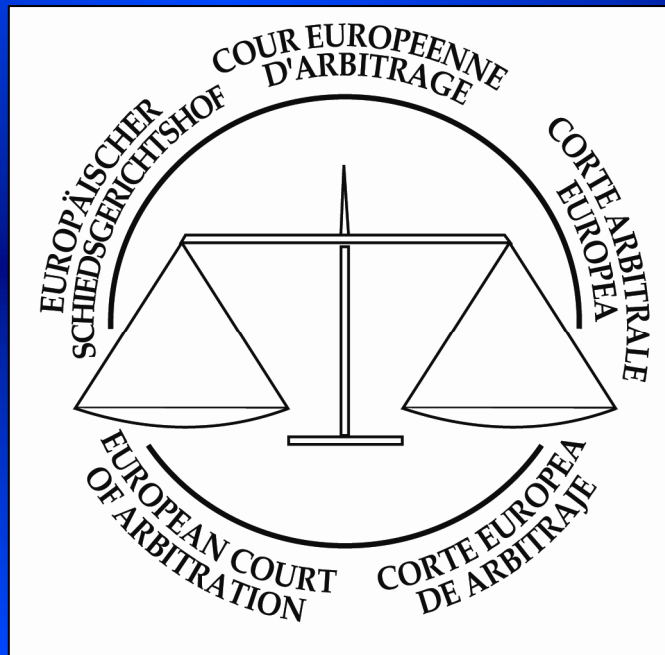


EUROPEAN COURT OF ARBITRATION



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DOMESTIC, FOREIGN AND INTERNATIONAL ARBITRATION

by MAURO RUBINO-SAMMARTANO

**President of the
European Court of Arbitration**

NATIONALITY OF ARBITRATION

- ❑ Old doubts as to the possibility that arbitration have a nationality
- ❑ International Conventions
- ❑ Domestic arbitration laws

CRITERIA TO IDENTIFY NATIONALITY

THE GEOGRAPHICAL CRITERION

- The place where the award is made
- The New York Convention (1958)
- Proceedings taking place in a State different from the State where the award is made
- Proceedings in which different steps take place in different countries
- Which nationality until the place of arbitration is selected ?
- Hiscox v. Outwhaite* (House of Lords, July 24, 1991)

THE PROCEDURAL CRITERION

New York Convention

(the second criterion:

awards not considered as domestic
in the State where they are made)

... continued

Gotaverken Arendal AB v. Lybian General National
Maritime Transport Co.

(Court of Appeal, Paris, February 21, 1980)

“the award rendered pursuant to a procedure that is not the one prescribed by French Law and that is in no way linked to the French legal order as both parties are foreign and the contract was made and was to be performed above, cannot be considered as a French award ...”

The Italian Judge and his judgment made in Croatia

... continued

Ghezzi v. Boss
(Bundesgerichtshof, June 20, 1961)

“Pursuant to the constant case law of [our Court] a foreign award is made when the arbitral tribunal has based its decision on foreign procedural law.”

... continued

Union of India v. McDonnell Douglas Corp.
(High Court of England and Wales, Queen's
Bench Division, December 22, 1992)

The arbitration clause

“The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof. The Arbitration shall be conducted in the English language. The award of the arbitrators shall be made by majority decisions and shall be final and binding on the parties thereto. The seat of the arbitration proceedings shall be London, United Kingdom.”

... continued

Saville J. found that:

“the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are not inconsistent with the choice of English arbitral procedural law.”

... continued

- ❑ Limited relevance of the seat of arbitration
 - ❑ Relevance of the procedural law

RELEVANT PLACE FOR RECOGNITION AND PROCEDURAL NATIONALITY

- Difference
- However different purposes

THE CATEGORY OF INTERNATIONAL ARBITRATION

Distinction between national and
international arbitration

Is there a room for a *tertium genus* ?

CRITERIA TO IDENTIFY INTERNATIONAL ARBITRATION

- The subjective criterion
 - nationality/residence of the parties

- The objective criterion
 - arbitration which involves international commerce

... continued

The Swiss Federal Statute on Private International Law

- The procedural criterion

QUERIES

- Can procedural law be international ?
- If so, when it is international ?
- Plurality of applicable procedural laws
- Supra national arbitration rules
- Awards made under the Washington Convention (1965)

THE SUGGESTED SOLUTION (transnational v. international arbitration)

The procedural criterion

- Domestic awards with international subjective or objective ingredients
- Really international awards