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# Pathological Arbitration Clauses

## Malpractice, Diagnosis and Therapy

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"Ces grands malades qui nous gouvernent"

Any arbitral tribunal derives its authority and power from the interplay of two sources of law, the *lex arbitri* (the law at the seat of the arbitration), and the *agreement to arbitrate*[1]. The agreement to arbitrate may refer and thus incorporate arbi-

[1] One of which may be missing, and the other sick, hence this article.

tration rules under which an appointing authority or an arbitral institution may already have acted.

Before an arbitral tribunal even reaches the question whether it has jurisdiction – a question which it has, under all modern *leges arbitri*, power to decide itself, subject to be sure to review by the state courts at the seat[2] of the arbitration (Kompetenz-Kompetenz in the untechnical sense) –, it must answer some other questions concerning its authority and power. These are the issues to be dealt within of the present article. They may be called collectively the question of the *proper constitution* of the arbitral tribunal. Only when an arbitral tribunal is properly constituted can it decide on whether it has jurisdiction, which may raise separate questions such as the question of the arbitrability of the subject matter.

While Article 190 (2) (a) and (b) PIL Statute[3] makes a proper distinction between the two questions, they are sometimes lumped together by arbitration statutes. They indeed have much in common. An arbitral tribunal has not only the (non-technical) Kompetenz-Kompetenz but also the (non-technical) *Constitution – Kompetenz*. Both decisions must be made on the basis of an agreement to arbitrate. A decision on proper constitution may likewise be made in an interim award. Both these become separately subject to challenge under article 190 (3) PIL Statute.

All this sounds easy, but the *lex arbitri* depends on the arbitration clause. Unfortunately, in this world hardly anybody is totally healthy. Many arbitration clauses are faulty, or "pathological" as they are traditionally called.[4] For instance, more than 10 percent of the arbitration clauses coming before the Zurich Chamber of Commerce are pathological.

## I. Aetiology and Diagnosis

Therefore, the first task that the *lex arbitri* often expects the arbitral tribunal to solve within the legal framework that the *lex arbitri* sets, is to heal a pathological arbitration clause. To heal one, one must first know the causes of the illness (aetiology). Why are there so many pathological arbitration clauses?

One frequently hears that arbitration clauses are added into a contract at the last minute (the myth of the *midnight clause*). This sounds good and may be a

[2] Following the English Arbitration Act 1996, Art. 3, this expression should generally be used instead of "place".

[3] Swiss Federal Private International Law Statute

[4] The phase was coined by Frédéric Eisemann.

convenient excuse for those responsible for having drafted them. The reality, however, is usually slightly different: Arbitration clauses are normally a negotiation point for a long time, but the negotiation point is soon put on the back burner. The final text is agreed relatively late with little expert help, and it is typed and translated by people who do not understand it. Plain clerical and translation errors creep in and go undetected until it is too late. One reads "settled" instead of "decided". One reads "national" instead of "international". "Commerce" may well be translated by "trade". Blanks in forms may be left blank or, where two variations are offered, both may be included in the text. Multiple versions of an arbitration clause may be equally authentic, yet have different meanings.

Fortunately, in these type of cases, the *normal rules of contract interpretation* will often help understand what the parties wanted to say *(falsa demonstratio non nocet)*. The arbitral tribunal will have to pick and choose between the various elements in the various versions and combine them into an arbitration clause that makes sense.

More specific problems are however raised when sloppy drafting is confronted with *special requirements of arbitration law*:

### *1. Arbitral Institution that Does not Exist*

The clause may refer to an arbitral *institution* which, even after the most artful interpretation, cannot be found to *exist*. Such an arbitration clause then fails as an institutional arbitration clause. In my opinion, it should convert into an ad hoc clause.

### *2. Missing Text*

Sometimes an entire passage of the clause is left out by mistake. If the arbitration clause must be in writing, there is no way that the missing passage can be brought into the clause. Neither does the more relaxed requirement that the clause should be "evidenced by a text" (as in Article 178 (1) PIL Statute) help in my view: True, one may identify the text that the parties failed to copy properly, but one can hardly say that such a virtual text "evidences" the clause. Accordingly, the arbitral tribunal must cope with what it has. Fortunately, it also has the context.

### *3. Conciliation, Arbitration, and Litigation Mixed up*

One simply cannot expect the parties to use words in a technical sense. Some do not understand arbitration and confuse it with non-binding conciliation. For

instance, the parties write that the "arbitration" award must be "accepted" by the parties or must be "confirmed" by a court. That is conciliation. If the clause first mentions conciliation, then something else, and then discusses resorting to state courts, the process in the middle must be presumed to be arbitration. If arbitration is first mentioned, and then a state court, arbitration is present if the arbitral tribunal's decision, in the context of the clause, can be overturned only under exceptional circumstances. Otherwise, even if called "arbitration", the first phase is conciliation. If "all" remedies to state courts are excluded, the first phase is arbitration. If only remedies in a country of enforcement are reserved, the first process is arbitration in the country of arbitration.

If arbitration as proposed by one of the parties is coupled with jurisdiction of the state courts as suggested by the other, the clause may operate as an alternative clause giving usually the claimant the choice of either going to arbitration or to the state courts. Such clauses fail to fulfill the primary goal of any dispute resolution clause which is to help the parties predict a possible outcome in order to make it possible for them to reach a negotiated settlement. Many pathological arbitration clauses are such unhappy compromises.

Parties that are insecure whether their dispute resolution clause will be operative may provide for a *cascade*: A first clause, then a subsidiary clause, and a subsidiary clause to that one, etc., in the hope that if one fails, the next one will hold.[5] This is not as catastrophic as it sounds. The arbitral tribunal may follow the cascade and deal with every step one at a time as if it were the only clause. Usually the first step in the cascade will be sufficient, and one should not worry about the further steps.

Inaccurate descriptions of how an arbitral award will be treated in the country of origin and at the place of enforcement are innocuous as long as it is clear that the parties agreed on arbitration. If the arbitration clause provides for substitute decisions by state courts in case the arbitration "fails", the arbitral tribunal should proceed without worrying about the meaning of "failure". If it can find itself properly constituted, it should so find. If not, it should decline to proceed with the case. Whether in that case the arbitration "fails" is not for it to decide.

### *4. Violation of Institutional ("Public") Policy*

Arbitration rules are available, but few drafters read them. Everybody loves to leave some mark on the arbitration clause. Negotiation sometimes leads to unrea-

[5] A spectacular example was published by Jan Paulsson in ASA Bulletin 1996 p. 570.

sonable compromises. The institution proposed by one party will be required to administer an arbitration in the place proposed by the other party (which the institution's arbitration rules do not permit), or following the arbitration rules of another arbitral institution (which the first institution is not prepared to do). Or the parties tinker with the arbitration rules. They seek to impose on the Zurich Chamber of Commerce a mode of appointing a presiding arbitrator that it does not accept.[6] In ICC arbitration, they exclude terms of reference[7] or the scrutiny of the draft award.[8]

In such a case, the arbitral institution should first explain the situation to the parties and announce to them what it would do should they not alter their agreement to arbitrate. The institution should in my view announce and do as follows: Simply disregard the elements of the clause which are contrary to its ("public") policy (*utile per inutile non vitiatur*), rather than retreat to a role of an appointing authority, or, worse, do nothing at all.

### 5. *Two-Party Arbitration Clause in Multi-Party Contract*

Parties may have overlooked the difficulty of multi-party arbitration and inserted an otherwise perfectly good arbitration clause designed for two-party arbitration. The question arises whether the arbitration rules referred to, or the practice of the arbitral institution which applies them, can correct the parties' mistake. This was one of the questions presented in Dutco.[9] Should a Dutco-Type situation arise under more modern arbitration rules such as those of the Zurich Chamber of Commerce (1989), Art. 13, the Geneva Chamber of Commerce (1992), Art. 17, the WIPO Rules (1994), Art. 18, and the new ICC Rules, Art. 9 and 10, the difficulty would be resolved by the arbitration rules, and thus indirectly, by the parties themselves.

The additional statement by the Cour de Cassation in Dutco that the parties may provide for an unequal treatment of the parties only *in limine litis* can however not be satisfied by a reference to arbitration rules in an arbitration clause.

[6] Arts. 11 et seq. Zurich Rules.
[7] Art. 13 ICC Rules.
[8] Art. 21 ICC Rules.
[9] Cassation civile 1ère Chambre, January 7, 1992.

### 6. "Old" Clauses

Parties with little actual experience in international arbitration will sometimes continue to use *"old" clauses* which once were state-of-the-art but were overtaken by changes of law.

*Example*: In 1996, the General Counsel of a well-known corporation publicly recommended an arbitration clause for arbitration in Zurich which was obviously more than ten years old and did not take into account two and even then not so recent shifts in the law: In 1987, Zurich joined the Cantonal Concordat, and in 1989, Switzerland changed its international arbitration law.

Fortunately, skillful drafters of new international arbitration laws or arbitration rules are mindful of the existence of "old" clauses, and of the fact that some "old" clauses may still be inserted for a long time.

To remain with the same *example*: The way article 176 (1) and (2) PIL Statute is drafted, an "old" clause referring to the Zurich Code of Civil Procedure or to the Concordat without more will be a good arbitration clause under the PIL Statute. Similarly, an "old" arbitration clause referring to an older version of the Zurich Chamber of Commerce Arbitration Rules will, by operation of Art. 59 Zurich Chamber of Commerce International Arbitration Rules, be a good reference to the latest rules.

### 7. Consciously Agreed Pathological Clauses

Sometimes imperfect arbitration clauses are *consciously agreed*. The negotiator who detects a mistake asks himself whether the mistake will be his or her party's or the other party's problem. This assessment is made in a rough and ready way: Who is likely to sit on the money?

This is dangerous: Badly drafted wording in a contract may well turn out to be a headache for both parties. Even if the difficulty arises mostly on one side, the other party will have to bear hidden costs of resolving the difficulty. A respondent may well be able to drag out the arbitration, but while the arbitration is pending, its balance sheet will be burdened with a contingent liability. Conversely, a party who is suing in an arbitration will not necessarily be required to enter the claim of the arbitration as an asset in its balance sheet. The balance sheet effect on respondents is more substantial than on claimants.

It is usually better to take matters into one's own hands than to rely on an appointing authority. An *illustration*: A party may at the initial stage of an arbitration think that it is good tactics not to nominate an arbitrator. This will force the other party to resort to the appointing authority to nominate the arbitrator in

the defaulting parties place and stead. The cost for this operation will first be borne by the other party, but ultimately be borne by the defaulting party. If the appointing authority appoints an unsuitable arbitrator, as many such appointing authorities are likely to do, the defaulting party will suffer.

Moreover, a clause that at first glance seems likely to be invoked by one party, may in reality have to be invoked by the other: One should also think of the possibility of setoff, counterclaims and declaratory judgment.

### *8. A Pathological Arbitration Clause in Favor of Third Parties*

Insufficient knowledge or experience of international arbitration law is not limited to inexperienced entrants into the international marketplace. The following is a clause in an investment protection treaty between Switzerland and Poland. The clause is supposed to operate in favor of third parties, namely investors from one country investing in the other, but how will it work?

> Meinungsverschiedenheiten zwischen einer Vertragspartei und einem Investor der anderen Vertragspartei
>
> 1. Zur Lösung von Meinungsverschiedenheiten über Investitionen zwischen einer Vertragspartei und einem Investor der anderen Vertragspartei finden, unbeschadet von Artikel 10 dieses Abkommens, Beratungen zwischen den betroffenen Parteien statt.
>
> 2. Führen diese Beratungen innerhalb von sechs Monaten ab dem Zeitpunkt der Unterbreitung eines schriftlichen Gesuches, solche Beratungen aufzunehmen, nicht zu einer Lösung, so können die Streitparteien wie folgt vorgehen:
>
>    a) Streitigkeiten über eine Verpflichtung gemäss Artikel 5 oder Artikel 6 dieses Abkommens werden auf Ersuchen des Investors einem Schiedsgericht unterbreitet.
>
>    b) Streitigkeiten, die nicht unter Absatz (2), lit. a) dieses Artikels fallen, werden einem Schiedsgericht unterbreitet, sofern beide Parteien damit einverstanden sind.
>
> 3. Das Schiedsgericht wird von Fall zu Fall gebildet. Vorbehältlich einer anderslautenden Verständigung zwischen den betroffenen Parteien bezeichnet jede von ihnen einen Schiedsrichter, und die zwei Schiedsrichter wählen einen Staatsangehörigen eines dritten Staates als Obmann. Die Bezeichnung der Schiedsrichter erfolgt

innerhalb von zwei Monaten nach Empfang des Gesuchs um ein Schiedsverfahren, und der Obmann ist innerhalb der folgenden zwei Monate zu wählen.

4. Wurden die in Absatz (3) dieses Artikels genannten Fristen nicht eingehalten, kann jede Streitpartei, vorbehältlich einer anderslautenden Vereinbarung, den Präsidenten des Schiedsgerichts der Internationalen Handelskammer in Paris einladen, die erforderlichen Ernennungen durchzuführen. Ist der Präsident an seiner Mandatsausübung verhindert oder Staatsangehöriger einer der beiden Vertragsparteien[10], so werden die Bestimmungen von Absatz (5) des Artikels 10 dieses Abkommens mutatis mutandis angewandt.

5. Vorbehältlich einer anderslautenden Vereinbarung zwischen den Streitparteien regelt das Schiedsgericht sein Verfahren selbst. Seine Entscheide sind engültig und bindend. Jede Vertragspartei stellt die Anerkennung und Vollstreckung der Schiedssprüche sicher.

6. Jede Streitpartei trägt die Kosten ihres eigenen Schiedsrichters und ihrer Vertretung im Schiedsverfahren; die Kosten des Obmannes und die übrigen Kosten sind von den Streitparteien zu gleichen Teilen zu tragen. Allerdings kann das Schiedsgericht in seinem Schiedsspruch festlegen, dass eine der beiden Streitparteien einen anderen Kostenanteil zu tragen hat; ein solcher Entscheid ist für beide Parteien verbindlich.

7. Die an der Streitigkeit beteiligte Vertragspartei kann in keiner Phase des Streitbeilegungsverfahrens oder der Vollstreckung eines Schiedsspruchs den Einwand erheben, der Investor habe auf Grund eines Versicherungsvertrages eine Entschädigung für einen Teil oder die Gesamtheit des entstandenen Schadens erhalten.

8. Wenn beide Vertragsparteien der Konvention vom 18. März 1965 zur Regelung von Investitionsstreigikeiten zwischen Staaten und Angehörigen von anderen Staaten beigetreten sind, werden Streitigkeiten gemäss Absatz (2), lit. a) dieses Artikels auf Ersuchen des Investors und Streitigkeiten gemäss Absatz (2), lit. b) dieses Artikels mit Zustimmung beider Streitparteien dem Internationalen Zentrum zur Beilegung von Investitionsstreitigkeiten unterbreitet.

[10] Which is presently the case.

Where is the seat of the arbitration? Paris? What is the language of the arbitration? English? Which law will apply? The law of the host country? French law? What about *compensatio lucri cum damno*? And how will costs be allocated?

## II. Therapy

After this impressionistic introduction, let us see what can be done. It depends on the *lex arbitri* which depends on the seat of the arbitration. The *lex arbitri* puts various interpretation tools at the disposal of the arbitral tribunal. The *lex arbitri* may be applicable directly to interpret the (alleged) arbitration clause, or it may claim that the will of the parties applies "sans qu'il soit nécessaire de se réferer à une loi étatique".[11] Or it may refer in PIL fashion to a law applicable to the interpretation of the (alleged) arbitration clause. In Switzerland, three laws mentioned in Art. 178 (2) PIL Statute apply *in favorem validitatis*.[12] The first law is the law that the parties apply specifically to their arbitration clause, if such a choice was made. The second law is the law chosen by the parties to apply to their contract. The third law is Swiss substantive law. These are thus the legal tools put at the disposal of the arbitral tribunal. In Switzerland accordingly, one sometimes has two or three sets of tools with which to operate.

If one applies *Swiss substantive law* to the question of the scope of the arbitration clause, the arbitration clause must be interpreted according to the principles of good faith and according to art. 18 of the Code of Obligations (CO)[13] which reads as follows:

> As regards both the form and content of a contract, the real intent which is mutually agreed upon shall be considered, and not an incorrect statement or method of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract.

A first consequence of this is that arbitration clauses must, as a rule, be interpreted widely and not narrowly.[14]

[11] *Dalico*, Rev. arb. 1994, p. 116.

[12] Lalive/Poudret/Reymond, n.14, p.322; A. Bucher, Le nouvel arbitrage international en Suisse, 1988, n.105, p.43.

[13] ATF 116 Ia 56, 58 to 59; see also Lalive/Poudret/Reymond, n.18, p. 324; Wenger, n. 49 ff. ad Art. 178.

[14] ATF 116 Ia 56, 58 to 59; see also, Lalive/Poudret/Reymond, n.1.2, p.46; Jolidon, Commentaire du Concordat suisse de l'arbitrage, Berne, 1984, p.134 to 135; Wenger, n. 49 ad Art. 178.

To be sure, there is a policy in Switzerland favoring arbitration and limiting court intervention in arbitration: As in other countries where *favor arbitri* prevails, one reason is to alleviate the burden on the state court system: If the parties have agreed on arbitration, to arbitration they must go.

There is another, deeper rationale for favor arbitri in Swiss law, however: It must be presumed that the true intention of the parties who make an agreement to arbitrate was to subject all their disputes that bear some connection with the main contract, whether sounding in contract or in tort, to resolution in one single forum, namely the arbitral tribunal.[15]

In this respect, the practice of the Swiss Federal Supreme Court is interesting: Once the existence of the arbitration agreement is established, its scope is not subject to a restrictive interpretation.[16] It is the meaning and the purpose of the arbitration agreement which must be decisive and not its formal wording. Jolidon[17] refers to the following example: "Lorsque une clause arbitrale vise 'les difficultés nées de l'exécution' d'un contrat, on peut lui soumettre aussi tout différend qui, quand bien même il n'aurait pas trait à un acte d'exécution proprement dit, se rattache à cette exécution par un lien de causalité tel que sa solution dépend de l'examen des stipulations contractuelles". Rüede/Hadenfeldt[18], are also of the opinion that the claims to be decided by the arbitral tribunal can result from the circumstances, in particular from the fact that the arbitration clause is contained in a certain agreement.

The contrary view that arbitration ousts state court jurisdiction and therefore is an exception and as such should be interpreted narrowly must be rejected as purely formalistic. Indeed, under Swiss law it is incorrect that exceptions *must always* be interpreted narrowly. It all depends on the policies involved (teleological interpretation). For instance, it is well known that under Swiss law the exceptions to the rule *periculum est emptoris* must be interpreted broadly.[19]

A broad and liberal interpretation of arbitration clauses is also the predominant practice in international arbitration. This practice mainly takes into account the common intentions of the parties.[20]

*Favor arbitri* has more specific consequences for the interpretation of agreements to arbitrate: *Ut res magis valeat quam pereat*, an arbitration clause must be

[15] Jdt 1988 III 10-11 N.9: "la clause arbitrale contenue dans un contrat s'étend à l'exécution de la transaction à laquelle a donné lieu ce contrat et qui l'a remplacé.

[16] ATF 116 Ia 56.

[17] Commentaire du concordat Suisse sur l'arbitrage, 1984, p. 133.

[18] Page 70.

[19] Tercier, Les contrats spéciaux, 1995, n. 617 ff.

[20] Berger, International Economic Arbitration, 1993, p. 160

interpreted in such a way that the purpose that the parties wanted to achieve is as nearly realized as possible.

Accordingly, the central task for an arbitral tribunal is to find the *applicable lex arbitri*. This appears as a simple step-by-step process beginning with the wording of the arbitration clause. The case of a pathological clause shows however that this process is less simple than it appears, since the *lex arbitri* depends on the seat of the arbitration which is determined in the arbitration clause or by an arbitral institution empowered by the parties – usually through reference to arbitration rules that so provide. The arbitral tribunal must accordingly work with a hypothesis – that it has its seat at a particular place – and this hypothesis must subsequently be verified.

What is the *lex arbitri*? This is the question that an arbitral tribunal may have to ask more than once. One must proceed in *stages* as follows:

*Firstly*, one should ensure the survival of the clause as an arbitration clause which might be implemented at the very least as an ad hoc arbitration clause at the seat of the arbitration selected by the parties. If one is successful, all further elements will be supplied, as far as necessary, by the *lex arbitri*, in particular an appointing authority in form of a state court at the seat of arbitration (e.g., Art. 179 (1) PIL Statute). If no *lex arbitri* was chosen, one should nevertheless keep going.

*Secondly*, one should consider further elements such as the selection of an appointing authority or the selection of an institutional arbitration system. If an arbitration institution was chosen by the parties, but no seat of the arbitration, the institution may set the seat of the arbitration, and one will then have found a *lex arbitri* after all. If no arbitration institution can be found to have been chosen, one will have an ad hoc arbitration.

*Thirdly*, additional elements such as special qualification requirements for arbitrators should be examined.

### *1. First Stage: Did the Parties Agree on Arbitration? On the Seat of the Arbitration?*

At the outset, the arbitral tribunal should *identify and lay out the text of the pathological clause* on which it is called to operate. Is there an "in writing" requirement or a requirement that the arbitration agreement must be "evidenced by a text"? If so, the arbitral tribunal must dissect the text of the arbitration clause. It will not be allowed to substitute any further text.

While arbitration clauses are separable contracts, this does not mean that the context should be disregarded when the text is interpreted – a context that may be

found in the other provisions of the agreement, or even in other agreements where there is a group of contracts. This is particularly important in order to understand the scope of an arbitration clause.

The first *tools* that the arbitral tribunal will use will normally be the usual tools of *contract interpretation*. These have nothing about them that is specific to international commercial arbitration.

Some examples, which are of some help, have already been given of ordinary interpretation. Here are a few more: If the parties say that only in case of dispute will they discuss whether to arbitrate, there is no agreement to arbitrate. We have already seen that the use of the word, "arbitration" *per se* does not necessarily point to arbitration, and in rare cases it is possible to agree on arbitration without using the word, "arbitration". There is no agreement if the parties simply provide that in case of dispute they will agree on a "suitable arbitral institution". I do not believe that it makes any difference if the parties add: "such as the ICC in Paris", because this is still plainly an agreement to agree and not an agreement on the ICC. Without an authority empowered to choose the "suitable institution" (as in UNCITRAL arbitration for the selection of an appointing authority where there is no agreed appointing authority), the clause fails as an *institutional* clause. It is however an agreement to arbitrate as such.

If the seat of the arbitration is unequivocally stated in the agreement to arbitrate, this will determine the *lex arbitri*. The parties may by *contrarius actus* choose yet another seat of the arbitration, even pending arbitration. They may also designate an institution, even pending arbitration, to set the seat of the arbitration.

Normal contract interpretation will correct wrong geography or incorrect information: In my opinion, the more specific element dominates over the more general according to the principle, "*lex specialis derogat legi generali*". "Uncitral in Geneva", means *Uncitral* which is in Vienna; "Stockholm, Swiss", means *Stockholm* in Sweden; and "ICC, Dresden", means *ICC* in Paris, seat of the arbitration in Dresden.

There is no justification in my opinion for the practice of the ICC to put the place of arbitration in Paris simply because the word, "Paris", appears in the clause, and no other place of arbitration was selected. For instance, if the clause provides for "arbitrato della camera di commercio internazionale di Parigi", the word, "di", makes it perfectly plain that all the parties wished was to identify the arbitration institution, (as parties do in one fourth of all ICC clauses): No court will think otherwise. One fourth of all ICC arbitrations in Paris wind up there because of this in my view indefensible practice of the ICC.[21]

[21] See Verbist, Arbitration International 1996, 347, 351.

If only a country of arbitration is named, not a place, an arbitral tribunal, if constituted pursuant to the arbitration clause, may set the seat of the arbitration within that country under the international *lex arbitri* of that country, e.g., Art. 176 (3) PIL Statute. Alternatively, the *lex arbitri* may put the seat of arbitration directly in the capital city.

If no country of arbitration is determined, but the arbitral tribunal is in place (which is possible if the parties cooperated in the appointment of the arbitrators, or if an appointing authority was named in the arbitration clause), the arbitral tribunal probably does not have the right to set the seat of the arbitration wherever it wishes. It should first try to find the seat of the arbitration implied in the clause. It could look first for the place of the subject matter of the dispute (for instance membership in a company which is registered in a particular place). If there is no such place, the place of the appointing authority should be the seat of the arbitration.

If only an institution is identified, but not the place of arbitration, the arbitration clause is workable: "Local" institutional arbitration rules provide that the seat of the arbitration be in a particular city. "International" institutional arbitration rules provide that the institution will determine the seat of the arbitration. If the seat of the arbitration is determined in one of these ways, the *lex arbitri* is the international arbitration law at the seat.

Where the parties refer to an institution, "its arbitration laws and rules", the arbitral tribunal should first look whether the *lex arbitri* is determined by other elements of the clause. If so, the reference to the institution's "laws" (which no institution has) should be disregarded, or, which comes to the same thing, the expression of "laws and regulations" should be taken as one. If the seat of the arbitration was not named and the arbitral institution is of a local type, the reference to its "law" should be taken as a reference to the *lex arbitri* at the seat of the institution. This is probably correct even if the arbitration institution is an international arbitration institution. Thus, the ICC will do well to put the seat of the arbitration in Paris if the arbitration clause refers to "the laws and the regulations of the ICC".

If the parties did not choose a seat of the arbitration and therefore no *lex arbitri*, can they be prompted to still do so? If not, the defect is lethal because no tribunal can be appointed.[22]

[22] Example: Arfazadeh, ASA Bulletin 1996, 325.

## 2. Second Stage: Did the Parties Agree on Institutional Arbitration? Which Institution?

The following wording points to institutional arbitration: *"the ... arbitration"*, "an arbitral tribunal *of*" or *"next to"* a particular chamber of commerce, the words, *"institution"*, *"institute"*, *"chamber"*, *"commerce"*, *"trade"*. *Capitalization* of words points to institutional arbitration. The names of chambers of commerce vary: "chamber of commerce", -"of trade", -"of industry", or "economic chamber". These names are often poorly translated.

By contrast, the following words are not helpful: "court", "panel", "college" because they are appropriate to ad hoc arbitration also.

The word, *"International"* is not in itself sufficient to decide in favor of the International Chamber of Commerce/Chambre de Commerce internationale. There the expression, "chamber of commerce" is characterized as international. "International" is a generic term used also by other institutions such as the London, Copenhagen, and Vienna Courts of International Arbitration, Belgium's CEPANI, the British Columbia and Quebec, Hongkong, Channel Islands, Los Angeles Centers, the Milan and Singapore Chambers, the Mexican Academy. Most of these characterize the word, "arbitration" as international. Even institutions that do not call themselves "international", such as the Zurich Chamber of Commerce, may have "International Arbitration Rules". Accordingly, it was held that arbitration under these rules was meant where the arbitration clause referred to the "International Arbitration Court in Zurich"[23], or to the "international trade arbitration organization in Zurich".[24]

Often the city *where* the alleged institution is supposed to be, helps to identify it. In many cities, there is a prominent arbitral institution:

| | |
|---|---|
| Paris: | ICC |
| London: | LCIA |
| New York: | American Arbitration Association |
| Amsterdam: | Netherlands Institute |
| The Hague: | Netherlands Institute |
| Rotterdam: | Netherlands Institute |
| Milan: | Milan Chamber of Commerce |

[23] Interim Award in ZHK 224/1993, point 28.4.
[24] Interim Award in ZHK 245/1994, point 29.

Berlin: Deutsche Institution für Schiedsgerichtsbarkeit

Hamburg: Deutsche Institution für Schiedsgerichtsbarkeit

Geneva: Chambre de Commerce et d'Industrie

It is perfectly possible that an arbitration be administered *at a distance* from some *other* place. Nevertheless, when an (institutional) chamber of commerce arbitration is selected for an international arbitration to be conducted in a town such as Zurich or Geneva, the reference to the institution must be understood to be a reference to the *local* Chamber of Commerce arbitration system which provides for international arbitration, as the Zurich Chamber of Commerce has done for many years, in fact, since 1911.

By contrast, it is not possible to identify an institution just by its country except where there is a privileged institution, as there is in Austria or Hungary. *Example*: The arbitration clause reads: "If the parties fail to settle the dispute by negotiations then on the basis of mutual agreement the dispute submitted to Arbitration Commission in *Switzerland*. Any award made by the Arbitration Commission is considered as final and obligatory to follow for the both parties." On the basis of this clause, the Zurich Chamber of Commerce appointed an arbitral tribunal. The arbitral tribunal[25] however decided that it had no jurisdiction since the Zurich Chamber of Commerce had not been identified in the clause sufficiently.

The *statistical likelihood* that a particular institution was meant is irrelevant.

*Subsequent negotiations* in the time after the signing of the arbitration clause are irrelevant. The fact that the parties may have had an incomplete understanding of the arbitration system chosen, is of no relevance for the question which type of arbitration they in fact selected in their arbitration clause. All that is required is that the parties must be fairly understood to have agreed on this particular type of arbitration, no matter what one or the other of them may have thought about its content, if anything.

Particular problems arise were the chosen arbitral *institution* to which the parties refer has *disappeared*. In the case of the arbitration court at the German Democratic Republic's Chamber of Foreign Commerce, the question arose whether the new private institution, "Schiedsgericht Berlin", was the legal successor of that chamber's arbitral institution. As is well known, the German Federal Supreme Court decided against such a legal succession,[26] and the parties had to go to the state courts.

[25] ZHK 287/1995

[26] BGHZ 125.7 = NJW 1994, 1008.

To deal with this problem one must know first where one stands. If one is an arbitral tribunal appointed by the institution claiming to be the legal successor one will have a *duty of loyalty* to the institution. If the institution (as the Schiedsgericht Berlin) considers itself the legal successor of another institution (as the GDR Chamber of Foreign Trade) then an arbitral tribunal appointed by that institution is bound by that view

By contrast, another institution or state court is not bound by the decision of whatever the appointing institution was. A preliminary question will be raised as to the legal succession *vel non*. This question should be answered by the law of the place of incorporation of the institution. Under this law, the decision that the Schiedsgericht Berlin was not the legal successor of the arbitration court at the German Democratic Republic's Chamber of Foreign Trade, appears correct.

The consequence that the arbitration clause failed altogether, should however, in my opinion, not have been drawn. If the arbitral institution of the German Democratic Republic Chamber of Foreign Trade disappears without a successor, *ad hoc arbitration in Berlin* remains feasible. The parties must be presumed to have preferred arbitration to litigation before the state courts even if the arbitral institution does not or does no longer exist. The clause should thus convert into an ad hoc arbitration clause.[27]

This does not deal with the question of the arbitral institution which is still in existence, but where the arbitration clause is *no longer "capable of being performed"* in the sense of article 7 PIL Statute. If it is no longer possible for a Slovenian party to arbitrate in Belgrade, even in ad hoc arbitration, then the arbitration clause is indeed no longer capable of being performed and lapses.[28]

### *3. Third Stage: Additional Pathological Elements*

Some additional pathological elements concern the proper constitution of the arbitral tribunal. If the parties require "Befähigung zum Richteramt" in German fashion, this cannot be interpreted in a narrow sense in Switzerland to exclude all non-Swiss persons (who cannot be appointed judges in Switzerland) from being arbitrators.

Most additional pathological elements in an arbitration clause however probably do not concern the proper constitution but the jurisdiction of the arbitral tribunal. Just three examples:

[27] See the somewhat different criticism by Schlosser in IPRax 1995, 361 et seq.
[28] See, Recht der Internationalen Wirtschaft, 1993, 239.

*Requirements to negotiate* and possibly conciliate before the dispute goes to arbitration do little good and just a little harm: One wonders whether there ever was a case were the arbitral tribunal declined jurisdiction because the prerequisites for arbitration had not been met. When the parties are in dispute whether their settlement talks have broken down, they have broken down.

A second example: In an effort to speed up the resolution of disputes, parties are given to imposing unreasonably short *deadlines to render an award.* In practice, the arbitral tribunal can perfectly well give the parties a taste of their own medicine an draw up a "fast-track"-schedule that is reasonable from every point of view, but will put the parties, and particularly their lawyers, under such pressure that they are likely to agree to a schedule which gives them more of an opportunity to present their case, and the arbitral tribunal more time to reflect on its decision. Alternatively, an arbitral tribunal probably has the right to go to a state court at the place of arbitration in order to have the deadline to render the award extended, but which court this is, is unfortunately not clear.

A last example: Special and difficult problems are raised by excessively short *time limits within which to commence arbitration.*

This may be illustrated by the *Swiss Federal Supreme Court's decision of August 17, 1995*, which set aside an ICC award on jurisdiction.[29] The *facts* as found by the arbitral tribunal were as follows: This was a dispute in which a Dutch buyer sued its American seller and claimed that the goods had been deficient. The arbitration clause started out fine, but was "pathological" in its last sentence which provided for a thirty days deadline beginning when the parties "agreed to disagree". It read as follows:

> Any dispute of whatever nature arising out of or in any way relating to the Contract or to its construction or fulfillment may be referred to arbitration; such arbitration shall take place in Geneva (Switzerland) and shall proceed in accordance with the rules of the International Chamber of Commerce. The said difference or dispute shall [be] so referred by either party within thirty days after it was agreed that the difference or dispute cannot be resolved by negotiation.

When the quality dispute between the buyer and the seller arose, the parties negotiated. Then, on January 9, 1992, the buyer presented its claims in detail to the seller and wrote the following:

[29] Case No. 4P.284/1994/odi (Maran/Vekoma).

> If you have any questions, we are, of course, prepared to answer them for you. In the meantime, we should like to have your reply as quickly as possible and no later than 17 January [1992]. If, by that time, you are not prepared to settle the claim, we shall most regrettably have to apply for arbitration under the terms of our contract.

The letter remained unanswered, and nothing happened for more than thirty days after the deadline until, on April 3, 1992, the buyer wrote the seller and recipient of the first letter another letter which reads as follows:

> We continue to await a response to the settlement proposal set forth in our [fax] to you dated January 9, 1992.

On April 13, 1992, the seller's parent company thereupon answered as follows:

> that it "'had assumed that the subject was closed" and that it believed that it had "no outstanding obligations in respect of our contract".

On these facts, the Arbitral Tribunal rejected respondent seller's plea of lack of jurisdiction and found that the trigger date was not January 17, 1992, but rather April 13, 1992, the date of the seller's final fax, and therefore the request for arbitration of May 11, 1992, was within the thirty-days contractual limitation period, hence timely, and rendered an award on the merits for the claimant buyer.

The *Swiss Federal Supreme Court*, applying Swiss substantive law, set aside the award for lack of jurisdiction of the arbitral tribunal because in its view the letter that set the January 17, 1992, deadline had to be understood the way it had been written: As a last take-it-or-leave-it offer that could be rejected by silence which would make January 17, 1992, the trigger date.

Finally, arbitration clauses sometimes include *pathological choice-of-law clauses*. *Example*: "as amiable compositeur *ex aquo (sic) et bono*". But by now we have definitely strayed outside the scope of this article.

## III. Conclusion: Many Doctors Bring Good Health

### *1. Self-Medication by the Parties*

The parties at the outset of an arbitration may still try to remedy the arbitration clause (perhaps with some prompting from the arbitral tribunal – we just mentioned the example of an "overly fast track arbitration").

An interesting example occurred recently: Two Swiss parties had provided for arbitration in an employment contract. Even though the contract was with a leading employee it was not entirely clear that the questions that might arise from the employment contract would be arbitrable in domestic arbitration under the Concordat in the particular canton of the place of arbitration. Fortunately, in the meantime, the employee had moved abroad. The parties made a new arbitration agreement (compromis arbitral) providing for the same place of arbitration. Now the arbitration was an international arbitration under article 176 (1) PIL Statute. and the dispute was arbitrable under article 177 (1) PIL Statute. The difficulty had been overcome.

### *2. Arbitral Institution*

An arbitral institution facing a pathological arbitration clause should, as its arbitration rules will normally provide, make only a preliminary determination of the jurisdiction of the arbitral tribunal. In case of doubt it should therefore appoint an arbitral tribunal and leave it to the arbitral tribunal to resolve the difficulty.

What is touchier is the question of the identification of the arbitral institution itself in the arbitration clause. If it is not clear whether the institution was *prima facie* meant at all, the institution should make the appointment (In an example, mentioned earlier, the Zurich Chamber of Commerce was correct to appoint a tribunal when the clause read "Arbitration Commission in Switzerland"). If the question arises whether the institution is the legal successor of the institution named in the agreement to arbitrate, the institution's decision may well not be *prima facie* only, and thus binding on the arbitral tribunal.

### *3. Arbitral Tribunal*

An arbitral tribunal faced with a pathological arbitration clause should determine whether it can overcome the difficulties presented on its own, that is without the help of the parties, in which case it should normally render an interim award on its proper constitution.

If the arbitral tribunal comes to the conclusion that it needs the help of the parties to resolve a difficulty presented by a pathological arbitration clause it should simply suggests to them the necessary wording and ask them to agree. If the parties do not help, the arbitral tribunal will have to find itself improperly constituted and will thus have to decline to enter into the merits of the claim which it may then dismiss only "without prejudice".

An arbitral tribunal that was constituted pursuant to institutional arbitration rules but on the basis of an arbitration clause which is, in the view of the arbitral tribunal, an ad hoc clause, should be *reconstituted as an ad hoc arbitral tribunal* or, if that is not possible, should decline jurisdiction.

Conversely, an arbitral tribunal should *call upon the proper institution to adopt* it into its system if the arbitral tribunal is already constituted ad hoc or by another institution.

* * *

What is there to learn for the *international practice of law*? A phone call in time to an international lawyer familiar with international arbitration can save enormous trouble. One should think through what one drafts and signs. A good constitution helps. By referring to an appropriate seat of the arbitration and to appropriate arbitration rules the parties may (unconsciously, most of the time) provide the arbitral institution and the arbitral tribunal with valuable antidotes to counteract pathological elements of their arbitration clause.

# A2

# PATHOLOGICAL ARBITRATION CLAUSES

*What do the following clauses mean:*

(a) Arbitration: All disputes arising from the execution of, or in connection with this contract shall be settled amicably through friendly negotiation. In case no settlement can be reached through negotiation, the case will be submitted to the International Trade arbitration in Zurich (Switzerland).

(b) "Arbitrator in via bonale e inappellabile."

(c) "Nach Billigkeit des amiable compositeur."

(d) "als amiables compositeurs."

(e) "Wenn die amiable composition scheitert, kann jede Partei vor dem stattlichen Gericht klagen."

(f) "Das Schiedsgericht darf überhaupt kein Recht anwenden."

(g) "Nach schweizerischem Recht und Billigkeit."

(h) "Vor der Genfer Handelskammer nach ihrem Reglement und Recht."

(i) "Arbitrato della Camera di Commercio Internazionale di Parigi."

(j) "Arbitration court of the Chamber of Commerce of Switzerland in Zurich."

(k) "All disputes arising in connection with the present agreement shall be finally settled by arbitration under the rules of arbitration of the Canton of Geneva, Switzerland. Arbitral tribunal shall be held in Geneva and the courts there shall have the jurisdiction to appoint the arbitrator or the arbitrators."

(l) "Any dispute that may arise in the course of the implementation of this contract shall be considered by an independent board consisting of the representatives of three parties: from the seller, appointed/elected by the seller,

from the buyer, appointed/selected by the buyer, and from the president of the Chamber of Commerce of Zurich, Switzerland. In the consideration of disputes, the commercial legislation of the USA shall be applied."

(m) Aus einem bilateralen Investitionsschutzvertrag: "...ist jede der Streitparteien berechtigt, ein internationales Schiedsgericht anzurufen .... Sofern die Streitparteien keine abweichende Vereinbarung treffen, sind die Bestimmungen des Artikels .... sinngemäss mit der Massgabe anzuwenden, dass die Bestellung der Mitglieder durch die Steitparteien erfolgt und dass ... jede Vertragspartei mangels anderer Vereinbarungen den Vorsitzenden des Schiedsgerichtsinstituts der Handelskammer Stockholm bitten kann, die erforderlichen Ernennungen vorzunehmen."

(n) "Arbitration, if any, by ICC rules in London."

(o) "Tous litiges découlant de ce contrat seront en 1ère instance soumis à l'arbitrage. L'arbitre sera une Chambre de Commerce renommée (comme la Chambre de Commerce Internationale) désignée en commun par l'acheteur et le vendeur."

(p) "Tous les litiges et différends qui pourraient surgir au cours de l'exécution du présent contrat, au cas qu'il ne peuvent pas être solutionnés à l'amiable seront soumis à l'arbitrage de la Commission d'Arbitrage siégeant auprès de la Chambre de Commerce de Paris."

(q) "Any dispute arising from this agreement will be decided upon without appeal according to the law of Conciliation and Arbitration of the International Chamber of Commerce by one of two named arbitrators conforming to this law."

(r) "Tous litiges découlant du présent contrat devraient être réglés par négociation et accord amiable. Si ce mode de règlement s'avérait impraticable, les questions litigieuses seront réglées selon le Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale à Paris, par un ou plusieurs arbitres nommés conformément à ce Règlement. Au cas où la procédure arbitrale ne parviendrait pas à régler la question pour quelque raison que ce soit, le Tribunal judiciaire dont relève la partie lésée statuera sur le litige sue la base du droit."

(s) "Sämtliche Meinungsverschiedenheiten betreffend Gültigkeit, Auslegung, Erfüllung und Aufhebung des vorliegenden Vertrages werden durch ein Schiedsgericht gelöst, welches bei der Schiedsgerichtseinrichtung von Zürich abgehalten werden wird.

Zu diesem Zweck wird jede Partei ihren Schiedsrichter benennen und diese einen Dritten; bei Meinungsverschiedenheiten wird dieser durch den Vorsitzenden des Schiedsgerichtes von Zürich ernannt.

Falls eine der Parteien innerhalb von 30 Tagen gerechnet ab entsprechender Aufforderungen des anderen, welche durch Einschreiben erfolgen muss, ihren Schiedsrichter nicht benennen sollte, wird der Schiedsrichter ebenfalls durch den Präsidenten des Schiedsgerichtes von Zürich auf Antrag der anderen Partei bestimmt werden. Die getroffenen Entscheidungen werden ohne weiteres vollstreckbar sein, endgültig und nicht angreifbar. Für alle Meinungsverschiedenheiten im Bezug auf die Nichtzahlung der Kollektionen und der Waren sowie Schadenersatzansprüchen wird die jeweilige Klagepartei befugt sein, entweder das genannte Schiedsgericht anzurufen oder die ordentliche Gerichtsbarkeit.

Im letzten Fall wird als ausschliesslich zuständiger Gerichtsstand Mailand gewählt."

(t) "In the case of disagreement as to the fulfillment of its' commitments by the Plant, the parties agree to have recourse to arbitration before the Zurich Chamber of Commerce (Switzerland), applying the regulations and laws of the Chamber of Commerce of Paris (France)."

(u) "Any dispute arising ... will be settled under the Rules of the International Chamber of Commerce of Geneva."

"Arbitration Site: Geneva."

(v) "Chamber of Commerce in Zurich/Switzerland, but only in case that the buyer and the seller cannot solve a dispute amicably. Decision of arbitration board of Chamber of Commerce to be final and binding for both parties. Costs for arbitration for losing party's account."

# AUSZÜGE AUS ENTSCHEIDEN ÜBER PATHOLOGISCHE SCHIEDSKLAUSELN AUS VERFAHREN DER ZÜRCHER HANDELSKAMMER

1. ZHK 249/1994; Jurisdiction Affirmed by Interim Decision of October 7, 1994

"It follows clearly from the text that the parties wanted to agree on arbitration. It is also clear that the arbitration court should have its seat in Zurich. As follows from the words "in accordance with the rules with this court" the parties wanted to be subject to a set of procedural rules as applicable to arbitration courts in Zurich. As the Zurich Chamber of Commerce provides for such rules it can be concluded that the parties wanted to be subject to the arbitration as provided by the rules of the Zurich Chamber of Commerce. Accordingly, certain authors have held that the term "arbitration court in Zruich" means arbitration in accordance with the rules of the Zurich Chamber fo commerce (Sträuli/Messmer, Kommentar zur zürcherischen Zivilprozessordnung, Zürich 1982, 2nd ed. N 6, § 238 ZPO; Rüede Hadenfeldt, Schweizerisches Schiedsgerichtsrecht, Zürich 1993, 2nd ed., p. 85).

It is true that clause 9 of the contract no. 1120/92 does not contain the standard arbitration clause as suggested by the Zurich Chamber of Commerce. However, this is of no relevance as follows from a decision of the Federal Supreme Court (BGE 102 Ia 500)."

2. ZHK 262/194; Zuständigkeit bejaht mit Verfügung vom 10. Juli 1995 (staatsrechliche Beschwerde pendent)

"Durch die Überschrift kommt klar und unzweifelhaft zum Ausdruck, dass beide Parteien sämtliche Streitigkeiten aus der Vereinbarung *durch ein Schiedsgericht beurteilt haben wollten.* Klar ist auch, dass die Parteien den *Sitz des Schiedsgerichts in Zürich festlegten.*

Ungenau ist andererseits die Bezeichnung "Internationaler Gerichtshof" in Zürich. Nach Vertrauensprinzip ist diese Formulierung im Zusammenhang mit der Überschrift des betreffenden Absatzes so auszulegen, dass die Parteien damit ein ständiges internationales Schiedsgericht in Zürich vereinbarten. .....

Auf dem Platz Zürich ist das internationale Schiedsgericht der Zürcher Handelskammer die einzige ständige Schiedsgerichtsorganisation mit umfassender internationaler Zuständigkeit. In einem ähnlichen Fall wurde entschieden, dass

unter Bezeichnung "Arbitration Court Zurich" das Schiedsgericht der Zürcher Handelskammer zu verstehen ist (vgl. Rüede/Hadenfeldt, a.a.O., S. 85 und Sträuli/Messmer, Kommentar zur zürcherischen Zivilprozessordnung, N6 zu § 238). Genauso ist vorliegend mit der Bezeichnung in Ziff. 9 des Vertrages "Schiedsgericht" im Zusammenhang mit "Gerichtsstand ... ist der Internationale Gerichtshof in Zürich" das internationale Schiedsgericht der Zürcher Handelskammer zu verstehen. Dies ist der objektive Sinn der Schiedsklausel. Beide Parteien durften sich nach Treu und Glauben darauf verlassen, dass auch die Vertragspartei dieses Schiedsgericht vereinbaren wollte."

3. **ZHK 245/1994; Jurisdiction Affirmed by Preliminary Award of November 25, 1994**

Summary (not an exact quotation):

- Both parties clearly agreed to an arbitration (as opposed to litigation in ordinary state courts).

- Both parties clearly agreed to a determination of their dispute in Zurich/Switzerland.

- Both parties clearly referred to an institutional arbitration (as opposed to a near ad hoc arbitration, not administered by any arbitral institution).

- The further reference to the "International Trade Arbitration Organization" could only have meant the International Arbitration Organization maintained by the Zurich Chamber of Commerce because this is in fact the only Organization which does accomplish the function and task of an international trade arbitration organization.

  Moreover, the International Arbitration Rules of the Zurich Chamber of Commerce have gained a worldwide reputation.

4. **ZHK 260/1994; Jurisdiction Affirmed by Preliminary Award of July 10, 1005**

"The fact that the parties may have had an incomplete understanding of the Zurich Chamber of Commerce arbitration system until recently is of no relevance for the question which type of arbitration they in fact had selected in the arbitration clause. All that is required for a Zurich Chamber of Commerce arbitration to be present is that the parties must be fairly understood to have agreed on this particular type of arbitration no matter what one or the other of them may have thought about its content, if anything.

Thus, the Arbitral Tribunal is left with a *simple interpretation of the arbitration clause.* The word "Trade" which characterizes "arbitration" points in connection with the idea that an institutional arbitration was chosen to some Chamber of *Commerce.* This, however, does not help to distinguish the Zurich Chamber of Commerce from the International Chamber of Commerce in Paris.

The word "*International*" which here characterizes "*Trade*" which in turn characterizes "*arbitration*" is not in itself sufficient to decide in favor of the International Chamber of Commerce/Chambre de Commerce internationale. There the expression "chamber of commerce" is characterized as international. "International" is a generic term used also by other institutions such as the London and Copenhagen Courts of International Arbitration, Belgium's CEPANI, the British Columbia and Quebec, Hong Kong, Channel Islands, Los Angeles Centers, the Milan and Singapore Chambers, the Mexican Academy. Most of these characterize the word "arbitration" as international. The word "international" could be properly worn also by institutions such as the Zurich Chamber of Commerce under whose auspices numerous international arbitrations are conducted and which, already at the time of the making of the arbitration agreement, had "International Arbitration Rules". Accordingly, it was held that arbitration under these rules was meant where the arbitration clause referred to the "International Arbitration Court in Zurich", see interim Award in ZHK 224/1993, point 28.4., or "international trade arbitration organization in Zurich", see Interim Award in ZHK 245/1994, point 29.

.... When an (institutional) chamber of commerce arbitration was selected for an international arbitration to be conducted in a town such as Zurich or Geneva, the reference to the institution on the contrary must be understood to be a reference to the local Chamber of Commerce arbitration system which provides for international arbitration, as the Zurich Chamber of Commerce has done for many years, in fact, since 1911. The Arbitral Tribunal notes that, conversely, the practice at the ICC is to say that the parties have chosen Paris as the place of arbitration whenever that city is mentioned (even if the parties wrote "Camera die Commercio internazionale die Parigi", see e.g. ICC No. 7589; ICC International Court of Arbitration Bulletin 1995, 6).

Under these circumstances, the Arbitral Tribunal finds that fair-minded parties could not have understood the arbitration clause "the International Trade arbitration in Zurich" to mean anything b*ut international arbitr*ation, to be conducted in Zurich under the auspices of *the Zurich Chamber of Commerce* according to its International Arbitration Rules (The Zurich Rules).

5. ZHK 224/1993; Jurisdiction Affirmed by Interim Award of March 18, 1994

"The two versions to not reach the same degree of lucidity: Whereas the Russian version refers, without any ambiguity, to ZCC Arbitration, the English version contains an ambiguity insofar as it refers to Zurich (instead of Paris) as the location of the ICC.

Had the Russian Party been the Claimant, the "Foreign Trade Arbitration Commission in [sic] Chamber of Commerce of the USSR in Moscow" would have had jurisdiction (clause 4.2. of the Agreement of Consign). Obviously, the Parties' intent was to create a balanced arbitration agreement in the sense that the national or local Chamber of Commerce at the place or geographically near the place where the Claimant party is located, should administer the arbitration proceeding. The Zurich Chamber of Commerce corresponds better to this intention than the International Chamber of Commerce.

Although, according to the intent of the Parties, the English and the Russian version of the Agreement of Consign were both to be authentic, as explicitly expressed in the Agreement, the Russian version of the Agreement was "the principle document" in the negotiations which were conducted in the Russian language. Respondent did not contest such an allegation made by Claimant (submission of August 24, 1994).

it follows from the considerations made in §§ 24.1 to 24.3 above that the Russian version takes precedence over the English version of the arbitration agreement."

6. ZHK 224/1993; Jurisdiction Affirmed by Interim Award of March 18, 1994

"The Parties have explicitly opted for arbitration administered by a national or local chamber of commerce in three out of the four situations contemplated in the two Agreements, depending on whether the one or the other side would be the plaintiff. No reason has been given by Respondent why the Parties, by exception to the usages of Eastern European business corporations, should have preferred ad hoc arbitration for one of the said four situations. It is very likely that, should the Parties have intended to agree on ad hoc arbitration, they would have used the expression "ad hoc". The expression the Parties used in the instant case ("International Arbitration Court in Zurich..." with capitalized initial letters) indicates the opposite, i.e. some permanent institution rather than ad hoc arbitration.

The analysis conducted above clearly indicates that the Parties, by inadvertence, have omitted to specify the institution, more precisely the national or lo-

cal chamber of commerce of which the "International Arbitration Court in Zurich" depends. According to a general principle recognized in international arbitration, this ancillary point has to be supplemented in accordance with the relevant trade customs and usages and the hypothetical intent of the Parties (Art. 2 al. 2 Swiss Code of Obligations per analogiam). Although the Parties refer to the wording "International Arbitration Court" which is known to the ICC, but not to the Zurich Chamber of Commerce, there is no indication from Respondent's side that it would have preferred another institution and namely the ICC to the Zurich Chamber of Commerce. The conclusion can therefore be similar to the one regarding the first agreement, i.e. the missing ancillary term has to be completed by reference to the Zurich Chamber of Commerce.

Taking all elements referred to above into consideration, the Tribunal concludes that the intent of the Parties was similar in both the Agreement No. 2 and the Agreement No. 1. Had the Parties specified the point under discussion, they would have agreed on the same arbitration system, i.e. on an arbitration ruled by the Zurich Chamber of Commerce.