Guideline 11: Guidelines for arbitrators dealing with jurisdictional problems in international cases.

1. Introduction

1.1 We have previously issued guidelines on how to handle jurisdictional problems that arise in arbitrations taking place in England, Wales and Northern Ireland. These guidelines cover the problem from an international perspective.

1.2 The huge variety of issues that can arise in international arbitrations make it impossible to provide definitive and exhaustive guidance to arbitrators dealing with jurisdictional problems in such cases. These guidelines intend to provide the international arbitrator with an awareness of the key points that come up regularly and the basic principles so that he can react intelligently when jurisdictional issues arise. Since most jurisdictional disputes relate to arbitration clauses in contracts rather than agreements to submit existing disputes to arbitration, references to "arbitration clause" will also encompass agreements to submit existing disputes.

2. The issues that typically arise

2.1 It may be helpful to list at the beginning some of the most common types of issues that may be regarded as jurisdictional:
(1) identity of the parties;
(2) identity of the contracts subject to the arbitration clause;
(3) formal validity of the agreement to arbitrate;
(4) the effect of a problem with with the main contract on the validity of the arbitration clause (separability);
(5) whether a particular subject-matter can be arbitrated;
(6) time-limits for commencing proceedings;
(7) failure of a condition precedent to the right to arbitrate contained perhaps in an agreement to mediate in advance;
(8) whether the arbitrator(s) was or were validly appointed; and
(9) whether a particular remedy can be awarded.

2.2 Jurisdictional issues normally break down uneasily into three categories
(1) whether there is a valid agreement to arbitrate at all;
(2) whether the scope of the agreement covers the dispute and the parties that one side wishes to have as respondents or wish to participate in the arbitration; and
(3) whether the arbitrator has certain powers.

2.3 Formal validity and problems with the main contract (separability) (issues 3 and 4) probably fall within the first category. They involve a decision on whether there is a valid arbitration agreement. Questions relating to whether the arbitrator can award a particular remedy (issue 9) come within the third category. They deal with the ambit of the arbitral tribunal's powers. The other points fit within the second category. They relate to whether the arbitration agreement allows the arbitrator to deal with the particular dispute and the parties to it.

2.4 There are issues that may contain elements of jurisdiction mixed in with other points. For example, problems relating to the constitution of a tribunal are definitely matters of jurisdiction. An improperly constituted panel does not have jurisdiction to render an award. However, issues of bias more properly belong to other guidelines.

2.5 Otherwise, the range of jurisdictional issues is as wide as with domestic arbitrations with just a greater range of municipal laws to be concerned with.

2.6 These guidelines will not deal with the law applicable to jurisdictional issues which is a subject of its own.

3. The Process"

3.1 Attitude

All jurisdictional issues deserve careful consideration by the arbitrator, especially in an international context characterized by legal divergences and possible cultural clashes. If an arbitrator faces a challenge to his jurisdiction, he has to deal calmly with the facts and issues, without taking the challenge as a personal attack on its authority. The arbitrator must avoid doing anything which may give the impression to the losing party on the jurisdictional issue that he has any bias against it.

3.2 The arbitrator has the right to rule on his own jurisdiction

The laws of all the countries featured in these guidelines expressly permit the arbitrator to consider a challenge to his own jurisdiction. He does not have to wait for a party to bring court proceedings. In the western European and UNCITRAL Model law countries considered in these guidelines, there is no obligation to wait for the court to make up its mind. So, the tribunal faced with a challenge needs to consider straight away what to do with the problem.

3.3 Waiver

In the legal systems considered here, the parties must raise their jurisdictional objection within a reasonable time. For general objections, under Article 16(2) of the UNCITRAL Model Law, this must be no later than the submission of the statement of defence. Otherwise, the objecting party will have waived the right to object to the step in question or to the case being dealt with at all. In practice, there is considerable divergence in the way in which different courts and arbitrators interpret certain behaviour in this area. The individual facts of a case can easily sway a tribunal either way. A useful test is whether the party now seeking to raise the objection has behaved in a way inconsistent with the position that it now wishes to take in relation to the point in question.

One can argue as to whether there needs to be any reliance on the behaviour by either the arbitrator or the other party. The UNCITRAL Model Law approach does not require it. In practice, it will not be difficult to find reliance where one party's behaviour is inconsistent with its position on the jurisdictional challenge.

Similar provisions appear in various arbitration rules, Examples include Article 23.2 of the LCIA Rules which says:

"A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim. …In any case, the Arbitral Tribunal may nevertheless admit an untimely plea if it considers the delay justified in the particular circumstances."

The last sentence gives the tribunal a little more latitude than many national laws would allow. The first part of the rule is based on Article 21.3 of the UNCITRAL Rules. Other rules just rely on arbitrators applying the relevant legal standards.

3.4 Dealing with jurisdictional issues not raised by the parties

Where an arbitrator spots a jurisdictional problem that the parties have not noticed, the question arises as to whether he should take any active steps to draw this to their attention. In many cases, failure to raise the point promptly will result in its waiver. Bearing in mind the fact that the parties have not objected to the arbitrator dealing with the case or at least not on the grounds in question, the arbitrator should normally not raise issues on his own initiative. This is particularly the case when the tribunal may not know where the parties will have to enforce the award. However, where the jurisdictional problem concerns a matter of public policy, the arbitrator may have an active duty to raise the matter and invite the parties' submissions on the point and ultimately not to deal with the case for fear of offending local norms or risking the subsequent recognition or enforcement of the award. This may be the case where the tribunal risks allowing an arbitration to be used to cover up corruption or other criminal matters or actually become part of the means by which the parties aim to transfer funds as part of money laundering, terrorist financing, exchange control fraud or other criminal activity.

3.5 Agreements about jurisdictional issues

3.5.1 Increasingly in international cases, the arbitrator has to issue a ruling on jurisdiction. With different legal cultures involved, it may be vital for the arbitrator to obtain the parties' agreement as to the precise scope of the challenge. The use of Terms of Reference, mandatory in ICC cases, or a document like it, may be particularly useful here. If signed, even under protest by the objecting party, it may reduce the scope for challenges not listed in the Terms of Reference. For example, an argument about the overall formal validity of the agreement may be excluded if the challenging party only indicates in the Terms of Reference a general concern about whether one or all of the parties agreed to arbitrate.

3.5.2 It is always open to the arbitrator to invite the parties to agree to him resolving the jurisdictional issue. This is a practical solution where the ruling on whether there is a contract containing the arbitration clause in question may determine both the jurisdictional point and the outcome of the case. Such an agreement, though, loses most or all of its expected effects if the jurisdictional issue involves public policy. Without the parties' agreement to submit the jurisdictional dispute to a panel of the type selected, there does not appear to be any scope for forcing parties to be bound by the tribunal concerned. This applies even if the parties appear to have agreed to arbitration under a set of rules which empower the arbitrator to rule on his own jurisdiction (some recent US case law notwithstanding). It is always open to the party objecting to the arbitrator dealing with the case to argue before a court that he did not validly consent to arbitrate at all or under the relevant rules.

3.5.3 An arbitrator sitting in England may consent to a party bringing an application to court to resolve the matter. Where a challenge is made in good faith and seems to have a reasonable prospect of success, there is something to be said for consenting. This consensual approach is unique to England.

3.6 Ruling on jurisdiction: the process

3.6.1 More commonly, the arbitrator has to issue a ruling on jurisdiction before the court can intervene directly. The alternative approach, found in Sweden and the USA, is that the parties may request the court to make a ruling at any time and regardless of whether the arbitrator agrees to this. Either way, the tribunal might consider it better for it to express an opinion on the point to allow the court the benefit of its view of the case.

3.6.2 The key question is whether to deal with jurisdiction separately from substance. Article 16(3) of the UNCITRAL Model Law reflects modern legislative practice by giving the arbitrator a choice as to whether to rule on his own jurisdiction in a preliminary ruling or the final award on the merits. Examples of this include Section 31(4) of the English 1996 Act and Article 186 of the Swiss LDIP. There is much to be said for the view, expressed in Article 186(3) of the Swiss LDIP, that normally the arbitrator should deal with jurisdictional matters separately. It is helpful if such problems can be cleared up at an early stage of the process with any court challenges being concluded before extensive consideration of the merits. It should be noted, though, that France, Belgium and Holland contain no provision for challenging an award rejecting a jurisdictional challenge which does not contain a ruling on the substance of the dispute. If the tribunal is likely to declare that it has no jurisdiction over all or part of the case, it is imperative that it rules swiftly on jurisdiction. It needs to end the arbitrators' consideration of parts of the claim that fall outside their authority. Delays may also cause an unsuccessful claimant to be time-barred elsewhere. There are, though, exceptions to this, for example where:

(1) Jurisdiction and substance revolve around the same point
(2) The challenge is made in bad faith
(3) Delays in the local legal system could result in the case being delayed for many years pending the resolution of any court challenge to the ruling.

3.6.3 As seen above, jurisdiction and substance sometimes concern the same point, notably where the case revolves around whether the parties ever concluded the contract or validly assigned it. Normally, in such a case, issuing a final award on jurisdiction and substance together makes sense.

3.6.4 Otherwise, where the jurisdictional challenge appears to be a delaying tactic with no prospect of success or there is a risk of delays within the local court system damaging the proceedings, the arbitrator should consider a single ruling on jurisdiction and substance.

3.6.5 When considering matters of jurisdiction, the tribunal must be careful to give both parties a reasonable opportunity to present their case. An informal approach has led to challenges to the tribunal's competence as well as to its actual decision.

3.7 The form of a ruling on jurisdiction

3.7.1. An issue that can arise relates to the form in which the arbitrator's decision should be delivered. Normally, the form of such a ruling is determined by the law of the seat. Any ruling against jurisdiction may terminate the case and should in such a situation clearly be in the form of a final award. It also needs to cover the tribunal's fees.

3.7.2 A problem arises with rulings that reject jurisdictional challenges. Anything called an "award" in ICC cases must be subject to the approval process of that organization under Article 21 of that organization's rules. This can create delays. There is, therefore, much to be said for avoiding making the decision on jurisdiction in that form. Unfortunately, it is not just a question of labelling the ruling "order" or such like. If the arbitrator's ruling purports to decide definitively an issue in the case, it is an award under certain legal systems (notably French and Swiss). One solution is to make a ruling giving reasons but reserving the tribunal's right to reach a different decision at a later date in the proceedings. The final option is just to incur the delays of institutional approval while campaigning for the relevant requirements to be relaxed.

3. 8 Stopping the arbitration to await a court's ruling

3.8.1 When a court is considering a challenge to his jurisdiction, should the arbitrator stop the procedure? Normally, again, the answer depends on law of the seat and, the likely success and good faith of the application. If the application seems reasonable, waiting at least initially for a reasonably prompt ruling can make sense. If not, the arbitrator should usually continue to prevent an abusive application to court from delaying the resolution of the matter.

3.8.2 Faced with a challenge to his authority, the arbitrator must be aware of the seat of arbitration and its rules governing the process. So, for example, if sitting in the USA, he may find himself or the parties prevented from proceeding by an injunction brought in aid of an application to court for a final order stopping the arbitration. Failure to observe this may affect the arbitrator's ability to complete the case or others in the future and, depending on the jurisdiction concerned, could prevent enforcement of the award.

3.8.3 However, the arbitrator may also be faced with an injunction obtained outside the seat of arbitration. This may, and usually does, involve the home country of the party objecting to jurisdiction. As a matter of principle, if the parties agreed to arbitrate, they consented to a process in the place of arbitration not elsewhere. In the case of a foreign injunction, the arbitrator should normally continue with the case, as long as the courts in the seat are happy for the case to continue. If so, before disregarding the foreign injunction, the arbitrator should also consider the consequences in terms of recognition and enforcement of the award in that foreign country and how it affects parties' expectations.

3.8.4 Article 186(1 bis) LDIP (in force from 1st March 2007) allows arbitrators sitting in Switzerland to rule on their own jurisdiction and proceed with the arbitration even if litigation is pending elsewhere unless there are "serious reasons" to suspend the proceedings. This effectively removes the possibility that the courts will criticize an arbitrator in that country for continuing with a case while proceedings are pending before a court elsewhere.

4. Jurisdictional Issues

There is increasing convergence between municipal arbitration laws in their treatment of jurisdictional issues. As a result, many of them can be dealt with in practice by only cursory references to municipal law. This is notably the case where the question relates to the proper construction of the arbitral agreement.

4.1 Parties

4.1.1 Increasingly, the international arbitrators' main jurisdictional task is to decide whether the actual or prospective participants in the case are parties with claims under the arbitration agreement. The differences between the approaches to this point of various countries' legal systems may be more apparent than real. The French courts have made a number of decisions indicating a willingness to include within an arbitration more companies within a corporate group than are listed in the contract, particularly where those other entities play a significant role in

performing the agreement. This is accentuated where the involvement of non-signatories was anticipated at the point of sale.

4.1.2 Ostensibly, this appears to be different from the domestic legal positions in countries like England and Switzerland with their apparently stricter approaches to the corporate veil. However, as the French cases indicate, it is a matter of judging the parties' intentions as to who they thought they were contracting with. A number of US, Swiss and English court decisions have shown that concepts of agency or simple construction based on the parties' intentions can produce similar results to those found in France.

4.2 Incorporation of arbitration clauses by general reference
4.2.1 The English courts have traditionally been more inclined than most countries to permit the incorporation of arbitration clauses by general reference to a standard form agreement.

4.2.2 The issues here may be two-fold. First, there is the contractual question of whether the parties' behaviour demonstrated an intention to incorporate the second agreement. That often breaks down to two sub-questions: whether the words of incorporation are drafted widely enough and whether the arbitration clause fits the dispute in question. Secondly, there can be difficulties with the formal validity of the arbitral clause under local laws and notably Article II (2) of the New York Convention. This requires the agreement to arbitrate to be contained either in a signed document or an exchange of letters or telegrams. In recent times, as will be seen, the courts and statutes of major arbitration countries have liberalised their rules in this area and the Convention represents the minimum acceptable standard. Article 7(6) of Option 1 of the UNCITRAL Model Law reflects the modern consensus in this area for those countries which still have formal validity requirements. It says:

> "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

Nevertheless, arbitrators need to be careful in this area.

4.2.3 The greater emphasis is on the point about the parties' intentions. Not infrequently, one finds a master agreement to which other contracts refer with greater or lesser degrees of clarity and incorporation. Sometimes, arbitrators have to sort out conflicting dispute resolution clauses in the different agreements.

4.3. Formal validity
4.3.1 Since the 1980s, there has been a general coming together of legal systems on formal validity.

4.3.2 One should note, though, that in countries that adopted the original UNCITRAL Model Law and states such as Belgium, Holland and Switzerland, one has to be able to find written evidence of an agreement to arbitrate. An e-mail or fax confirming an arbitration agreement concluded orally will not on its own constitute a formally valid agreement under these legal systems even though the underlying contract remains in force. The Anglo-American approach of accepting oral or other types of evidence to indicate an intention to be bound by an arbitration clause in writing is not acceptable in those countries. When UNCITRAL amended the Model Law in 2006, it adopted the Anglo-American position as Option 1 of Article 7(3) of the Model Law, which now reads:

> "An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

4.3.3 Sweden has no formal validity requirements. Nor does France for international cases. Option II of Article 7 of the UNCITRAL Model Law (2006) adopts this position. However, very few countries have adopted these revisions. In English law, a purely oral agreement is valid; it is just not covered by the Arbitration Act. In practice, the definition of an agreement in writing under Anglo-American position virtually eliminates any formal validity arguments.

4.3.4 Whatever the situation, having a properly signed agreement to arbitrate either in the original contract or a subsequent Terms of Reference or submission can facilitate enforcement of the award. The New York Convention still permits countries to decline enforcement in the absence of

both parties' signature or an exchange of letters or telegrams. The fact that few countries insist on such formalities should not blind the arbitrator to the desirability of a signed document (typically obtained by asking the parties to sign a submission agreement, called the Terms of Reference in ICC parlance). This reduces the scope for later disputes.

4.4 Separability

4.4.1 The international arbitrator needs to know that the law of the countries where all major arbitration centres are located, and often these centres' arbitration rules, apply the principle of separability. This creates a presumption that the agreement to arbitrate will survive any problems with the validity of the main contract. If the problem affects the arbitral clause equally, this may invalidate the arbitration clause. It is insufficient, though, to say that the contract is illegal or its formation was affected by fraud. Unless it is argued that the arbitral clause itself suffers from these defects, the challenge must be rejected. This is reflected in Article 16(1) of the UNCITRAL Model Law which says:

> "A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause".

4.4.2 Arbitrators should be aware that in France and Switzerland, the Supreme Courts have held that separability does not extend to the situation where it is alleged that the parties did not conclude the underlying agreement, while the Swedish equivalent reached the opposite result where the parties had reached agreement on the arbitral clause. The English House of Lords in the *Fiona Trust* case expressed support for the Swedish position.

4.4.3 Usually, a contract formation problem (but not the failure of a condition precedent) will affect the arbitration clause equally. This is more open to discussion, though, where, during negotiations, the parties agreed the arbitration clause but there is a dispute as to whether they reached agreement on the necessary substantive provisions. In that situation, the Anglo-Swedish position suggests that arbitrator can decide the dispute without a subsequent agreement while the Franco-Swiss caselaw indicates the opposite.

4.5 Subject-matter arbitrability

4.5.1 Subject-matter arbitrability can cause serious problems although the law of the countries where major arbitration centres are located, have made a point of reducing barriers to arbitration of this type over the last 50 years.

4.5.2 For example, it is now clear that an arbitrator can resolve a dispute over whether a contract infringes the anti-competition provisions of what is now Article 81 (and was Article 85) of the Treaty of Rome. The Swiss Tribunal fédéral even requires arbitrators to rule on this in cases involving the European Union's scope of activities. They cannot, though, grant an exemption to the nullity of the contract entered into in violation of Art.81(1).

4.5.3 It is sometimes argued that patent validity disputes are a matter for the exclusive jurisdiction of a court. This argument should almost invariably be rejected on the basis that this refers to rulings capable of binding people not party to the arbitration. US legislation in 1983 expressly clarified the arbitrator's right to rule on patent validity.

4.5.4 Bankruptcy is a subject to be handled with care and reference to local lawyers. In practice, there is no general rule that stops an arbitration in the event of a bankruptcy. There are, however, a series of difficult municipal laws which can prevent arbitrations continuing and may lead to the annulment of an award on public policy grounds. Local lawyers must be consulted if a wasted arbitration is to be avoided. See J Sutcliffe & J Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for thought in Testing Times, 76 Arbitration 277 (2010).

4.5.5 In England, the Insolvency Act allows an administrator, administrative receiver or liquidator in a voluntary liquidation to conduct arbitration proceedings and refer cases to arbitration. A liquidator in a compulsory liquidation only has these powers with the court's consent. The position of the insolvent respondent is a little different from that of a claimant. Once a company is in administration, no proceedings can be begun or proceeded with except with the permission of either the administrator or the Court. Leave of the court is required to commence or continue with proceedings against a company in voluntary liquidation; the consent of the Court is needed for a case brought against a company being compulsorily liquidated. In the USA, the mandatory stay of proceedings affects arbitration against insolvent parties. However, a party can apply for relief from

it "for cause". Under French law, there is an initial stay until the creditor files a declaration of claim. After that, the arbitrator may proceed with the arbitration and declare the parties' rights but must not order an insolvent party to pay any sum of money. The problems in this area become even more complex where an arbitrator may find itself wondering what to do with a party that is insolvent under a different municipal legal system to the seat.

4.6 Time-limits for commencing proceedings
It is an unusual feature of English law that the court has a limited power to extend time for commencing arbitration. Other major arbitration centres and the UNCITRAL Model Law do not contain any such provision. This may increase the importance of deciding whether a limitation rule affects the tribunal's jurisdiction or is merely a ground for dismissing the claim. The US Supreme Court recently followed the majority view in England and other major arbitration countries by presuming that a limitation rule was not jurisdictional. Clearly, though, an arbitration clause can be worded to make the time-limits jurisdictional.

4.7 Conditions precedent – mediation
It is becoming increasingly common for an arbitration clause to require the parties to engage in a mediation process before agreeing to arbitrate. Recent French Supreme Court and English High Court decisions and an older judgement from the US have favoured the enforcement of these clauses. Section 2A of the Hong Kong Arbitration Ordinance requires the courts to take the same view providing a highly structured approach to the enforcement of mediation clauses. This approach, though, can be used to prevent the arbitral tribunal from having jurisdiction over a party who fails to co-operate with the mediation process. Australian authority favours enforcement but only where the mediation process is sufficiently certain, contrast *Hooper Bailie Associated Ltd v. Natcon Group Pty Limited* (1992) 28 NSWLR 195 at 206 where it was said "What is enforced is not co-operation but participation in a process from which co-operation and consent might come," with the decision in *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 716 where enforcement was refused.

4.8 Disregarding the law applicable to the substance
4.8.1 Where the parties have expressly chosen the law to govern the merits of the dispute in question, the arbitrator is normally bound to try to apply that law. (The only exception is where public policy or, where applicable, overriding mandatory rules require otherwise.) If he fails to do this accurately, that is not a matter of jurisdiction. However, the House of Lords in the *Lesotho Highlands* case went further in deciding that a failure to observe the Arbitration Act 1996 when reaching a conclusion on the merits did not constitute an excess of jurisdiction. Its reasoning suggested that so long as the remedy awarded was not excluded by the arbitration agreement, the arbitrator could not exceed his jurisdiction by reaching a particular result on the merits by actively disapplying the law chosen by the parties or the 1996 Act. Lord Steyn in a part of his judgment with which the majority agreed said:

> "It will be observed that the list of irregularities under section 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the "correct decision" could afford a ground for challenge under section 68. On the other hand, section 68 has a meaningful role to play. An example of an excess of power under section 68(2)(b) may be where, in conflict with an agreement in writing of the parties under section 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest. There is a close affinity between section 68(2)(b) and section 68(2)(e). The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator."

4.8.2. In other parts of Europe, a deliberate failure to apply the law chosen could be regarded as a breach of public policy, including in Switzerland where the courts have repeatedly referred to pacta sunt servanda as having the force of ordre public, although the Tribunal fédéral has never reached a decision on this precise point. In France (Art 1502(3), Holland (Art. 1065(1)(c), an arbitral tribunal may be held not to have conformed to the task entrusted to it and face the setting aside of or refusal to enforce its award. Article 1704(2)(d) of the Belgian Code Judiciaire is similarly

drafted to Section 68(2)(b) of the English 1996 Act. However, the fact that the House of Lords had to reverse the Court of Appeal's decision in Lesotho Highlands on the meaning of "excess of jurisdiction" shows how unpredictable the limits of this concept are. The US Supreme Court appeared to take the opposite view to the House of Lords in *Stolt-Nielsen S.A.* v. *Animalfeeds International Corp*, 27 April 2010. The court there concluded that a decision to hold a class action arbitration was in excess of jurisdiction even though the parties had expressly agreed in a separate submission to have the question of whether the contract provided for it to be determined by the arbitrator. Breaching the Federal Arbitration Act in making that ruling was deemed to be an excess of jurisdiction.

4.8.3 It may be a matter of semantics whether one describes these matters as jurisdictional or a matter of excess of powers or public policy. Except for the English *Lesotho Highlands* and the US *Stolt-Neilsen* case, practical examples are extremely rare. In any event, a court reviewing an award, as part of setting aside or enforcement proceedings, may rule that for public policy reasons, the arbitrator was right to disapply the law agreed upon by the parties.

4.9 Remedies - Punitive Damages

4.9.1 While the USA's Federal Arbitration Act is silent on the issue, Revised Uniform Arbitration Act §21(a) provides "[a]n arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." Some states have enacted statutes which prohibit arbitral tribunals from awarding punitive damages. There is a question of whether such laws are substantive (in which case they follow the parties' choice of law) or procedural (in which case they apply only if the arbitral tribunal is seated in that state). However, in a case governed by the Federal Arbitration Act, where a federal statute mandates an award of punitive damages, a refusal to make such an award based on state law will almost certainly result in the setting aside of the award on the basis that the state law prohibition is pre-empted by a combination of the two statutes. This would seem to follow from the *Mitsubishi*, *Mastruobuono* and more recent *Pacificare Health Systems* cases. Consequently, an arbitrator sitting in the US probably has to consider awarding punitive damages even if the arbitral agreement indicates otherwise where antitrust and RICO claims are raised in relation to activities which have a substantial effect on the USA. Otherwise, his award would probably be set aside, as a matter of public policy. A tribunal sitting outside the United States may find his award unenforceable in the US if it fails to give proper consideration to these types of claims and remedies.

4.9.3 An arbitrator in continental Europe, where such awards are generally frowned upon, might find that he has no jurisdiction to make such an award even where the parties have agreed to apply a US state or federal law to the case. The arbitrator is in a difficult position here in view of the lack of any definitive caselaw on the subject. Even the Swiss Tribunal fédéral has ruled that the tribunal has to resolve a competition law issue raised by one of the parties regardless of whether it arose under the law governing the contract. If in doubt, a tribunal might do best to make the award according to the applicable law chosen by the parties, make it clear which parts of the award relate to any punitive damages element and risk partial annulment or limited enforcement of the award.

5. Concluding Remarks

5.1 There is no fundamental difference between the jurisdictional problems that arise in international cases from those that come up in domestic arbitrations. The arbitrator must focus on whether there is a valid agreement to arbitrate at all, whether it covers the dispute and parties in question and whether he has the power to act in the way in which he would like to. In resolving these issues, he must, as always, pay careful attention to the arbitration agreement and the surrounding circumstances.

5.2 The difficulty stems from the possible application of legal systems with which the arbitrator may not be familiar. He needs to be aware of the possible differences between different countries' laws in the areas most likely to concern him. There will, though, be occasions where the very international nature of the disputes produces intractable difficulties. This comes about where different legal systems with an interest in the case produce conflicting outcomes At the same time, the growing consensus in international arbitration statutes and increasing amounts of information available about the differences should make the handling of jurisdictional problems less challenging than it has been in the past.