3. Q: Are templates sometimes copied mindlessly?

A: It happens, and this keeps lawyers busy.

4. Q: And this leads to arbitrations?

A: Not necessarily, but imperfect Contracts may aggravate rather than avoid disputes.

5. Q: Does this also lead to more Anglo-American law being adopted?

A: At least indirectly, yes. Even if the applicable law clause provides for some civil law to apply, the agreement may include clauses that are geared to common law concepts. Two thirds of the world lives with civil law systems, yet because English is the *lingua franca*, and many English-speaking countries are among the economically dominant, common law concepts are often adopted.

6. Q: An example?

A: The American client's favorite template has a clause excluding liability for "consequential damages." With some difficulty, one *can* apply this common law concept even in a civil law Contract. However, in civil law, liability for damages for gross negligence cannot be excluded, even if they are only consequential, so the clause may mislead.

7. Q: Can one avoid the influx of English law through the use of the English language?

A: A friend of mine suggests this "We-write-English-but-we-think-German" language: "The English expressions used do not imply an English law understanding of the obligations of the Parties. English is used only as a means of communication."

8. Q: Is this a good idea?

A: Most of the time, no. This will just raise suspicion, thus be counterproductive.

9. Q: Do more complex Contracts lead to more disputes, or fewer?

A: Computerization makes it possible to enter into more complex Contracts than was possible in earlier times. For instance, instead of just designing and building a production line, the supplier of a complex production line may also be required to train personnel locally, and this may involve problems different from designing and producing plant and equipment and delivering it to a site.

Ideally, if one deals with many questions expressly, all in one document that is well thought through, this should lead to fewer disputes. Remember, Contracts are designed

to say what should happen if a particular event occurs. The more complete and detailed a Contract is, the more one can hope that it will cover even rare events.

10. Q: Surely is it not possible to foresee all possible disputes and avoid them?

A: Of course not, but one can, and should try.

For instance, the Contract may provide for payment in a particular currency. It is foreseeable that that particular currency may be *devalued* dramatically at some time in the future. The Contract may providently provide for a mechanism to redress the balance between the obligations of a Party that must pay in the now devalued currency, and those of the Party that must provide goods and services for which it pays in a different (by now) stronger currency.

It may however happen – and did happen at some point with the Russian Ruble – that the value of a currency unexpectedly goes *up* dramatically. In this particular case, few Parties had foreseen that *this* might happen, and they had not provided anything expressly for it.

So, while detailed regulations may help to avoid disputes, not everything that may subsequently occur may have been foreseen. The Parties may then differ about what a particular provision provides, and whether it is designed to deal with something that did in fact happen, or something different. In our Ruble devaluation example, the dispute was whether one could use the Ruble devaluation clause by analogy, and if so, how.

Thus, the complexity of Contracts increased, but so did the complexity of the disputes. The sums in dispute increased, but not necessarily the number of disputes.

11. Q: Apart from crafty wording of the Contract, are there other ways to minimize disputes?

A: Yes. A long-term agreement can avoid disputes early on by the use of a milestone system. At each milestone, the correct performance is ascertained by some objective testing, involving somebody else, and part payment is then made. This way, at any given time, neither Party is in the uncomfortable position where *it* has performed almost all its obligations required by the Contract, but is now reluctant to go forward because the other Party has hardly performed at all.

Often, some simple dispute resolution mechanism is already built in at various milestones of a complex Contract, so that the performance of the Contract as a whole will not be held up by a relatively minor dispute. Ideally, disputes are resolved as one goes.

12. Q: This is not arbitration, is it?

A: No, here we are talking about regular meetings by site managers or higher levels of management, or amicable dispute resolution by dispute review boards and the like.

13. Q: And if this does not work, you go to arbitration?

A: Not so fast. You then try to negotiate a more complex, *overall* solution, an amendment to the agreement perhaps.

14. Q: Then arbitration?

A: Preferably not. The best arbitration is the arbitration that you can avoid.

15. Q: Through mediation or conciliation?

A: Exactly. Incidentally, the difference between the two is not important here.

16. Q: If nothing works, arbitration is the last resort?

A: Yes. But the other ways of resolving disputes (negotiation, mediation, conciliation, etc.) would probably not work if there was not the threat (and dread) of an arbitration down the road.

17. Q: Whose questions does this book try to answer? Those of in-house counsel or Party Advisors? Those of outside counsel or Party Representatives? Or those of arbitrators?

A: All three. Roughly, our focus will be first on questions from Party Advisors, who, at the time of making a Contract, try to serve the needs of their clients,[1] then questions from Party Representatives, who, in the initial phase of an arbitration, seek to optimize their client's position,[2] and last, questions from Arbitrators, concerning most of the arbitration itself and how to conduct it in the best interest of all concerned.[3]

However, on occasion our focus will switch to questions from other participants in the process. One should not forget right from the start that in an arbitration many participants interact.

Moreover, one faces a protracted process, and early decisions may have repercussions many months or years later.

1. See questions 19 et seq.
2. See questions 239 et seq.
3. See questions 347 et seq.

18. Q: Does this mean that the reader should approach the subject of international arbitration as an entire process, rather than taking the limited view of a particular participant at a particular stage of the process?

A: Yes. In fact, in our last chapters, we will even look briefly at international commercial arbitration from a historical and philosophical point of view.[4] This should be of interest and help to *all* participants as they think more deeply about the process.

4. See questions 944 et seq.

22. Q: Make a decision on the basis of incomplete information? Is this not difficult?

A: Sure, but no more difficult than any other business decision. It is just in the nature of business decisions that they must be taken on incomplete information. And as with any difficulty, you should divide it up and solve every aspect separately. This is the method that Descartes taught us.

23. Q: How can you maximize your chances to make the right decision about your arbitration clause?

A: Do not adopt an old template mindlessly. Do not fiddle too much with an arbitration clause.

24. Q: Is this not contradictory advice?

A: Admittedly. But it is easy to discuss arbitration with an arbitration specialist. A simple phone call will cost little, if anything, and may save millions.

25. Q: Before one makes that phone call, should one prepare?

A: Last minute? Not even. There is normally no time to do that.

If you want to prepare, do this much earlier, by acquiring an understanding of international arbitration in general.

26. Q: What should one do?

A: Keep a mental picture of an *entire* arbitration all the way from the beginning to the end. That is, from the arbitration agreement all the way to enforcing a favorable Award. You can gain this from experience.

27. Q: If your experience is limited?

A: You may read a practical book like this one. It goes through an international arbitration roughly chronologically, but always within the context of the entire arbitral process.

28. Q: The first question in practice is probably, should one insert an arbitration clause and provide for arbitration in the first place?

A: Not all answers are easy, but this one is. In an international setting the practical answer is clearly, *yes*.

29. Q: But why not use State Courts? They are reasonably good and even cheap in some countries.

A: Good to hear, but unfortunately this misses the point. The question is not "arbitration or litigation." There is the other Party, which will not be eager to come here and litigate in our courts.

If you do not provide for arbitration, you may be forced to go before some State Court in some faraway jurisdiction, to you an unattractive option, unless the Parties agree on a neutral State Court.

In an international commercial setting, international arbitration is therefore almost the only game in town.

30. Q: Many say that conciliation or mediation is better than arbitration. Are they wrong?

A: No, but unfortunately the question is not "mediation *or* arbitration." What do you do if conciliation or mediation does not work? You go to arbitration. It is the last resort.[5] So you need arbitration in the end.

31. Q: Should one then provide in the arbitration clause for conciliation or mediation first?

A: Beware of the *courtesy trap* in arbitration agreements. Many arbitration agreements indeed provide that, before arbitration, the Parties must try to negotiate a settlement. This is well-meaning, but it often leads to disastrous results.

When the arbitration is finally commenced, the other Party may not be so well-meaning. It may say that there was not enough friendly negotiation, and that commencing the arbitration is premature. And it may say this again and again. Saying this costs the other Party nothing and gains it time.

32. Q: How do you avoid this cheap trick?

A: If you use a multi-tiered arbitration agreement, you should provide clear criteria for determining *when* friendly negotiation has been unsuccessful and arbitration may commence.

In any event, the Party that wishes to commence arbitration must establish its right clearly, by at least a letter setting out the negotiation attempts, and saying that, in its view, the friendly negotiation has now come to an end.

5. See question 16.

If the clause provides for specific deadlines, it is particularly important not to miss one of the contractual deadlines, or the right to arbitrate may be lost.

Beware of clauses and Parties that talk not just about negotiation, but embellish it with "in utmost good faith" and other flowery language. Hypocrites are dangerous.

33. Q: Can we not just sit still, and we will never have to sue? If the other Party is forced to sue us right here in our State Courts, will we not have a home turf advantage?

A: This is short-sighted and too risky.[6] Think again. A Party may unexpectedly find itself in the position of Claimant, or of Counterclaimant. If it wins, it may all of a sudden wish to enforce the Award. Suddenly arbitration becomes attractive to it after all.

34. Q: What then should the arbitration clause provide?

A: Avoid fancy language. The simplest clause is the best.

35. Q: If the simplest is the best, why not be pragmatic and easy and always take the same simple arbitration agreement – stay with the clause under which one has had success in the past, and, conversely, avoid those clauses under which one has been unsuccessful?

A: Many indeed proceed in this way.

Even more than 20 years after the downfall of the Soviet Union, Russian Parties still like to go to Stockholm because people who did this earlier were not put in jail, or worse. Same reasoning in China. Nothing against Stockholm, but there are other possible places.

The legal counsel of a major automobile manufacturer once proudly showed a roomful of people the arbitration clause that he used regularly. It was outdated by more than 20 years. It would just barely have worked if put to the test.

(b) Institutional or *Ad hoc*

36. Q: If simplest is the best, then what is so complex about an arbitration agreement? For instance, should one use institutional arbitration, or should one go for *ad hoc* arbitration?

A: Another easy one. Normally, institutional arbitration is to be preferred. Arbitral Institutions even regularly provide excellent model clauses that in their experience work, and they often have extensive experience.

6. See question 20.

37. Q: Some people say that there is plenty of *ad hoc* arbitration out there. Is this not true?

A: This is probably incorrect, especially for ordinary cases. Do not rush into agreeing on *ad hoc* arbitration without having discussed this thoroughly with an (international) arbitration specialist.

38. Q: Why is *ad hoc* arbitration not used so much? Does it not save the cost of an Arbitral Institution?

A: Imagine an *ad hoc* arbitration against a recalcitrant Party. You would be in State Court right from the beginning, and again, and again – just what arbitration is designed to avoid.

One should not be overeager to save money, or, as they say in England, penny-wise and pound-foolish (an important idea in all aspects of international arbitration).

The service provided by a reputable Arbitral Institution is usually worth its price. Think of the scrutiny of draft Awards by the ICC Court – you profit, practically for free, from the experience of some of the world's most respected specialists. Just look at the list of ICC Court Members on the ICC Website.

39. Q: Which is the best Arbitral Institution? We love the local Arbitral Institution right where we are. Friendly and competent people. And not too expensive. Rather cheaper than ICC.

A: *You* may like your Arbitral Institution, and it may be very good and even cheap, but it may not appeal much to the other Party, and it takes two Parties to agree.

40. Q: But we definitely do not want to go to the other Party's country and the Arbitral Institutions that they have there. These are likely to be biased in *their* favor.

A: You may think so, and perhaps you even have a point. But the other side may well be – rightly or wrongly – wary of *your* local Arbitral Institution, and that is perhaps why they do not want to come here.

41. Q: So one will probably be forced to agree on a neutral Arbitral Institution and a neutral place or seat of arbitration?

A: Yes.

42. Q: Suppose we have now decided on institutional arbitration. There are then three questions that all need to be answered at the time of making the agreement: Which Arbitral Institution?[7] Which seat of the arbitration?[8] Which applicable law?[9]

A: Yes. While the answer to the three questions will, in each case, be short and easy to state, they involve a complex analysis, especially of procedural questions.[10] And there will be a further question as well, to be answered right when the arbitration agreement is made and there is no arbitration in sight.

43. Q: Namely?

A: The language of the arbitration.[11]

44. Q: What about the idea that one should not talk or even think about bad things that could happen, because that *causes* them to happen?

A: This is nonsense, of course.

Choosing a *suitable Arbitral Institution* is not easy, especially since a Party is not alone in this. There is always the other side. The other Party will think about all these matters also. It may agree to arbitration and making it institutional arbitration. So far, so good. But, beyond these points, it may, as the result of its own analysis, have ideas of its own, different from yours.

As in any business negotiation, each side may have its preferred outcome, but may have to settle for something else as part of an overall compromise. So in the end, the agreement on some points may not be for one's first option, but for a second or third option.

There may, however, also be some deal-breakers. But these will break not only the agreement to arbitrate but the entire commercial deal. Sometimes to negotiators, the commercial deal appears more important than a foreseeable dispute resolution system. They should think twice, because without a reasonable dispute resolution system disputes are more likely to arise.

45. Q: Because dispute resolution agreements are designed to *prevent* disputes?

A: Exactly. This is their most valuable function.

7. See questions 47 et seq.
8. See questions 56 et seq.
9. See questions 686 et seq.
10. See questions 77 et seq.
11. See questions 140 et seq.

46. Q: Being everybody's second or even third choice gives an Arbitral Institution a good share of the market?

A: This is one of the reasons for the ICC's success.

47. Q: Which Arbitral Institution should one pick? The ICC?

A: This is a good choice, or another Arbitral Institution that has been tried and tested. Not one of the about two hundred pushy Arbitral Institutions eager for cases.

48. Q: Are there differences between Arbitration Rules?

A: Among the leading Arbitral Institutions, hardly. They tend to follow fashions.

49. Q: On what then do Arbitral Institutions compete?

A: On the quality of their arbitrators and staff.

50. Q: And on price?

A: Yes, but this should be secondary. A badly run arbitration will be costly. The costs of the Arbitral Institution, and even the arbitrators, are only a fraction of the whole cost.

51. Q: Why are we talking in this book so much about ICC arbitration and less about other well-regarded systems, such as LCIA, Swiss Rules, Stockholm Rules, ICDR, Hong Kong International Arbitration Centre, and Singapore International Arbitration Centre?

A: Mostly to keep things practical and simple.

ICC has a truly international system that is used all over the world.

52. Q: But its system is not particularly simple?

A: Admittedly the ICC system is in some respects slightly more complicated than other leading systems, but not all that much.

53. Q: What is the main difference?

A: ICC arbitration is highly *administered*. The ICC Court and its Secretariat exercise functions that the Arbitral Tribunal must often perform itself in other institutional arbitration systems, and always in *ad hoc* arbitration.

54. Q: Why this involvement of the ICC Court and the Secretariat?

A: Other Arbitral Institutions also offer world-wide arbitration services, but most of their arbitrations have a local seat (London, Stockholm, Switzerland, Hong Kong, or Singapore) with some local arbitrators. Often even local law is applicable. And they are heavily used by local Parties.

By contrast, the ICC is the only truly international Arbitral Institution, and is designed to work really everywhere, with all kinds of arbitrators. Besides, once you understand how the ICC works, you will understand the other systems also. This is why in this book we will depart from the usual pedagogical principle that you should start with what is simple and then add more and more complexity.

55. Q: Are there things that one should watch out for in exotic Arbitration Rules and seats?

A: Yes, read them carefully.

If the *lex arbitri* does not give an Arbitral Tribunal the power to issue Provisional Measures, the Arbitration Rules should expressly provide for this, but this may not be effective.

In some arbitration systems, the language of the arbitration *must* be a language not often spoken outside the seat. So provide for a suitable language in the arbitration clause if this is allowed!

In some systems, the arbitrators must be chosen from a list. Many unknown persons without international experience are listed. In some lists, old or dead persons appear. So, in practice, the choice is extremely limited.

If the *lex arbitri* does not provide that the Arbitral Tribunal can decide on arbitration and Party Representation costs, the Parties should agree on this in the arbitration clause, or the State Courts at the seat will have to set the arbitration costs.[12] In Sweden, if the seat is in Sweden, even in institutional arbitration, the Award must specify which Swedish State Court may review the arbitration costs. Beware of State Court involvement. Many state judges think that arbitrators earn too much too easily.

One should study the costs schedule. There are international arbitration systems where foreign arbitrators are paid very badly, or must be paid directly by a foreign Party. With such a system, it will be difficult or expensive to appoint a suitable arbitrator.

If the Arbitral Institution is exotic, the arbitrators should insist on being paid as they go and reserve the right to step down if they are not.

In one arbitration with an exotic seat, the Presiding Arbitrator was told by the Arbitral Institution that Party R was owned by the Ruler's family. The Presiding Arbitrator said:

12. See questions 850 et seq.

"Thank you, interesting, but not relevant." The Arbitral Institution told him again, and a *third* time. The Presiding Arbitrator did not like this.

(c) Seat, *Lex Arbitri*

56. Q: Is it true that by choosing the seat one chooses the *lex arbitri*?

A: Yes. Most people think so, except in France.

57. Q: What does *lex arbitri* mean?

A: The arbitration law of the seat. In some jurisdictions (e.g. France, Switzerland), there is a dual system for domestic and international arbitration. So you should make sure that you are in *international* arbitration. In Switzerland, even domestic Parties can opt into international arbitration. This is advisable.

58. Q: Will the arbitration be conducted at the seat?

A: Not necessarily. Most people emphasize that there is no need to meet at the seat. It is a *legal* concept. Choosing the seat means choosing the *lex arbitri*.

But note that for French theory, this is too easy and indeed wrong; the place of arbitration is chosen just for convenience, and should have no legal significance at all.[13]

59. Q: Here, we go with the majority view?

A: Yes, we start with the theoretical concept that by choosing the seat, the Parties indeed choose the *lex arbitri*, as accepted everywhere except France. We will come to French philosophy towards the end of our conversation.[14]

60. Q: What is the best seat? That is, the best *lex arbitri*?

A: The question should not be asked this way. There are many differences between the arbitration *laws* of various jurisdictions, and we mentioned some of them already.[15] But differences in law are not the *only* relevant consideration when choosing a *seat*. Otherwise we would arbitrate in Djibouti all the time, or in India. Both have arbitration statutes that read well, but in reality other seats are more popular.

13. See questions 956 et seq.
14. See questions 956, 961 et seq.
15. See question 55.

61. Q: What is relevant beside the law?

A: The local State Court system is not equally attractive everywhere, to mention just one aspect.

62. Q: Other aspects?

A: Many, including: ease of travel; accommodation; hearing rooms; Court Reporters; visas; currency control; climate; corruption; food; cleanliness; political stability; political and cultural neutrality; reliability and neutrality of the legal system; tax considerations; VAT or withholding tax on arbitrators' fees; quality of local arbitrators and local bar; quality of the court system; language considerations; convenient geographical location; telecommunication; airports; hotels; restaurants; and banks that work well.

63. Q: Now the substance of the arbitration law at the seat.

A: An easy way to find out where the arbitration laws differ is to use a book which presents the various arbitration laws according to a particular grid or questionnaire. These go from the relatively superficial, often published by international law firms, sometimes pushing those jurisdictions where they have offices, to in-depth comparative law and practice analysis.

64. Q: Apart from exotic specialties,[16] where are the main differences?

A: An important difference is in the *tiers of judicial review of Awards*. This goes from three, as in England, to two as in France, Germany, and Belgium, to just one, as in Switzerland and Austria. This has a major impact on speed.

65. Q: Having fewer tiers of judicial review saves time and money, correct?

A: Time, yes. Fewer tiers save time, especially if you think of the Swiss Federal Supreme Court, which more often than not decides setting aside proceedings in less than five months, and almost always in less than seven.

66. Q: And costs?

A: With respect to costs, it all depends on the rates charged by the reviewing courts. For instance, one should know that the rate before the Austrian Supreme Court is 5% of the value in dispute on review. The Austrians say that 5% was reached by roughly adding

16. See question 55.

up the court fees that were payable in the three tiers before that system was replaced by the one-tier system.

67. Q: This means that reviewing an Award in Austria may cost far more than the arbitration with three arbitrators and the Arbitral Institution?

A: Yes. The costs of three tiers were outrageous, and having almost the same cost for just one tier hardly makesit any better. Fine as Austrian arbitration law is otherwise, this one feature means that, in practice, it is foolish to try to set aside an Austrian arbitral Award.

68. Q: In other words, in practical terms, forget setting aside in Austria?

A: Yes, and time will tell whether the "Lex Storme" idea will be more successful in Austria than it was in Belgium, or whether this feature of Austrian arbitration law will be corrected, as we all hope.

69. Q: Other differences in the *lex arbitri*?

A: What also differs is the *extent* of judicial review of facts and laws. If much of the dispute is repeated before State Courts, why go to arbitration in the first place?

If English law was the applicable law, in England, an appeal on a point of law is possible. So if you like English law, go elsewhere. If you like to go to London, have another law than English law apply. Otherwise, you will see your case in the hands of people with wigs, and they will take years to further English law at your (considerable) expense.

Another difference is in the procedure adopted to *ascertain the applicable law*.

70. Q: Must "foreign" law be proved by Expert Reports?

A: Proving "foreign" law is still popular in some jurisdictions, but there is no requirement for this even in the arbitration laws there.[17]

What is more tricky is the question whether *iura novit curia* applies. The question is how far the right to be heard goes. Does it also include the idea that Party should not be *surprised* by the Arbitral Tribunal applying a certain principle of law, or a particular provision, without having had an opportunity to comment?

If so, the question then is, *when* a principle of law or a legal provision is surprising, because the Parties should also know the law, *ignorantia juris nocet*. If a legal principle is mentioned, but not its implementation in all its facets, is it surprising if one of its implementations or facets is applied?

17. See English Arbitration Act 1996, Art. 34(2)(g).

71. Q: An example?

A: In many laws, there is the principle of good faith. One implementation of that principle may be the entire law of unfair competition. If provisions on unfair competition law are unexpectedly applied, is this still surprising if the principle of good faith has been mentioned?

72. Q: Let us go deeper. For which questions does the *lex arbitri* matter?

A: Arbitration is comparative law in action.

Let us start with the fundamental distinction or characterization of questions of *substance versus procedure.*

73. Q: What is the purpose of procedure?

A: An Arbitral Tribunal must (1) find the facts and (2) apply the law to the facts as found. Procedure is about identifying the method that the Arbitral Tribunal will apply to do one and then the other. Substance is about applying the identified method to one and then the other.

74. Q: Does the same law apply to substance and procedure?

A: No. Substantive law questions will be governed by the substantive law applicable to the merits (which may be chosen expressly by the Parties in their agreement, or determined indirectly by the Arbitral Institution's Arbitration Rules, or by the *lex arbitri*).

By contrast, procedural questions in an arbitration are often answered in a fundamentally different way.

75. Q: The difficulty is that in some jurisdictions, many questions are characterized as procedural that elsewhere are characterized as substantive. Is there a good way to distinguish between substance and procedure?

A: This distinction is for the *lex arbitri* to make. Unfortunately, you will not find much of an answer there. But here is the way one could do it:

In doubtful cases one should characterize a question as substantive. From a *functional* point of view, one should characterize as substantive all questions that have a substantial impact on the outcome of the case apart from the facts of the case. Therefore, the following questions should be characterized as substantive questions of law:

- who must provide what under the Contract;
- deadlines to observe;
- deadlines of *mise en demeure;*
- statute of limitations;
- interest;
- presumptions and burden of proof;
- whether an interest worthy of protection exists to justify issuing a declaratory judgment;
- *locus standi*; and
- set-off.

By contrast, where the equal treatment of the Parties and their right to be heard must be guaranteed, in short, procedural due process, one should characterize a question as procedural.

One should pay attention to the notion that procedural law is the handmaiden of substantive law. Procedural questions should remain without substantial influence on the outcome of the dispute. Therefore, long-term predictability is less important.

Accordingly, the following should be characterized as procedural:

- all questions aptly listed in Section. 34 Arbitration Act 1996 (even if the *lex arbitri* is not English);
- the duty to particularize allegations within reason;
- singular procedural provisions of the applicable substantive law such as limitations on proof, for instance, exclusion of parol evidence and prohibition to use as evidence information illegally obtained (exclusionary rule);
- taking of evidence;
- questions covered by the IBA Rules of Evidence 2010, including assessment of the evidence and adverse inferences if evidence is withheld;
- advances and recourse of the Party that made the advance against the defaulting Party;
- security for Party Representation costs; and
- assessing and allocating costs.

76. Q: Is this just an autonomous distinction that you are suggesting? Would it not be better to look to the way the procedural law of the *lex arbitri* distinguishes substance from procedure?

A: No. When a system draws the substance versus procedure distinction for local purposes, this is influenced by local factors, particularly, the court system, the legal profession, legal tradition, and the division of powers in a federal system. None of this is important in international arbitration.

242. Q: Does having three arbitrators rather than one lead to additional costs and delay?

A: The additional cost is negligible in a large case.

243. Q: Where do the large cases start?

A: Many Arbitration Rules still have a threshold of USD 1 million. This is far too low. Cases up to USD 20 million can easily be handled by a sole arbitrator, even one who is not the most experienced. From about USD 30 million having three arbitrators makes good sense.

244. Q: Is it true that, at the upper levels, the additional costs of having three arbitrators instead of one are negligible in comparison to the costs of Party Representation?

A: Yes.

It is of course also true that having three arbitrators makes it more difficult to find dates when everybody is available. This, however, is only part of the difficulty. Even greater scheduling difficulties arise with Party Representatives and the Parties themselves. In a recent arbitration, three busy arbitrators had several dates and times available for a telephone Case Management Conference, and had already deliberated on what to say at the conference. It took three months, however, before the Parties were at long last simultaneously available. The telephone conference lasted 20 minutes.

245. Q: Are the advantages of Party-appointed arbitrators then more psychological than real?

A: Yes, but psychology is also part of reality. Moreover, there are Parties that find it imperative to appoint a partisan arbitrator. The people who make the choice cannot be faulted if the case is lost, so long as "their" arbitrator argued in their favor. This includes not only some large corporations, but also entire countries ruled not by laws but by men. As long as these types of Parties exist, Parties will prefer selecting their own arbitrators. They will not entrust the task to an Arbitral Institution or, in *ad hoc* arbitration, some judge at a faraway seat.

246. Q: A Party-appointed arbitrator may develop "diplomatic" illnesses that delay the arbitration, or will simply be slow. Or, worse, leak information to the Party that appointed them. How do you fight such mischief?

A: One should not throw out the baby with the bathwater. And there are specific ways to fight abuse.

247. Q: Why are partisan arbitrators often slow?

A: If an arbitrator is a member of an Arbitral Tribunal purely to help the Party that appointed him or her, and the Presiding Arbitrator develops views that are favorable to the appointing Party, then the partisan Co-arbitrator will have no reason to work very hard.[48]

248. Q: Is there a possible compromise between having all Party-appointed arbitrators and having the Arbitral Institution make all the appointments?

A: Yes, the Parties could agree to a shortlist-and-ranking system. The shortlist may be established either by the Co-arbitrators, when one is looking for a Presiding Arbitrator, or by the Arbitral Institution if one is looking for one or three arbitrators. The shortlist may be even more useful if, beforehand, the Parties specify their views about the requirements or profile that arbitrators should meet. But it is often difficult to find a common profile at an early stage of an arbitration, and at the beginning the profiles will be quite different. This once again shows that an Arbitral Tribunal with two Party-appointed Co-arbitrators, each fully meeting one of the Parties' requirements, will be preferable to one consisting exclusively of Arbitral Institution appointees.

249. Q: What is the most important decision in an arbitration?

A: Choosing the presiding or sole arbitrator. It is true that the arbitration is worth what the arbitrator is worth. The choice must be made carefully, and it must be made at the beginning when, unfortunately, one knows but little of the case.

In a three-person Arbitral Tribunal, it is in the self-interest of the Co-arbitrators to have a competent person in the driver's seat. Appointing an inept Presiding Arbitrator will lead to long, boring hearing days in badly lit, windowless rooms, going hungry or eating unpleasant sandwiches, being crammed into low, uncomfortable chairs at narrow tables, and trying to hear a witness testifying at the other end of the room. Everybody will be trying to find a document "two thirds into the binder submitted with the reply to the rejoinder to the answer and looking like this." Afterwards the Parties will fight about the minutes because no proper verbatim Transcript was taken.

The choice of presiding or sole-arbitrator should not be left to others, neither a State Court nor the ICC Court (which is a court only in name).

48. See question 903.

250. Q: Why not leave this to a State Court?

A: Suppose a State Court must appoint an arbitrator, as must necessarily happen in an *ad hoc* arbitration when the Parties or the Party-appointed arbitrators cannot agree. A State Court is poorly equipped to make this choice. It is often too local in its outlook.

Especially in the civil law, State Court judges tend to be bureaucrats with limited knowledge and experience of the world. Languages and comparative law are not their daily concern.

In the common law, many judges have been distinguished practitioners. However, many speak only English, and may have only ever seen the English-speaking, cricket-playing parts of the world.

Moreover, judges everywhere will know many people, but mostly within their own jurisdiction, namely fellow judges and lawyers appearing before them.

Appointing a local practicing lawyer is tricky for a judge, because the judge will often consider an appointment to be a favor. To some judges, an arbitration appears to be a juicy plum. Favoring one lawyer within the jurisdiction over others is something a judge will often wish to avoid. Judges are more afraid of lawyers than lawyers are of judges.

State Courts will therefore tend to appoint former local State Court judges. Their idea will be that these are valued ex-colleagues who have vast experience. True, but experience in local court cases only, not in arbitration, and certainly not in international arbitration. They are real specialists, but in the wrong area.

251. Q: So is this a reason why one should prefer institutional arbitration?

A: Yes. Arbitral Institutions should know something about arbitration and arbitrators all over the world, and many do.

252. Q: So why not leave it to the Arbitral Institution entirely?

A: It is better than leaving it entirely to State Court judges, but it is still not the best solution. Consider the method by which the ICC picks Presiding Arbitrators in the absence of agreement by the Parties or the Party-appointed arbitrators. It relies heavily on proposals made by its national committees. Some national committees are knowledgeable and professional, but others are slow and unpredictable, and may well select unsuitable Presiding Arbitrators. This is known in the jargon as the "ICC Roulette."

253. Q: At least the Arbitral Institution knows many people, does it not?

A: Some officers of the Arbitral Institution, yes, but not all young trainees.

254. Q: Should one fear favoritism from some Arbitral Institutions?

A: Consider this true story: There was a Chairman of a small Arbitral Institution who said: "I must appoint the best to preside, and I am the best."

Most Arbitral Institutions, such as the ICC, are rightly prevented from appointing their own people. At the ICC, this unfortunately rules out some of the most suitable people because they are court members. This is particularly unfortunate in countries where there are few suitable people in the first place.

Beware of any Arbitral Institution appointing recent staff members.

255. Q: Are Arbitral Institutions fast in picking a Presiding Arbitrator?

A: Not always. Stockholm is particularly fast because it picks people in advance, just in case, and has a board of multinational specialists. The ICC is slower because it normally selects a national committee only if it has to, and some of these are slow.

256. Q: So should you do it yourself?

A: Yes. "Shortlist and rank" is a good method that involves the Parties also.[49]

257. Q: Is it true that Parties prefer to nominate one arbitrator of a three-person Arbitral Tribunal, rather than having all arbitrators appointed by the Arbitral Institution?

A: It is true.

Not always for the right reasons. Many Parties believe, often wrongly, that the arbitrator that they appointed will be biased in their favor. If that were true, decisions would hardly ever be unanimous, when in reality, most seemingly are,[50] and dissenting opinions are rare.

258. Q: Would an all-neutral Arbitral Tribunal not be preferable?

A: No. The Parties regularly want to nominate "their" arbitrator, and who are we to tell them what would be good for them?

It is a fact that Parties hardly ever provide in their arbitration clause that *all* three arbitrators shall be nominated by the Arbitral Institution, which the Parties could perfectly well do.

49. See question 290.
50. See question 885.

Also, there is the experience of at least one Arbitral Institution, the Zurich Chamber of Commerce. For many years, it *had* a system of all-neutral arbitrators nominated by the Arbitral Institution. In that system, the Arbitral Institution would appoint the Presiding Arbitrator and nominate four potential Co-arbitrators, from whom the Presiding Arbitrator could choose two. This was a system that allowed an Arbitral Tribunal to be formed partly by lawyers and partly by experts, all neutral.

This sounds attractive, at least in small cases. However, when people had chosen the system, they were often surprised when they saw what it meant, which rightly struck them as unusual, though not necessarily bad. Incidentally, this shows that Parties often have little idea of what they are getting into when they make an arbitration agreement.

259. Q: Where did that system come from?

A: This was meant to replicate a Commercial Court which indeed had (and has to this day) a combination of professional judges and technical and business people sitting alongside them. But many people wanted more of a say in the composition of the Arbitral Tribunal, hence arbitration.

In any event, the all neutrals arbitration system did not spread and was finally abolished.

260. Q: How does somebody become an arbitrator, a professional international arbitrator?

A: It is a question that older arbitrators are asked time and again. There is a short answer. There is also a longer answer. First, here is the short answer:

It is a bit like the way you become an orchestra conductor.[51]

261. Q: Why do you say that?

A: Look at today's better known arbitrators – or conductors, for that matter. Many started out as assistants preparing the documentation, the score, helping organize, sitting in, and then started following in the footsteps of their mentor.

Some others started out as orchestra musicians, then started conducting early and did more and more conducting after that.

There are also some very exceptional types who had distinguished careers as opera singers or solo pianists and then suddenly took up conducting as a second career.

51. An earlier version of the matters discussed in questions 260 et seq. was published by the author under the title "So, you want to become an Arbitrator – A Roadmap", The Journal of World Investment, Vol. 4, No. 1, 2003, pp. 13–15. It was reprinted, with permission, in Newsletter of Chartered Institute of Arbitration, Malaysia Branch, Vol. 4, 2003. The author thanks the copyright owners for the permission to use the earlier publication.

Some others were asked to stand-in, quite unprepared, when the maestro caught a cold. That is what happened to me many years ago. When I first did it, I thought: "Hey, this is fun"; and people apparently said: "Well, it did not look promising, but it could have been worse. We might try him again."

And that is how you normally become an arbitrator – by good luck.

262. Q: Well, is it just good luck?

A: Here comes the longer answer. It is not only good luck. You have to ask yourself: "What are people looking for when they are looking for a good international arbitrator?"

You do not become a good international arbitrator overnight. You must have some basic skills, and those take a while to acquire.

263. Q: Such as?

A: You need to have independence of judgment, imagination, creativity, quickness of mind, and also a good memory. Good memory for the things that you learned at home, and those that you learned in school - yes, physics, biology, chemistry, history, all the things that you thought you would never need again. And above all, languages. This is the key to everything else.

264. Q: Anything else?

A: Yes, on that basis, a multicultural background, a multicultural life. You develop a liking for travel, for different lifestyles. Politicians show us the way to do it. When they are in China, they use chopsticks.

265. Q: In other words, you have to have an interest in people?

A: Yes.[52]

266. Q: More?

A: Apart from this mindset, you also just simply need to be organized as a professional. You need to know how to work with people. You do not have to be high-tech; you can also work low-tech and find your way. Some people in your office should be a bit more high-tech than you. The late Robert Briner liked to say: "Arbitration is mostly logistics."

52. See question 448.

267. Q: Still more?

A: One last thing is that you must know how to relax. You must know how to manage stress and when to work and when not to work.

268. Q: Should one be a lawyer?

A: It definitely helps. More about this later.

269. Q: What else?

A: Once you discover that you really would like to be an arbitrator, and perhaps you have been one for the first time and a second time, you must *focus* your activities on this dispute resolution business early on.

Once that is the goal, you must find the time to do it (even if, at first, the money is not so good). You have to develop some specific arbitration knowledge, and you can learn this at many seminars and colloquia and so on. You must find the time to concentrate your mind on it and to gain experience. Experience is really learning from your own mistakes and preferably also from other peoples' mistakes. Perhaps even a book like this can help.

Get on with it. Answer at once. Never say no. If you cannot do something, just find somebody else who can, so at least you may be asked again.

270. Q: Do you have to be prominent?

A: Prestige – symbolic capital, as it is somewhat pompously called – can help, but not much. If you are a partner in a well-known law firm, this will be seen as a sign of quality, but it will not help in any other way. What you really need is simply quality of judgment, and quality in the art of persuasion and presentation of your judgment. You must sell what you are saying.

271. Q: Is it important to get to know the good and the great members of the "mafia"?

A: I would say, not really. They will soon know *you*.

How do you get appointed? You do not get appointed by the good and the great; you get appointed by your peers and those that are younger than you. These are the people whom you must persuade that you might be a candidate to sit as an arbitrator. So join the groups. If you are still able to, join the under-forty groups of the various

associations in this world, and do something there. Get to work there. Participate in working parties, help draft a new statute – it is going to be fun – help draft new Arbitration Rules or new guidelines. Participate in the work of the IBA, of UNCITRAL, or of WIPO. By working with people, you get to know them, and they get to know you.

272. Q: Should you get on the lists of Arbitral Institutions?

A: It is not that important, because that is not where the appointments come from. Many of these lists are just the lists of the ambitious who pestered the Arbitral Institution long enough to get listed. Then they think that they will get appointed. But instead they get disappointed.

273. Q: So you have to do your own marketing?

A: Marketing is not a dirty word. Marketing an arbitrator is of course a bit different from developing a brand or selling a law firm like yours. However, even when you market your law firm you try to develop a consistent product, a recognizable name, a certain corporate culture, an image, and that is what you are selling.

As an arbitrator you are a bit removed from all that. You are yourself, and you have to develop your own individual brand. The simplest thing is to get your name out there as much as you can, and on all kinds of occasions. That is where lists come in and where vanity publications may be useful – things like the "Best Twenty" or whatever of this sort. If you can do a little more of that, that can be helpful. If it comes naturally to you, you can and should develop your personal style, beginning but not ending with, perhaps, the arbitrator who always wears a scarf around his neck. All these things are good, but never forget: Be yourself.

274. Q: For an arbitrator to be neutral, is it not a good idea to take this person from a neutral country?

A: A popular choice, but this is another myth. The political neutrality of a country has nothing to do with the attitude of its citizens.

275. Q: In investment protection disputes, some arbitrators have the reputation of being sympathetic to host states, some others of favoring the investor. Is there any truth in this?

A: There is, but this is investment arbitration. In international commercial arbitration, arbitrators are not so easily labeled.

276. Q: Back to Party Representation. How do you select your arbitrator? Does it make sense to appoint somebody knowledgeable about the applicable law?

A: This should not be the primary concern. Of course, sometimes the applicable law may be important. However, a lawyer familiar with a similar law should be able to understand a related system. Even the common law/civil law divide is not too difficult for a capable lawyer to bridge.

In one arbitration, the Parties apparently believed that Swiss substantive law would apply, and appointed three Swiss lawyers. Yet it turned out that Texan law was applicable to the merits, and the three Swiss arbitrators applied Texan substantive law. When, on enforcement in Texas, one Party argued that the arbitrators had misapplied Texan law, the Texan Court said that, on the contrary, they had got it exactly right.

In a panel of three, it is not likely that all three lawyers will be from the same jurisdiction. Arbitrators from other jurisdictions may be curious and eager for statements about the applicable law by the arbitrator from that jurisdiction. They may however be skeptical, and then the intended effect disappears.

277. Q: Will somebody from our own jurisdiction not push in our favor?

A: Perhaps, but appointing a partisan arbitrator is not a promising strategy.[53] It is a fallacy that one's own law always helps.[54]

278. Q: To appoint an arbitrator who is an expert in the subject matter of the dispute should save money?

A: This is a frequent misconception. We are looking for somebody who, in a team of three people, will be able to understand all the complexities of an international arbitration.

Yes, some of the questions will be technical, but many more questions will be completely different. There will be questions of law, questions of understanding business relationships, questions of language, psychological approach, and many more. Coal specialist Professor X may not be the best person for all these other things.

In any event, we should not be looking for somebody who knows everything already. Nobody does. And people who believe they do are downright dangerous.

Rather, we must look for somebody who has the curiosity and ability to learn. Even lawyers can, with adequate help, understand technical questions. Some technical people such as engineers may, it is conceded, also learn about the law.

53. See question 239.
54. See questions 693 et seq.

But beware of the elusive, rare bird of all feathers. Those who chase after such a bird may well find themselves in the swamps.

279. Q: If we are to teach an Arbitral Tribunal technical things, how should we go about this?

A: It can be done with the help of Party-appointed Experts who are good communicators. As a Party Representative, you will need somebody like this on your team from the very start, first to teach *you* and the other team members. In many arbitrations this happens too late, if at all. One pays a high price for beating around the bush without understanding, let alone explaining, the technical aspects of the case.

280. Q: Should we choose an arbitrator from the seat of the arbitration?

A: Again, this is only one factor. Think of who the Presiding Arbitrator might be. If you would prefer somebody from the seat in the chair, then picking somebody from the seat as your Party-appointed Co-arbitrator may defeat that preference.

281. Q: So as one appoints a Party-appointed arbitrator, should one already be thinking about who the Presiding Arbitrator might be?

A: That was a special situation, but generally no. From time to time one sees some such attempt, but it will not always work, depending on the seat of the arbitration.

282. Q: Where, for instance, will it not work?

A: One cannot predict who will be the Presiding Arbitrator with sufficient certainty. What can be done about this is limited. One can, for instance, *exclude* certain categories of arbitrators in the arbitration clause itself. But the Arbitral Institution is not likely to appoint such candidates anyway. It will definitely not appoint anybody from the country of one of the Parties. It is also unlikely to appoint anybody from the same country as one of the Co-arbitrators.[55] It will look for an equal distance between the Parties (and often their counsel), the Co-arbitrators, and the Presiding Arbitrator, also on cultural grounds.

By trying too hard to avoid trouble, the Arbitral Institution may occasionally exclude all tried and tested options and go for somebody totally unknown. This may lead to Arbitral Institutions making unsuitable appointments.

Take the case of a Belgian Party and a German Party, Paris seat, Swiss law applicable, Party-appointed arbitrators Swiss and Belgian. No Presiding Arbitrator from Germany, Belgium, Austria, the Netherlands, or Switzerland is likely to be appointed, nor

55. See question 280.

anybody from the Common Law. This will limit the candidates to French or Italians. Spaniards are already further remote from the applicable Swiss law. If one of the Parties says that it does not want anybody from France, the Presiding Arbitrator will definitely be an Italian, at the ICC upon proposal by the Italian National Committee.

Another example: The Parties are from the Philippines and the BVI, Manila seat, Philippine law applicable, the Party-appointed arbitrators are English and Swiss, the lawyers on both sides are from Hong Kong and the Philippines. The candidate to chair could be from Korea, Taiwan or Japan, or perhaps Singapore, Malaysia, Hong Kong, or even Australia.

283. Q: Is this not giving too much weight to geographical proximity, and too little to comparative law?

A: Yes, a frequent mistake. Air travel costs time and money, but little in comparison to what you save by having a suitable person presiding. Frequently too little attention is also paid to civil law/common law aspects. Take the last example: The Philippines, Korea, Taiwan and Japan are civil law jurisdictions, the last four, Singapore, Malaysia, Hong Kong, and Australia, are common law jurisdictions, which do not fit the case particularly well.

284. Q: Is somebody's passport really relevant?

A: Not normally, but many are fixed on citizenship. Citizenship is easy to ascertain and easy to handle.

Dual or plural citizenship can become an unnecessary obstacle. In Brazil, one cannot renounce one's citizenship. If you were born there, but left as a baby, you are *iure soli* a Brazilian for the rest of your life even if you never went back.

285. Q: Will an arbitrator who speaks a particular language be biased in favor of the Party that speaks the same language?

A: Some Parties indeed think so. Normally Parties with limited language skills. Those who speak many languages have a more realistic understanding. To them, languages are just means of communication, not of identity and affinity.

In one case, a Party insisted on having a Presiding Arbitrator who would *not* know the languages of either Party, nor the language of the applicable law.

286. Q: You found this silly?

A: Frankly, yes.

The idea should be to find somebody who is equally *close* to both Parties, not somebody equally *remote* from them. Those who understand both Parties easily are likely to be able to treat them on an equal footing. Those who are local in their outlook, and find it difficult to know and understand either of the Parties, may in the end be swayed by irrelevant considerations, such as a personal liking of one or the other of the Party Representatives. A person who objectively initially looks unbiased may later turn out to be the most subjectively biased.

287. Q: How then can one influence the choice of an adequate Presiding Arbitrator?

A: One should pick a suitable Party-appointed arbitrator. Respondent should study the Party-appointed arbitrator proposed by Claimant. The idea should not be to mimic one's opponent's choice, but to counterbalance it, if needed.

One should definitely pick somebody very persuasive. There is then a better chance that this person will be able to persuade the other participants to agree on a suitable Presiding Arbitrator, or a shortlist of suitable people for the job. Suitable, not biased in the appointing Party's favor.

One also needs somebody who will be persuasive in the interaction with the Presiding Arbitrator. Substantial experience in international arbitration and with the Arbitral Institution in question can help.

Some say that you should pick the most persuasive lawyer you know as your arbitrator, and the second-most persuasive lawyer as your Party Representative.

288. Q: If the Co-arbitrators come up with a common proposal for Presiding Arbitrator, or a common shortlist, should one accept this?

A: Yes, even if the arbitration agreement does not foresee this. One must assume that the Co-arbitrators knew what they were doing, and, in their own interest, picked a suitable selection process. If one picked the right Co-arbitrator, then one can also trust that he or she will be capable of picking wisely. The Co-arbitrators are selected precisely for this. A Party should follow its Co-arbitrators' choice. This is preferable to playing the ICC Roulette.[56]

289. Q: By which process do Co-arbitrators select a Presiding Arbitrator?

A: There are various "shortlist and rank" processes.

56. See question 252.

290. Q: Can you please describe one?

A: This goes step by step.

It is recommended that the Party-appointed arbitrators first find agreement on the *process* as such, before they start talking about names. Otherwise, the "kiss-of-death" effect may eliminate a large number of suitable Presiding Arbitrators, merely because they were proposed by the other arbitrator.

Once the Parties have agreed on the profile that a suitable Presiding Arbitrator should meet, the Party-appointed arbitrators may submit this profile to the Parties that appointed them. This should be done in an even-handed way, avoiding direct contact between the Party-appointed arbitrator and the persons with whom he or she was originally in contact. The solution is to do it in writing. Even include a written statement to the effect that direct contact between a Party and a candidate would be improper.[57]

291. Q: Will this prevent direct contact?

A: One would hope so. The chosen candidate should be told about the selection process that was used, so any violation will become visible at that time – at least to the Presiding Arbitrator.

292. Q: Once a profile has been agreed, how does one then proceed?

A: The Co-arbitrators should each prepare a list of (say, five) candidates fitting the profile. Over the phone they can then together go down the alphabet to name candidates and discuss them briefly. About half the candidates may be acceptable to both Co-arbitrators, and each may have reservations about some of the others. This may result in a common shortlist, alphabetical only.

293. Q: How long should the shortlist be?

A: It should contain between four and ten names.

294. Q: Why so many?

A: One still needs a ranking. Some possible Presiding Arbitrators may be conflicted out or otherwise unavailable. A Party may rule out a candidate for reasons of its own that

57. See Annex (B), First Letter from Co-arbitratiors to Parties on Appointment of Presiding Arbitrator, for a diplomatic way of saying this.

it does not wish to disclose. A sufficient number of candidates should survive to give the Parties a choice.

295. Q: Is it then not better to give the Parties the right to a peremptory challenge of such candidates?

A: If the shortlist is long enough, it is simpler and more elegant for the Party in question to rank such a candidate very low. The risk that this candidate will then emerge on top, or near the top, is then negligible.

296. Q: Should the Arbitral Tribunal tell a candidate that he or she came out on top?

A: Yes, though of course only if it is true. Otherwise, you can just tell the candidates that they were ranked high up on the list. Either way, they will be flattered and normally accept.

297. Q: Is it a good idea for the Parties to jointly ask the Arbitral Institution to set up a shortlist?

A: Not a particularly bad idea, but not ideal.

The process then becomes cumbersome. The ICC may ask some of its national committees for proposals.

Some busy arbitrators may not be particularly eager to do the necessary work (for free), just to be on a candidate *shortlist*. If picked from the list, a candidate will of course be pleased, but the other candidates may be unhappy if somebody else is preferred and they worked for nothing.

298. Q: How does one pick the preferred candidate out of a shortlist drawn up by the Co-arbitrators?

A: The Co-arbitrators can ask the appointing Parties to rank the shortlisted candidates. The Co-arbitrators can also agree (internally) on what the Co-arbitrators will do if the Parties put more than one candidate in the same rank.[58]

Note that this is a ranking only, and the possible candidates will not yet have been contacted. The less successful candidates will not know of their initial luck in having been shortlisted and of their ultimate bad luck in not having been selected after all.

58. See Annex (B), First Letter from Co-arbitratiors to Parties on Appointment of Presiding Arbitrator, at the end.

Where is a photocopier, do you need a code? Where is the bathroom? How will you reach the next witnesses, by cellphone? Who will greet your witnesses when they arrive?

A Party should be completely ready to go perhaps 20 minutes before the hearing is supposed to start. Then there is still time to solve any unexpected problems that may come up – say, if a witness missed a plane. Everybody will have ample time to greet one another, get familiar with the facilities, drink a cup of coffee, and perhaps also catch up with the latest news and emails.

620. Q: And the Arbitral Tribunal?

A: The Arbitral Tribunal should also be in the hearing room well on time.

Yes, even the Co-arbitrators. Do not let the Presiding Arbitrator get worried about your whereabouts. If the Arbitral Tribunal is incomplete you will need the Parties' consent to proceed, and this must be on record.

The Arbitral Tribunal needs to prepare its desk and its file.

The Arbitral Tribunal may circulate a "topographical" list of persons present, and arrange for it to be copied and distributed, preferably before the hearing starts. The names should be legible. Insist on having every person present listed, including administrative assistants and trainees. Do not forget to put in the date and the case number.

The Arbitral Tribunal may also have things it needs to sort out internally. Did all arbitrators receive – though perhaps not read – that last-minute submission?

Is there something that the Arbitral Tribunal wishes to discuss? It should not do this in front of everybody. Instead, it may go into a huddle nearby.

Talk with Court Reporters and interpreters.[165]

Many well-organized hearings start a few minutes early.

621. Q: Before the hearing, what can the Arbitral Tribunal do to help the Court Reporters?

A: The Court Reporters need to prepare in advance. Ahead of the hearing, the Arbitral Tribunal should send the Court Reporters the Terms of Reference or a similar document, a copy of the letter summarizing the pre-hearing Case Management

165. See questions 621 and 623.

Conference,[166] a list of people expected to attend (perhaps the *Dramatis Personae*)[167] and the Witness Statements.

Ask everyone present at the hearing to give their business cards to the Court Reporters.

Just before the hearing, speak with the Court Reporters in confidence and tell them what the arbitration is all about.

622. Q: And during the hearing?

A: During the hearing, it is useful for the Court Reporters (and the Arbitral Tribunal itself) if the Arbitral Tribunal flags all documents that are mentioned, exactly where the relevant text portion appears, with the date *and time* when the document was mentioned (easy with a digital clock). Some even color-code the flags (green for Claimant, red for Respondent). Ask the Court Reporter to put the date and time (coordinate the clocks) into the Transcript at least once every page. Later on this will make it easy to bring together a document and what was said about it. Somebody once said: "In every arbitration, only some twenty documents in the file are relevant, but the whole question is, which twenty." The flags can help to find them.

Some move every document that is mentioned during the hearing into a special "core" file, which is easy to take away and study separately. But how do you find a document again once it has been moved? Leaving the documents in place and flagging them is normally more convenient.

Flags will also be useful for the Court Reporters if part of a document is read out loud, and, as is often the case, too quickly. Later in the day, the Court Reporters can go back to the original and improve the Transcript on this basis. You do not want a Transcript repeatedly saying, "inaudible."

Court Reporters should be encouraged to ask speakers to slow down and to help them during intermissions. The Transcript will be better if passages in other languages are transcribed correctly, rather than simply mentioning, "French spoken." Help the Court Reporters with this by slipping them notes at once. Yes, again with the date and time indicated.

623. Q: Before the hearing, what can the Arbitral Tribunal do to help the interpreters?

A: Talk to the interpreters. Find out their experience with law, with court cases, with arbitration. Discuss their role with them.[168]

166. See question 616.
167. See question 786.
168. See question 159.

(b) Time Management[169]

624. Q: Why is time management important?

A: Because arbitration is a service. The Parties have every right to expect a cost-effective procedure. It is simply unethical for lawyers or arbitrators to drag out cases just so they can charge more hours.

Time is the most important cost factor. The real costs in arbitration are not air tickets, hotels and restaurants, not interpreters and Court Reporters, not even arbitrators and Arbitral Institutions. The real cost is time spent by lawyers and management.

Time management is the art of keeping costs down. Time and costs will be saved mostly by keeping Evidentiary Hearings short.

625. Q: What can the Party Representatives do?

A: Put together an efficient team. This will save time and costs.[170]

Concentrate on the bottom line. Ask yourself which points are worth making, and how you can make them in a short and memorable way, using which witness. And watch the clock!

626. Q: And what can the Arbitral Tribunal do?

A: Help the Party Representatives to structure their case from the start. Provide structure early in the Terms of Reference.[171] Refer, generally, to the IBA Rules of Evidence[172] and add, after consultation with the Parties, a detailed Procedural Order No. 1,[173] and a Procedural Timetable, including hearing dates *and start times* (which people need to make travel arrangements).[174]

169. Earlier versions of this subchapter were published by the author under the titles "Why speed is good for arbitrators", Liber Amicorum Michel Gaudet, 1998, pp. 135–136; extract from the ICC Publication Improving International Arbitration, ISBN 92-842-1255-3, copyright © 1998 International Chamber of Commerce; "We need Speed: Time Management in International Arbitration", The Vindobona Journal of International Commercial Law and Arbitration, 2008, pp. 271–278; "Chess Clock Arbitration – Questions and Answers about Time Management in International Arbitration", Liber Amicorum Tadeusz Szursky, 2008, pp. 41–47, copyright © Wydawnictwo C. H. Beck sp; Article with Andrew Burr: "Chess Clock Arbitration and Time Management – from the Perspective of the Arbitrator and Counsel", in Construction Law Journal, Vol. 26, No. 2, 2010, pp. 53–76, copyright © Sweet & Maxwell. The author thanks all the copyright owners for their permission to use their earlier publications.
170. See Annex (A), Our Arbitration Team, and Theirs, Internal Party Worksheet.
171. See question 349.
172. See Annex (L), Procedural Order No. 1, para. 4.
173. See see Annex (L), Procedural Order No. 1.
174. See Annex (J), Procedural Timetable.

Ask the Parties for a simple primer on the relevant technical aspects.[175] Study the file well, but only in the days leading up to the hearing. We learn fast, but unfortunately forget fast also.

627. Q: How short should the Evidentiary Hearing be, and how do you keep it short?

A: It is not efficient to schedule hearings lasting more than a week. A week is sufficient for most arbitrations. Any suggestion to sit on weekends should be resisted.

Nor is it efficient to sit for more than six hours, net, per day (i.e., not counting frequent breaks). Give people sufficient time for lunch. Being time-pressed and fighting with the waiter for the check will spoil the best meal. Do not sit into the evening.

Long hearings make people hungry, inattentive, bored, unfriendly, and aggressive.

628. Q: All this presupposes that everything that can be done in writing before and after hearings should be done in writing?

A: Yes. And what has been done in writing should not be repeated in live hearings.[176]

629. Q: Should one have oral opening statements?

A: No need, they may be replaced entirely by written (skeleton) submissions.[177] If the Parties insist, then oral opening statements should be limited to no more than half an hour each.

630. Q: How do you reduce the number of witnesses?

A: The number of witnesses and Experts to be heard live should be reduced through various means, particularly at a pre-hearing Case Management Conference.[178] Try hard to avoid live testimony from *Expert witnesses on law*.[179]

631. Q: How do you manage the volume of oral evidence?

A: By side (not snide) remarks on doubtful relevance, and by using the chess-clock system.

175. See question 572.
176. See questions 532 et seq.
177. See Annex (L), Procedural Order No. 1, para. 54.
178. See question 608.
179. See Annex (L), Procedural Order No. 1, para. 48, and question 583.

632. Q: How does the chess-clock system work? Do you use a real chess-clock?

A: No, not a real chess-clock as used in chess tournaments to ensure that players have equal time. Good for chess champions, and not many buttons. But still too many buttons for lawyers. If you hit the wrong button, that mistake is hard to correct. Some arbitrators enlist the help of one team member from each side; others just do it on their own with a simple digital clock, a calculator and a writing-pad. Easy.

633. Q: How do you allocate time to the Parties?

A: Normally an equal number of minutes for a stretch of hearings.

634. Q: How many minutes?

A: A rule of thumb is to give each Party an overall amount based on an average of one hour per half day. Include oral opening statements, if any. This will be an incentive to keep them short.

635. Q: What counts against allocated time?

A: Time for questions to witnesses and receiving their answers, including normal interpretation.[180]

636. Q: Each Party has just one hour in the morning and one in the afternoon?

A: No. This is just the method to calculate how many minutes to allocate *overall*. Say the hearings are planned for four full days, all for hearing witnesses individually. Eight half days works out to eight hours for each Party, thus, a total of 480 minutes allocated to each Party. But this does not mean that on each of the four days each Party must use exactly 120 minutes or less. This is just the average. Each Party may use its 480 minutes whichever way it wishes; more minutes on one day and fewer on another, more time for a particular witness, less for others.

637. Q: An average of only four hours per day for the Parties? This leaves plenty of time – for what?

A: To give the Arbitral Tribunal sufficient time for sundry procedural matters, such as admonishing witnesses to tell the truth and having them confirm their Witness Statements, questions from the Arbitral Tribunal, interpretation incidents, procedural

180. See Annex (L), Procedural Order No. 1, para. 60.

incidents such as decisions having to be taken about new documents and recalling witnesses, and various other rare and unforeseen problems.

638. Q: What kind of rare problems?

A: The fire alarm goes off. A participant passes out. Witnesses are stuck in an airport somewhere because of terrorism. All these things have happened. One needs time to solve such problems.

The chess-clock should reserve for the Arbitral Tribunal an average of about one hour per half day for these matters. This is normally ample time if one has a full Procedural Order No. 1[181] in place.

This makes it possible to sit for no more than about six net hearing hours per day. Six hours is about right. It is tiring for all those present (some non-native speakers of English) to hear people trying to make themselves understood in a language that may not be their first, with unusual accents, and to deal with complex facts and technical matters.

One also needs time to prepare for the next hearing day.

639. Q: Is it not unfair to give each Party the same number of hours regardless of how many witnesses it will present?

A: It is erroneous to believe that the more witnesses one presents the more time it will take to hear them.

If anything, the time spent with a Party's witness is mostly spent on cross-questioning, which is time spent by the *other* Party, that is, the Party that does *not* present the witness.

Sometimes one Party will make its case with few witnesses while the other Party will have more. This may reflect the way the Parties are organized internally. A Party organized in a more specialized way will have more specialist witnesses than a Party that uses generalists. But even so, the testimony will cover roughly the same ground and will take roughly the same time.

640. Q: Claimants usually say that their case is simple, and Respondents say that the case is complicated. Does that not mean that Respondents will have more ground to cover than Claimants?

A: This is another fallacy when considered in the long run. To be sure, a Request for Arbitration is often shorter than the answer. Things will, however, even out with the reply.

181. See Annex (L), Procedural Order No. 1, para. 60.

641. Q: Why will the time used even out?

A: Because the more defenses that are raised by Respondent, the more Claimant will have to reply to. It is likely that the time spent on a particular claim will be about the same for both Claimant and Respondent, as will be the time spent on a particular defense. The overall time spent by each Party will accordingly tend to be the same.

642. Q: Surely there is a disadvantage to the Party that must question a long-winded witness?

A: At first glance this appears correct. However, this also tends to even out over the course of the testimony of a larger number of witnesses.

If it appears that a witness is *deliberately* long-winded, the Arbitral Tribunal should intervene and show its impatience. In practice, such situations are rare because most witnesses are not particularly devious or crafty. For them, testifying is unusual and difficult. Some are not particularly good at it. It is unlikely that they will deliberately play games under stress.

Those who complain about long answers often only have themselves to blame. Good short questions lead to short answers that go to the point.[182]

Those who make long prefaces and ask long open-ended questions, even on cross, do not use their time wisely.

643. Q: What about interpretation? If a witness' testimony must be interpreted consecutively, does this not double the time?

A: Of course, consecutive interpretation takes time, but not nearly as much as the original testimony in the original language. This is because interpreters know what to interpret. They have just heard the testimony, while a witness must develop his or her answer and search for words, often in a language that is not the witness' first. Interpreters are eloquent professionals. The same cannot be said of all witnesses.

Moreover, it often happens that the questioner already understands the gist of the witness' testimony when given in the original language, or even every word. With this provisional understanding, the questioner will understand the full interpretation straight away, and be ready for the next pre-drafted question.

If a witness testifies through an interpreter, the witness, and the questioner, will also have a little more time to think about the answer and the next question. Thus, some of the time lost through consecutive interpretation will be gained in efficiency.

182. See Annex (L), Procedural Order No. 1, in the end, and questions 490 et seq.

Experience shows that, because of all these factors, consecutive interpretation does not typically slow down the testimony of a witness in any significant way.[183]

644. Q: But all this presupposes that the interpreters are good, correct?

A: Absolutely, and an Arbitral Tribunal should take every measure to ensure that this is the case.[184] The interpreters may perfectly well come from the Parties themselves, as long as there is an interpretation-checker on the other side. Interpretation incidents must be addressed on the spot.

645. Q: Can one not save time by using simultaneous interpretation rather than consecutive?

A: Yes, but one must then be certain that it is done flawlessly. With simultaneous interpretation errors will be difficult to spot and to correct. Simultaneous interpretation is also costly and may not be worth the extra expense.

646. Q: Should the Arbitral Tribunal have float time that it can distribute if it appears that a Party needs more time to make its case, perhaps because of a lesser command of the English language?

A: Never say never. Something very unusual may happen in a hearing, and one must then be flexible.

But float time is generally a dangerous idea. If it is given to a Party under normal circumstances, the other Party will protest that the Arbitral Tribunal is treating the Parties unequally, and is blatantly helping the Party receiving additional time.

The second Party may be unhappy even if *both* sides receive equal *extra* time. It will argue that it did its best to present its case within the available time. Its opponent should have done the same and only has itself to blame.

Instead of distributing float time, the Arbitral Tribunal can ask its own questions on its *own* time. This is easy for the Arbitral Tribunal and difficult for a Party to oppose.

647. Q: So equal time to treat the Parties equally?

A: Not really. The chess-clock is just a tool that helps manage time efficiently. The Arbitral Tribunal should make it clear from the outset that it does not believe that giving both Parties *exactly* the same number of minutes will automatically result in treating them equally. Equal treatment is a much more difficult concept, as we all know from the days of Aristotle. However, in practice equal time comes closer to equal

183. See question 155.
184. See question 156.

treatment than one may think. This is borne out if one analyzes the time spent by Parties in the vast majority of cases, those where neither Party exhausted its allocated time. By the time both Parties have made their case, one often sees that they have spent a similar number of minutes.

648. Q: Should an Arbitral Tribunal put time pressure on the Party Representatives from the outset? Or should ample time be distributed to them?

A: Definitely the latter. The Arbitral Tribunal should help the Party Representatives do a good job. Do not put them under unnecessary stress. If, at the end of a stretch of hearings (say Thursday late afternoon), both Parties still have time on the clock but no more questions to ask, they will go home with a smile on their face. And the Arbitral Tribunal will not have to worry about a Party complaining in the end that it was denied a fair opportunity to present its case, especially a Party that reserved its rights about the chess-clock (which happens, but rarely).

649. Q: Sometimes one sees precise Procedural Timetables specifying who shall testify, when, and for how long. This looks well-organized. Is this not useful?

A: This should be resisted. It is inefficient and illusory. One simply does not know how any particular witness' testimony will go, and one's Counterparty may be eager to spring a surprise.

The *sequence* in which the witnesses will be heard is more easily predicted, and will reduce the number of witnesses waiting in the wings for their moment on stage.

650. Q: Is the chess-clock really compatible with the Arbitral Tribunal's obligation to give the Parties a full opportunity to present their case?

A: Full opportunity does not mean an unlimited opportunity to churn and filibuster. Indeed, the *lex arbitri* will often only say that only a *reasonable* or *fair* opportunity must be provided. This must be the case even where the expression "full" is used.

If the Parties wisely choose Arbitration Rules that say "reasonable," or if they expressly agree to the chess-clock outright, then there should be no problem anyway because that is their agreement.

In any event, to be on the safe side, from the start one should give the Parties a bit more time than they really need or overoptimistically estimate (which happens often). If some is left in the end, all the better.[185]

185. See question 648.

651. Q: So one should be generous with time?

A: Yes, but only with the number of days, not with the hours per day. The Parties will easily understand that the Arbitral Tribunal cannot distribute more days than there are. On occasion however, the Parties will request at the outset that each side be allocated significantly more time than one hour per half day. This should be resisted.

652. Q: Even if people have traveled far? Would they not wish to make good use of their time?

A: Good use yes, but there are limits.

Besides, the Parties need time to prepare for the next day. That preparation time will help keep the next day's hearing short and to the point.

It is also important that the Arbitral Tribunal have enough time of its own.

Occasionally the Arbitral Tribunal may wish to explore, on its own time, points that do not appear to have been covered adequately in the testimony. This is proper and hard to challenge.

653. Q: What do you do if one side does not use its time wisely?

A: If time appears to be wasted on points that appear irrelevant, the Arbitral Tribunal should intervene. The Arbitral Tribunal should also help speed up the testimony of a witness who struggles with language or is difficult to understand (perhaps difficult just for some in the back of the room, but *everyone* should be able to follow what is happening).

A live Transcript appearing on computer screens often helps participants who are not used to hearing unusual accents but that can read English well.

The Arbitral Tribunal should frequently tell the Parties how much time is still available – at least every half day but preferably at each break. From time to time it should also assess the situation with the Party Representatives, by asking: "How are we doing on time?"

654. Q: Has a Party ever run out of time?

A: Rarely. There was a case where a Party was about to run out of time, and tried to cram as much as possible into the record by talking fast. A rather ineffective method that simply made counsel look foolish.

In another case, counsel never raised the subject until late on Friday afternoon, when, after a full week of generously scheduled hearings, he requested another full week. The Arbitral Tribunal refused – it simply had not reserved the next week and had no time available until many months later.

The Party lost. But it had been given more than a fair opportunity to present its case. Its lawyer had squandered its time, and the Arbitral Tribunal had intervened repeatedly to speed up the proceedings.[186]

The case led to a malpractice suit against the counsel who had run out of time. This was an experienced American corporate counsel in a large firm, but he had little experience in litigation or arbitration. He should have known better than to take on a case that he simply could not handle properly.

655. Q: Should one use the chess-clock also for oral argument, such as closing statements?

A: Not necessarily, but the lawyers should at least know how much time they can use.

Whether the chess-clock is used or not, one should make it clear that it is not possible for a Party to "reserve time for rebuttal."

(c) Hearing Incidents

656. Q: Procedural incidents may arise during the hearing. As a Party Representative, how do you prepare your witness for this?

A: Tell the witness that if somebody raises an objection against a question, the witness should remain quiet until the objection has been dealt with, and the Arbitral Tribunal instructs the witness to answer.

Tell the witness to remain cool, to take his or her time (also for a better Transcript), and to talk slowly. The witness should be told not to try to argue the case and do the job for which the lawyers were hired.[187]

657. Q: How can an Arbitral Tribunal help a witness?

A: The Arbitral Tribunal may say the following: "We arbitrators would have been very interested to be present at that meeting that you are telling us about. We would have opened our eyes and ears. Unfortunately, we were not there. But fortunately *you* were there. So could you help us by telling us, as precisely as you can, what you *saw*, what you *heard*, *smelled*, *tasted*, etc. The lawyers will no doubt tell you what to make of it."

658. Q: As an arbitrator, how do you handle a procedural incident?

A: Keep your cool. If a document surfaces that is not yet on file (allegedly it simply summarizes other documents, or "should not become controversial"), put it to one side

186. See question 654.
187. See Annex (N), Instructions to Our Fact Witnesses.

and possibly seal it, so that nobody – not even your curious Co-arbitrators – will be tempted to read it before the incident has been resolved. Then, at an appropriate moment, deal with the procedural incident. The chess-clock should leave enough time for this for the Arbitral Tribunal.

If the procedural incident concerns a witness that is testifying, ask the witness to leave the room, so that the lawyers can discuss the incident without influencing the witness. This is actually the equivalent of "approaching the bench."

Explain to the witness that being sent out of the room is not the same as what occasionally happens in school, and is no reflection on the witness' person or performance. Say to the witness: "Why are we sending you out? Lawyers sometimes fight, and we want to spare you this and give you a break. We will call you back soon."

If the Arbitral Tribunal does not know what to do, it should ask the other Party to comment. If it then still does not know what to do, it should take a break and discuss the matter internally. Leave the room to deliberate; the Arbitral Tribunal should never deliberate in front of the Parties.

659. Q: Should hearing incidents be recorded in the Transcript?

A: Yes. For instance, if the Arbitral Tribunal allows a witness to be present when another witness testifies, and a Party claims that this witness does not qualify as a permitted "client witness."[188] For procedural incidents such as this, you need a verbatim Transcript that establishes what happened and reflects any protest. The protester should be invited to dictate the text of the protest into the record (so that it can be reproduced in the Award, but do not dwell on this).

660. Q: What should an Arbitral Tribunal do if a Party walks out in protest?

A: While the Party is heading for the door the Arbitral Tribunal should immediately announce a break until a particular time. It should say that it will consider the situation *at that time*, but that for the time being the proceedings are merely interrupted.

By instituting a "cooling off period" in this way, the Arbitral Tribunal maximizes the chances that the Party that walked out will return without losing too much face.

661. Q: Has this ever happened?

A: Yes, and it worked. This was a case where one of the Party Representatives did everything he could to impress his client, and to prompt the Arbitral Tribunal to make

188. In the sense of Annex (L), Procedural Order No. 1, para. 69, (that allows two "client witnesses" to be present at all times).

a mistake, which, no doubt, he would then have exploited to derail the arbitration or delay it – one suspects, at least until he had done his homework. In such a situation, the Arbitral Tribunal should be particularly cool and cautious.

662. Q: What do you do if a Party does not show up at a hearing?

A: This is another occasion where establishing a written record is important. State that the Party that did not show up had been properly invited, and exactly how this was done. Say that no reason for the Party's absence has *yet* been stated. Do not prejudge the reason; it may be perfectly innocent, and you should not be biased. In due course, deal with the problem. Keep the Party that did not show up informed.

All this should be presented painstakingly in the Award.

663. Q: How do you go about improving the Transcript?

A: If the Presiding Arbitrator has a good rapport with the Court Reporter, the Transcript will be very good to begin with.[189]

You can then simply ask the participants for "Errata Sheets" (one for each day of hearing) to be provided within, say, a week after the end of the stretch of hearings, and file them with the each day's Transcript, without more.

A poor Transcript causes unnecessary expense. A Transcript based only on a tape recording is a disaster. Ask anybody who has actually seen one.

664. Q: What should a Presiding Arbitrator say at the close of the hearing?

A: First, draw the attention of the Parties to the waiver provision in the Arbitration Rules or the *lex arbitri:*[190] "We are not fishing for compliments, just say: no objection."

Have the Transcript reflect exactly what the Parties answered. An objection, once made, need not be repeated, but a Party should make sure that it does not waive an objection even by implication. A Party should also make sure not to miss a deadline, for instance, to file separately for setting aside an (implied) decision on the proper constitution of the Arbitral Tribunal.

Do not forget to thank the interpreters and the Court Reporters: "We are all looking forward to receiving the Transcript."

Finally, thank the Parties and wish them a good trip home.

189. See question 621.
190. For example, Art. 39 ICC Rules.

(d) Arguing the Law

665. Q: Should one argue the law only in Post-Hearing Briefs?

A: In most cases, yes. But the law on threshold questions should be argued before the main Evidentiary hearing, to make it possible to decide the threshold issues or to put them aside before the main Evidentiary hearing.

666. Q: Which law applies to the question whether the Arbitral Tribunal is properly constituted?

A: This is a question to be decided by the *lex arbitri*, and this should be discussed early in the arbitration.

667. Q: Does *lex arbitri* mean the law of the arbitrator?

A: Not exactly.

Watch out. Originally, one asked: "Which is the *lex fori* of an Arbitral Tribunal?" Then one coined "*lex arbitri*" as the counterpart of "*lex fori.*" There, "*arbitri*" is used as a *genitivus subjectivus* (in analogy to "*lex fori*") to mean the private law at the seat.

However, by now *arbitri* is often a *genitivus obiectivus*, so one should translate as, "the law concerning the arbitrator." This is a law at the seat dealing with the relationship between the Arbitral Tribunal and the State Courts at the seat. In German, this would be "*Schiedsverfassungsrecht.*"

668. Q: Why?

A: The *lex arbitri* deals mostly with three peripheral things, not the arbitration itself.

First, it deals with the way arbitrators are appointed, supervised, deposed and replaced. This is relevant mostly early in an arbitration.

Second, the *lex arbitri* also deals with the way State Courts at the seat may assist the Arbitral Tribunal during the arbitration. This depends on the assistance that one is seeking.

Finally, the *lex arbitri* deals with the way arbitral Awards may be reviewed and possibly set aside by the State Courts at the seat. This is relevant mostly towards the end of an arbitration.

669. Q: So the lex arbitri deals with State Court intervention concerning just these three subjects?

A: Normally, yes. However, in the United States the following additional matters may also be brought before a federal or state court:

680. Q: Does it apply to the power of an individual to act for a company?

A: This may be governed by a different substantive law for each company.

681. Q: Which law applies to the question of *costs*, their assessment, and allocation?

A: This has nothing to do with the law chosen to apply to the merits. This must be separately argued, possibly under the *lex arbitri* and the applicable Arbitration Rules. The fee schedule issued by a local legislator or bar association may have an impact.

682. Q: That is many different laws. Should they all be argued by the same person?

A: No. It is rather odd to hear a barrister argue some exotic law in beautiful English, while a real specialist of that law is sitting in the back and looks on.

One should also be aware of the sources of law in the various fields. In some fields there is generic or detailed statutory law, in some there is case law.

Unfortunately, the Arbitral Tribunal often receives a hodgepodge of sources of law from Party Representatives, dealing directly or remotely with a particular question, and cited without regard to conflicts of laws, the law on sources of law, and the way sources of law are used in various legal systems.

Further, sources of law are often used in an unpersuasive way.

683. Q: What type of legal agreement is unpersuasive?

A: If one is told that some professor somewhere is of a particular view, this may not be persuasive in itself. Even famous professors change their minds. Is the professor right or wrong in this particular instance? That is what should be discussed for the benefit of the Arbitral Tribunal.

One author's views may be discussed in detail and shown to be correct. This is more persuasive than citing many authors who are said to be of the same view, but without any argument in support.

Similarly, to say that a particular Arbitral Tribunal was of a particular view is not helpful. One would need to know which tribunal this was, who were the members, where it was sitting, who were the Parties, what were the issues. In short, all the things that, as one learns in law school, must be discussed when one reads a precedent.

It is better to use one case, but one on point, and discuss it in all its aspects, rather than to use many cases, none of which are properly relevant to the instant case.

684. Q: What are the provisions of the law that apply to the merits of the contractual issues?

A: In short, first the Contract. But the Contract must be interpreted according to principles of the applicable law, with gaps filled by the method and the means provided by that law. Then the statutory law, or case law or doctrinal writing if that is also a source of law, are relevant.

685. Q: So you need to know the applicable law right from the start?

A: Yes, even though somebody will say that the Contract speaks for itself.

686. Q: The *lex arbitri* and the chosen Arbitration Rules give the Parties the right to choose the law applicable to the merits. Should they exercise that choice?

A: Yes. There are replacement mechanisms, but it is far more convenient if the Parties exercised their choice.

They should however choose carefully, after having done their homework.

687. Q: In negotiations, each Party usually starts insisting that the law applicable to the merits should be its own. Is this unreasonable?

A: Not entirely. Usually a Party has easier access to lawyers in its own jurisdiction. Obtaining their opinion on a proposed agreement will be easier and cheaper than obtaining an opinion on the basis of another law. And if your local lawyer, applying your own law, has already told you that your position is strong, why stick your neck out for another law? However, your case may be equally strong under another law, and perhaps even stronger.

Unfortunately, there are local lawyers who are too close to their client and too weak to do what they *should* do: advise their client honestly and objectively, even if the case is weak.

Local lawyers may unfortunately also support the local law approach for less admirable reasons. All things being equal, they may be greedy and prefer the option that gives them more work.

Local lawyers are at the root of many problems in international arbitration. *A lawyer's foremost concern should be the interest of the client, not the lawyer's own.*

688. Q: Surely certainty should be valued? And there is more certainty about one's own law than about some faraway, exotic legal system.

A: Sometimes this is true, but it all depends on the legal systems.

One reason for legal uncertainty may be that the applicable legal system is simply not designed to deal with complex commercial matters on a large scale. All domestic laws started out as laws dealing with small local disputes in agricultural societies. Some laws have not evolved beyond that stage, even though society has.

689. Q: Why are laws often backwards?

A: Change is costly.[193]

Change may sometimes even be impossible, because the law has a religious foundation that cannot be shaken. It would be blasphemous to try and improve law that was given by God personally.

690. Q: In modern societies ...?

A: Regardless of the development of society, even non-religious law may be mysterious. The outcome of any dispute before the State Courts is then too certain or too uncertain.

691. Q: Too certain?

A: Because the local courts will in reality just follow the principle that the local or more influential Party must win, regardless of the legal situation.

692. Q: Too uncertain?

A: In some State Courts, the outcome will not depend on the law but on bribery. Try to obtain a legal opinion about the law of a country low on the list of Transparency International. The legal opinion will be very long, learned, and convoluted. It will be, in one word, useless, because State Court decisions in such countries are not taken on the basis of the law at all.

693. Q: Under these circumstances, is it not better to go for one's own law?

A: Not necessarily. Even if our own jurisdiction is one where the law is reasonably developed, and really and honestly applied, there may be a realistic possibility of another law being chosen that is *also* reasonably predictable in its outcome. So it would be foolish to prefer one's own law without having engaged in a comparative law analysis.

193. See questions 695 et seq.

694. Q: An example?

A: There are countries where local distributors succeeded in obtaining protective legislation providing for substantial severance payments upon termination of an agency relationship. In other countries, there is no such protection for commercial agents.

In one case, an Italian distributor believed that its own law would favor it. However, on this point, it did not. Its German supplier readily agreed to the application of Italian law. This was, for the German supplier, an elegant way to get out of the substantial protection for commercial agents provided in German legislation. Had the German Party insisted on German law, this would have been an own goal.

695. Q: We often hear that the applicable law does not really matter, because most laws lead to the same result. Is this not true?

A: In many cases, but not always. There are many different laws out there. Each law is the product of the interplay between various *interests*,[194] and the interests that are at play are not always the same.

696. Q: Do you have examples?

A: We just had one on commercial agency.[195] Here are some more: Some countries were once emigration countries but are now immigration countries. Some economies import goods and export technology. Some produce raw materials for export. Some have important banks that provide credit worldwide. Some have important debtors. Comparative law reflects economic interests of the kind just mentioned, and these change. Some laws will favor manufacturers, some will favor bankers, some will favor debtors or farmers and so on. Religion and ideology also have an enormous impact. Change is costly, so even if you would do things differently if you could start from scratch, in the short run it is cheaper to just leave things as they are. *Inertia* explains why legal fossils are encountered in many jurisdictions.

697. Q: Are there special areas where the applicable law *regularly* makes a difference?

A: Yes, for instance with respect to statute of limitations questions. For example, under Swiss law the statute of limitations on claims in construction Contracts for plant and equipment is just one year, but if the Contract is a building Contract, the statute of limitations is five years. Or take the whole area of *interest*.[196] This is often heavily influenced not just by debtors (as in the Midwestern states of the United States), but by religion and ideology. Depending on the rates and on the way interest is calculated, the

194. See above question 694.
195. See above question 694.
196. See questions 845 et seq.