8. THE ARBITRATORS

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Introduction
It is often said that the quality of an arbitration stands or falls with the quality of the arbitrators. One of the characteristics of arbitration is that parties may choose their own judges, the arbitrators. The composition of the arbitral tribunal and the choice of the arbitrators are essential to the smooth working of arbitral procedures.

The discussion of arbitrators in this section is limited to certain issues. The first issue is the requirement that arbitrators should, like judges, be impartial and independent. Arbitrators should disclose the circumstances which may give rise to doubts about their impartiality or independence (see a). If such doubts exist a challenge procedure may follow. Who is going to decide on the challenge? (see b). Which persons are eligible to be appointed as arbitrator? May judges be appointed and which persons may be excluded by the parties? (see c). The composition of the arbitral tribunal is regulated in various ways in arbitration laws and Arbitration Rules. The List procedure will be discussed and the system of so-called party arbitration (see a). In the composition of the arbitral tribunal the number of arbitrators, uneven

Impartial and Independent

This requirement is generally accepted. It is found in arbitration laws in the context of challenge and in Arbitration Rules. The Model Law states this principle in art 12:

"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence..."

In my opinion 'impartiality' forms the corner stone. In case the 'independence' of the arbitrators is doubted, e.g., because of family or business relations with one of the parties, also his impartiality may be at stake. 'May be' as also the 'dependent' arbitrator may act in an impartial way. Article 12 adds to the sentence just quoted: 'or if he does not posses qualifications agreed to by the parties'. This is another issue to be discussed under c infra: Persons eligible as arbitrator.

Modern arbitration laws use the general formulation of 'impartiality and independence'. Other arbitration laws may specify in detail the grounds for challenge, repeating the grounds on which judges may be challenged or referring to these grounds.

The ENGLISH Arbitration Act 1996 repeats in s. 24 under (a) and (b), on removal of the arbitrators, the grounds for challenge of the M.L. and adds to these (c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so and (d) that he has refused or failed (1) to properly

1 For an indepth discussion of 'independent' as used in art. 7(1) of the ICC Rules and 'impartiality' see 'A Guide to the New ICC Rules of Arbitration' (Kluwer 1998) by Deraeis and Schwartz, 108-120.
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conduct the proceedings or (2) to use all reasonable dispatch in conducting the proceedings or making the award. This section is a mandatory provision.

The Arbitration Law of ARGENTINA, exceptionally makes a distinction between de ture arbitrators and amiables compositeurs. The first can be challenged on the eight grounds for challenge of judges (art. 746 CCP). For the latter only the three grounds enumerated in art. 768 apply.

Also Arbitration Rules mostly use the general formula. See e.g. the 1998 Rules of the London Court of International Arbitration (‘justifiable doubts as to his impartiality or independence’, art. 10.3) and ICC Arbitration Rules (‘lack of independence or otherwise’ (art. 8). The AAA Commercial Arbitration Rules (effective January 1, 1999) require, like before, disclosure by the arbitrator of any circumstances likely to affect his impartiality or independence to which is added: ‘including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives’ (Rule 19). Upon objection of a party the AAA decides whether the arbitrator should be disqualified, which decision shall be conclusive (see b hereafter).

A duty to disclose may also be found in Arbitration Acts like the 1986 Act of THE NETHERLANDS (art. 1034) and in the new GERMAN law on arbitration (§ 1036). This is not restricted to the appointment-stage but applies throughout the arbitral proceedings. It is a provision which, in my opinion, should be recommended as it avoids setting aside proceedings at the end of the arbitration road.

Arbitration Institutes, appointing arbitrators, are very careful not to appoint an arbitrator who may be challenged. They may include in the Arbitration Rules a provision on disclosure or require a statement of independence from a prospective arbitrator as the new 1998 Rules of the ICC state in art. 2(2). The LCIA new Rules of 1998 contain an extensive disclosure provision in 5.3 by requiring a declaration of impartiality or independence before appointment whilst adding that the arbitrator thereby assumes a continuing duty to disclose circumstances which may give rise to doubts on his impartiality or independence originating after the declaration and before the

Challenge Procedures

arbitration is concluded. Although Arbitration Rules may contain a provision on disclosure, a provision in the arbitration law, providing for a continuing duty to disclose, seems appropriate.

(b) Challenge Procedures

In Chapter IV.C I dealt already with the challenge under art. 13 of the Model Law and the changes made by some of the 34 States adopting the M.L. Parties are free to agree on the procedure for challenging an arbitrator (para. 1). In practice this means a reference to Arbitration Rules in which first of all an Arbitral Institute decides whether the challenge is justified or rejected. Failing such agreement the challenge should be brought before the arbitral tribunal itself (para. 2). In my opinion a decision by the arbitral tribunal, including the challenged arbitrator, is not to be recommended. Finally art. 13 M.L. states that, regardless whether para. 1 or para. 2 applies, the challenge, if not successful, may be brought before the court which decision is without appeal (para. 3). The court therefore, has the last word.

In Chapter IV.C I noted deviations made by five States adopting the M.L. From them I may only refer to TUNISIA. Parties are free to agree on the procedure for challenge. If the Rules of an Arbitral Institute apply, the challenge will be decided by the Institute. In that case the court, if approached, may declare the request for challenge inadmissible. In the absence of a challenge procedure agreed upon by the parties, the challenge will be decided by the Court of Appeal of Tunis without appeal.¹

By far the greater part of arbitrations are institutional. Arbitration Rules to which the parties have referred attribute the decision on the challenge to the Arbitral Institute, a neutral instance, which cannot be said of the arbitral tribunal of which one of its members is challenged. When the Arbitral Institute has accepted the challenge a substitute arbitrator will be appointed. This we find, inter alia, in the

¹ See report TUNISIA by Malouche and art. 58 of the Code of Arbitration (Annex I).
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Arbitration Rules of UNCITRAL (art. 12). The Appointing Authority, a third and neutral party, will make the appointment. Under the Rules of the ICC (art. 11, para. 3) and the LCIA Rules (art. 11) it is the Institute, a third and neutral party, which makes the appointment.

If the challenge is accepted and a new arbitrator is appointed, the decision of an Arbitral Institute on the challenge may be final or 'conclusive' as AAA states in its Rules. However, if the challenge is rejected and the arbitration proceedings go on with the arbitrator who was challenged, an appeal to the court cannot, in my opinion be excluded. It cannot be accepted that an award would be rendered by a tribunal which in toto (sole arbitrator) or in respect of one or more of its members is partial. This would be in violation of rules of public policy. The situation thus differs essentially with the one in which the challenge is accepted and, after replacement of the challenged arbitrator, a tribunal, the impartiality of which is beyond doubt, continues the arbitral proceedings.

The Model Law only deals with rejecting the challenge. Art. 13, para. 3 states that, 'if a challenge under any procedure agreed upon by the parties ... is unsuccessful, the challenging party may request within 30 days ... the court ... to decide on the challenge'. The situation that the challenge is accepted has not been discussed, as far as I can see, at UNCITRAL.

It would go far beyond the scope of this study to present a survey of challenge procedures provided in national laws. The M.L. at least had some harmonising effect but national arbitration laws differ greatly and so do court decisions on challenge. I only made, based on arbitration practice, a distinction between on the one side a challenge accepted by a neutral third party - in practice an Arbitral Institution - followed by the replacement of the arbitrator in question, in which case the decision may be final and on the other side the rejection of the challenge which in my opinion should be subject to court review. Whether this review takes place, immediately as the M.L. provides - a solution I prefer as it avoids that the arbitral proceedings may later on appear to have taken place in vain - or in an action for setting aside after an award has been rendered, depends on the applicable arbitration law.

(c) Persons Eligible As Arbitrator

One of the issues in this respect is, whether a judge can be appointed as arbitrator. No general answer can be given: the national reports in the Handbook of ICCA should be consulted. The situation is also subject to changes. For example, in THE NETHERLANDS prior to the new Arbitration Law of 1986 judges were excluded but since then it is permitted. When permitted, the judge may need permission from his superior in the judicial hierarchy. On the other hand, retired judges are free to accept an appointment. Former judges are regularly appointed as arbitrator, for example, in the Iran-US Claims Tribunal.

Arbitration laws seldom enter into the issue of a judge as arbitrator. However, HONG KONG’s Arbitration Ordinance of 1996 does so in s. 13A. A judge shall not accept appointment 'unless the Chief Justice has informed him that, having regard to the state of business in the courts, he can be made available to do so' (para. 2). The fees he receives 'shall be paid into the general revenue' (para. 4).

GREECE, amending its arbitration law in 1995, introduced in art. 871A the appointment of a judge as sole arbitrator or chairman of the arbitral tribunal. Art. 882 contains, curiously enough, a schedule of fees for arbitrators. According to art. 882A this also applies to the judge-arbitrator who may retain 35% of it, 25% to be paid to the Fund for Financing Court Buildings and the remaining 40% is deposited to a special interest bearing account kept by the President of a Court or the Public Procurator who, according to art. 882(5) may also be appointed as arbitrator.

In ARAB countries non-Muslims are excluded from being appointed. Arbitrators should have knowledge of the Shari’ah. In ITALY, before the reform of the arbitration law foreigners were excluded. Since 1983 arbitrators 'may be Italians or of foreign nationality' (art. 812 CCP). In SPAIN art. 12 of the 1988 Arbitration Law excludes judges from serving as arbitrator (para. 4) and requires
that in a *de iure* arbitration 'the arbitrators must be practising lawyers' (para. 2).

Arbitration Rules are free to exclude certain categories of persons from being appointed as arbitrator. In commodity arbitrations the applicable Arbitration Rules may exclude lawyers; only experts on the specific field of trade should be appointed. Actually, the first court case on arbitration I handled in 1937 concerned the appointment of three law professors in such a commodity arbitration case in which an interesting legal issue had to be decided. The Court of Appeal Amsterdam set their award aside.

*Nationality* is another topic on which Arbitration Rules may contain provisions. They may provide that the sole arbitrator or the chairman of the arbitral tribunal should be of another nationality than the nationality of the parties (e.g. UNCITRAL Arbitration Rules art. 6(4) and art. 7(3)). The Rules of the AAA, ICC and LCIA contain similar provisions for international arbitrations, unless parties agree otherwise.

(d) Composition of the Arbitral Tribunal

On my first visit to the AAA after the War I was much impressed by its system of appointing arbitrators which I took over when in 1949 the Netherlands Arbitration Institute was founded: the *list-system*. I also introduced this system in the draft I made for UNCITRAL for its Arbitration Rules of 1976. According to this system the Institute sends to the parties an identical list containing several names for each arbitrator to be appointed. Within a short period after the receipt of the list, each party may return the list after having deleted the names of persons to whose appointment he objects and numbering the remaining names in order of his preference. Under the list system the parties still have an influence on the choice of the arbitrators. In practice, it regularly appears that their choice coincides.

The UNCITRAL Arbitration Rules have been widely accepted. They have been adopted (with only a slight adaptation) by the Iran-US Claims Tribunal in The Hague and in Latin America by IACAC (see Chapter IIA under b). Also the Permanent Court of Arbitration in The Hague adopted these rules for disputes between International Organisations and private parties.1 In an increasing number of contracts parties refer to arbitration under the UNCITRAL Arbitration Rules. Many Arbitral Institutes are prepared to handle arbitrations under these Rules instead of their own Rules. In Chapter IA I already referred under 4 to the harmonising effect of the UNCITRAL Arbitration Rules.2

*Arbitration Rules* cannot do without provisions on the appointment of arbitrators and the number of arbitrators, both subject to 'failing agreement of the parties'. For the appointment of arbitrators, they usually provide that each party has the opportunity to appoint 'his' arbitrator and that the third arbitrator will be appointed either by the parties or, if they cannot agree, by the Arbitration Institute or the court. Court-appointment may have been provided in an arbitration law in case one of the parties has not appointed 'his' arbitrator or in case the parties cannot agree on the third arbitrator who will act as chairman.

On the system of so called *party-arbitration* I already gave my opinion in Chapter IIA under 2(c): In international arbitration this system presents some advantages, but in domestic arbitration it may be criticised. Appointment by a third party, either through the list-system or a direct appointment of all arbitrators by a third party, presents in my opinion a better guarantee to become so-called 'neutral' arbitrators.

It is interesting to note the difference between the appointment-method in the UNCITRAL Arbitration Rules and the method of appointment according to UNCITRAL's Model Law. The M.L. contains in art. 11(3), failing an agreement by the parties on a procedure for appointment, the appointment of one arbitrator by each

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2 In Chapter IIA I referred to a comparative study of Arbitration Rules in 1960 by Peter Benjamin. More recently, at ICCA's Stockholm Congress 1990 Alvarez (General Counsel ICC) produced a paper on Selecting Arbitrators to which is attached a comparison of 20 Arbitration Rules (443-461). See ICCA Congress Series no. 5 (Kluwer 1991).
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party and the appointment by the two arbitrators of the third arbitrator. The Rules contain the list-system in art. 6 (sole arbitrator) and art. 7 (three arbitrators). States, adopting the M.L., did not change the party-arbitration system of art. 11(3), but the freedom of the parties to agree on a procedure of appointment (para. 2 of art. 11) allows them to change the system by reference to the UNCITRAL Arbitration Rules or other Rules which entrust the appointment to a third party.

(e) Number of Arbitrators

As a rule the number of arbitrators is determined by the parties or the Arbitration Rules to which they have referred. If not, we fall back on the applicable arbitration law. Arbitration laws usually provide for an uneven number of arbitrators. However, they may also, in particular in common law countries, permit an even number. The Model Law of UNCITRAL has taken this situation into account by stating in art. 10 that parties are free to determine the number of arbitrators, which includes the possibility of an even number. Failing such agreement the number of arbitrators shall be three. The M.L. does not give a solution in case the even number of arbitrators do not reach consensus on the award.

In my opinion a regulation in the arbitration law, dealing with the possible deadlock in case of an even number of arbitrators, is desirable. Usually the solution consists in the appointment of a third arbitrator by the even number of arbitrators or, if they cannot agree, by the court, whilst stating that this additional arbitrator will act as chairman. I was astonished to find that only a few States, adopting the M.L., were concerned about the deadlock which may arise in case of an even number of arbitrators. Only one State provided for the appointment of an additional arbitrator. Three other States avoided the deadlock situation by requiring that the number of arbitrators shall in any case be uneven (see Chapter IV.C ad art. 10 M.L.).

The solution of avoiding a deadlock by the appointment of an additional arbitrator is also found in other, non M.L. based arbitration laws, e.g. in the DUTCH new arbitration law of 1986 (art. 1026 CCP).

Number of Arbitrators

It was also already contained in the Uniform Law of Strasbourg 1966: in case of an even number of arbitrators 'an additional arbitrator shall be appointed' (art. 5, para. 2). The even number is then turned into an uneven-number.

In common law countries an award may be made by an even number of arbitrators. However, in case the two cannot agree on the decision, an umpire or chairman may be appointed. The ENGLISH Arbitration Act 1996 states in s. 15(2).

'2. Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring an additional arbitrator as chairman of the tribunal.'

This is a new provision. An umpire may be appointed only where there is an express agreement between the parties to this effect. However, there may be problems as, according to s. 22 the parties may agree that 'there shall be two or more arbitrators with no chairman or umpire.'

From the new detailed regulation in ss. 15-22 of the English Arbitration Act I may further refer to s. 17 dealing with default of a party to appoint an arbitrator. If a party fails to appoint an arbitrator within the time specified:

'the other party, having duly appointed his arbitrator may give notification to the party in default that he proposes his arbitrator to act as sole arbitrator.'

The other party still has an opportunity within 7 days to make the required appointment but if not:

'the other party may appoint his arbitrator as sole arbitrator whose award shall be binding by both parties as if he has been so appointed by agreement.'

It is an exceptional provision, parties themselves cannot make. It brings one party in an privileged position if he alone is permitted to appoint a sole arbitrator. The Uniform Law of Strasbourg 1966

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states in art. 3 that in such a privileged position as to the appointment of the arbitrator the arbitration agreement shall not be valid'. This radical sanction is still contained in art. 1025(2) of the BELGIAN CCP.

Other arbitration laws may save the arbitration agreement and provide, in case of a privileged-position-situation, the appointment of the arbitrator or arbitrators by the court. Thus the GERMAN Arbitration Act 1998 in § 1034(2) and the DUTCH arbitration law of 1986 in art. 1028.

(f) Liability of Arbitrators

In the past, this subject did not draw much attention. In international instruments it is only dealt with in the Washington Convention 1965 (ICSID Arbitration): 'Arbitrators shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions' (art. 21). Claims against arbitrators were hardly known. The litigation mindedness of our society today has caused legislators and Arbitration Institutes to insert in arbitration laws and Arbitration Rules provisions in order to protect arbitrators and Institutes against claims. However, such claims are still very exceptional.1

The Model Law is silent on the topic. However, several States adopting the M.L. inserted a provision which generally reads that an arbitrator 'is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator'. Some of these States, when doing so made exceptions, mostly reading 'except that he may be liable for the consequence of conscious and deliberate wrongdoing' or, shorter, 'except for fraud in respect of anything done or omitted'. For the eight States which made a provision, seven of them common law States, I may refer to Chapter IV.D under h.

Also the ENGLISH Arbitration Act 1996 (in force since 1 January 1997) contains in s. 29 a provision on Immunity of the Arbitrators:


Liability of Arbitrators

Ch. V.8(f)

'(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).'

This provision may be compared with s. GM of the 1996 HONG KONG Ordinance, which also, and in even more detail, deals with immunity of an employee or agent of an arbitrator. Section 29 is mandatory (see Schedule 1 to the Act) and new, although earlier court decisions already extended the immunity of judges to arbitrators.

The English Arbitration Act refers in para. 3 of s. 29 (between brackets) to s. 25. This section deals with the liability of an arbitrator in case he resigns.

Under circumstances the arbitrator may in that case not be entitled to fees and expenses or should repay any fees and expenses already received (see para. 3). If his resignation would be in bad faith, for example, by resigning just before the award is made, this might even, in addition, make him liable for damages. Reference may also be made to section 33, the duty of arbitrators to avoid unnecessary delay or expenses in the conduct of arbitral proceedings which is also found in section 24: the removal of an arbitrator if he has failed to use all reasonable dispatch in conducting the proceedings or making an award. There are thus circumstances under which an arbitrator may be held liable which deprive him from his immunity under s. 29.

For Arbitral Institutions the English Arbitration Act contains a similar provision, also mandatory, in s. 74:

'74(1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.

(2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his function as arbitrator.

(3) The above provisions apply to an employee or agent of an arbitral or other institution or person as they apply to the institution or person himself.'
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Arbitral Institutes also started in view of the increased litigious environment to insert provisions in their Rules, protecting arbitrators and Institutes as well. One example of these is art. 34 of the 1998 Rules of the ICC.1

‘Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.’

This provision does not include exceptions as contained in the English Arbitration Act (bad faith) or other laws dealing with immunity, which make an exception for ‘continuous and deliberate wrongdoing’. However, even if not expressly stated, it may be expected that, when it would come to court proceeding this exception will apply.

Court proceedings against arbitrators or Arbitral Institutes are highly exceptional and if instituted as far as I know, unsuccessful. It is difficult to imagine when arbitrators may be held liable, leaving aside the resignation of the arbitrator dealt with in the English Arbitration Act. In any case he can not be held liable for a ‘mal juge’.

Arbitrators can be compared with judges. Nevertheless, also for judges nowadays insurance is considered in some countries. And when could Arbitration Institutes be held liable? Certainly not for their choice of arbitrators. If this would be the case, no Institute would be prepared to function as appointing authority. Liability of arbitrators and Institutes is an exceptional topic, not known at the time I started arbitration.

(g) Code of Ethics

At UNCITRAL, the Secretariat raised the question whether it would not be desirable to prepare a Code of Conduct or Code of Ethics outside the Model Law which ‘could provide guidance to arbitrators in performing their important function’. The Working Group on the Model Law, however, decided not to attempt the preparation of such a Code.

Presently there are two general Codes, leaving aside Codes of Ethics drawn up for specific categories of disputes like the Code of Practice of GAFTA or the Code of Ethics produced by an Arbitral Institute like the Singapore Institute of Arbitration. GAFTA contains inter alia the principle that an arbitrator ‘shall not resume the role of an advocate, not help a party prepare its case’. Also the Singapore Code states that arbitrators ‘shall not act as advocates for any party’.

It is in particular the two general Codes which are interesting as they reflect a different view on the position of the party-appointed arbitrator. As such these Codes are not binding on the parties although parties could expressly agree to be bound by them, which - as far as I know - hardly ever happens in practice.

The ABA/AAA Code

This Code of the American Bar Association and the AAA contains the American view on the party-appointed arbitrator, called non-neutral arbitrator. Canon VII states under c that a non-neutral arbitrator is allowed ‘to communicate with the party who appointed him concerning any aspect of the case’ provided he first of all informs the other arbitrators and the parties that he intends to do so’. Disclosure of the content of the communication is not required.

This already deviates from the general connotation of the party-appointed arbitrator, already stigmatised by ‘non-neutral’ but a still stronger objection can be made to what is stated under E of Canon VII: ‘the non-neutral arbitrator is permitted to be predisposed toward deciding in favour of the party who appointed him’.

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1 First Secretariat Note of May 1981 no. 70. See Guide to the Model Law p. 1148.
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The IBA Code

In the Code of the International Bar Association the party-appointed arbitrator has no special position. The Rules of this Code apply to all arbitrators who 'shall be and shall remain free from bias', (art. 1). The party-appointed arbitrator is only mentioned in art. 5 'Communication with the Parties'. In case he has to participate in the selection of a third or presiding arbitrator 'it is acceptable for him (although not required) 'to obtain the view of the party who nominated him as to the acceptability of candidates being considered' (art. 5.2). According to art. 5.3 all arbitrators should 'throughout the arbitral proceedings avoid any unilateral communications regarding the case with any party or its representatives. If such communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance'. These different views on the party-appointed arbitrators may, however, be less outspoken than the situation above seems to suggest. According to the Arbitration Rules of the AAA all arbitrators must be impartial and independent. However, parties may agree otherwise, for example by reference to the ABA/AAA Code.

9. THE ARBITRAL PROCEDURE

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A. Organisation of Arbitral Proceedings
   - Notes of UNCITRAL
   - Preparatory Meetings
   - Terms of Reference
   - Comparison
B. Place of Arbitration
   - The Applicable Arbitration Law
   - Determination of the Place


Introduction

Compared with court proceedings, the rules under which arbitral proceedings are conducted largely depend on the will of the parties. As early as 1923, the Geneva Protocol stated under (2):

'(2) The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place'.

The UNCITRAL Model Law of 1985 art. 19 states:

'(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence'.

The Secretariat observed under the heading Magna Carta of Arbitral Procedure: 'Article 19 may be regarded as the most important provision of the model law. It goes a long way towards establishing