Doch sind diese Schwierigkeiten überwindbar, indem man sich jeweils die Frage stellt, ob mit dem Entscheid ein quantifizierbarer Teil des Verfahrens abgeschlossen wurde. Immer, wenn dies – und sei es auch *inter alia*[62] – der Fall ist, muss der Entscheid *hinsichtlich dieses Teils* wie ein Voll-Endentscheid behandelt, d.h. eine Beschwerde dagegen sogleich im Anschluss an dessen Eröffnung erhoben werden.

Schließlich mag man befürchten, dass Unklarheiten bei der Abgrenzung der einzelnen Beschwerdegründe, etwa zwischen Art. 190 Abs. 2 lit. b und lit. c, mit der neuen Rechtsprechung stärker ins Gewicht fallen als bis anhin, da fortan bei Zwischenentscheiden zwischen den Beschwerdegründen nach lit. a, b und denjenigen nach lit. c-e strikt zu trennen ist.[63] Wir teilen diese Bedenken nicht: Zum einen werden die Abgrenzungsschwierigkeiten vielfach überbewertet;[64] zum anderen ist hier in jüngster Zeit in vielen Bereichen Klarheit geschaffen worden.[65]

VI. Fazit

Die beiden Entscheidungen BGE 130 III 76 und BGE 130 III 775 haben wesentliche Änderungen für das Beschwerderecht im Rahmen der internationalen Schiedsgerichtsbarkeit gebracht, indem sie zunächst die seit langem nahezu einstimmig geforderte Differenzierung zwischen Teil- und Zwischenentscheiden vollzogen haben. Darüber hinaus hat das Bundesgericht seine bisherige, verfehlte Auffassung über die Wechselwirkung zwischen dem 12. Kapitel des IPRG und dem OG aufgegeben. Teilentscheide werden nunmehr wie Endentscheide behandelt, während gegen Zwischenentscheide lediglich die in Art. 190 Abs. 2 lit. a, b IPRG genannten Beschwerdegründe gegeben sind. Durch diese Rückbesinnung auf klare und objektive Eintretenskriterien wird das Beschwerdeverfahren vor dem Bundesgericht nicht nur effizienter, sondern zugleich um einiges unkomplizierter und transparenter.

Summary
For the procedure on setting aside international arbitral awards issued in Switzerland under Switzerland's Private International Law Statute the Statute refers to the procedure on constitutional complaints. Within 30 days preliminary awards on the constitution or jurisdiction, or both, of the arbitral tribunal may and must be challenged, but not other preliminary awards. Partial awards which decide on part of the relief requested may and must be challenged as any final award within 30 days. The Swiss Federal Supreme Court clarified this in two leading decisions. The previous confusion has now come to an end. It was caused by the Swiss Federal Supreme Court failing to distinguish preliminary from partial awards and by applying norms on constitutional complaint too directly.

Sec. 47(2)(b) English Arbitration Act 1996: *"The tribunal may, in particular, make an award relating ... to a part only of the claims or cross-claims submitted to it for decision."*

61 Vgl. etwa § 38 f. DIS-Schiedsgerichtsordnung 1998; Rule 46 ICSID Convention 1965, dazu *Jagusch/Gearing*, in: Arbitration World, 2004, S. 57, 75. Die ICC Court schafft hier unnötige Verwirrung, weil sie von ihren Schiedsgerichten immer wieder verlangt, ihre Ausdrucksweise auf jene der ICC Rules abzustimmen.

62 Vgl. etwa BGE 118 II 508, 510, worin das Schiedsgericht sowohl einen Zwischenentscheid (Bejahung eines Klageanspruchs) als auch einen Teilentscheid fällte, indem es die Widerklage der Beklagten abwies.

63 Nach bisheriger Rechtsprechung konnten gegen einen Zwischenentscheid mit der Beschwerde nach lit. a, b auch weitere Beschwerdegründe geltend gemacht werden (lit. c-e), und zwar ohne dass ein nicht wieder gutzumachender Nachteil nachgewiesen zu werden brauchte, wenn die Rüge nach lit. c-e nicht offensichtlich unbegründet war, BGE 116 II 80, 85. Diese Rspr. dürfte mit den jüngsten Entscheiden hinfällig geworden sein, vgl. auch *Besson*, Jusletter 18.4.2005, Rn. 21. Das BGer erwähnte sie zwar in BGE 130 III 76, 80 im Rahmen der Zusammenfassung der bisherigen Rspr., begründete dann aber im Folgenden die neue, *sub* IV. geschilderte Rspr.

64 Dass die Grenzen zwischen den einzelnen Beschwerdegründen nicht immer in aller Schärfe und Absolutheit gezogen werden, zeigt sich daran, dass die herrschende Lehre Art. 190 Abs. 2 lit. e IPRG (*ordre public*) jeweils als Auffangtatbestand für alle diejenigen Verfahrensfehler versteht, die nicht mit Beschwerde gegen lit. a-d gerügt werden können, vgl. dazu Text bei Fn. 34.

65 Vgl. z.B. *Wiegand*, FS Kellerhals (Fn. 6), S. 127 ff.; *H. P. Walter*, ASA Bull. 2001, 217 ff. zur Abgrenzung zwischen Art. 190 Abs. 2 lit. b, c und d IPRG.

Arbitration under the Rules of the Chicago International Dispute Resolution Association (CIDRA)

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International arbitration has become the established method of determining international commercial disputes, and long-standing international arbitral institutions report a steadily increasing number of cases. Against this background, it is not entirely surprising that in recent years also a number of new arbitral centers have arrived on the international arbitration scene, most of them focusing on disputes involving parties from a particular country or region, but generally at the same time offering their services and their institutional rules to parties and arbitration practitioners from elsewhere in the world.

One of these newcomers is the Chicago International Dispute Resolution Association (CIDRA), whose Arbitration Rules entered into force on 1 July 1999.[1] *The present article attempts to*

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1 The Arbitration Rules of Chicago International Dispute Resolution Association (CIDRA), as effective on 1 July 1999. For the text of the CIDRA Rules, see *Hans Smit/Vratislav Pechota* (eds.), Smit's Guides to International Arbitration. Arbitration Rules – National Institutions, Vol. 1, 2nd ed.,

give an overview over the CIDRA Rules and comments on some of their distinctive features. In doing so, it may assist parties and their legal representatives in their decision about a possible choice of the CIDRA Rules, which – as far as could be ascertained – have not yet been subject to any reported case law and have only occasionally been referred to in legal writings.

I. The Arbitration Rules of the Chicago International Dispute Resolution Association (CIDRA)

The Chicago International Dispute Resolution Association[2] was established in 1997 as a not-for-profit corporation under the laws of Illinois (United States) intent on promoting international dispute resolution and improving Illinois international legal infrastructure.[3] As a first step, CIDRA enlisted the assistance of the International and Foreign Law Committee of the Chicago Bar Association in order to draft a modern arbitration statute, which in 1998 was enacted by the Illinois legislature as the Illinois International Commercial Arbitration Act (ICAA).[4]

Subsequently, CIDRA went on and adopted the CIDRA Rules, a set of institutional arbitration rules under which it has been serving as appointing authority and administrative body since the Rules entered into force on 1 July 1999. Although CIDRA was founded with a view to encourage arbitration of international commercial disputes in Illinois, the use of its rules in arbitration proceedings does neither require the place of arbitration to be in Illinois[5] nor the parties to have any particular connection to that State. The CIDRA Rules are accordingly of potential interest to every practitioner in the field of international commercial arbitration.

1. Legal background of the CIDRA Rules

The legal background against which the CIDRA Rules were drafted is marked by two sets of rules on international commercial arbitration, both of which were developed by the United Nations Commission on International Trade Law (UNCITRAL).[6]

a) The drafting model: the UNCITRAL Arbitration Rules

The text of the CIDRA Rules proper has clearly been modeled on the well-known UNCITRAL Arbitration Rules that were adopted by UNCITRAL on 28 April 1976 as a comprehensive set of rules for use in *ad hoc* arbitrations. By taking the UNCITRAL Rules as a model, the CIDRA has followed a substantial number of other arbitral institutions that have relied on the well drafted and time-tested UNCITRAL Rules when designing their institutional arbitration rules,[7] as – among others – the Iran-United States Claims Tribunal, the Hong Kong International Arbitral Centre and, most recently, the six Swiss Chambers of Commerce when harmonizing their rules through the Swiss Rules of International Arbitration.

In doing so, CIDRA has closely followed the text of the UNCITRAL Rules by not merely using them as a source of inspiration, but rather as a drafting model in full. In fact, the vast majority of the CIDRA Rules' provisions follow the wording of their counterpart UNCITRAL provisions word by word. Only occasionally the drafters have made changes and additions that were either required to adapt the UNCITRAL Rules to institutional arbitration, were considered to reflect modern practice in the field of international arbitration or, one might assume, were believed to constitute clarifications recommendable in order to secure the CIDRA Rules' acceptability to international parties, in particular those with a civil law background. Most of these deviations from the UNCITRAL Rules will be discussed in detail below.

b) The drafting background: the ICAA and the UNCITRAL Model Law

While the CIDRA Rules provide a comprehensive set of arbitration procedures, they do not exist in a legal vacuum, but operate subject to the rules of the applicable arbitration law (the *lex arbitri*). Article 1(2) CIDRA Rules explicitly acknowledges this important interaction by stipulating that "[t]hese Rules shall govern the arbitration except [...] where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot deviate".[8]

In view of the relevance of the *lex arbitri's* mandatory provisions, it is important to know which law of arbitration was taken into account during the development of the CIDRA Rules. To this end, CIDRA's draftsmen have emphasized that the Rules were purposely drafted in light of the Illinois International Commercial Arbitration Act,[9] CIDRA's "first-born". The text of this arbitration law is based on yet another UNCITRAL text, namely the Model Law on International Commercial Arbitration adopted on 21 June 1985 (the "Model Law"). The CIDRA Rules' drafting background accordingly justifies the prognosis that the Rules will work similarly well in arbitrations held in one of the numerous other Model Law jurisdictions, as *e.g.* Australia, Canada, Chile, Hong Kong, Germany, India, Japan, New Zealand, Nigeria, the Russian Federation, Singapore, Spain and – within the United States – California, Connecticut, Oregon and Texas.[10]

2. Interpretation of the CIDRA Rules

With a view to the practical application of the CIDRA Rules, it is furthermore submitted that the Rules' drafting history described above should also yield consequences for their interpreta-

2004, and *Eric E. Bergsten* (ed.), International Commercial Arbitration, IV. National Rules and Enactments, Release 99-2 (issued April 1999) and Release 99-4 (issued September 1999).

2 See CIDRA's official website at www.cidra.org.

3 *Peter V. Baugher/Steven M. Austermiller*, "A New Way to Resolve International Business Disputes in Illinois", 88 Illinois Bar Journal (2000), 583.

4 710 ILCS 30/1-1. For a commentary on the ICAA, see *Baugher/Austermiller* (supra fn. 3), 585-6.

5 This can implicitly be derived from Article 18(2) CIDRA Rules.

6 It has been stressed that "taken together, and despite some difference between them, the UNCITRAL Rules and the Model Law offer an increasingly well-tested package of solutions" (*Jack J. Coe, Jr.*, International Commercial Arbitration: American Principles and Practice in a Global Context, 1997, p. 88).

7 *Alan Redfern/Martin Hunter*, Law and Practice of International Commercial Arbitration, 4th ed., 2004, para. 1-108: "sensibly".

8 *Pieter Sanders*, "Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?", 20 Arbitration International (2004), 245 (commenting on Article 1(2) UNCITRAL Rules).

9 *Baugher/Austermiller* (supra fn. 3), 584.

10 As of 1 June 2005, the UNCITRAL Secretariat reports that legislation based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 has been enacted in a total of 51 jurisdictions.

tion: Whenever there is yet no reported case law on the CIDRA Rules' provision at issue and that very provision has been modeled on the UNCITRAL Rules, arbitrators and courts should look to case law and scholarly writings that have interpreted the relevant counterpart provision in the UNCITRAL Rules.[11]

This comparative approach can be deemed to be in accordance with both the intent of the drafters of the CIDRA Rules and the expectation of the parties, who will generally prefer an application of their chosen institutional rules that is in accordance with international arbitral practice and thus foreseeable to them (and their legal representatives). In addition, it is difficult to see why two provisions with an identical (or almost identical) wording should be interpreted differently, when a coherent interpretation and application of parallel arbitration rules would promote the effective resolution of international arbitral disputes.

An invaluable resource in predicting and evaluating the practical application of the CIDRA Rules can be found in the jurisprudence of the Iran-United States Claims Tribunal, which has been using a version of the UNCITRAL Rules amended for its use in institutional arbitration since 1981. The conventional wisdom is that this available and positive jurisprudence[12] has been influential in the now common designation of the UNCITRAL Rules in government and private arbitration clauses alike,[13] and it is likely that is has also contributed to the tendency among international arbitral centers to use the UNCITRAL Rules as a basis for their institutional rules.

3. Guiding Principles for Proceedings under the CIDRA Rules

In its Articles 1(3) and (4), the CIDRA Rules contain the first of their few rules not adopted from the UNCITRAL Rules. They define some guiding principles to be followed in CIDRA arbitrations by firstly committing each arbitrator to active case management (Article 1(3)), a tool that is often cited as the key to eliminating unnecessary prolongation in modern arbitral proceedings,[14] and furthermore listing a number of aims that CIDRA arbitrators are committed to achieve (Article 1(4)(a)-(g)), namely the holding of early pre-hearing conferences, the early refinement of issues, the establishment of expeditious schedules, the discouragement of "wasteful" pre-hearing activities, a thorough arbitrator preparation, the use of available technology and the encouragement of settlement where appropriate.

Most of these points are generally recognized in current international arbitration practice and do therefore not require any particular comments. Within the framework of the CIDRA Rules, they should on one hand be taken into account by the arbitrators when exercising their right to establish the appropriate procedure granted by Article 17(1) CIDRA Rules, and can on the other hand be relied upon when interpreting other provisions of the CIDRA Rules.

II. Initiating the Proceedings

Articles 2-6 CIDRA Rules govern the procedures to be followed during the initial phases of a CIDRA arbitration.

1. Statement of Claim and Notice of Arbitration

a) Required content of the Statement of Claim

While, under the UNCITRAL Rules, the notice of arbitration (addressed in Article 3) is to be distinguished from the statement of claim (governed by Article 18),[15] Article 3 CIDRA Rules - under the heading "Statement of Claim and Notice of Arbitration" - combines the content of the two provisions, thus introducing a deviation from the UNCITRAL Rules not dissimilar to Article 18 of the Iran-U.S. Claims Tribunal Rules of Procedure.[16] Under Article 3 CIDRA Rules, already the Claimant's first communication initiating the arbitral proceedings (the statement of claim) is thus required to contain a number of specific details about the dispute and the arbitration that is about to be commenced, among them a notice of arbitration demanding that the dispute be referred to arbitration (Article 3(3)(a) CIDRA Rules).

b) Notification to the other party

The question of how the Statement of Claim is to be notified to the other party is addressed by Article 2(1) CIDRA Rules.[17] While the point as to notice is a matter of formality, it is, as has been noted by well-known commentators, important nonetheless.[18]

aa) Relevance of form requirements for the notification

The reason is that any agreement by the parties as to conditions of form for the notification must be enforced by the arbitrators.[19] Its practical importance is underlined by the fact that, under Article V(1)(b) New York Convention, enforcement of an award may be refused if "the party against whom the award is invoked was not given proper notice [...] of the arbitration proceedings". Based on the same ground, Article 34(2)(a)(ii) Model Law allows for an award be set aside by the courts at the place of arbitration.[20]

In order for a notice to be "proper" in the sense employed by these provisions, it has to comply with the method of notifying agreed to by the parties, either by specific contractual stipulation or by reference to institutional arbitration rules.[21] In this

11 For a similar approach see *Menno Aden*, Internationale Handelsschiedsgerichtsbarkeit, 2nd ed., 2003, p. 574 (with respect to the interpretation of the Model Law, which has also been partially modeled on the UNCITRAL Rules).

12 See in particular *Jacomijn J. van Hof*, Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal, 1991.

13 *Lucy Reed/Stephanie Hill Rosenkranz*, "The UNCITRAL Rules as applied in the Iran-US Claims Tribunal", in *Gabriele Kaufmann-Kohler/Blaise Stucki* (eds.), The Swiss Rules of International Arbitration. ASA Swiss Arbitration Association Conference on January 23, 2004, ASA Special Series No. 22 (2004), p. 119.

14 *Coe* (supra fn. 6), p. 68.

15 *Aden* (supra fn. 11), p. 586; *Rolf Trittmann/Christian Duve*, "Uncitral Arbitration Rules", in: Frank-Bernd Weigand (ed.), Practitioner's Handbook on International Arbitration, 2002, p. 326.

16 For this provision's wording, see *van Hof* (supra fn. 12), p. 119-20.

17 The provision mirrors Article 2(1) UNCITRAL Rules.

18 *Redfern/Hunter* (supra fn. 7), para. 10-39.

19 *Emmanuel Gaillard/John Savage* (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 1213.

20 According to *Redfern/Hunter* (supra. fn. 7), para. 10-39, Article 34(2)(a)(ii) is the most important ground for vacatur under the Model Law.

21 Cour d'appel Paris, 17 January 1992, Revue de l'arbitrage 1992, 656; *Peter Gottwald*, in: Münchener Kommentar zur ZPO, 2nd ed., 2001, Art. V UNÜ

respect, Article 2(1) CIDRA Rules requires notices and communications under the CIDRA Rules to be "physically delivered to the addressee" or to be "delivered at his habitual residence, place of business or mailing address". In addition, Article 3(1) CIDRA Rules calls for the submission of a "written" statement of claim.

bb) Notification by electronic mail?

A question that might arise in this context is: Can a statement of claim be properly submitted *by electronic mail (e-mail)* when the parties have agreed on arbitration under the CIDRA Rules? In view of the ongoing technological advancement, it is surely only a matter of time before parties will increasingly seek to initiate arbitral proceedings by e-mail.[22] While other institutional arbitration rules[23] explicitly provide for notices to be made by electronic means of communication,[24] the wording of Articles 2(1), 3(1) CIDRA Rules is insofar open to interpretation.

To this end, the explicit requirement of the notice's *physical delivery* to the addressee (Article 2(1) CIDRA Rules) at first seems to speak against a submission in electronic form, and it has similarly been doubted if a requirement under the governing rules that statements of claim be "in writing" would be satisfied in cases of electronic communication.[25] Additionally, when taking into account the fact that the CIDRA Rules were drafted at a time when e-mail was already widely used, the omission of any reference to electronic means of communication could arguably be understood as indicating that the drafters of CIDRA Rules did not want to allow for a notification via e-mail.[26] The writing requirement contained in the UNCITRAL Rules has, however, been interpreted by scholars as allowing for delivery via e-mail.[27]

Yet a different approach that has been advocated would be to look to the law applicable to the merits of the dispute for guidance,[28] because some laws contain explicit rules on the interpretation of the term "in writing", as *e.g.* Article 13 of the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG). A number of courts have thus interpreted form requirements contained in procedural rules in light of, and with reference to, the substantive international law of contracts embodied in the CISG.[29] To this end, the clause "in writing" in Article 13 CISG is generally read as to include communications made through electronic mail.[30]

The decisive source of inspiration when interpreting the formal requirements contained in Articles 2(1), 3(1) CIDRA Rules should, however, be Article 1(4)(f) CIDRA Rules: By explicitly committing arbitrators to the use of "available technology", this provision makes clear that reliance on modern means of telecommunication is not only acceptable under the CIDRA Rules, but is even encouraged. This aim, however, could not be achieved if other provisions dealing with communications in general were interpreted narrowly. In the light of Article 1(4)(f) CIDRA Rules, Articles 2(1), 3(1) CIDRA Rules should thus be read as generally allowing for the statement of claim as well as any other notice under the CIDRA Rules to be submitted by electronic mail, save in cases where the other party is not equipped to handle e-mails.[31]

2. Recipient(s) of the Statement of Claim

The intended addressees of the Statement of Claim are specified in Article 3(1) CIDRA Rules, which requires the statement to be submitted both to CIDRA *and* the Respondent.[32] As, according to Article 3(5) CIDRA Rules, "CIDRA shall send a copy of the statement of claim and the documents annexed thereto to the respondent for his statement of defense", this first of all means that the Respondent will receive the Statement of Claim *twice* (most other institutional arbitration rules require the notice of arbitration to be filed with the arbitral institution only, which then will send copies to the other party[33]).

While the procedure prescribed by Article 3 CIDRA Rules might initially not cause more than an inconvenience to the Respondent, it at the same time creates the potential for more difficult legal problems:

a) The decisive moment – pick and choose?

Once a dispute between the parties has developed to a stage that makes the initiation of arbitral proceedings seem inevitable, time is frequently of the essence. To this end, under the CIDRA

para. 18; *Albert Jan van den Berg*, The New York Arbitration Convention of 1958, 1981, p. 303.

22 *Yves Derains/Eric A. Schwartz*, A Guide to the New ICC Rules of Arbitration, 1998, p. 50 (on the ICC Rules); see also *Coe* (supra fn. 6), p. 89.

23 All institutional arbitration rules referred to in the present article are cited in their version in force on 1 June 2005.

24 See Article 18(1) AAA Rules, Article 4.1 LCIA Rules.

25 *Coe* (supra fn. 6), p. 89.

26 This point has been made with respect to Article 8(2) Vienna Rules; see *Martin Niklas*, „Schiedsverfahren via Internet nach den Wiener Regeln", Internationales Handelsrecht (2004), 105.

27 *Sanders* (supra fn. 8), 261; *Aden* (supra fn. 11), p. 576 (on Article 1(1) UNCITRAL Rules); see also *Marc Blessing*, "Comparison of the Swiss Rules with the UNCITRAL Rules and others", in: Kaufmann-Kohler/Stucki (supra fn. 13), p. 27 (at least in cases where the parties have used electronic communication during the life of their contractual relationship). National arbitration legislation has been construed similarly, as *e.g.* the "written" agreement provisions of the U.S. Federal Arbitration Act in U.S. District Court, N.D.Ill., 11 May 2000 – *Lieschke et al. v. RealNetworks*, XXV Yearbook Commercial Arbitration (2000), 534.

28 U.S. District Court, S.D.N.Y., 14 April 1992 – *Filanto v. Chilewich*, 789 F. Supp. 1229; see also Supreme Court Spain, 17 February 1998 – *Epis-Centre v. La Palentina*, UNILEX; Larry A. DiMatteo et al., "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence", 34 Northwestern Journal of International Law and Business (2004), 324.

29 U.S. Court of Appeals, 9th Cir., 5 May 2003 – *Chateau des Charmes Wines v. Sabaté*, Internationales Handelsrecht (2003), 296; U.S. District Court – *Filanto v. Chilewich* (supra fn. 28); Supreme Court Spain – *Epis-Centre v. La Palentina* (supra fn. 28).

30 *Sieg Eiselen*, "Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980", 6 EDI Law Review (1999), 36; *Ulrich G. Schroeter*, "Interpretation of 'writing': Comparison between provisions of the CISG (Article 13) and the counterpart provisions of the PECL", 6 Vindobona Journal of International Commercial Law and Arbitration (2002), 273.

31 In the latter case, electronic mail is a technology which, in the sense employed by Article 1(4)(f) CIDRA Rules, is not "available".

32 Article 3(1) UNCITRAL Rules, having been designed for *ad hoc* arbitrations, merely requires the notice of arbitration to be given to the Respondent.

33 Article 11(1) CIETAC Rules, Article 4(1) ICC Rules, Article 6(1) DIS Rules, Article 1(1) LCIA Rules, Article 6(1) SCC Rules, Article 3(1) Swiss Rules; but see Article 2(1) AAA Rules requiring notice of arbitration to be given to the administrator and "at the same time" to the Respondent (under the AAA Rules, however, the statement of claim is not forwarded to the Respondent by the administrator).

Rules and most other arbitration rules, the moment when the Statement of Claim is received marks the relevant point in time for the calculation of a number of time limits, albeit with divers effects: While the receipt of the Statement of Claim stops some periods from running, other periods will start to run.

The problems that may arise under the CIDRA Rules in this context result from the unfortunate procedure enshrined in Article 3 CIDRA Rules which provides for three different points in time, all of which potentially can be relevant for the calculation of different time limits: (1) The date on which the Statement of Claim is received by CIDRA in accordance with Article 3(1) CIDRA Rules, (2) the date on which the Respondent receives the Statement of Claim "directly" submitted by the Claimant in accordance with Article 3(1) CIDRA Rules, and (3) the date on which the Respondent receives the Statement of Claim sent by CIDRA in accordance with Article 3(5) CIDRA Rules.

In international arbitral proceedings in which the Claimant, the Respondent and CIDRA will often be located in three different countries (and potentially even different parts of the world), it can be safely assumed that there often will be a gap of at least a few days between each of those three dates, and these few days can in practice easily make or break a case. It is therefore necessary to look at the different relevant time limits to see how they are affected by the initiation of arbitral proceedings under the CIDRA Rules:[34]

b) Limitation Period

Under most national limitation regimes[35] as well as under the United Nations Convention on the Limitation Period in the International Sale of Goods 1974, the limitation period ceases to run (or is interrupted) when either party "commences" arbitral proceedings. To this end, Article 3(2) CIDRA Rules explicitly stipulates that arbitral proceedings shall be deemed to commence on the date on which the statement of claim is received by CIDRA, a clear-cut rule that in comparable form can be found in a number of other institutional arbitration rules.[36] (Both Article 3(2) UNCITRAL Rules and Article 21 Model Law on the contrary consider the date of receipt by the Respondent as decisive.)

The approach followed in the CIDRA Rules has been criticized as inappropriate on the ground that the statute of limitations should continue to run until the notice of arbitration is received by the adverse party,[37] a rule generally accepted in domestic litigation.[38] Article 3(2) CIDRA Rules can indeed lead to different results as, under the latter provision, cessation of the limitation period also may occur in situations where only CIDRA has received the Statement of Claim, but the Respondent has not. It has therefore been argued that the rule should not be read as dealing with the limitation period, but that the receipt of the notice of arbitration by the Respondent should be decisive instead.[39] In the present author's opinion, the latter suggestion should not be followed in view of the clear wording of Article 3(2) CIDRA Rules and the fact that, in international arbitration, the rule stated therein has insofar not given rise to significant problems.[40]

c) Other time limits

Article 4(1) CIDRA Rules fixes a *time limit* of thirty days *for the communication of the Statement of Defense*, calculated from the day the Respondent – not CIDRA – has received the Statement of Claim. This time-frame may be criticized as being unrealistically short for international arbitral proceedings,[41] a problem that can become particularly pressing under arbitration rules that provide for the proceedings to continue *ex parte* in case the Respondent has not submitted his statement on time (default).[42] Against this background, it might therefore be disputed between the parties if the time limit under Article 4(1) CIDRA Rules elapses thirty days after the receipt of the "first" or rather of the "second" Statement of Claim, or – different again – if the statement sent by the Claimant or by CIDRA should be regarded as the decisive one.[43] Under the CIDRA Rules, this constellation should nevertheless not be difficult for the tribunal to handle, as Article 22 CIDRA Rules allows for an extension of the time limit for the communication of the Statement of Defense, which – in view of the uncertainty caused by the applicable rules themselves – would arguably be justified.

The situation might be more difficult where the 15-day *time limit for the parties' agreement on the number of arbitrators* (Article 7 CIDRA Rules) is concerned, as this period does not seem to be covered by the extension rule of Article 22 CIDRA Rules.[44] When considering a hypothetical case in which the Claimant has offered to fix the number of arbitrators at three (either expressly according to Article 3(3)(h) CIDRA Rules or impliedly, *e.g.* by nominating a party-appointed arbitrator in his Statement of Claim in accordance with Article 3(3)(i) CIDRA Rules[45]) and the Respondent has accepted within 15 days after receiving the second notice (but not within that time-frame after having received the first notice), it does not seem clear if one or three arbitrators should be appointed. Again, the enforceability of the award is at stake, since Article 34(2)(a)(iv) Model Law as well as Article V(1)(d) New York Convention

34 Cf. *Hans Smit*, "Commentary on the AAA International Arbitration Rules", in: Smit/Pechota (supra fn. 1), p. 1-70 who, commenting on the similar Article 2(2) AAA Rules, fears "technical questions as to when exactly the service of the notice is complete".

35 On German law see *Ulrich G. Schroeter*, „Der Antrag auf Feststellung der Zulässigkeit des schiedsrichterlichen Verfahrens gemäß § 1032 Abs. 2 ZPO", German Arbitration Journal 2004, 292.

36 See *Schroeter* (supra fn. 35), 92.

37 *Smit* (supra fn. 34), p. 1-70 (on the almost identical Article 2(2) AAA Rules).

38 *Smit* (supra fn. 34), p. 1-70 citing case law from the U.S.

39 *Smit* (supra fn. 34), p. 1-70.

40 *Schroeter* (supra fn. 35), 292. A difficulty of a more technical nature may result from the fact that the Respondent will frequently not know the exact date on which the Statement of Claim was received by CIDRA. In order to remedy this problem, both Article 4(1) ICC Rules and Article 8 WIPO Rules explicitly require the administering institution to automatically inform the Respondent about the date the arbitration is deemed to have commenced – a procedure that would also be a useful feature in CIDRA arbitrations.

41 *Derains/Schwartz* (supra fn. 22), p. 67; *Trittmann/Duve* (supra fn. 15), p. 350.

42 See Article 28(1) sentence 2 UNCITRAL Rules. The CIDRA Rules, however, notably do not contain a rule dealing with this situation; see infra IV 4.

43 In addition, as noted by *Derains/Schwartz* (supra fn. 22), p. 51, the actual date of receipt of the statement by the Respondent may occasionally be disputed.

44 The reason being that the time limit in Article 7 CIDRA Rules is not a period of time "fixed by the arbitral tribunal or CIDRA" – it is rather provided for in the CIDRA Rules themselves.

45 It is important to note that the CIDRA Rules anticipate a proposal for the appointment of an arbitrator solely in the context of a tripartite panel (*cf.* Article 3(3)(i) CIDRA Rules), whereas Article 3(4)(a) UNCITRAL Rules leaves it to the Claimant if he wants to make a proposal for the appointment of a sole arbitrator or rather nominate an arbitrator in a three arbitrators' panel (*Trittmann/Duve* (supra fn. 15), p. 326).

allow an award to be successfully attacked if "[t]he composition of the arbitral authority [...] was not in accordance with the agreement of the parties".[46]

In addition to the examples mentioned, the date of receipt can be of relevance for the calculation of yet other time periods that may be either provided for in the contract,[47] in the law applicable to the merits[48] or elsewhere.[49]

3. Statement of Defense

Article 4(1), (2) CIDRA Rules deal with the Respondent's statement of defense and are noteworthy insofar as they deviate from Article 19(1), (2) UNCITRAL Rules by providing the Respondent with the opportunity to answer to the Claimant's notice *prior* to the constitution of the arbitral tribunal. The CIDRA Rules thereby remedy a serious deficiency of the UNCITRAL Rules[50] which frequently has been criticized by commentators observing that it is not good practice to constitute an arbitral tribunal without having any indication of the kind of a case that will be mounted in defense, as this may well bear on the required attributes of arbitrators.[51]

III. The Arbitral Tribunal

1. Number of Arbitrators

Article 7 CIDRA Rules dealing with the composition of the arbitral tribunal is modeled on Article 5 UNCITRAL Rules, albeit with one important difference: While the UNCITRAL Rules provide for three arbitrators in case the parties have not agreed otherwise, the CIDRA Rules call for the designation of a sole arbitrator. The latter solution is often recommendable[52] because it can reduce the costs of the arbitral proceedings quite significantly, as only one and not three arbitrators need to be compensated for their work.[53] On the other hand, the *automatic* appointment of a sole arbitrator where no other party agreement can be reached is not necessary suitable for every dispute:[54] As the landmark *Andersen* arbitration showed, cases involving difficult factual and legal questions or exceptionally high values can constitute a considerable burden for a sole arbitrator that might more appropriately be borne by a tripartite tribunal.[55] Unlike most other institutional rules,[56] Article 7 CIDRA Rules does in such a situation not authorize the administering institution to determine the number of arbitrators with regard to the particular circumstances of the case.

2. The Arbitrators' Independence and Impartiality

Articles 6(4), 9 and 10(1) UNCITRAL Rules make clear that each arbitrator appointed under those Rules has to be both independent and impartial. This is in full accordance with the position under the Model Law, as Article 12(2) Model Law requiring that an arbitrator must be independent and impartial is commonly considered to be a mandatory provision from which the parties cannot derogate.[57]

The CIDRA Rules in their Articles 8(2), 11(2) and 12(1) adopt the exact wording of the pre-cited provisions of the UNCITRAL Rules, but in Article 11(1) CIDRA Rules supplement them with an additional clause apparently copied from Article 7(1) ICC Rules, requiring that "[e]very arbitrator must be and remain independent of the parties involved in the arbitration". It can only be speculated what caused CIDRA to include this new provision in its Rules, but one possible reason could have been the wish to stress that indeed *every* arbitrator on a CIDRA tribunal – the presiding arbitrator and party-appointed arbitrators alike – is required to be independent from the parties: While the latter approach is in line with the general opinion and practice in international commercial arbitration,[58] it has in the past not necessarily been followed in the U.S., where party-nominated arbitrators are commonly regarded as non-neutral, unless an indication to the contrary is given.[59] CIDRA's attempted clarification in this matter has, however, resulted in an unfortunate inconsistency within the CIDRA Rules, as Article 11(1) CIDRA Rules now merely requires the arbitrator to be independent, while Article 12(1) CIDRA Rules also allows for his challenge based on an alleged impartiality.

IV. The Arbitral Proceedings

The CIDRA Rules' provisions on the conduct of the arbitral proceedings (Articles 17-29) contain a number of interesting innovations.

1. Interim Measures of Protection

In international arbitration practice, tribunals are frequently asked to grant interim measures of protection at a stage when the arbitral proceedings are still pending, and an award on the

46 See *Fouchard Gaillard Goldman* (supra fn. 19), para. 782.

47 For an example, see Cour d'appel Paris, 16 January 1986 – *Europmarkets v. Argolicos Gulf Shipping Co.*

48 As e.g. in Article 39(2) CISG.

49 *Fouchard Gaillard Goldman* (supra fn. 19), para. 1217 note that it is not uncommon for arbitrators to decide that interest will accrue on sums awarded to a party with effect from that date; an approach that is often followed independent from the applicable law.

50 *Blessing* (supra fn. 27), p. 28 characterizes this *lacuna* in the UNCITRAL Rules as "one of the most important elements to be considered in the framework of a revision of the UNCITRAL Rules".

51 *Blessing* (supra fn. 27), p. 30 fn. 16; *Jan Paulsson*, "Memorandum", in: Kaufmann-Kohler/Stucki (supra fn. 13), p. 286; *Reed/Rosenkranz* (supra fn. 13), p. 127.

52 *Aden* (supra fn. 11), p. 589.

53 Article 5 AAA Rules, Article 8(2) ICC Rules, Article 5(4) LCIA Rules, Article 6(2) Swiss Rules similarly provide for a sole arbitrator (unless the circumstances of the case require otherwise).

54 See *Trittmann/Duve* (supra fn. 15), p. 328; see also *Redfern/Hunter* (supra fn. 7), para. 4-18.

55 *Cf.* "The *Andersen* Arbitration", American Review of International Arbitration (1999), 438.

56 See supra fn. 53 and Article 16(1) SCC Rules.

57 *Derains/Schwartz* (supra fn. 22), p. 351 fn. 804; *Howard M. Holtzmann/Joseph E. Neuhaus*, A Guide To The UNCITRAL Model Law On International Commercial Arbitration, 1989, p. 409; *Redfern/Hunter* (supra fn. 7), para. 4-54.

58 See *Derains/Schwartz* (supra fn. 22), p. 108; *Jens-Peter Lachmann*, Handbuch für die Schiedsgerichtsbarkeit, 2nd ed., 2002, para. 1502; *Redfern/Hunter* (supra fn. 7), para. 4-53.

59 *Cf.* U.S. Court of Appeals, 7th Cir., 9 October 2002 – *Sphere Drake Insurance Limited v. All American Life Insurance Company*, 307 F.3d 617.

merits has yet to be made.[60] In a situation as this, a party may request an order from the tribunal aimed at maintaining or restoring the status quo pending determination of the dispute, directing a party or a third party to take action that would prevent (or refrain from taking action that is likely to cause) current or imminent harm, providing a means of preserving assets out of which a subsequent award may be satisfied, or preserving evidence that may be relevant to the resolution of the dispute.

An arbitrator's necessary power to grant such interim measures of protection primarily turns upon the terms of the parties' arbitration agreement and the applicable institutional arbitration rules.[61] The frequently criticized legal uncertainties concerning the tribunal's powers to this end and the possibilities of enforcement[62] are mostly due to the fact that the majority of arbitral rules and arbitration laws currently in force do not provide clear and detailed rules on this subject. In this respect, the CIDRA Rules are no different.

a) Scope of interim measures

The text of the pertinent Article 25 CIDRA Rules was *verbatim* adopted from Article 26 UNCITRAL Rules, and its interpretation accordingly raises a number of questions that have already for some time been discussed under the latter provision. Firstly, it is not entirely clear which interim measures the tribunal may grant,[63] as Article 25(1) CIDRA Rules broadly speaks of "any interim measures it [i.e. the tribunal] deems necessary",[64] but adds the words "in respect of the subject-matter of the dispute". The latter phrase might be taken as a limitation of the tribunal's powers,[65] thereby excluding measures aimed at stopping a party from using intellectual property rights,[66] at securing future arbitration awards[67] or preventing the flight of assets.[68] The practice of the Iran-U.S. Claims Tribunal arguably supports this narrow interpretation, as that Tribunal usually relied on "inherent powers" (and not Article 26 UNCITRAL Rules) when the relief requested was something other than the "conversation of goods".[69]

b) Form of interim measures

As to the form of interim measures, Article 25(2) CIDRA Rules provides that they "may be established in the form of an interim award", while Article 17 Model Law only addresses an order.[70] An important difference between interim awards and procedural orders (which could both be issued under the CIDRA Rules[71]) lies in their enforceability, as the New York Convention, according to its Article 1(1), only applies to arbitral awards. The preference some arbitral tribunals have thus understandably shown for interim awards does, however, not always guarantee their enforceability abroad, as courts might (as they have done in the past[72]) refuse their enforcement on the ground that such an award is not final as required by Article V(1)(e) New York Convention.[73]

c) Ex parte interim measures?

A highly disputed question yet awaiting a satisfactory solution concerns the power of arbitral tribunals to grant interim measures of protection on an *ex parte* basis.[74] While in a number of situations there is clearly a practical need for such a procedure, this step pits the effectiveness of arbitral proceedings against the parties' right to be heard, thereby inevitably raising the question if the standards protected by Article 18 Model Law and Article V(1)(b) New York Convention are met.[75] In the present context, this difficult issue cannot be dealt with in sufficient detail to reach any definite conclusion. It is submitted, however, that each party's right to a full opportunity to present his case does not necessary mean that the tribunal can never proceed in absence of a party – the other party could (and indeed must) alternatively be heard once the measure has been granted, with the possibility of the measure subsequently being lifted or modified.[76] A possible approach could thus be to interpret Article 25(1) CIDRA Rules as implicitly allowing for *ex parte* interim measures of protection to be granted under narrow conditions (subject to contrary mandatory rules of the *lex arbitri*), but to construe Article 25(2) CIDRA Rules as entitling the same arbitral tribunal to award full compensation for damages incurred should the interim measure later prove to have been unjustified.[77]

2. Applicable Law and Remedies

The determination of the applicable substantive law is a critical issue in international arbitration, as it has legal, practical and

60 During the early stages of the arbitral proceedings, when the tribunal has not yet been appointed, requests for interim measures have by necessity to be directed to the courts; *see* Article 25(3) CIDRA Rules, Article 9 Model Law.

61 *Gary B. Born*, International Commercial Arbitration in the United States, 1994, p. 761.

62 *Born* (supra fn. 61), p. 756; *Trittmann/Duve* (supra fn. 15), p. 353.

63 *Stewart Abercrombie Baker/Mark David Davis*, The UNCITRAL Arbitration Rules in Practice, 1992, p. 133.

64 *Jason Fry*, "Interim Measures of Protection: Recent Developments and the Way Ahead", International Arbitration Law Review 2003, 154: broad discretion; similarly *Trittmann/Duve* (supra fn. 15), p. 353.

65 *Grégoire Marchac*, "Interim Measures in International Commercial Arbitration under the ICC, LCIA and UNCITRAL Rules", American Review of International Arbitration 1999, 128.

66 *Julian D.M. Lew/Loukas A. Mistelis/Stefan M. Kröll*, Comparative International Commercial Arbitration, 2003, para. 23-40.

67 *Houston Putnam Lowry*, "Recent Developments in International Commercial Arbitration", 10 ILSA Journal of International and Comparative Law (2004), 340: "unclear".

68 *Lew/Mistelis/Kröll* (supra fn. 66), para. 23-26; *Redfern/Hunter* (supra fn. 7), para. 7-26.

69 *Baker/Davis* (supra fn. 63), p. 134; *cf.* Iran-U.S. Claims Tribunal, 21 June 1985 – *Behring International v. Iranian Air Force*, 8 Iran-U.S. Claims Tribunal Reports (1985), 275.

70 *Pieter Sanders*, The Work of UNCITRAL on Arbitration and Conciliation, 2001, p. 40, stressing that this is the "one important aspect" in which both regulations differ.

71 *Lew/Mistelis/Kröll* (supra fn. 66), para. 23-78 (on the UNCITRAL Rules).

72 Supreme Court of Queensland, 29 October 1993 – *Resort Condominiums v. Bolwell*, XX Yearbook Commercial Arbitration (1995), 628.

73 *Redfern/Hunter* (supra fn. 7), para. 7-16.

74 The issue has since 2001 been under discussion in an UNCITRAL Working Group charged with preparing a revised text for Article 17 Model Law; see *Fry* (supra fn. 64), 154-5.

75 *Born* (supra fn. 61), p. 770-1; *Hans van Houtte*, "Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration", 20 Arbitration International (2004), 89.

76 *Fry* (supra fn. 64), 155; *Lew/Mistelis/Kröll* (supra fn. 66), para. 23-73.

77 *Fry* (supra fn. 64), 156; *Smit* (supra fn. 34), p. 1-100; *Trittmann/Duve* (supra fn. 15), p. 353; but see also the different wording of Article 17 Model Law.

psychological influence on every arbitral proceeding. As commentators have remarked, "[n]othing is more important in any international arbitration than knowing the legal or other standards to apply to measure the rights and obligations of the parties."[78]

The determination of the applicable law and remedies is governed by Article 32 CIDRA Rules which mirrors Articles 33(1)-(3) UNCITRAL Rules, but adds the new Article 32(4) CIDRA Rules devoted to the question of punitive or exemplary damages. Against this background, the problems potentially connected to some of these provisions do not primarily result from the fact that the relevant rules are yet untested, but rather from their approach being partially outdated.

a) Choice of law by the parties

Like all other modern institutional rules and arbitration laws, Article 32(1) sentence 1 CIDRA Rules first orders the tribunal to apply the law designated by the parties, thereby confirming the paramount importance of party autonomy in international arbitration. The problems that this provision may cause arise from the fact that it apparently *limits* the parties' freedom of choice by merely allowing them to designate the "law" to be applied to the merits of their dispute, rather than the "rules of law" (as Article 28(1) Model Law and most institutional arbitration rules[79]). The reference to "the law" in Article 33(1) UNCITRAL Rules (that served as a model to the provision discussed here) has traditionally been construed as referring to the internal law of one State only;[80] an understanding that was confirmed during the drafting process of the Model Law.[81]

It is therefore doubtful if, under the wording of Article 32(1) sentence 1 CIDRA Rules, an arbitral tribunal has the authority to apply a non-national system of law. This question may essentially arise in three scenarios, namely where the parties have agreed either on (1) an international Convention like the CISG, (2) an international set of rules as the UNIDROIT Principles on International Commercial Contracts or (3) a clause designating "general principles of international commercial law"[82] as the legal rules to be applied to their dispute. In particular, clauses reading "This contract shall be governed by the 1980 Convention on Contracts for the International Sale of Goods"[83] or alike are not infrequently used in practice and have emerged especially in contracts also containing an arbitration agreement.[84] In all the examples listed above, the choice of law clause invokes rules that as such cannot be qualified as the internal law of one particular country, and thus do not seem to be covered by Article 32(1) sentence 1 CIDRA Rules.

It is nevertheless submitted that the choice of a non-national system of law should be upheld and followed by a tribunal acting under the CIDRA Rules, as such a choice of law clause simply constitutes a contractual modification of Article 32(1) CIDRA Rules: As Article 1(1) CIDRA Rules makes unequivocally clear, CIDRA arbitrations shall only be conducted in accordance with these Rules "subject to such modification as the parties may agree in writing", provided that such modification is not "in conflict with a provision of the law applicable to the arbitration from which the parties cannot deviate" (Article 1(2) CIDRA Rules). At least in cases where the *lex arbitri* is based on the Model Law,[85] the parties' choice of a non-national system of law is in full accordance with the applicable law, as Article 28(1) Model Law explicitly allows the parties to choose "rules of law".[86] It is therefore commonly accepted that both a direct choice of the CISG and of the UNIDROIT Principles is admissible under Article 28(1) Model Law,[87] although the situation with respect to a choice of "general legal principles" is not similarly clear.[88]

b) Determination of the applicable law by the arbitral tribunal

Where and as far as no choice by the parties has been made, it is left to the arbitral tribunal to determine "the law" to be applied to the merits of the dispute (Article 32(1) sentence 2 CIDRA Rules). In view of the narrow wording of this provision, which is mirrored by Article 28(2) Model Law,[89] a direct application of the CISG or the UNIDROIT Principles would seem excluded, as long as a traditional conflict of laws doctrine is followed.[90] In support of such a construction of Article 32(1) sentence 2 CIDRA Rules, one might point to the fact that the reference to the "law" was chosen by the drafters at a time when this issue had been extensively discussed and most other arbitration regulations had intentionally opted for a wider formula.

Convincing reasons why an arbitral tribunal should not apply an international Convention like the CISG in cases where it is not automatically applicable (and the parties have not chosen it themselves) are, however, difficult to find: The content of the CISG is easily determinable and accessible in a number of languages, and it provides a juridical order capable of filling contractual gaps and providing rules of interpretation (although recourse to another law acting as a gap-filler may be necessary whenever a certain issue is not governed by the Convention, Article 7(2) CISG). Furthermore, the Convention

78 *Lew/Mistelis/Kröll* (supra fn. 66), para. 17-3.

79 Article 28(1) AAA Rules, Article 17(1) ICC Rules, Article 23(1) DIS Rules, Article 22(3) LCIA Rules, Article 33(1) Swiss Rules, Article 59(a) WIPO Rules. A restriction to the choice of "law" is currently only found in Article 16(1) Vienna Rules and Article 43(1) CIETAC Rules.

80 *Aden* (supra fn. 11), p. 650; *Blessing* (supra fn. 27), p. 53; *van Hof* (supra fn. 12), p. 226.

81 *Aron Broches*, Commentary on the UNCITRAL Model Law on International Commercial Arbitration, 1990, p. 143.

82 It should be noted that the Iran-U.S. Claims Tribunal, 28 July 1989 - *Watkins-Johnson Company v. Iran*, XV Yearbook Commercial Arbitration (1990), 226 held that the rules of the CISG are an expression of "the recognized international law of commercial contracts".

83 Example by *John O. Honnold*, Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed., 1999, p. 86.

84 See the examples cited by Georgios C. Petrochilos, "Arbitration Conflict of Laws Rules and the 1980 International Sales Convention", 52 Revue Hellenique de Droit International (1999), 208.

85 The vast majority of adopting States uses the wording suggested by the Model Law, except for Bulgaria and Tunisia (*Peter Binder*, International Commercial Arbitration in UNCITRAL Model Law Jurisdictions, 2000, para. 6-008).

86 The Analytical Commentary on the UNCITRAL Model Law, Art. 28 para. 4, written in 1985, still considered the reference to "rules of law" in Article 28(1) Model Law as "a progressive step".

87 *Michael Joachim Bonell*, in: Cesare Massimo Bianca/Michael Joachim Bonell (eds.), Commentary on the International Sales Law: The 1980 Vienna Sales Convention, 1987, Art. 6 para. 3.5.1; *Holtzmann/Neuhaus* (supra fn. 57), p. 768; *Redfern/Hunter* (supra fn. 7), para. 2.71; *Marianne Roth*, "UNCITRAL Model Law", in: Weigand (supra fn. 15), p. 1253.

88 *Holtzmann/Neuhaus* (supra fn. 57), p. 768 reporting on the legislative history.

89 It should be noted that more than half of the adopting jurisdictions have used a wording different from Article 28(2) Model Law; see *Binder* (supra fn. 85), para. 6-012.

90 *Roth* (supra fn. 87), p. 1254-5: only a national system of law.

being a uniform sales law capable of being ratified by any State, the appropriateness of its rules must similarly be presumed.[91]

It is accordingly submitted that Article 32(1) sentence 2 CIDRA Rules and Article 28(2) Model Law should be construed as allowing for direct recourse to the CISG[92] and the UNIDROIT Principles, without unduly restricting the tribunal to the application of the national law of any given State.[93]

c) Punitive damages

The power of an arbitral tribunal to award punitive or exemplary damages to a party firstly depends on the law applicable to the substance of the dispute.[94] Even where this law provides for punitive damages to be granted, the tribunal will secondly have to look to the law of the seat of arbitration[95] and thirdly to the law of the country where the award is likely to be enforced, as some national laws consider the enforcement of awards granting punitive damages as being contrary to public policy (Article V(2)(b) New York Convention).[96]

Beside this complex legal situation, the issue of punitive damages in international arbitration also involves important psychological aspects and is often considered to be disturbing by parties unaccustomed to the U.S. legal system. Article 32(4) CIDRA Rules therefore constitutes a useful exercise of party autonomy by introducing an express waiver of any right to punitive, exemplary or similar damages,[97] although it should be noted that comparable clauses have not always been upheld by U.S. courts.[98]

3. Evidence

Articles 23, 24 CIDRA Rules set out a number of rules with regard to evidence in CIDRA arbitrations. Although these provisions largely mirror Articles 24, 25 UNCITRAL Rules, they introduce two important modifications.

a) Burden of Proof

Article 23(1) CIDRA Rules commences by laying down a principle on the burden of proof that, as such, seems to be generally accepted.[99] The provision, nevertheless, might create more problems than it solves,[100] because frequently a rule on who should bear the burden of proving particular facts is also contained in the substantive law applicable to the merits of the dispute: This is the case in national contract laws of civil law jurisdictions,[101] but also in instruments developed on an international level, as the Vienna Sales Convention.[102] Under these rules, the burden of proof may well rest on a party other than the one asserting the facts necessary to constitute a claim or defense.[103] It is submitted that, in such a case, the tribunal should first look to the law applicable to the merits to determine the burden of proof, as the rules contained therein will have been crafted with the particular necessities of the subject matter in mind, and will thus be better suited than a general principle like the one discussed here.[104] Accordingly, Article 23(1) sentence 1 CIDRA Rules should only be applied to cases in which the applicable law itself does not allocate the burden of proof.

Article 23(1) CIDRA Rules subsequently goes beyond the scope of Article 24(1) UNCITRAL Rules by adding a second sentence, which – somewhat cryptically – reads: *"That burden is not on each element upon which a party has the burden of proof by proving to the satisfaction of the arbitrator that it is more profitable than not that each of these elements exist."*[105] This rule provides little guidance to the parties and the arbitrators, and is therefore unlikely to constitute a deviation from the practical rule that a chairman at the Iran-U.S. Claims Tribunal is reported to have described as follows: "Meeting the burden of proof means that you'll have to convince *me*."

b) Pre-trial Discovery

The use of the permissive and wide-ranging pre-trial discoveries common in U.S. courts has traditionally been a matter of significant concern for parties from a civil law background, who often view the American system as costly, time consuming, and disruptive.[106] While arbitration agreements often are viewed as a tool offering a possibility to avoid or at least restrict the scope of pre-trial discovery,[107] most institutional arbitration rules in fact fail to specifically address this issue and might therefore be construed as allowing for an (albeit limited) conduct of discovery.[108] To this end, Article 24(6) CIDRA Rules adopts a straightforward position by explicitly prohibiting "pre-trial discovery as known in common law countries",[109] a clarification that will be welcomed by many parties and practitioners.[110]

91 *Petrochilos* (supra fn. 84), 208.

92 "Direct recourse" being understood as applying the Convention irrespective of any contrary mandatory rules of the *lex contractus*. For a contrary approach *see* ICC Award 7585/1994, Journal du Droit International (1995), 1016.

93 ICC Award 8817/1997, XXV Yearbook Commercial Arbitration (2000), 358.

94 *Redfern/Hunter* (supra fn. 7), para. 8-11.

95 *Redfern/Hunter* (supra fn. 7), para. 8-11.

96 This is the case in Germany, *cf.* Federal Supreme Court Germany, 4 June 1992, Neue Juristische Wochenschrift (1992), 3104.

97 Article 28(5) AAA Rules contains an identical provision.

98 See U.S. Court of Appeals, 8th Cir., 17 August 2001 – *Gannon v. Circuit City Stores, Inc.*, 2001 WL 930550; Supreme Court of Alabama, 5 October 2001 – *Cavalier Manufacturing v. Jackson*, 2001 WL 1177028.

99 *Aden* (supra fn. 11), p. 626: „weltrechtlicher Grundsatz des Beweisrechts"; *Baker/Davis* (supra fn. 63), p. 109.

100 See the critical comments by *Smit* (supra fn. 34), p. 1-95 on the similar Article 19(1) AAA Rules.

101 *Lew/Mistelis/Kröll* (supra fn. 66), para. 22-25; *Trittmann/Duve* (supra fn. 15), p. 350.

102 Federal Supreme Court Germany, 9 January 2002, Internationales Handelsrecht (2002), 19; Commercial Court Zurich, 9 September 1993, CLOUT.

103 *Smit* (supra fn. 34), p. 1-95; *Trittmann/Duve* (supra fn. 15), p. 350.

104 The Iran-U.S. Claims Tribunal similarly tempered its application of Article 24(1) UNCITRAL Rules by shifting the burden or employing presumptions; see *Baker/Davis* (supra fn. 63), p. 109-10.

105 This is the text of Article 23(1) sentence 2 CIDRA Rules as published in *Smit/Pechota* (supra fn. 1) and on CIDRA's website (supra fn. 2). It should be noted that the provision's wording printed in *Bergsten* (supra fn. 1) in two respects reads somewhat differently: It commences with the words "That burden is on each ..." (omitting the "not") and then defines the relevant standard as "more probable than not" (rather than "more profitable than not").

106 *Baugher/Austermiller* (supra fn. 3), 587; *Born* (supra fn. 61), p. 7.

107 *Lachmann* (supra fn. 58), para. 142.

108 See on Article 20(5) ICC Rules *Derains/Schwartz* (supra fn. 22), p. 261 who make clear that this provision leaves it to the arbitral tribunal to decide on a case-by-case basis how much, if any, discovery should be allowed; *Lachmann* (supra fn. 58), para. 1552.

109 § 20-50(d) ICAA contains a similar provision.

110 *Baugher/Austermiller* (supra fn. 3), 587.

4. Default

Situations in which one of parties to the arbitration fails to participate in the proceedings or certain phases thereof ("default") are addressed in Article 27 CIDRA Rules. While this provision's paragraphs (2) and (3) have *verbatim* been copied from Article 28 UNCITRAL Rules, Article 27(1) CIDRA Rules departs from its model by providing: *"If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall order the proceedings to continue."*

The rationale behind this rule is difficult to determine. Indeed, one is tempted to believe that the provision has emerged from a – maybe unintentionally caused – fusion of the first sentence of Article 28(1) UNCITRAL Rules (dealing with the Claimant's default, and calling for an order by the arbitral tribunal for the termination of the arbitral proceedings) and its practically much more important second sentence (devoted to the default of the Respondent and envisaging the tribunal's order that the proceedings shall continue). Against this background, a revision of Article 27(1) CIDRA Rules should be considered at the earliest opportunity.

V. The Award

Articles 30, 31 CIDRA Rules (on the award proper) and Articles 34-36 CIDRA Rules (on the interpretation and correction of the award and additional awards) almost exactly resemble their counterparts in the UNCITRAL Rules.[111] Article 30(1) CIDRA Rules also retains the *majority award requirement* of Article 31(1) UNCITRAL Rules which has been qualified as the "most important constraint" on the arbitrators' discretion in conducting the process of deciding the case[112] and criticized for burdening the presiding arbitrator with the onus to move the least unreasonable arbitrator[113] – an unfortunate rule that reportedly was the immediate reason for Judge *Bellet's* decision to retire from the Iran-U.S. Claims Tribunal.[114]

Article 32(4) CIDRA Rules calls for an award to be signed by the arbitrators and to contain the date on which and the *place where the award was made*, while Article 18(4) CIDRA Rules adopts the traditional rule providing that the award "shall be made at the place of arbitration". Similar requirements have in the past created controversy as to whether arbitrators have to travel just for signature,[115] a discussion that was much enhanced by the famous decision by the House of Lords in *Hiscox v. Outhwaite*.[116] Newer arbitration rules have accordingly been rephrased and now wisely provide that the award "shall *be deemed to* be made at the place of the arbitration",[117] an example that should arguably have been followed by CIDRA's draftsmen.

VI. Conclusion

An overall assessment of the CIDRA Rules leads to some promising results: The CIDRA Rules don't stop at copying the accepted UNCITRAL Rules, but rather add several modern arbitration features and also include a number of improvements over the UNCITRAL Rules where the latter have shown some deficiencies over the years. Since other provisions in the CIDRA Rules may, however, yield problematic results in practice, cautious practitioners might prefer to wait until CIDRA has developed a more extensive track record, and more practical experience in conducting arbitrations under the CIDRA Rules has emerged.

[111] Article 30(3) CIDRA Rules introduces a thirty day time limit for the making of the award (not contained in the UNCITRAL Rules), extendable at the discretion of CIDRA.

[112] *Baker/Davis* (supra fn. 63), p. 151.

[113] *Paulsson* (supra fn. 51), p. 287; *Reed/Rosenkranz* (supra fn. 13), p. 124; *Smit* (supra fn. 34), p. 1-106; *van Hof* (supra fn. 12), p. 212.

[114] *Paulsson* (supra fn. 51), p. 287.

[115] See *Trittmann/Duve* (supra fn. 15), p. 343: the arbitrators "have to return to the place of arbitration to sign the award"; *contra Blessing* (supra fn. 27), p. 41; *Sanders* (supra fn. 8), 253; *ibid.* (supra fn. 70), p. 9.

[116] House of Lords, 24 July 1991 – *Hiscox v. Outhwaite*, (1992) A.C. 594; *cf. Fouchard Gaillard Goldman* (supra fn. 19), para. 1240 fn. 103.

[117] *Cf.* Article 31(3) CIETAC Rules, Article 32(4) DIS Rules, Article 25(3) ICC Rules, Article 16(2) LCIA Rules, Article 32(1) SCC Rules, Article 16(4) Swiss Rules.

Mediation

The Proposal for an EU Directive on Certain Aspects of Mediation in Comparison with the Austrian Mediation Law

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On May 1, 2004 Austria had enacted the Federal Law on Mediation in Civil Matters (Zivilrechts-Mediations-Gesetz). *The question arises to what extent the Austrian Mediation Act corresponds with the envisaged EU directive on certain aspects of mediation in civil and commercial matters. This article presents the main provisions of the proposed directive, followed by an examination of Austria's compliance with the expected regulatory framework of the EU. The paper keeps the structure of the proposed directive, including the assessment of the Austrian mediation law at the end of each chapter.*

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