also has the right to not approve of a party nominated arbitrator if it deems his qualifications not adequate or if there are reasonable doubts of independence and impartiality. In this case the right to appoint is with the institute. (Art 9.2)

Also in case of a challenge of an arbitrator the challenging party has to submit a written statement containing the reasons for the challenge. The challenged arbitrator has the possibility to resign or answer to the challenge and the Appointments Committee or the Chairman of the Institute will decide upon the challenge. The same procedure applies in case of resignation or incapability to

perform. In all cases of replacement the Appointments Committee has discretion to decide whether the substitution will follow the original appointment steps or whether to make the appointment directly itself. (Art 11)

CEPANI Rules provide explicitly for multi – party appointments under Art 9.3 third paragraph – which provides that multiple Claimants or multiple Defendants jointly nominate their arbitrator for approval through the Appointments Committee. In case of failure to reach such agreement the Appointments Committee makes the substitute appointment of each member of the tribunal and additionally designates one of them as chairman of the tribunal. (Art 9.3. last paragraph) Under Art 9.4. the Rules provide for the decision by a sole arbitrator in case parties did not or cannot agree on the number of arbitrators. This provision derogates the Belgian Judicial Code, which requests in such case the decision by a tribunal composed of three arbitrators. (Art 1681 of the Judicial Code above)

With respect to multi – party arbitration Art 12 addresses the joinder of arbitrations due to multiple closely related contracts and multiple CEPANI arbitration clauses. Again the Appointments Committee or the Chairman of the Institute has discretion to allow such joinder. Did the joinder be allowed the Appointments Committee has even discretion to increase the number of arbitrators to five and appoint the missing arbitrators. (Art 12) The Appointments Committee is a special body attached to CEPANI and consists of the Chairman of the Institute and two more members, who are nominated by the Executive Committee of CEPANI.

Therefore there are two multi – party stipulations in the CEPANI Rules addressing different multi – party situations (Art 9.3 and Art 12). Art 9.3 addresses multiple parties deriving out of the same contract and Art 12 provides for consolidated arbitration.

4. France[73]

a. Conventions ratified

France has ratified the NY Convention,. therefore international commercial awards are enforceable in France and French awards are enforceable internationally, and the Geneva Convention.

b. Laws applicable

- France did not adopt the UNCITRAL Model Law.

- Code of Civil Procedure (CCP) – Book V reflecting International Arbitration and IV (as provided in Art 1493), Arbitration, in Force since 14 May 1981

The CCP provides for specific rules for international arbitration. (Articles 1492 – 1497) The President of the Tribunal de Grande Instance in Paris is the body to assist parties when difficulties occur during the constitution of the arbitral tribunal.

[73] see the ICC web-site

Parties are free to opt for ad - hoc arbitration as well as institutional arbitration. Parties can agree on the numbers of arbitrators as well. With respect to the numbers of arbitrators there is no special rule for international arbitration, the CCP allows however in its regulations for general arbitration for a tribunal consisting of a sole arbitrator or an uneven number of arbitrators. (Art 1453) Have parties agreed on an even number of arbitrators it is mandatory to chose another arbitrator to reach the uneven number. (Art 1454) When difficulties arise during the constitution of the tribunal the President of the Tribunal de Grande Instance of Paris will decide. (Art 1493)

An arbitrator may be challenged only for reasons revealed or arising after his appointment. The President of the Tibunal de Grande Instance of Paris will decide upon this challenge. An arbitrator may withdraw also; the same procedure applies as for the challenge. (Art 1463)

The CCP allows in Art 1493 also that parties can agree on another method to overcome their difficulties to compose the tribunal instead of adhering to the President of the Tribunal de Grande Instance in Paris.

There are no specific regulations with respect to multi – party nominations of arbitrators in the French procedural law. Therefore it seems to be in parties discretion to provide for their own stipulations. The French CCP contains only

very few rules for international commercial arbitration thus giving broad discretion for parties own arrangements and agreements.

c. Rules

ICC Rules of Arbitration in force as from January 1, 1998.

These Rules are the outcome of multi - year considerations of the Dutco decision of the Supreme Court of France. They contain in Art 10 a stipulation regarding Multiple Parties during the constitution of the tribunal. This Art 10 speaks out clearly that multiple parties as Claimants or “Respondents” are supposed to nominate their arbitrator jointly if parties agreed on a tribunal composed of three arbitrators. In case parties cannot agree on the arbitrators the Court will make the substitute appointments and may appoint each member of the tribunal and designate one to act as chairman of the tribunal. In this case the Court also reserves the right to appoint every person as arbitrator which the Court thinks fit to take over the mandate.

The ICC Rules stipulate that the number of arbitrators is fixed with one or three. Parties have to agree on the sole arbitrator as well as on the tribunal composed of three arbitrators. In case that parties did not agree on the number of arbitrators the Court shall appoint the sole arbitrator unless the Court is of opinion that for the relevant case a three arbitrator tribunal should decide the case. Than the Claimants are invited to nominate their arbitrator as well as the Respondents to nominate their arbitrator. The so nominated arbitrators agree on the third arbitrator.

(Art 8. paragraphs 1 - 3) In any case in which parties fail to nominate the arbitrator or the nominated arbitrators fail to agree on the chairman the appointment is made by the Court. (Art 8.4)

The nominated arbitrators have to disclose whether they are independent. (Art 7.1) After the nomination procedure of the arbitrator/s took place the Court respectively the Secretary General of the Court confirms/appoints the nominated candidate. If the Secretary General considers that there are considerable reasons that the nominated candidate would not be able to perform its duty or keep his independence or would not work unbiased, the Secretary General has the right to refuse appointment. He than has to bring the case before the Court, who will decide upon it during its next session. (Art 9.2)

The Court himself relies on the proposals of candidates of the different National Committees installed around the globe when he has to make a default appointment. The Court is not bound however to the proposed person. (Art 9.3 and 9.6) The nationality of parties and arbitrators is however taken into consideration – so the sole arbitrator and the chairman of a tribunal shall not be of the same nationality as the parties. (Art 9.5)

Arbitrators can be challenged as well as replaced. (Art 11 and 12) The Court will make a decision upon the challenge or the replacement only after hearing the statement of the arbitrator under scrutiny. In case the arbitrator died, resigned, a challenge or a parties' request for replacement was successful, the Court has discretion to decide whether the missing arbitrator has to be replaced and which

procedure will have to be applied – the original party appointment or directly by the Court. In case a three - person tribunal has been constituted and one arbitrator has to be replaced which is generally referred to as “truncated tribunal”, the Court has discretion to decide whether a replacement will take place or not.

The ICC Rules have been reconsidered and are in force now since 1998 and have been applied in many multi – party arbitrations since then. They offer a well balanced path of interaction between parties’ autonomy and the discretion of the Court for the constitution of an arbitral tribunal also in case multi - parties are reluctant.

The Dutco case asked for equal nomination methods of arbitrators – as mentioned before. Under the new Rules the right to nominate the arbitrators moves to the Court, if multiple parties - Claimants or Respondents - cannot agree on their arbitrator/s. In such case the Court also has the right to designate one of the appointed arbitrators as chairman of the tribunal.

5. Switzerland:[74]

a. Conventions ratified

Switzerland has ratified the NY Convention, but did not ratify the Geneva

[74] see the web-site of ASA and the respective links

Convention. Therefore also in this country foreign arbitral awards are enforceable as well as Swiss awards in the other member States according to the provisions of the NY Convention.

b. Laws applicable

- Switzerland did not adopt the UNCITRAL Model Law

- Federal Statute on Private International Law Act 1987, Chapter 12, International Arbitration

Switzerland as a State is a Confederation of Cantons (ie Federal States). This situation is mirrored also in the laws applicable to arbitration. The Federal Statute on Private International Law (Federal Statute) mentions explicitly that it can be waived by parties if they want their arbitration to be held according to the cantonal provisions on arbitration, which are set up in the International Arbitration Convention of 1969. Besides the Federal Statute also refers to this Convention for the procedure of assistance of State Courts to constitute the arbitral tribunal.[75]

The Federal Statute strengthens parties' autonomy to appoint, remove, challenge, replace the arbitrators. In case such provisions did not be agreed on by parties, the competent judge where the tribunal has its seat, shall make the decision. The judge is to apply the cantonal law on the appointment, removal

and replacement of arbitrators. (Art 179.2 Federal Statute). One finds the competent judge by applying the International Arbitration Convention 1969, Art 3, - it is the respective High Court of Common Civil Jurisdiction of the canton in which the arbitration takes place. This Court has jurisdiction to assist in the constitution of the tribunal and also in some cases during the procedure before the tribunal.

An arbitrator may be challenged not only for reasons of lacking independence but also, if he does not show the qualification parties agreed on or when parties stipulated some specific provisions on challenges in their arbitration agreement. In case of missing provisions for the challenge the respective judge will have to decide upon the challenge. (Art 180)

– International Arbitration Convention March 27/August 29,1969

The cantons of Switzerland jointly agreed on this Convention, which has to be applied on international arbitration with seat in the respective cantons. The Convention regulates among others the interaction between the State Courts and the parties with respect to the procedure of the constitution of the arbitral tribunal including the challenge and replacement of the arbitrator and the State

[75] Federal Statute on Private International Law, Art 176

Courts and the arbitral tribunal during the pending arbitral procedure. (Articles 3, 9, 12, 18,19,21,22,23)

The Convention provides for provisions for the designation and appointment of the arbitrators under Chapter III. The Swiss Convention stipulates that the number of arbitrators has to be three, allowing however also the decision by more arbitrators with any uneven number or by a sole arbitrator. (Art 10) Should parties wish for a decision by an even number of arbitrators they are requested to give a "casting vote" to an umpire or to require that arbitrators decide unanimously or with qualified majority. (Art 11, last sentence) Parties are free to appoint their arbitrator/s themselves or delegate such appointment to an arbitration body of their choice.

The International Arbitration Convention is offering two interesting provisions in case of default of parties in the nomination procedure. In case parties fail to agree, each party is given the right to nominate an equal number of arbitrators and the nominated arbitrators shall "unanimously elect an umpire". (Art 11, third sentence) Article 12 however stipulates that in case of default of parties in the nomination of a "single arbitrator", or arbitrators for the tribunal consisting of more arbitrators, or the arbitrators cannot agree on the umpire, the respective Court will make this decision.

With respect to the challenge ("objection" in the Convention), the revocation or replacement of the arbitrator, the Convention simply refers to the Act on Federal Judicial Administration and its obligatory or facultative rules for the withdrawal of

federal judges, or the reasons established by the arbitration institution parties might have selected as administrative body. (Art 18)[76] Parties also can revoke unanimously the authority of an arbitrator or the respective Court may terminate the authority of the arbitrator for good reason only. (Art 22)

In case an arbitrator has to be replaced, because an arbitrator died, or resigned, or his authority has been revoked, he has to be replaced. For this procedure the same methods apply as for the nomination of the arbitrator. If parties fail to replace the arbitrator the Court will appoint the replacement. It is also up to the Court to determine together with the arbitral tribunal and the parties, if and how far the proceedings before the tribunal will have to be repeated or in how far the previous proceedings stay valid and binding also for the replaced arbitrator. (Art 23)

Summing up the legal provisions in Switzerland for international arbitration to be applied on ad – hoc arbitration, one can find that they are somewhat casuistic, reflecting nicely though the cantonal composition of this State.

[76] This Act on Federal Judicial Administration is not published on the Swiss web-site nor to be found in another search mode for Swiss legal provisions. Therefore it has to be mentioned only without offering the respective stipulations.

c. Rules

– Swiss International Arbitration Rules in force since Jan 1, 2004 (Swiss Rules)

Previously the several Chambers of Commerce in Switzerland offered services as administrative body and Appointing Authority in international arbitration, each with its own set of Rules.[77] From 2004 on these Chambers are operating these services under the same set of Rules, which are primarily based on the UNCITRAL Arbitration Rules. The changes applied to the UNCITRAL Rules adapt the UNCITRAL ad – hoc Rules to institutional arbitration and reflect the international legal developments and comparative considerations.

So for example the Chambers have set up a Special Arbitration Committee acting on behalf of the Chambers. This Arbitration Committee is composed of experienced specialists in the field of international arbitration. Within this Arbitration Committee another Special Committee has been set up to act as Appointing Authority or deal among others with the challenge, revocation or replacement of arbitrators. (Introduction (e) As an example for the comparative considerations one can mention that the Swiss Rules contain a separate Article (Art 4) dealing with the consolidation of arbitral proceedings (joinder) and the participation of third parties.

[77] The Chambers of Commerce and Industry of Bale, Bern, Geneva, Ticino, Vaud and Zurich offered such services. – see the introduction to the new Swiss Rules.

The joinder more or less is understood as a new case filed in between identical parties to an existing arbitration. Than the new case simply has to be brought to the attention of the existing arbitral tribunal whose jurisdiction is expanded to the new case. (Art 4.1 first case) Another joinder - case scenario deals with the filing in of a new case/claim between non - identical parties but referring to an existing ongoing arbitration. Than the Chambers/Arbitration Committee will decide under consideration of the status of the pending claim to which the new claim refers whether the cases can be joined or not. In case the joinder is allowed the case will be submitted to the existing arbitral tribunal and the new parties have to accept the tribunal thus waiving their rights to appoint arbitrators. (Art 4.1. second case) And one other jonder - case scenario deals with a “third party” which term is not specified in the Swiss Rules. Either a third party wants to join the existing arbitration or a party of an ongoing arbitration wishes to make a third party join the procedure, in both cases the arbitral tribunal decides whether to allow the joinder or not. (Art 4.2)

Under Art 6 the Swiss Rules fix the number of arbitrators with a sole arbitrator or a tribunal composed of three arbitrators. In case parties did not agree on the number of arbitrators the Chamber will decide upon it taking into consideration the specifics of the case. The Chamber also has discretion after having contemplated upon the specifics of the case where parties agreed on a procedure with three arbitrators, to make parties accept a decision by a sole arbitrator.

The multi - party nomination provisions are woven into the stipulations regarding the appointments of the arbitrators. It simply refers to the term "…two or more parties…" or also as " … group of Claimants or Respondents … " shall jointly designate the arbitrator. Furthermore in multi - party arbitration the parties shall set up the rules for selection of the arbitrators. In case of failure to "designate" the arbitrator the Chamber will appoint all three arbitrators under specification of the "presiding" arbitrator. (Art 8)

Also the Swiss Rules rely on the impartiality and independence of the arbitrator and offer the remedy of a challenge if the arbitrator does not comply. If an arbitrator is challenged he can withdraw, or the Chamber will decide upon the challenge. (Art 10 and 11). An arbitrator's authority may also be revoked in case he does not perform his duties as arbitrator. (Art 12) An arbitrator also may be replaced in case of death or if he becomes unable to perform. These Rules also specify what is understood under "unable to perform" – it refers to reasons beyond the control of the arbitrator. (Art 13.1) In any case where the arbitrator has to be replaced the Chamber invites the party who has designated the arbitrator to designate the "replacement" arbitrator. In case of failure to do so the Chamber will appoint the "replacement" arbitrator. (Art 13) The Swiss Rules also specify that the "replacement" arbitrator takes over the proceedings as is unless the arbitral tribunal makes a different decision.

The new Swiss Rules are one of the first Rules to work into its stipulations regulations on

multi – party nominations of arbitrators as well as joinders (which will not be dealt with in more depth as fixed in the clarifications of this work).

6. Austria:[78]

a. Conventions ratified

Austria has ratified the Geneva Convention as well as the NY Convention; therefore international commercial awards are enforceable in Austria and her awards are enforceable in the member states of the NY Convention.

b. Laws applicable

– UNCITRAL Model Law

Austria has adopted the UNCITRAL Model Law.

– Code of Civil Procedure Art 577 f and Judicature Act, as in force from Jan 1, 2006 (altered by the Law on Alteration of The Arbitration Regulations) [79]

[78] See web-site of VIAC and the referred to Appendices
[79] Author's translation Appendix 2

Parties can deliberately consider the number of arbitrators to decide their case. If they opted for an even number the arbitrators are obliged to nominate an additional person as chairman of the tribunal. (Art 586.1) In case parties did not provide for the number of arbitrators three arbitrators are to decide the case. (Art 586.2)

Parties can deliberately agree on the procedure to nominate arbitrators and also on the number of arbitrators. Parties have first hand right to agree on the sole arbitrator and in case of a three persons arbitral tribunal nominate their arbitrator. If they fail to do so the sole arbitrator as well as the different arbitrators are nominated by the respective State Court. (Art 587) If parties agreed on a tribunal consisting of more than three arbitrators, each party has to nominate the equal number of arbitrators. If they fail to do so the respective State Court will substitute the nomination. (Art 587.2) The respective State Court will nominate the arbitrator/s if parties agreed on a procedure to nominate the arbitrator/s and fail to do so, or they did not agree on such procedure, or in case an agreed on Appointing Authority does not comply within the time-limits set forth by parties. (Art 587.2.3.)

The new arbitration Law of Austria also deals with <u>multi – party arbitration</u> – more or less woven discreetly into the stipulations regarding the nomination of arbitrators "…. If more parties who have to nominate one arbitrator jointly … " fail to do so the Court will provide for this nomination. (Art 587.5) As a general fallback provision the Austrian law also provides for a default - nomination in any case for which the recent stipulations do not offer a cover and an arbitrator

could not be appointed, the Court is taking over the nomination procedure. (Art 587.6)

The Austrian Law also provides for broad parties' discretion and autonomy with respect to time limits. Even if a party has referred the nomination already to the Court and the other party nominates after the Court has been called for, but before the Court' s decision on the nomination/s is rendered, the nomination of the party is valid and hinders the Court to proceed. (Art 587.7) In any case the Courts decision is final and binding. (Art 587.9)

Of course parties can challenge an arbitrator due to justifiable reasons to doubt his impartiality and independence. The arbitrator also has to disclose all reasons also during the procedure; or that the arbitrator does not comply with the procedures parties have set forth for the qualifications or abilities of the arbitrator/s. (Art 589) The challenge has to be rendered with the arbitral tribunal, who will also decide upon the challenge. If the challenged arbitrator does not withdraw or the party does not consent to the challenge, the arbitral tribunal decides upon such challenge – under cooperation of the challenged arbitrator. (!) (Art 589.2) Otherwise the Court decides upon the challenge. (Art 589.3)

An arbitrator can resign, or might be to be replaced either; parties might also agree on terms that the arbitrator might wish to retire prematurely or if he does not resign from office at all, than parties are allowed to call upon the Court for decision. (Art 590) If the office of the arbitrator ends prematurely, a substitute

arbitrator has to be nominated applying the same rules as have been applied for his nomination. (Art 591) All relevant procedural results which have been achieved so far can be used also by the freshly substituted tribunal and the substitute arbitrator. (Art 591)

The respective State Court shall be in case of a commercial arbitration the Trade Court of Vienna or in any other case the Higher Court of Civil Jurisdiction in any Federal State of Austria. (Art 615)

With this new Arbitration Law in Austria set in force, this arbitral venue offers the ultimate law taking into consideration the latest developments of international commercial arbitration.

c. Rules

Rules of the Vienna International Arbitral Centre of the Federal Economic Chamber of Austrian, in force since Jan 1, 2001 - VIAC Rules – or Vienna Rules

The Vienna Rules offer arbitration under tribunals composed of a sole arbitrator or three arbitrators. If parties failed to agree on the number of arbitrators or fail to nominate their arbitrator for a three - person tribunal, or the two nominated arbitrators cannot agree on the chairman of the tribunal, the Board of the VIAC will substitute the default nomination. (Art 9)

The VIAC Rules deal with multi – party arbitration (Art 10) too, stipulating clearly that it is admissible only, if the VIAC has jurisdiction for all parties. (The jurisdiction of the VIAC is established before bringing in a claim.) (Art 1) Furthermore multi – party proceedings are admissible if the applicable law allows such proceedings; if all parties are bound by the same arbitration agreement or if the procedure has been agreed upon. (Art 10.1.a-c.) Multiple parties on one side need to agree on one arbitrator if they have chosen a decision by a tribunal composed of three arbitrators (Art 10.1.and Art 10.1.d) or all parties involved in this dispute have to jointly nominate the sole arbitrator. (Art 10.5) If parties fail to do so, the Board of the VIAC is substituting the agreement. (Art 10)

These Rules also deal with the situation that a statement of claims could not be served on all Defendants. Than the proceedings will continue against those Defendants on whom the claims could be served if Claimant/s declare/s that it/they withdraw/s the claims against the Defendants on whom the claim could not be served. If Claimant/s do/es not bring forward this declaration and there are still some Defendants on whom the claim cannot be served within a year – the complete case has to be deleted from the list of cases. (Art 10.2)

The VIAC Rules also provide for a challenge of arbitrator/s for reasons of lacking impartiality and independence (Art 11). Parties as well as the challenged arbitrator have to have the possibility to answer to such challenge. The arbitrators can continue to work, however they cannot render the award until the Board of the VIAC has decided upon the challenge. (Art 11. paras 4 & 5) In case of incapacity of

an arbitrator, or failure to perform the Board of the VIAC as well as parties can terminate /request termination of the mandate of the arbitrator. (Art 12)

If an arbitrator has been successfully challenged, has resigned, has passed away, or his mandate has been terminated, he has to be replaced. The right to replace is with the body who appointed the arbitrator. A newly appointed arbitrator than has to consider in what extent the previous proceedings will have to be repeated together with the other arbitrators and the parties. (Art 13)

II. E/. Summary of II. A - D:

From the before mentioned analyzes the following can be shown with respect to multi – party nominations of arbitrators:

- Based on the New York Convention it is essential for ad hoc and institutional arbitration to avoid failures in the nomination procedure of the arbitral tribunal. Otherwise an award can be set aside.

- Complementary to the New York Convention the Geneva Convention pre – stipulates the substitute composition of the arbitral tribunal in case parties cannot agree on the arbitrator/s or are defaulting in the nomination procedure. Furthermore this Convention provides for an Appointing Authority “the President of the competent Chamber of Commerce”. Therefore in countries having ratified the Geneva Convention without further parties agreement an Appointing Authority is established. This Convention

therefore eases the nomination procedure and concentrates the specific knowledge how to appoint to the Chambers of Commerce thus securing high quality of streamlined, harmonious, stabile appointments standing in the continuity of the venue with steady outcome. According to Article I (1) a, the Geneva Convention is applicable only when all States of origin of parties have ratified it.

- The Uncitral Model Law introduces international harmonized stipulations on Law level among others for the clarification of the number of arbitrators, for the nomination procedure/ respectively the default situation. The Model Law offers referral to an Appointing Authority, parties can pre - stipulate or a State Court which the adopting State determines. It does not contain specific requirements for multi – party arbitration but the standard applies that multiple parties are looked at as one party and have to jointly nominate their arbitrator/s.

  Furthermore the Model Law reduces the possibility of Court interventions in arbitration to some explicit activities, like the appointment procedure for arbitrators in case of default, or the challenge of an arbitrator and the termination of the mandate (Art 11,13,14). To limit Court interventions is the consequential request by the arbitral community of the fact that by signing an arbitration agreement parties expressed their will to have their dispute settled through the means of arbitration and want to avoid Court procedures. According to the Explanatory Note by the UNCITRAL Secretariat

parties of an arbitration agreement prefer " … expediency and finality to protracted battles in court…" [80]

- In Austria, Great Britain and Switzerland the Federal Law regarding international commercial arbitration contains stipulations for multi – party nominations of arbitrators; the local Federal Laws of Belgium, France, and the United States do not contain explicit stipulations for multi – party nominations.

- The International Commercial Arbitration Rules of VIAC, CEPANI, ICC, LCIA and the new Swiss joint Rules contain explicit stipulations for multi – party nominations, whereas the AAA/ICDR Rules do not explicitly manifest such stipulations. The AAA/ICDR Rules simply state in a general way in the introduction that "party" also means "parties" and "arbitrator" means "arbitrators".

- With respect to the Appointing Authority it should be mentioned that in countries having ratified the Geneva Convention the Presidents of the competent Chambers of Commerce are stipulated as Appointing Authorities. – This applies to Austria, Belgium and France. Having ratified the UNCITRAL Model Law in Austria the same President of the Chamber also can act in such capacity under UNCITRAL Model Law. Whereas the Geneva Convention works between member States only, it is sufficient that the State of the arbitral venue has adopted the Model Law that it is applicable.

[80] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, A/40/17,Annex I, par B.1.b.14

Additionally to the above mentioned Appointing Authorities deriving from the provisions of the local procedural laws are the State Courts respectively their Presidents in all cited States. The Appointing Authorities according to Federal local procedural law in Austria is in commercial cases the President of the Trade Court in Vienna or the District Courts acting as Trade Courts in the other Federal States of Austria (CCP Art 587 & 615); in Belgium according to Art 1684 of the Belgian Judicial Code the President of the Civil Court; in France the President of the Tribunale de Grande Instance of Paris (French CCP Title V, Art 1493); in Great Britain according to Sections 15, 16 and 18 of the Arbitration Act the Court determined by the Lord Chancellor – High Court or County Court; in Switzerland the High Court of Common Civil Jurisdiction of the Canton of the venue (International Arbitration Convention , Chapter I, Art 3); in the USA according to the FAA in connection with the Federal Rules of Civil Procedure the US District Courts.

- With respect to the number of arbitrators the local Federal Laws stipulate in case the arbitration agreement/clause does not specify the number of arbitrators (default situation) the following: in Austria the number of arbitrators shall be three (CCP Art 586.par 2): in Belgium the Belgian Judicial Code requests three arbitrators as well (Art 1681.par 3); in France CCP, Book V Art 1453 in connection with 1495 requests the decision by a sole arbitrator or uneven number of arbitrators have to be nominated; Great Britain mandates a sole arbitrator (Arbitration Act Section 15 par 3; Switzerland mandates 3 arbitrators (Art 10 International Arbitration Convention in connection with Federal Statute); and in the United States the FAA and UAA opt for a decision by a sole arbitrator in case parties did not stipulate the number of arbitrators. (FAA Chapter 1, Section 5; UAA Section 3).

- Of interest is also whether the local Federal procedural Laws also offer freedom for parties to decide on the number of arbitrators. Here the analyses shows that all selected countries offer such freedom. Austria stipulates that a decision by "even or odd numbers of arbitrators" are possible. If an even number is opted for, an additional person has to be nominated, who will act as chairman of the tribunal. (Art 586.1 CCP) Additionally the tribunal also can be composed of more than three arbitrators – then each party has to nominate an equal number of arbitrators. Belgium allows decisions by a sole arbitrator as well as odd numbers of arbitrators, (BJC Art 1681). If parties opted for a decision by odd numbers of arbitrators, they have to add another arbitrator (Art 1681 in connection with Art 1685 BJC), who not necessarily will act as chairman. France and Great Britain allow even an odd numbers of arbitrators. If an even number has been stipulated the additionally nominated arbitrator will act as chairman. (French CCP Art 1453 and 1454; English Arbitration Act Sections 15 & 16). In Switzerland even and odd numbers are allowed. If an even number has been stipulated the arbitrators vote with qualified majority. (Art 11 Intern. Arb Conv). The American FAA allows one or more arbitrators without further stipulations. (FAA Section 5)

- All scrutinized local Federal procedural laws allow parties to stipulate their own appointment procedures with the fall back stipulation that in case of default in such specific appointment procedure the respective State Court would assist with the substitute nomination.

- The comparison of the stipulations of the local procedural Federal Laws for the provisions dealing with death of arbitrator, vacancy, inability to perform, resignation,

premature retirement, revocation of mandate differ – some countries offer regulations for these situations some not for all. However the result of such situations is the same – the arbitrator has to be replaced and here all laws state that the same appointment procedure which has been applied for the nomination of the original arbitrator has to be applied for the substitution of the arbitrator. In case there is a default in the substitution procedure again all laws state that the respective State Court is competent.

The conclusion therefore is, that the utmost comfort for multi – party arbitration can be found in States / Countries which have ratified and adopted the New York Convention, the Geneva Convention and the UNCITRAL Model Law. The "Summary Chart"[81] contains the selected States and their legal provisions, mirrors the ratified Conventions, adopted laws and whether explicit stipulations for multi – party arbitration are set in force in local laws or Institutional Rules. Looking at this Chart one will find that the utmost comfort for international commercial arbitration among the selected States is offered in Austria only. The consequence is that this country has to be considered as recent ultimate arbitration venue.

III/ How a lawyer drafting an arbitration clause in a contract can deal with the problem of the nomination of arbitrators by multi - parties under various arbitration regimes:

When drafting an arbitration clause for multiple parties the lawyer needs to consider among

[81] Summary Chart see Appendix 3

others:

the State of origin of the contractual parties with respect to the Conventions this State has ratified; whether States have adopted the UNCITRAL Model Law; the venue of arbitration and the procedural laws applicable there; whether the local law of the arbitration venue offers explicit multi - party nomination provisions; whether there are pre – stipulated Appointing Authorities or not and whether possible disputes will be resolved under ad – hoc or institutional arbitration.

Imagine the following case scenarios using the check of countries and laws applicable under II.D.

A./ The first presumption is dispute resolution under ad – hoc arbitration without pre - stipulated arbitration Rules:

1./ The commercial contract includes two parties from Belgium and two parties from Austria.

Both countries have ratified the New York Convention, the award will be enforceable in the member States, as well as the Geneva Convention. Belgium did not adopt the UNCITRAL Model Law, but Austria did.

A/ The venue of arbitration shall be Brussels:

the Belgian laws do not explicitly include stipulations for multi – party nominations; but the default provisions of the local Federal law for the number of arbitrators request three arbitrators.

Due to the membership of both countries of origin to the Geneva Convention this Convention is applicable (Art I (1)a) Therefore one of the Appointing Authorities can be the President of the Chamber of Commerce. Depending on whether Claimants or Defendants are defaulting, the President of the Chamber of the respective country will be the Appointing Authority. If the venue is Brussels and the Austrian Defendants default, this would be the President of the Federal Economic Chamber of Austria; if Belgian Claimants suffer a default the President of the Belgian Chamber of Commerce would be the Appointing Authority.

A further possible Appointing Authority derives from the applicable State law and is the President of the Belgian Civil Court.

Therefore this arbitration clause has to contain a selection of the Appointing Authority and stipulations for the nomination procedure; it can contain the request for a different number of arbitrators than the default provisions stipulate.

b./ The venue of arbitration is Vienna:

Austria has ratified the New York Convention, the Geneva Convention, adopted the UNCITRAL Model Law, its local Federal procedural law contains explicit

stipulations for multi – party nominations and requests in case of default the decision by a tribunal composed of three arbitrators.

The Appointing Authority can be the respective President of the Chamber of Commerce (id the Federal Economic Chamber of Austria or the President of the Belgian Chamber of Commerce, depending on who is defaulting - see above) due to the Geneva Convention. The application of the Model Law, which is applicable in this case scenario, leads to the President of the Federal Economic Chamber of Austria as Appointing Authority for defaulting Claimants and Defendants; whereas the local Federal procedural law opts for the President of the Trade Court of Vienna as Appointing Authority also in both cases.

Consequently the arbitration clause has to contain the selection of the Appointing Authority; it can contain stipulations regarding the nomination procedure, and the number of arbitrators.

In both cases the results differ and the drafter will stipulate different clauses. Decisive will be for the drafter how comfortable he will be with appointments from specialist Chamber Presidents, who certainly have the requested commercial inside knowledge for the commercial community they represent.

2./ The commercial contract includes two parties from Great Britain and two parties from Austria.

Both States have ratified the New York Convention – the award will be enforceable in the member States. Austria has ratified the Geneva Convention; Great Britain has not. Austria has adopted the UNCITRAL Model Law on Federal level, Great Britain has not adopted the UNCITRAL Model Law on Federal level. Both procedural laws include stipulations for multi – party nominations.

a/ The venue of arbitration shall be London:

Neither the Geneva Convention is applicable nor the UNCITRAL Model Law. The Appointing Authority therefore is the respective State Court. In case of default a sole arbitrator will decide according to the Arbitration Act.

The arbitration clause therefore needs not contain stipulations regarding the Appointing Authority nor provisions on the nomination procedure. It can contain these stipulations and provisions regarding the number of arbitrators if more than one arbitrator shall decide the case and it should contain a stipulation regarding the services of the umpire.

b/ The venue of arbitration shall be Vienna:

The Geneva Convention is not applicable but the Model Law. Due to the effective Model Law the Appointing Authority can be the President of the Federal Economic Chamber of Austria and additionally according to local procedural law the President of the Trade Court in Vienna. The default number of arbitrators is three.

The clause therefore has to contain the selection of the Appointing Authority. The clause can contain stipulations regarding the nomination procedure and the number of arbitrators.

This constellation demonstrates again that the different arbitration venues lead to differently drafted arbitration clauses.

3./ The commercial contract includes one party from the United States, one party from Switzerland and two parties from Austria.

All States ratified the NY Convention, therefore the award will be enforceable in the ratifying States. Only Austria ratified the Geneva Convention and this Convention therefore is not applicable. The Model Law has been adopted by Austria on Federal level, by the US on State level for Illinois not for New York, and not by Switzerland. Local procedural Federal laws include explicit multi – party nomination provisions in Austria and Switzerland, not in the US. The default provisions regarding the number of arbitrators provide for three arbitrators in Austria and Switzerland and for a sole arbitrator in the US.

a/ The venue of arbitration shall be Chicago, Illinois:

As Illinois has adopted the Model Law there are the two possible Appointing Authorities again - the President of the Chamber of Commerce and the respective District Court. The FAA does not contain stipulations for multi – party arbitration.

Therefore the clause has to contain the selection of the Appointing Authority and stipulations for the nominations of the arbitral tribunal; it can contain provisions for the number of arbitrators if more than one arbitrator shall decide the case.

b/ The venue of arbitration shall be New York:

New York did not adopt the Model Law, therefore the Appointing Authority is according to the FAA the District Court.

Thus the clause has to contain provisions regarding the nomination procedure; it can contain provisions regarding the number of arbitrators, if more than one arbitrator shall decide the case and needs not contain provisions for the Appointing Authority.

c/ The venue of arbitration shall be Zurich:

All States have ratified the NY Convention; the award will be enforceable in all member States. Neither Switzerland nor the Canton of Zurich have adopted the Model Law – therefore the Appointing Authority is the High Court of Common Civil Jurisdiction of the Canton of Zurich. The local procedural law contains stipulations regarding multi – party arbitration, the default provisions regarding the number of arbitrators request a decision of three arbitrators.

Therefore the clause needs not contain stipulations for the Appointing Authority, but can contain the number of arbitrators and specifications for the nominations.

d/ The venue of arbitration is Vienna:

All States have ratified the NY Convention; the award will be enforceable in all member States. Only Austria has ratified the Geneva Convention, therefore this Convention is not applicable. Austria has adopted the Model Law, consequently there are two Appointing Authorities - the President of the Federal Economic Chamber or the President of the Trade Court in Vienna. The local procedural law contains multi – party nomination provisions and the default stipulation requests a decision of a tribunal of three arbitrators.

Therefore the clause has to contain the selection of the Appointing Authority, and can contain provisions regarding the number of arbitrators and specific nomination provisions, which differ from the default provisions.

4/ The commercial contract includes two parties from Belgium and two parties from France.

All States ratified the NY Convention, therefore the award will be enforceable in the ratifying States. Both States have ratified the Geneva Convention, none has adopted the Model Law. Nevertheless there are two Appointing Authorities again (due to the Geneva Convention). In both States the local Federal Laws do not contain explicit stipulations regarding multi – party nominations. The Belgian local procedural law requests for a default decision by three arbitrators, whereas the French law provides for the default situation for one or an uneven number of arbitrators.

a/ The venue of arbitration shall be Brussels :

In toto there are three Appointing Authorities – shown above under the first case scenario.

The clause has to contain the selection of the Appointing Authority and all stipulations regarding the multi – party nomination of arbitrators. It can contain stipulations regarding the numbers of arbitrators.

b/ The venue of arbitration shall be Paris:

In toto there are three Appointing Authorities – shown above under the first case scenario

The clause has to contain the selection of the Appointing Authority and all stipulations regarding the multi – party nominations of arbitrators, as well as specifications regarding the number of arbitrators.

c/ As venue of arbitration could be chosen a different location also[82] – other than the state of origin of the contracting parties, like London. Great Britain has ratified the NY Convention, such award will be enforceable in the ratifying States. Great Britain did not adopt the Model Law on Federal level nor ratify the Geneva Convention, therefore the Appointing Authority is the respective State Court in London. The local procedural law contains provisions regarding multi – party nominations; the default

[82] Chosing also a different location then their states of origin is applicable also for all other venues and may lead to exactly the same result , namely different arbitration clauses. This is the reason for "forum – shopping" in arbitration.

provision requests a decision by one sole arbitrator,

Therefore the change in the venue leads also here to different arbitration clauses: This clause needs not contain the selection of the Appointing Authority, but can contain the number of arbitrators, otherwise the arbitral tribunal would be a sole arbitrator according to the Arbitration Act. The clause can include specifications regarding the nomination procedure, and should to contain a stipulation whether the services of the umpire would be requested.

Also this case results in different outcome of the contents of the clause and needs to be drafted differently according to venue and laws applicable on parties (state of origin) and venue of arbitration.

5/ Imagine another scenario: The ad hoc arbitration clause allows each party to nominate one arbitrator, the venue shall be Brussels; the group of Claimants consists of 3 parties from Belgium and 2 parties from Austria, all together 5 parties. These 5 parties have to appoint 5 arbitrators. The group of Defendants consists of two parties, one from Belgium, one from Austria, who have to appoint one arbitrator each also, together 2 arbitrators, makes 7 party appointed arbitrators. These will have to agree on a chairman, who will be the 8. arbitrator.

From the 5 Claimants 2 Belgian parties and 1 Austrian party nominate their arbitrators; 1 Belgian party and 1 Austrian party default. Given the legal framework described under III.A.1.a the Appointing Authority for the Belgian parties can be the President of the Chamber of Commerce of Belgium and the President of the Belgian Court; for the

Austrian party the President of the Federal Economic Chamber of Austria and the President of the Belgian Court. Taking into consideration the described situation it will take a time until all arbitrators for Claimants will be appointed.

Only afterwards the Defendants will be invited to nominate their arbitrators. Here of course none of the 2 parties nominates her arbitrator and thus the already known Appointing Authorities (same as above) step in again.

If finally all arbitrators are nominated the so chosen need to find a chairman of the arbitral tribunal and also here a default might easily happen. Then again the Appointing Authority (which, if the clause does not stipulate the Appointing Authority) will have to nominate the chairman.

In the meantime however one of the arbitrators resigns, another passes away and a third becomes unable to perform. The nomination procedure has to be repeated for the arbitrators who have to be replaced, which will not add to the longed for speed of the arbitration procedure.

One single case scenario shows already that the stipulation of nomination procedures which allow parties to deliberately nominate more than three arbitrators and not jointly leads to very undesirable results.

Could such situation have been avoided by the agreement for an institutional arbitration or in an ad – hoc clause requesting joint nominations of sole arbitrators or a tribunal of three arbitrators – yes. If the venue stays at Brussels and the local institution is opted

for, the CEPANI would be the institution of choice. CEPANI Rules offer explicit multi – party nomination stipulation – one or three arbitrators are the choice for parties and nominated jointly. With the presumeable magnitude of the underlying case in mind and 7 parties involved, certainly a tribunal composed of three arbitrators could be justified. Therefore applying the CEPANI Rules leads to joint nominations for one arbitrator for Claimants and one for Defendants, in case of default the Appointment Committee will step in and substitute the nomination for the defaulting parties or the arbitrators for the nomination of the chairman.

The result is a timely and streamlined procedure compared to the described faux – case.

III.B/ The second presumption is dispute resolution under <u>institutional arbitration</u>:

One of the differences between dispute resolution under institutional arbitration and ad-hoc arbitration can be seen in the administration according to pre - stipulated arbitration Rules of the institution and has been analysed above (II.D) with respect to the nomination of arbitraors. These Rules contain already stipulations regarding the number of arbitrators or the nomination procedure. Rules will also specify the Appointing Authority as body within the organization of the Institution.

As already shown all institutional Rules from the selected countries institutions offer explicit regulations regarding multi - party nominations of arbitrators instead of the AAA/ICDR, whose Rules mention in the introduction only that “party and arbitrator” also

means “parties and arbitrators.” This sort of provision differs from the other explicit multi – party stipulations and therefore does not seem to be classified as explicit multi – party nomination procedures. The ICDR also serves as Appointing Authority upon request but does not further describe this procedure.

As most of the questions of interest like the number of arbitrators are pre – stipulated in the Rules, the Claimants have to bring forward in their statement of claims the requested specification. For example a clause will provide for a decision by one or more arbitrators and the underlying Rules will offer decision by one or three arbitrators. Then Claimants will be invited by the Rules already to specify the number of arbitrators in their statement of claims and some Rules also invite Claimants to make suggestions with respect to the nominated arbitrator.

As described above the Appointing Authority within the institutional arbitration bodies are: for the CEPANI the Appointments Committee; for the VIAC the Board of the Arbitral Centre; for the ICC the Court according to suggestions of the National Committees and jointly with the Secretary General of the ICC; for the LCIA the Court; for the Chambers in Switzerland the Special Committee within the Arbitration Committee and for the ICDR the nomination procedure is administered by the administrator.

IV. How do multiple parties execute their right to nominate ?

In all situations described above the multiple parties execute their right to nominate the arbitrator by a specific request - either to the Appointing Authority or to the arbitral institution

agreed on. As has been shown above the Appointing Authorities differ depending on the chosen arbitration mode - if ad hoc arbitration is chosen or institutional arbitration, and according to procedural laws of the venue or in the state of origin (Geneva Convention) as well.

Multiple Claimants can request a nomination within the statement of claims already; multiple Defendants can request such nomination in their Statement of Defense/Response. If Defendants default on the nomination of their arbitrator/s, Claimants need to request the appointment for Defendants. In institutional arbitration the administrating body is taking care of this timely procedure.

V/ Findings and suggestions:

As the different results for the drafting of an arbitration clause show, there are many different legal stipulations on the different levels of laws to be considered. The biggest danger lures in ad – hoc arbitration without pre – stipulated Rules as the drafters have to be mindful of many relevant provisions differing from venue to venue.

Whereas the many different provisions, which help to increase the comfort for the commercial user, like the stipulations of the Conventions or the Model Law, ease arbitration, over creative drafters can overdue within the drafted ad hoc clause and make results impossible.

In particular with respect to ad hoc arbitration clauses one could recommend that in any case a stipulation regarding the number of arbitrators would be useful. One has to have in mind the

efficiency of the arbitral procedure and therefore should opt for a decision by one or three arbitrators, who have to be jointly nominated by the multiple parties from one group of parties. In case of default an Appointing Authority has to be cared for. This complex can be dealt with easier in institutional arbitration because of the prefixed Rules and already existing provisions.

Institutional arbitration gives better protection, but depends also on the provisions of the chosen institute. For good reasons one might prefer institutions with clear stipulations regarding the nomination procedure for multiple parties (like the VIAC, ICC or LCIA).

The standard that party's autonomy prevails is still valid as well as the standard that multiple parties on one side are looked at as one group of parties and need to jointly nominate their arbitrator.

Consequently the Dutco case has led to scrutiny of Arbitration regimes which results in more explicit, clearer stipulations in the respective institutional Rules (like ICC, LCIA and VIAC) and Federal local arbitration laws like in Austria, Switzerland or Great Britain.

Therefore the author would like to make the following suggestions for further harmonization and increased efficiency of international commercial arbitration:

- The UNCITRAL Model Law should be generally adopted on Federal level;
- Local Federal procedural laws should contain explicit Rules for multi – party nominations of arbitrators;
- UNCITRAL should not avoid the discussion about the multi – party nominations of arbitrators, especially as 14 years after Dutco some clarifications have been achieved with respect to the explicit stipulations in Laws and Rules;

- In the US at least those Federal States being heavily exposed to international commerce, like Georgia, should adopt the UNCITRAL Model Law;
- Individual drafters of arbitration clauses should keep the number of arbitrators small, like it is working so well within institutional arbitration. Additionally they might wish to provide for joint nominations of “groups of Claimants and groups of Defendants”. With respect to the Appointing Authorities drafters should not forget to stipulate them in ad hoc arbitration, but leave such stipulation within the framework of institutional arbitration, because the institutions have their own appointing bodies. Individual different stipulations might turn out here as contra-productive. Generally drafters should keep in mind what is needed for the respective venue of arbitration they wish to use according to the local laws there.

The goal is to further streamline and unify the international legal arbitration provisions to ease the dispute resolution procedure for the international commercial community. It has been this international commercial community who was the driving force behind the Geneva and New York Convention, the installation of the UNCITRAL Model Law and the creation of the UNCITRAL Arbitration Rules. Certainly it would be of highest interest for this community to encourage also further streamlining of arbitral procedures in the US and Europe.

Appendix 1

Agreement regarding the Cooperation in the Field of International Commercial Arbitration between the Federal Economic Chamber of Austria, Vienna, and the Hungarian Chamber of Industry and Commerce, Budapest

June 1998

The Federal Economic Chamber of Austria, Vienna and the Hungarian Chamber of Industry and Commerce, Budapest, (consequently contractual parties),

- Having considered that the Republic of Austria as well as the Republic of Hungary have ratified the OSCE documents of Helsinki 1971, in which the use of arbitration as means of dispute resolution in commercial contracts in the field of the exchange of goods and services as well as resulting out of contracts concerning industrial cooperation is greatly recommended;
- Considering that the Republic of Austria as well as the Republic of Hungary have ratified the Geneva Convention and the NY Convention;
- Convinced that arbitration is an effective means of dispute resolution, which can occur during economic exchange between natural and legal persons of the Republic of Austria and economic legal entities of the Republic of Hungary (consequently parties)

have agreed on the following:

Appendix 1

Article 1

The Contractual Parties will inform each other regularly about developments in the field of arbitration in the Republic of Hungary and in the Republic of Austria and will assist each other with mailing relevant documentation. They will assist each other technically with arbitral procedures pending before the International Arbitral Centre of the Federal Economic Chamber of Austria and the Court of Arbitration of the Hungarian Chamber of Industry and Commerce.

Article 2

The Contractual Parties will recommend a specific Arbitration clause for the bilateral commerce between Austria and Hungary and also for commerce with third parties based on the UNCITRAL Arbitration Rules.

> "All disputes arising out of this contract, including disputes regarding its validity, interpretation and termination, will be exclusively and finally decided by an arbitral tribunal composed and administered according to the specific Rules of Art 2 and 3 of the Agreement regarding the Cooperation in the field of International Commercial Arbitration between the Federal Economic Chamber of Austria, Vienna, and the Hungarian Chamber of Industry and Commerce, Budapest."

This arbitration clause shall be understood as the following agreement:

All disputes arising out of this contract, including disputes regarding its validity, interpretation and termination, will be exclusively and finally decided by an arbitral tribunal

composed according to the UNCITRAL Arbitration Rules, 1977, which have been altered and amended by Art 2 and 3 of this Agreement.

Different from the UNCITRAL Arbitration Rules the information of the commencement of the dispute (Art 3), the statement of claims (Art 18) and the response (Art 19), have to be filed in with the Secretariat of this arbitration body, whose President will act as Appointing Authority according to Art 2. par. a, b and c. The respective Secretariat informs the other party, sets the requested time – limits and takes care of the constitution of the arbitral tribunal (Art 6 – 8) – under determination of Art 3 of this Agreement, fixes the costs of the arbitral proceedings (Art 38 – 40) according to the schedule of costs, which has been agreed on by the Contractual Parties of this Agreement, fixes the advance payments (Art 41) and stores one set of the procedural documents for 10 years.

Appointing Authority is

Par a: for disputes between parties with their seats on the territory of the republic of Austria and the territory of the Republic of Hungary

- The President of the Federal Economic Chamber of Austria, Vienna, if Claimant (Counter - claimant) has its seat in the territory of the Republic of Hungary;
- The President of the Hungarian Chamber of Industry and Commerce, Budapest, if Claimant (Counter - claimant) has its seat in the territory of the Republic of Austria;

Par b: for disputes between parties with seats in the territory of the Republic of Austria and the Republic of Hungary with parties having their seats in the territories of third states

- The President of the Federal Economic Chamber of Austria, Vienna, if one of the parties has its seat in the territory of the Republic of Hungary;

- The President of the Hungarian Chamber of Industry and Commerce, Budapest, if one of the parties has its seat in the territory of the Republic of Austria;

Par c: for disputes between parties, who all have their seats in one of the Contractual States

- The President of the Federal Economic Chamber of Austria, Vienna, if all parties have their seats in the territory of the Republic of Hungary:
- The President of the Hungarian Chamber of Industry and Commerce, Budapest, if all parties have their seats in the territory of the Republic of Austria.

In this case the statement of claims has to be filed in with the Secretariat of this Arbitral Body in whose country all of the parties have their seats. The respective Secretariat also will administer the proceedings according to Art 2 of this Agreement.

Article 3

Both Arbitral Bodies entertain a list of arbitrators consisting of 21 persons, who are able to act as arbitrators. Each Chamber nominates 7 persons who have Austrian or Hungarian citizenship, 7 persons will be nominated who will not have these citizenships.

This list of arbitrators is binding for the Appointing Authority but non - binding for the parties. Arbitrators have to sign in the Arbitrators' contract, which has been especially stipulated for this Agreement.

Article 4

The Contractual Parties establish a joint schedule of costs and arbitrators' fees, which will be applied only for arbitral procedures under this Agreement.

Austria

Law on Alteration of the Arbitration Regulations, January 2006 (excerpt)

Third Chapter

Constitution of the Arbitral Tribunal

Composition of the Arbitral Tribunal

Art 586 (1) Parties are free to determine the number of arbitrators. Have parties agreed on an even number of arbitrators, they are obliged to appoint an additional person as chairman.

Art 586 (2) Did parties not agree on any number of arbitrators, three arbitrators shall decide the case.

Appointment of Arbitrators

Art 587 (1) Parties can agree on the procedure to appoint arbitrator/s.

Art 587 (2) In case such agreement is missing, the following will be applied:

Art 587 (2) 1 In arbitral proceedings with a sole arbitrator, the sole arbitrator is appointed by the Court, if parties did not be able to agree on the appointment within 4 weeks after receipt of e respective written invitation of one party by the other party;

Art 587 (2) 2 In arbitral proceedings with three arbitrators, each party has to appoint one arbitrator, and the so chosen have to agree on the third arbitrator, who will act as chairman of the arbitral tribunal.

Art 587 (2) 3 If there are more than three arbitrators agreed on, each party has the right to appoint the same number of arbitrators. The so chosen arbitrators appoint another arbitrator, who shall act as chairman of the arbitral tribunal.

Art 587 (2) 4 Did a party not appoint its arbitrator within 4 weeks after receipt of a respective written request by the other party, or did parties not receive within 4 weeks after the

appointment of their arbitrators the information that the arbitrators appointed by them agreed on the third arbitrator, this arbitrator has to be appointed by the Court.

Art 587 (2) 5 A party is bound to its appointment of an arbitrator as soon as the other party received the information of the appointment.

Art 587 (3) If parties agreed on an appointment procedure

Art 587 (3) 1 and one of the parties involved does not perform accordingly or

Art 587 (3) 2 are parties or arbitrators unable to perform according to this procedure and cannot reach an agreement or

Art 587 (3) 3 a third person does not comply with his role, which has been assigned to him by parties according to this agreement on the procedure to appoint an arbitrator within three months after receipt of such request,

each party has the right to request the Court to appoint the missing arbitrator if the appointing procedure does not stipulate for another procedure in case of default.

Art 587 (4) The written request to appoint an arbitrator has to contain also information on the nature of the claims and the underlying arbitration agreement.

Art 587 (5) Multiple parties have to agree jointly upon the appointment on one or more arbitrators within 4 weeks after receipt of the request. In case parties fail to do so, the arbitrator/s are to be appointed by the Court upon request of a party, if the agreed on appointment modus does not provide for another procedure.

Art 587 (6) The arbitrator/s are to be appointed by the Court, if there are other reasons than those described above.

Art 587 (7) If an appointment is made before the Court of first instance decides upon the request to appoint an arbitrator and a party brings evidence for this, the request has to be dismissed.

Art 587 (8) The Court has to take into consideration all relevant stipulations parties have set forth for the appointment procedure and the qualifications of the arbitrator which lead to the appointment of an impartial and independent arbitrator.

Art 587 (9) Versus an appointment made by the Court no appeal/recourse is available.

Challenge

Reasons for Challenge

Art 588 (1) A person determining to accept the office of “arbitrator”, has to reveal all circumstances which could cause justifiable doubts on his independence and impartiality or which are against the parties’ agreement. An arbitrator has the duty to immediately disclose all relevant circumstances also during an arbitral procedure.

Art 588 (2) An arbitrator can be challenged only due to reasons which rise justifiable doubts on his independence and impartiality, or if he does not comply with one or the other conditions agreed on by parties. A party can challenge an arbitrator on whose appointment the party has been actively involved only, when these circumstances surface after the appointment or the active involvement of the party in the appointment procedure.

Procedure of Challenge

Art 589 (1) Parties can stipulate separate rules for the challenge despite par 3.

Art 589 (2) Is such agreement missing, the challenging party has to file in the written reasons for the challenge within 4 weeks after she has been informed about the composition of the arbitral tribunal or a circumstance surfaced according to Art 588 (2). If the challenged arbitrator does not resign or if the other party does not consent to the challenge, the arbitral tribunal will decide upon the challenge.

Art 589 (3) If such challenge is dismissed according to the procedure stipulated by the parties or according to the procedure described in par 2, the challenging party can

request a decision by the Court within 4 weeks from the notification of the dismissal of the challenge. This Court decision is final. During such pending request the arbitral tribunal including the challenged arbitrator is allowed to continue with the arbitral procedure and can render an award.

Termination of Mandate

Art 590 (1) The office of the arbitrator ends, if parties agree on it or if an arbitrator resigns. Despite par 2 parties can agree on a procedure for the termination of the mandate.

Art 590 (2) Each party can request a decision by the Court to terminate a mandate of an arbitrator, in case that the arbitrator is no longer able to fulfill his tasks or if he does not perform his tasks in due time and

1. the arbitrator does not resign from his office, or
2. parties cannot agree on the termination; or
3. the agreed on procedure does not lead to the termination.

There is nor appeal/recourse against this decision of the Court.

Art 590 (3) If an arbitrator resigns according to par 1 or Art 589 (2), or if a party agrees to the termination of the mandate of the arbitrator, it does not mean that the reasons for the termination are accepted.

Appointment of the Substitute Arbitrator

Art 591 (1) In case the mandate of an arbitrator is terminated, a substitute arbitrator has to be appointed. The appointment will be made according to the rules applicable for the appointment of the arbitrator.

Art 591 (2) If parties did not agree on another procedure, the arbitral tribunal can proceed with the arbitration and continue with the hearings and use also the collected evidence, the protocols of the oral hearings and all other relevant materials.

Appendix 3

Summary Chart II.E.

Countries listed alphabetically	New York Conv. ratifd		Geneva Conv ratifd		UNCITRAL Model Law adopted on Federal level		UNCITRAL Model Law adopted on State level		Local Federal Law includes stipulations for multi - party nomination		Appointing Authority - competent President of Chamber of Commerce		Local Federal Law Appointing Authority State Court		Instituional Arbitration Rules include explicit stipulations for multi party nominations	
	yes	no	yes	no	yes	no	yes	no	yes	no	yes	no	yes	no	yes	no
Austria	yes		yes		yes			no	yes		yes - Geneva Conv and Model Law		yes		VIAC yes	
Belgium	yes		yes			no		no		no	yes- Geneva Conv		yes		CEPANI yes	
France	yes		yes			no		no		no	yes- Geneva Conv		yes		ICC yes	
Great Britain	yes			no		no	yes - Scotland		yes			no	yes		LCIA yes	
Switzerland	yes			no		no		no	yes			no	yes		Chambers of Commerce of cantons yes	
USA	yes			no		no	yes - California, Connecticut, Illinois, Oregon, Texas			no		no; except for the States having adopted on state level the Model Law, like Texas, California, Illinois, etc	yes			no - +
FN + : ICDR Rules mention in introduction only that single form also refers to parties, arbitrators																

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IBA: ww.ibanet.org

ICC: www.iccwbo.org

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