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The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922

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THE MIXED ARBITRAL TRIBUNALS IN THE PEACE TREATIES OF 1919–1922

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Abstract:

This article describes the competence, the organization and the legal nature of the Mixed Arbitral Tribunal which were created by the Versailles Peace Treaty and other peace treaties after the First World War. It specifically analyses the case-law of these tribunals regarding issues of private international law. The article is a draft of a chapter to be published in an upcoming book on the Versailles Peace Treaty.

Keywords:

Mixed Arbitral Tribunals, Versailles Peace Treaty, Mass Claims, Private International Law, Arbitration, Dispute Settlement

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1. Origins and Legal Framework

1.1. Private Rights in the Peace Treaties

1.1.1. War Measures against the Property of “Ennemis Nationaux”

The First World War was not only the greatest war mankind had experienced so far: it also triggered many adverse consequences for private commerce and investment. In the course of the war, all belligerent nations adopted legislative measures against the so-called property of enemies.¹ According to these measures, trading with nationals of the enemies was generally prohibited, the property of these nationals, as long as it was located in the belligerent state, was strictly controlled and – often – seized. Measures of sequestration usually applied to corporations and branches of foreign investors of the belligerent nations.² As the nationals of enemy countries had been denied standing in the domestic courts, they faced default judgments and other detrimental decisions.³ It was clear that these adverse consequences had to be remedied by the peace treaties.⁴

1.1.2. Private Rights and Interests in the Peace Treaties

The Versailles Peace Treaty (VPT) addressed private rights and relationships in the so-called Economic Clauses (Part X, articles 264–312 VPT). This part firstly addressed inter-state commercial relations in general (articles 264–270 VPT)⁵ and imposed the (most favourable) treatment of nationals of the Allied and Associated Powers in Germany – without any reciprocity (articles 276–295 VPT). As a matter of principle, the Allied and Associated Powers obtained full access to the German markets and a most favourable treatment while Germany and its nationals were not accorded any reciprocal treatment.

Sections III to XI of part X of the VPT addressed private law relationships. Section III of the VPT, under the headline: “debts”, dealt with unsettled monetary claims arising out of pre-war contracts. These claims were resolved through so-called *Ausgleichsämter* (clearing offices) to be established by all contracting parties within three months after the signature of the peace treaty (article 296 VPT). All payments of debts between allied, associated creditors and national debtors of the “opposite states” had to be cleared through these offices.⁶ Article 296 VPT read as follows:

¹ Christian Dominicé, *La notion du caractère enemi des biens privés dans la guerre sur terre* (Génève 1961), 14–15; Michael Bazylar, ‘Trading with the Enemy’ in Frauke Lachenmann and Rüdiger Wolfrum (eds), *MPEPIL* (2011), paras 5 and 9 (only describing the practice of the UK and the US – but not of other belligerent states); Dirk Hainbuch, *Das Reichministerium für Wiederaufbau 1919 bis 1924* (2016) 127–136 (describing the German „Treuhänder für feindliches Vermögen“).

² In this respect, IP rights (especially brands and patents) and insurance contracts were mostly affected, see article 310 VPT.

³ The German legislation related to enemy property is described by Dominicé (n 1) 132–136; the French legislation at 113–123; the English legislation at 51–63.

⁴ This paper mainly addresses the Versailles Peace Treaty (with Germany) of 28 June 1919 (VPT), but also contemplates the parallel provisions in the peace treaties of Neuilly of 9 August 1920 (with Bulgaria: NPT), Trianon of 26 June 1921 (Hungary, TPT) and of Saint Germain of 16 July 1920 (with Austria: SGPT) as well as of Lausanne with Turkey of 1922 (LPT).

⁵ Especially shipping (articles 271–273 VPT), unfair competition (articles 275 VPT).

⁶ Karl Strupp, ‘The competence of the Mixed Arbitral Courts of the Treaty of Versailles’, (1923) 17(4) *The American Journal of International Law* 661 ff.; Jakob Zollmann, ‘Reparations, Claims for Damages, and the Delivery of Justice. Germany and the Mixed Arbitral Tribunals (1919–1933)’ in David Deroussin (ed), *La Grande Guerre et son droit* (Paris 2018) 379, 383.

“There shall be settled through the intervention of Clearing Offices (...) the following classes of pecuniary obligations: (1) Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of all Opposing Power, residing within its territory; (2) Debts which became payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an Opposing Power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war.”

According to sections IV and V of Part X of the VPT (addressing property, rights and interests as well as contracts and prescription periods), all measures taken by Germany against enemy property were discontinued and the property had to be restored to their owners (articles 297 (a) and 298 VPT).⁷ On the other hand, the property of German nationals within the allied countries was liquidated by the Allied and Associated Powers⁸ and used for the full compensation of their own nationals (article 297 (b) VPT).⁹

This basic regime also applied to judgments given by German courts during the war against allied nationals to defend their property. In these proceedings, the latter not had been able to make their defence; the respective judgments were reversed (article 302 VPT). The rationale of the regime demonstrated that the settlement of private rights and interests was aligned to the (full) reparation of war damages as it was foreseen in articles 231 ff. VPT.¹⁰ However, the legal regime of private rights was conceptually and formally clearly separated from the reparation regime.¹¹

1.2. The Establishment of the Mixed Arbitral Tribunals

1.2.1. The Pertinent Provisions in the Peace Treaties

The Allied and Associated Powers did not entrust the German, Austrian and Hungarian courts with implementation of the substantive provisions¹² of the peace treaties¹³ as they mistrusted the

⁷ Article 297 (a) VPT read as follows: “The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of article 298.”

⁸ The German government only paid partial compensations (of less than 10 % of the original value of the affected assets) to its nationals.

⁹ Article 297 (a) VPT read as follows: “Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty. The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State.”

¹⁰ At the peace conference 1919 the German delegation challenged these provisions which were deemed to be unilateral and unfair, but the Allied and Associated Powers did not make any concession in this regard. They considered the regime as a direct consequence of the war caused and lost by Germany.

¹¹ In practice, the delineation proved to be difficult. Example: PCIJ, 12 September 1924, *Traité de Neuilly, Article 179, paragraphe 4 (interprétation)*, Série A no. 3; on the reparation regime cf D'Argent Pierre, *Les réparations de guerre en droit international public: la responsabilité internationale des États à l'épreuve de la guerre* (Bruylant 2002) 46 ff.

¹² German authors disqualified them as *Vorrechte* (privileges), not as *Rechte* (rights), Walter Schätzel, ‘Die Gemischten Schiedsgerichte der Friedensverträge’ [1930] *Jahrbuch Öffentliches Recht* 378, 380.

willingness of these courts to fully implement the one-sided regimes of the peace treaties.¹⁴ Under the national applicable jurisdictional rules, these courts were competent to address private law issues regarding assets located on their soil.¹⁵ Instead, the peace treaties established a self-standing court system, the Mixed Arbitral Tribunals (articles 304 VPT, 256 TPSG, 187 TPN, 239 TPT). The pertinent provision, article 304 of the VPT, stipulated in a technical way:

“(a) Within three months from the date of the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Germany on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned. [...]

(b) The Mixed Arbitral Tribunals established pursuant to paragraph (a), shall decide all questions within their competence under Sections III, IV, V and VII.”

The name of these tribunals was due to their international composition: two arbiters were nominated by the respective governments, and a presiding judge was chosen by agreement between the two Governments who was a national of a neutral state. The most prominent and innovative feature of the peace treaties was the standing of individuals before these courts.¹⁶

1.2.2. The Competences of the MAT

The Mixed Arbitral Tribunals (hereinafter also MAT) were competent to decide the various disputes regarding the treatment of private rights according to the peace treaties. In the Versailles Peace Treaty, their main competences were as follows:

(1) The tribunals were competent to hear disputes relating to outstanding debts which had not been settled by the Clearing Offices (article 296 and Annex no. 16 VPT¹⁷).

(2) The MAT were competent to reverse judgments of Austrian, German and Hungarian courts which were given against allied nationals during the war and to award compensation (article 302 (2) VPT¹⁸).

¹³ Judicial decisions in the Allied States characterized the Treaty provisions as “mesures de défiance à l’égard des tribunaux allemands” (Tribunal de commerce de Bruxelles, December 29, 1920, Recueil, vol 1, 132, 134; Cour d’appel de Bruxelles, 20 March 1922, Recueil MAT, vol 1, 959, 961. In a similar vein, MAT Germany-Rumania, 3 January 1925, *Mr. Kirschen senior c Sobotka, ZEG et Empire allemand*, Recueil MAT, vol 4, 858, 863–864: “Les tribunaux arbitraux mixtes ont été créés uniquement pour soustraire la partie alliée à la juridiction ordinaire des tribunaux allemands, les alliés craignant que le ressentiment contre d’anciens ennemis pût influencer sur la décision de ces Tribunaux. Il s’agit donc avant tout d’un avantage accordé aux ressortissants alliés”. Same opinion: Reichsgericht, 16 April 1924, ‘Entscheidungen des Reichsgerichts in Zivilsachen’ vol 108, 50, 52.

¹⁴ Rudolf Blühdorn, ‘Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes créés par les traités de Paris’ (1932) 41 Recueil des Cours 141, 170.

¹⁵ Cf Sections 24, 29 and 32 German Code of Civil Procedure of 1877.

¹⁶ Burkhard Hess, ‘The Private-Public Divide in International Dispute Resolution’ (2018) 388 Recueil des cours 49, para 89.

¹⁷ See text of article 296 supra text at n.6. Annex 16 para 1 provided that “Where the two Clearing Offices are unable to agree whether a debt claimed is due, or in case of a difference between an enemy debtor and an enemy creditor or between the Clearing Offices, the dispute shall either be referred to arbitration if the parties so agree under conditions fixed by agreement between them, or referred to the Mixed Arbitral Tribunal provided for in Section VI hereafter”. Substantive and procedural rules followed, Annex 18-24.

¹⁸ Article 302 VPT stated as follows: “If a judgment in respect of any dispute which may have arisen has been given, during the war by a German Court against a national of an Allied or Associated State in a case in which he was not able to make his

(3) They decided on restitution and compensation claims concerning property rights and interests located in the enemy countries (article 297 VPT¹⁹).

(4) With regard to the Associated Powers Poland and Czechoslovakia the MAT were competent to review the liquidation of the property of German, Austrian and Hungarian nationals within their territory by those Powers and to fix the compensation to be paid (articles 297 h) VPT²⁰).

(5) The Mixed Arbitral Tribunals were competent to review judgments of national courts²¹ regarding their conformity with the VPT (article 305 VPT). In these constellations, the MAT acted functionally as a kind of 2nd instance court.²²

(6) Apart from these main competences, the MAT acted in additional settings, especially with regard to the granting of new licenses for IP rights (article 310 VPT). The German Polish MAT and the MAT for Upper Silesia played an important role in the protection of labour and minority rights in the transferred territories.²³

1.2.3. The German-US Peace Treaty of 1922

A specific situation existed with regard to the United States²⁴ as the Peace Treaty of the US and Germany of 10 August 1922 provided for the establishment of a Mixed Commission which dealt with the individual claims of American national against Germany and German nationals. It also decided on the reparation of war damages. However, these proceedings were different to the ones before the Mixed Arbitral Tribunals, as individuals had no standing in the Mixed Commission; their losses were espoused and claimed before the Commission by state agents.²⁵

defence, the Allied and Associated national who has suffered prejudice thereby shall be entitled to recover compensation, to be fixed by the Mixed Arbitral Tribunal provided for in Section VI. "

¹⁹ Especially article 297 (e) and (f) VPT. Article 297 VPT stated: "(e) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on 1 August 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State."

²⁰ Article 297 (h) (2) stated: "In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under articles 235 and 260, be paid direct to the owner. If on the application of that owner, the Mixed Arbitral Tribunal, provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State."

²¹ The same regime applied to enforcement measures taken in German territory to the prejudice of a national of an Allied or Associated Power during the war, article 300 (b) VPT.

²² Blühdorn (n 14) 141 ff.

²³ Cf the contribution of M. *Erpelding* in this volume.

²⁴ The United States did not ratify the peace treaties, cf. Arthur Burchard, 'The Mixed Claims Commission and German Property in the United States of America' [1927], 21 *American Journal of International Law* (1927) 472 ff.

²⁵ The procedure of the Commission was based on diplomatic protection where the rights of the individual are represented by its home state at the international level, Hess (n 16) 49, paras 83 ff.

2. The Organisation of the Mixed Arbitral Tribunals

2.1. Historical and Statistical Background

2.1.1. A New Model for the Settlement of International Disputes

In 1919, the idea of establishing international arbitral tribunals competent for the resolution of disputes between individuals (or individuals against states) at the international level was innovative. Of course, in the 19th century, there had been a couple of international mixed commissions competent to decide on the legal consequences of war affecting private properties. However, in these bodies, individuals were not granted any standing,²⁶ but were represented by their home state under the traditional rules of diplomatic protection.²⁷ A first attempt of establishing an international tribunal, competent to hear claims brought by individuals, was found in the 1907 Hague Convention on the International Prize Court. Shortly before the war, comprehensive rules of procedures had been elaborated.²⁸

These procedures were taken up by Germany and Russia when they concluded a separate peace treaty, the German-Russian Agreement on Private Rights of 27 August 1918, which aligned the Peace Treaty of Brest of 3 March 1918.²⁹ However, there were considerable differences between these courts and the Mixed Arbitral Tribunals. The main difference related to the limited access of German parties and other nationals of the defeated states to the Mixed Arbitral Tribunals of the 1919/1920 peace treaties. Their jurisdiction depended almost entirely on the initiative of allied and associated states and their nationals that were solely empowered to bring individual actions before the Mixed Arbitral Tribunals.³⁰ German individuals, however, were not entitled to bring own claims against allied parties³¹ – even counterclaims were largely excluded.³² This “unilateralism” might explain why the Mixed Arbitral Tribunals were not associated with the Permanent Court of Arbitration at The Hague which had been established for the settlement (and the administration) of international disputes.³³

2.1.2. Statistical Data

Until today, there is not much reliable information about the case law addressed by the mixed arbitral tribunals. The most reliable source of empirical information is an article written by *Walter*

²⁶ Kate Parlett, *The Individual in the International Legal System: continuity and change in international law* (vol 75, Cambridge University Press 2011) 52 ff.

²⁷ Hess (n 16) 49, para 84.

²⁸ Schätzel (n 12) 378, 380 f (with further references). Günther Küchenhoff, ‘Erinnerungen an das Schiedsgericht für Oberschlesien’ in Manfred Abelein and Otto Kimminich (eds), *Festschrift für Raschhofer* (1975), 143, 149 ff.

²⁹ Carl Friedrich Ophüls, *Gemischte Schiedsgerichte* in Karl Strupp and Hans Jürgen Schlochauer (eds), *Wörterbuch des Völkerrechts. Dritter Band* (De Gruyter 1962) 173; Schätzel (n 12) 378, 379 f.

³⁰ The peace treaties did not provide for specific provisions on the standing of the individual, cf article 304 VPT and Annex.

³¹ The only exception was article 297 (h) VPT with regard to the liquidation of (mainly) German assets in Poland, text *supra* at footnote 20.

³² See nevertheless the French-German MAT, article 14 (e), the Italian-German MAT, article 19, or the one corresponding to the Czechoslovakian-German MAT, article 24.

³³ The PCA did even not act as an appointing authority with regard to the respective presidents of the MAT. It was completely outside the framework of the MAT.

Schätzel.³⁴ According to this author, the overall number of the Mixed Arbitral Tribunals amounted to 36, and they decided almost 70.000 cases.³⁵ Germany established Mixed Arbitral Tribunals with Belgium, France, Greece, Italy, Japan, Yugoslavia, Poland, Romania, Thailand, Czechoslovakia and the United Kingdom. Austria established Mixed Arbitral Tribunals with Belgium, France, Greece, Italy, Japan, Yugoslavia, Romania and the United Kingdom. Hungary had Mixed Arbitral Tribunals with Belgium, France, Italy, Yugoslavia, Romania and the United Kingdom. Bulgaria formed Mixed Arbitral Tribunals with Belgium, France, Greece, Italy and the United Kingdom. The situation of Turkey was different as it established more self-standing Mixed Arbitral Tribunals by the Treaty of Lausanne (1922) with Belgium, France, Greece, Italy, Romania and the United Kingdom.³⁶ These MAT had their seat in Istanbul.

As already mentioned, the number of cases processed by the arbitral tribunals was remarkable: According to *Schätzel*, the French-German Mixed Arbitral Tribunal heard about 25.000 cases, the German-Polish Mixed Arbitral Tribunal held about 20.000 cases³⁷. The German-UK Mixed Arbitral Tribunal heard almost 10.000 claims while the German-Belgian Mixed Arbitral Tribunal decided 2.200 cases. The German Italian MAT was seized by thousands of small claims brought by Italian workers who had to leave Germany after the outbreak of the war.³⁸ All other arbitral tribunals decided less than 1.000 cases; the German-Siamese MAT only 3 cases.³⁹ The Mixed Arbitral Tribunals between Austria and the Allied Powers heard overall 2.845 cases, most of them (2.142) related to Italy.⁴⁰ The Mixed Arbitral Tribunals of Hungary decided almost 5.000 claims, the Bulgarian Mixed Arbitral Tribunal heard more than 1.000 cases. Most of these claims were processed within a period of time of less than 10 years.⁴¹

Overall, the work of the Mixed Arbitral Tribunals appears impressive. These courts were confronted with a multitude of claims and the tribunals (largely supported by the state agents⁴²) were able to develop first techniques for the processing and settlement of mass claims. The work of the Mixed Arbitral Tribunals is documented in a series of decisions which was published between 1921 and 1930.⁴³ In these Recueils one can also find information about the procedures applied, the composition of the courts, and the origin and representation of the parties. Remarkably, this collection of case law which has been described as comprehensive was chosen by its French editor

³⁴ Schätzel (n 12) 378, 449 ff.

³⁵ Hess (n 16) 49, para 89.

³⁶ Schätzel (n 12) 378, 389.

³⁷ Michel Erpelding, 'Upper Silesia Mixed Commission' in Ruiz Fabri (ed), *Encyclopedia of International Procedural Law* (to be published in 2018).

³⁸ Eventually, these claims (which related to unpaid wages, loss of personal property as clothes) were settled between the State Agents, Schätzel (n 12) 378, 392.

³⁹ Schätzel (n 12) 378, 450; Ophüls (n 29) vol 3, 173, 175.

⁴⁰ Schätzel (n 12) 378, 450 (fn. 2).

⁴¹ The Mixed Commission under the American-German Treaty of 10 August 1922 decided altogether 20.434 claims which were submitted to it, Department of State (ed) *The Treaty of Versailles and After - Annotations of the Text of the Treaty* (1947), 629 f (providing for statistical information).

⁴² See *infra* text at n 50.

⁴³ *Recueil des décisions des tribunaux arbitraux mixtes, institués par les traités de paix*, Librairie de la Société du Recueil Sirey, 1922–1930, online available at : <http://heinonline.org/HOL/Index?index=intyb/rdddt&collection=intyb>.

in collaboration with all presidents of the MAT and the state agents of all state parties involved.⁴⁴ However, it must be noted that this collection is not comprehensive, but only provides for the most important decisions of the MAT and of some important decisions of national courts, too.⁴⁵

2.2. The Composition of the Tribunals

2.2.1. The Judges and the Secretariats

The rules for the appointment of arbitrators and – especially – the presiding judges were contained in article 304 (a) VPT. The judges were nominated by the respective governments and the governments - by a common accord - appointed the presiding judge. The secretary of the League of Nation (finally) served as appointing authority, article 304 (a) VPT.⁴⁶ Once nominated, all judges of the MAT were independent.⁴⁷ Often, the presidents and the judges of the MAT were prominent international lawyers of the 1920s and 1930s: International lawyers as *C. D. Asser* acted as presidents of MAT; *Ernst Rabel* acted as a member of the German-Italian MAT. *De Lapradelle* usually acted as a party representative. In the 1920s and 1930s, the case law of the MAT was regularly documented and commented in international journals.⁴⁸

The tribunals were supported by secretariats. Their staff came from (and was paid by) the contracting states; the “*secrétaire général*” usually came from a neutral state. The secretaries were usually jurists with language skills covering both contracting states. In some MAT, the presidents were supported by personal secretaries.⁴⁹

2.2.2. The State Agents

One of the salient features of the MAT was the involvement of “state agents” before the tribunals.⁵⁰ The agents were formally representatives of the Contracting States (especially in case directly involving the states as parties), but they often acted as intermediaries between the individual parties and the MAT. They were not independent but received orders from their respective governments.⁵¹

⁴⁴ The decisions of the American German Mixed Commission were documented by the German Commissioner Wilhelm Kiesselbach, *Probleme und Entscheidungen der deutsch-amerikanischen Schiedskommissionen* (1927).

⁴⁵ Schätzel (n 12) 378, 424.

⁴⁶ Usually, the governments were able to agree on the presiding judge. Therefore, the procedure to nominate a judge (when the government failed to designate its judge) was seldom applied. However, after the occupation of the Ruhr by French and Belgian troops (1922/23), the German judges did no longer participate in the Belgian and French MAT. After the crisis, the German arbitrators joined the court again and one president of the French-German MAT, *Mercier*, was replaced by common agreement of the two governments. A similar crisis occurred in 1927 between Germany and Poland.

⁴⁷ According to the case law of the Reichsgericht, the German Government could not unilaterally terminate the appointment of the judges, 9 June 1925, ‘Entscheidungen des Reichsgerichts in Zivilsachen’ vol 111, 115.

⁴⁸ See for instance Jean Paulin Niboyet, ‘Tribunal arbitral mixte germano-roumain, 16 juin 1925. P. Negreanu v. Meyer’ [1927] *Revue de Droit International Privé* 97; Lewald, ‘Internationalprivatrechtliche Fragen vor den GSchHöfen’ [1926] *Juristische Wochenschrift* 2815; Max Gutzwiller, ‘Das Internationalprivatrecht der durch die Friedensverträge eingesetzten Gemischten Schiedsgerichtshöfe’ [1932] *Internationales Jahrbuch für Schiedsgerichtbarkeit* 123 ff (fn 1 and 2 with numerous references).

⁴⁹ Schätzel (n 12) 378, 398–399.

⁵⁰ The German state agents were supported by a specific unit, the “Commissariat for the MATs” (about 100 public servants and additional staff), organized within the Ministry of Foreign Affairs. It was led by a Commissioner for the MAT (*Otto Göppert*, 1872–1943). In 1924, there were 4 sub-divisions monitoring the proceedings in the different MAT, 79 qualified lawyers and 215 additional officials performed their duties in Berlin, Paris, London and Rome. Schätzel (n 12) 378, 399–400 (n 1), Zollmann (n 6) 379, 385.

⁵¹ Zollmann (n 6) 379, 385.

In practice, the state agents played a paramount role in the processing of the individual claims and in assisting the claimants. At the same time, the state agents were empowered to supervise their respective nationals and their representatives in the proceedings.⁵² Their activities eventually amounted to a kind of filtering of claims.⁵³ This empowerment was based on their right to oversee the conduct of private parties.⁵⁴ Furthermore, the state agents were also able to directly settle many claims between the states involved.⁵⁵ The most important function related to their right to intervene directly into the proceedings and to preserve the rights of the Contracting States. In this respect, they limited the standing of the individual parties in the proceedings.⁵⁶ Sometimes, state agents even contradicted the legal or factual allegations of individual plaintiffs of their nationality.⁵⁷

2.2.3. The Position of the Individual Claimants

The most innovative feature of the dispute resolution mechanism was the standing of the individuals in the Mixed Arbitral Tribunals. Representation by lawyers was not required, although it was the rule in major cases; in small cases parties were represented by the respective state agents. However, in most of the proceedings, not only the individual parties intervened, but also the state agents pleaded (and eventually settled the claims). This situation clearly distinguished the Mixed Arbitral Tribunals from private arbitration.

It is worth mentioning that the contemporary literature did not generally regard the standing of the individuals in the Mixed Tribunals as an achievement. Some authors clearly preferred the representation of the individuals by state agents as foreseen in the German-American Mixed Claim Commission.⁵⁸ According to this opinion, the direct involvement of the individuals complicated the proceedings. The unsettled legal position of the individual was highlighted in the compensation proceedings under article 297 VPT: Some authors considered these claims as part of the reparations and qualified the individual plaintiffs as a kind of representatives of their home states. However, several MAT clearly stated that the economic rights of the VPT were subjective rights of the individuals.⁵⁹

The strong position of the states in the proceedings became evident when the activities of most of the MAT⁶⁰ were terminated by international agreements related to the so-called Young plan

⁵² Piero Calamandrei, 'Il Tribunale Arbitrale Mixto Italo-Germanico e il suo Regolamento Processuale' [1922], *Rivista del Diritto Commerciale* 293, 305–306.

⁵³ Schätzel (n 12) 378, 400, reports that the state agents developed a filtering system for individual contract claims similar to the proceedings before the cleaning offices. Finally, the state agents were able to settle 5 out of 6 cases of the German-French MAT.

⁵⁴ According to Section 18 of Annex to article 296 VPT, the state agents were competent to supervise the representatives and lawyers of their respective nationals.

⁵⁵ Schätzel (n 12) 378, 400; Zollmann (n 6) 379, 385.

⁵⁶ Obviously, the old „leitmotiv“ of diplomatic protection reinforced the role of the state agents.

⁵⁷ Schätzel (n 12) 378, 400.

⁵⁸ Schätzel (n 12) 378, 400 ff.; Rudolf Blühdorn, 'Die Prozessführung vor den Gemischten Schiedsgerichten in der Praxis', [1930] *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 488 ff. This perspective was obviously influenced by the personal function of those authors who had acted as state agents.

⁵⁹ German-French MAT, 27 August 1926, *Sigwald v État allemand*, Recueil MAT vol 6, 888, 890; Anglo-German MAT, 13 December 1923, Exors. of F. Lederer v. German Government, Recueil MAT 1924, 762, 768. Same opinion: PCIJ, 25 May 1926, *Certain German Interests in Upper Silesia*, Series A no. 7, 33.

⁶⁰ With the exception of the MAT for Upper Silesia, cf *Erpelding*, Chapter in this volume.

in 1932: The state parties terminated the activities of the tribunals (including pending cases) by waiving the claims of the individuals. Eventually, the special regime of the MAT was terminated by an international settlement, based on diplomatic protection and the power of the states to espouse and to settle the claims of their nationals.⁶¹ It seems that the latter were (partially) compensated at the domestic level.

A similar situation occurred in the context of the Hungarian MAT when Hungary agreed with Czechoslovakia, Yugoslavia and Romania on a structural reform of the MAT. A Treaty of 28 April 1930⁶² augmented the number of the neutral judges of the MAT and introduced an appeal to the PCIJ. This "appeal" operated under international law according to the Statute of the PCIJ: The states took up the case of their nationals and presented them before the PCIJ.⁶³ As a result, diplomatic protection was reintroduced as the appropriate mechanism to settle the disputes at the level of public international law.

2.3. The Procedures Applied

According to article 304 (d) VPT, each MAT had to elaborate its own procedure: they made it in such detail that the outcome was described as "miniature civil procedure codes".⁶⁴ The MAT regulations addressed the internal organization of the tribunals (for instance where its headquarters would be), the rules of the proceedings (for example the principle according to which each court is the judge of its own competence, or those related to representation and legal aid, as well as costs) and also explained the unfolding of the procedure (its different phases, the regime of evidence, enforcement and appeals).⁶⁵

There were many similarities between the regulations as the drafters of looked at the preceding ones to be used as templates. Nevertheless, the procedures were not identical. The contemporary legal literature even identified three different "model" regulations: the French-German, which was the first, later inspiring the Italian-German MAT procedural rules. The second was the Anglo-German with original features borrowed from the English civil procedural law; it was later followed by the regulation of the MAT between Germany and Japan. The third model was the regulation of the Belgian-German MAT which took some distances from the French-German and served as a reference to the regulations for the MAT with Yugoslavia, Czechoslovakia and Poland. It should be recalled nevertheless that there were also relevant divergences among the MAT regulations,⁶⁶ and that the implementation of identical rules was not always made in the same way.⁶⁷ Decisions were also drafted in very different styles (and in different languages), closely following the

⁶¹ Hess (n 16) 49, para 91. The prerogative of the states to espouse the claims of their nationals was clearly stated by the German-French MAT, 27 August 1926, *Sigwald v État allemand*, Recueil MAT vol 6, 888, 891.

⁶² LNTS 121, 80.

⁶³ Eventually, the PCIJ, 15 December 1933, *Pazman University (Hungary) v Czechoslovakia*, Series A.B. no. 61, 222, openly addressed the relationship with the MAT. The Court stated: "The fact that a judgment was given in a litigation to which one of the Parties is a private individual does not prevent this judgment from forming the subject of a dispute between two States capable of being submitted to the Court, in virtue of a special or general agreement between them."

⁶⁴ Calamandrei (n 52) 293.

⁶⁵ Schätzel (n 12) 378, 402–418.

⁶⁶ Blühdorn (n 58) 488 490, highlights the peculiarities of the Anglo-German MAT regulation; Calamandrei (n 52) 293, *passim*, on the MAT Regulation between Germany and Italy.

⁶⁷ Such as for instance the more or less lenient attitude towards accepting time-barred claims: Blühdorn (n 58) 488, 493.

typical formulations of the local decisions of the country where the MAT at stake had its headquarters. In this respect, there was no uniformity at all in the way how the awards/judgments were drafted.⁶⁸ As a consequence, cross fertilization among the different courts (or, even more challenging, the elaboration of a “jurisprudence constante”) was difficult.⁶⁹

The procedures followed a similar pattern: The claims had to be filed within a limited period of time (mostly one year after the establishment of the tribunal), the lawsuit had to clearly designate the facts and the pertinent legal provisions, and the means of evidence had to be presented.⁷⁰ Usually, documentary proof prevailed – also because the state agents encouraged parties to provide for witness testimonies protocolled by the domestic courts.⁷¹ Representation by lawyers was not mandatory. Often, the state agents assisted the claimants in formulating the claims, they even elaborated forms.⁷² However, there were also specialised lawyers involved who “collected” similar claims (on the basis of forms) and brought them collectively before the MAT.⁷³

The procedures of the MAT favoured one comprehensive hearing – a concept which has been taken up by many modern procedural rules. The rationale behind this concept was easy to understand: As the parties to the individual disputes were often domiciled in different countries, the MAT tended to avoid several hearings which would have amounted to a time-consuming and costly burden of the parties. In order to speed up the proceedings, the procedural rules empowered the tribunals to set time-limits and to sanction non-compliance by preclusion.⁷⁴ However, these provisions were seldom applied in practice.⁷⁵ Nevertheless, from a contemporary perspective, these procedural provisions appear to be far progressed and modern.⁷⁶

Among the elements common to all MAT, it is worth mentioning those which provoked criticism of the contemporary scholars, pointing to elements which are essential to any court and all processes, such as the impartiality of the arbitrators and the equality of arms between the parties. The allegation that arbitrators were favourable to the national of the Allied or Associated Power, or were imbued with the general idea of retaliation or punishment of Germany, is found in some authors with regard to specific MATs: *Calamandrei* made this observation in light of the regulations of

⁶⁸ As a result, the decisions of the French-German and Belgian-German MAT were drafted in French and in the French style of judgments, the British-German MAT as English judgments and the decision of the Italian-German MAT appeared as Italian judgments. However, the decisions were short. They usually did not comprise more than five pages. This was due to the huge amount of cases.

⁶⁹ It must be noted that the ‘Recueil des decisions’ (supra n 43) contained in addition to the text of the decision in the languages of the countries involved a short summary in French, Italian, English and German.

⁷⁰ In practice, parties often pleaded according to their national procedural laws and backgrounds. Accordingly, Austrian parties easily complied with time limits which, as a matter of principle, corresponded to their national civil procedure.

⁷¹ Blühdorn (n 58) 488, 496–497.

⁷² Blühdorn (n 58) 488, 495.

⁷³ This was the case in Alsace and Lorraine where some lawyers and state agents collected thousands of claims of farmers with regard to requisite chattels and cars, cf Schätzel (n 12) 378, 391 and 426. Here, the issue was whether the inhabitants of Alsace and Lorraine could qualify as French citizens. The French-German MAT held that articles 72 and 73 VPT provided a standing of these groups, decision of 7 August and 25 September 1922, *Heim et Chamant c État Allemand*, Recueil MAT vol 3, 50.

⁷⁴ Calamandrei (n 52) 293, 313, regarding the Italian-German MAT Regulation.

⁷⁵ Schätzel (n 12) 378, 404.

⁷⁶ Cf Peter Gottwald, *Zivilprozessrecht* (18th edn, C.H. Beck 2018), § 1, paras 39 ff.

the Italian-German MAT⁷⁷ while *Zitelmann* cited examples from the practice of Franco-German MAT, whose tendentious character was commented by other authors as well.⁷⁸ The complaints nevertheless seem to be general, although it is usually added, in defence of the MAT, that partiality was not the result of bad faith but rather the natural consequence of the origin of the arbitrators, easier to be convinced by arguments presented from a familiar point of view - the one corresponding to their nationality or to their national law.⁷⁹ Besides, it could not reasonably be expected from the arbitrators that in cases involving strong interests of their respective States they would act in detriment of their own country.⁸⁰

Another fact which was usually pointed to as an explanation for the partiality was the selection of London⁸¹ and, specially, of Paris,⁸² as the headquarters of the arbitrations: an anti-German feeling was palpable in that environment.⁸³ Finally, the question of the language of the process was considered key in the inequality of the parties: According to section 8, the VPT itself foresaw the election by the Allied Power among French, English, Italian or Japanese, except if otherwise agreed.⁸⁴ In practice, the regulations chose the language of the Allied Power, or (in the case of Greece, Romania), the French; only in some cases German was also admitted (Czech Republic, Yugoslavia). Apart from the greater difficulties that this generated for the German members of the MAT,⁸⁵ the authors acknowledged that this fact translated *de facto* into an advantage for the allied litigant who simply used his mother tongue.⁸⁶ This discriminatory character of the proceedings was reinforced by the fact that the decisions were given in the language of the Allied Power and were immediately enforceable (without exequatur) in the defeated states (article 302 (1) VPT).⁸⁷

⁷⁷ Calamandrei (n 52) 293, 339.

⁷⁸ Ernst Zitelmann, 'Zwischenstaatliche Gerichtsbarkeit und die Gemischten Schiedsgerichtshöfe des Versailler Vertrags' [1923] Niemeyer's Zeitschrift für internationales Recht 303, 316, 320, 320; Blühdorn (n 14) 141, 171. The conflict within the French-German MAT was largely influenced by the occupation of the Ruhr region by French troops in 1923, cf Schätzel (n 12) 378, 391 f.

⁷⁹ In addition, the provisions of the peace treaties were one-sided and discriminating the (nationals of) defeated nations. This basic situation explains the bitterness of some commentaries of German scholars. Generally, German scholars had difficulties in understanding the official language of the Peace Treaties which did not provide for an official translation into German and were based on legal concepts which did not fully correspond to the domestic concepts of German law, Zollmann (n 6) 379, 389. Eventually, the isolated situation of German private law led to the establishment of the Kaiser-Wilhelm-Institut für Internationales Privatrecht in Berlin (1926), cf Jürgen Basedow, 'Der Standort des Max-Planck-Instituts - Zwischen Praxis, Rechtspolitik und Privatrechtswissenschaft' in *Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht* (Mohr Siebeck 2001) 3, 6 ff.

⁸⁰ Blühdorn (n 14) 141, 165.

⁸¹ The seat was at 21, St. James' Square, London SW1, 6.

⁸² The seat was firstly at Hôtel Matignon (the former Austrian Embassy), later at 145, Avenue Malakoff.

⁸³ Blühdorn (n 14) 141, 179; Zitelmann (n 78) 303, 321-322; Hermann Isay, *Die privaten Rechte und Interessen im Friedensvertrag* (3rd edn, Vahlen 1923) 424. Geneva was chosen for the Yugoslavian-German MAT as well as for the one with Czechoslovakia.

⁸⁴ Annex to article 304 VPT s 8.

⁸⁵ The German Government had considerable difficulties in recruiting sufficient legal experts to be sent to the MATs as "German" arbitrators or agents. The former allies of Germany faced the same problem, Zollmann (n 6) 379, 388-389.

⁸⁶ Blühdorn (n 14) 141, 178; Schätzel (n 12) 378, 405; Isay (n 83) 425, Zitelmann (n 78) 303, 321-322.

⁸⁷ See infra at n **Error! Bookmark not defined.**.

2.4. The Interfaces with Domestic Procedures

2.4.1. The Basic Regime

2.4.2. Concurrent Pending Jurisdiction in National Courts

2.4.3. Finality and Enforceability

3. The Legal Nature of the Mixed Arbitral Tribunals

3.1. The Contemporary Debate

One of the most debated issues in the literature between the 1920s and the 1930s was the nature of the MATs: Were they national adjudicatory bodies, international ones, or rather a *tertium genus*? Should they be considered as an exceptional jurisdiction, or as a general one? Both questions, especially the later, had significant impacts in practice.

3.1.1. National or International Tribunals

Scholars addressing the issue of the national or international nature of the MATs reached different conclusions depending on what decisive criterion they followed: the origin of the institution, or its function. According to the first opinion, MATs were indisputably international bodies.⁸⁸ On the contrary, a functional approach led to further distinctions following the taxonomy of the controversies allocated to the MATs. Taking as starting point the idea that international tribunals deal with disputes between States, *Blühdorn* excluded the MATs from the category when they addressed individual conflicts within the framework of article 304 (b) (2) VPT; the same in cases falling within their competence under the scope of article 296 VPT. Conversely, MATs were considered international when they fixed the compensations referred to in article 297 VPT. In this constellation, the individual was not considered bringing a right of his own, but of the allied or associated Power.⁸⁹

Other authors shared this opinion only to some extent. As a starting point, the view on article 304 (b) was uncontroversial: The competence of the MATs for contractual disputes between individuals was said to be tantamount to the one of the national courts, to the point that some scholars considered MATs as internal civil courts, with the particularity that their decisions deployed effectiveness simultaneously in two legal spheres - those of the States of the nationals involved.⁹⁰ Some major difficulty was experienced in relation to article 296 VPT, due to the presence in these cases of a State on the side of both the debtor and the creditor. However, the fact that the State's intervention was not carried out as an exercise of sovereignty - the obligation of the State being ancillary to the private obligation relationship - allowed concluding that MATs are internal bodies as well.⁹¹ Finally, the greatest controversy arose regarding article 297 VPT: the nature of the right to

⁸⁸ Burchard (n 24) 472, 476 (addressing the specific constellations of the German-US claims tribunal); Hans Joachim Hallier, *Völkerrechtliche Schiedsinstanzen für Einzelpersonen und ihr Verhältnis zur innerstaatlichen Gerichtsbarkeit. Eine Untersuchung der Praxis seit 1945* (Heymann 1962) 14, 15.

⁸⁹ *Blühdorn* (n 14) 144-146.

⁹⁰ Georg Geier, *Das internationale Privatrecht der Gemischten Schiedsgerichte des Versailles Vertrages* (1930) 7; Calamendrei (n 52) 293, 333, called them "tribunali anfibi",

⁹¹ Geier (n 90) 10-11, with further references.

claim of the individual, the question about whether he acts in his own name, on behalf of the State or even as a State's organ, remained unclear.⁹² In opposition to *Blühdorn*, *Geier* argued that article 297 VPT right found its root in the German legal system: it was a consequence of the State trespassing into a private right in the name of the common good, thus it corresponded to the field of administrative law; in this context the MATs were considered as well internal jurisdictional bodies of the States.⁹³

3.1.2. General/Special Jurisdiction

The question whether the MATs were bestowed with general or special jurisdiction received different answers both in literature and in the case law, although it seems that among the MAT, as well as before the national courts, the idea of an exceptional jurisdiction prevailed; as a consequence the MAT competences had to be restrictively interpreted. Instead, for other authors the MATs jurisdiction was general (or comprehensive) for all the subjects included in sections III, IV, V and VII of the VPT. A third group of scholars qualified the jurisdiction as special or common according to the type of controversy at stake: special jurisdiction for claims between individuals; common for the claims opposing individual and the enemy State.⁹⁴

The lack of agreement extended to the practice. The early decision of the Franco-German MAT *Société vinicole de Champagne v Mumm*,⁹⁵ defended the broadest interpretation: the MAT jurisdiction "is general for all matters corresponding to sections III, IV, V and VII)", without it being possible to interpret the list of subject matters enumerated in the VPT as limitative, because it would be absurd not to allow MATs to decide about issues equal to those for which jurisdiction had been expressly conferred to them.⁹⁶ However, the decision was soon contested: the Polish-German MAT decision *Leo von Tiedemann c. État Polonais*, of 21 May 1923, was frequently quoted as leading case in this regard;⁹⁷ others followed where the jurisdiction of the MATs was literally confined to the cases where it clearly⁹⁸ resorted from the peace provisions that the contracting States "ont entendu distraire le défendeur de son juge naturel pour le soumettre à la juridiction exceptionnelle des TAM".⁹⁹

The idea of a restricted jurisdiction was echoed by national courts. Although willing to give up their own jurisdiction - even by closing on-going procedures upon the VPT entering into force -

⁹² See supra n 59 on the position of the MAT.

⁹³ *Geier* (n 90) 13. From a modern point of view, this debate demonstrates that the access of the individual as a party to an international adjudicative body was an unknown concept in the 1920s.

⁹⁴ Calamandrei (n 52) 293, 299, represents the former opinion. Gilbert Gidel and Henry Émile Barrault, *Le Traité de Paix avec l'Allemagne du 28 Juin 1919 et les Intérêts Privés: commentaires des Dispositions de la Partie X du Traité de Versailles*, (Librairie Générale de Droit et de Jurisprudence 1921) 19, are representative of the second view. For the third opinion Hermann Isay, 'Die Zuständigkeit der Gemischten Schiedsgerichte' [1924] *Juristische Wochenschrift* 596, 597.

⁹⁵ 5 March 1921, *Recueil MAT* vol 1, 22–27, for a critique Strupp (n 6) 661, 663.

⁹⁶ Here, one should consider that the decision was about the infringement (or distribution) of IP rights between the parties in third states.

⁹⁷ Polish-German MAT, 21 May 1923, *Leo von Tiedemann v Etat Polonais*, *Recueil MAT* vol 3, 596, 601–606; Belgian-German MAT, 22 May 1924, *Joseph Zurstrassen et Cie v État allemand*, *Recueil MAT* vol 4, 326, 338.

⁹⁸ Although without a requirement of an *expressis verbis* endowment.

⁹⁹ Serb-Austrian MAT, 23 March 1923, *Wapa v République d'Autriche et autres*, *Recueil MAT* vol 3, 720, 728; Serb-Bulgarian MAT, 3 April 1923, *Raffinerie et Sucrerie serbo-tchèque Tchoupria v État bulgare*, *Recueil MAT* vol 3, 185, 191; Czechoslovakian-German MAT, 27 April 1923, *Paalen v État allemand*, *Recueil MAT* vol 3, 993, 997.

they understood the material scope of the MATs assignment as limited, and conducted a strict reading of the VPT terms. In this regard, an English judge explicitly stated that a MAT decision "can only be conclusive within the limits assigned to it by the Treaty. It cannot (...) assume jurisdiction in matters outside its province".¹⁰⁰ Other national decisions concurred in that MATs only disposed of an exceptional or special jurisdiction: Consequently, the VPT provisions to the point had to be narrowly interpreted.¹⁰¹

The specific nature of the MAT was also highlighted by several decisions of the PCIJ. Recurrently, the PCIJ was asked to interpret the peace treaties, especially to delineate the part on reparations (article 231 ff VPT) from the economic provisions¹⁰². Another dispute related to the issue whether liquidated assets in Upper Silesia had been in the ownership/possession of the German state or of German nationals who were entitled to compensation under article 297 h) VPT.¹⁰³ In *Certain German Interests in Upper Silesia*, the PCIJ clearly stated that there was no pendency between the MAT and the PCIJ because the MAT were only competent to decide about the restitution of a society whereas the PCIJ was asked to interpret the peace treaty (as a whole).¹⁰⁴ Eventually, the PCIJ considered itself as a court of general jurisdiction (competent for the interpretation of international law) and the peace treaties being a part of it.¹⁰⁵

3.2. Modern Parallels

The debate about the legal nature of the MAT recalls the debate about the legal nature of other modern international courts and tribunals deciding on claims of individuals against states and international organizations as the US-Iranian Claims Tribunal,¹⁰⁶ the United Nations Compensation Commission¹⁰⁷ or the Eritrea Ethiopian Claims Commission.¹⁰⁸ The most interesting parallelism relates to investment arbitration.¹⁰⁹ Although both areas of law are different and the current structure of investment arbitration does not correspond to the institutionalised dispute resolution by arbitral tribunals, there are some similarities to be mentioned here. First of all, there is a basic resemblance: In an untechnical way, the MAT protected private investments (especially in the case of article 297 (e) VPT) in the belligerent states which had been affected by the economic warfare.¹¹⁰ The procedural standing of the individuals before the bodies corresponds to the position of individual

¹⁰⁰ Decision of the English Controller and Registrar of Patents, 5 and 8 May 1922, Recueil MAT vol 2, 164, 172.

¹⁰¹ Cour d'appel de Bruxelles, 20 March 1922, Recueil MAT vol 1, 959, 961; Cour d'appel de Liège, 28 March 1924, Recueil MAT vol 4, 160 ff.

¹⁰² PCIJ, 12 September 1924, *Traité de Neuilly*, Article 179, paragraphe 4 (interprétation), Série A no. 3.

¹⁰³ PCIJ, 25 May 1926, *Certain German Interests in Upper Silesia*, Series A no. 7, 33.

¹⁰⁴ PCIJ, 25 August 1925, *Certain German Interests in Upper Silesia* (Admissibility), Series A no. 6, 19–20. From a dogmatic point of view, this argument was not convincing as the PCIJ did not take up the facts and the (direct) applicable law of the case at hand in order to assess whether the same claims were involved. Instead, it adopted a formalistic view.

¹⁰⁵ Surprisingly, this judgment is still quoted as an authority for the distinction between international and domestic courts, especially in the context of investment arbitration, cf Hess (n 16) 49, para 242 (with further references).

¹⁰⁶ Hans Van Houtte, 'International Tribunals and Conflict of Laws – Recent Examples' in Rafaël Jafferli, Vanessa Marquette and Arnaud Nuyts (eds), *Liber amicorum Nadine Watté* (Bruylant 2017) 517, 522 ff.

¹⁰⁷ Hess (n 16) 49, para 95 ff.

¹⁰⁸ Van Houtte (n 106) 517, 526 ff.

¹⁰⁹ Hess (n 16) 49, para 104 f.

¹¹⁰ Ex.: factories owned by enemy nationals had been put under trusteeship, see supra text at fn. 3.

investors before modern arbitral tribunals. The similarities might even increase when permanent investment courts are established.¹¹¹ Today, the relationship between domestic courts and investment arbitral tribunals is sometimes described in a way that both belong to different spheres: domestic and international law. In this context, some authors refer to the case law of the PCIJ regarding the MAT as belonging to a different order. However, in the case law of the PCIJ, the MAT were (rather) assimilated to domestic courts than to international tribunals. Therefore, the parallel is not entirely convincing.

4. Private International Law in the Case Law of the Mixed Arbitral Tribunals

4.1. Nationality and Standing

As the jurisdiction of the specific MAT (and the admissibility of the claim) depended on the nationality of the claimant, disputes on the nationality played a pivotal role in case law of the MAT. As a starting point, each plaintiff had to bring a claim to the MAT established by his “home state”.¹¹² This rule also applied to claims brought by a plurality of plaintiffs.¹¹³ The crucial moment for this requirement was the filing of the claim.¹¹⁴ From the defendants’ perspective, contesting the nationality of the claimants was often the most promising (or even the only) defence available (especially in the context of article 297 VPT).¹¹⁵ Against this background, it is no surprise that considerable case-law of the MAT related to the nationality of the parties – especially to the control of moral persons by shareholders.¹¹⁶ However, the principles applied in this context were specific to the extraordinary war measures. As a result, the case law regarding corporations was contradictory.¹¹⁷

A much contested issue in the context of article 296 VPT was the nationality of the inhabitants of Alsace Lorraine. Here, the German government argued that this group had to be considered as Germans until November 1918. The French government argued that this group had always had a “virtual French citizenship”. Eventually the French-German MAT endorsed this concept.¹¹⁸ As a result, more than 20.000 additional claims from Alsace Lorraine were filed with the MAT, German observers criticized that these claims had been systematically collected by “French agents”.¹¹⁹

¹¹¹ Cf the proposals of the EU Commission concerning a multilateral investment court.

¹¹² Belgian-German MAT, 29 October 1922, *Charles Petit et Cie v Thun*, Recueil MAT vol 2, 401–402: A claim of a Belgian creditor against a Dutch debtor resident in Germany was declared inadmissible because the defendant was not a German national.

¹¹³ British-German MAT, 7 and 17 December 1923, *Koch v Landauer Nachfolger*, Recueil MAT vol 3, 772, 774. The nationality was determined according to the domestic laws of the state concerned, Kurt Lipstein, ‘Conflict of Laws before International Tribunals. A Study in the Relation between International Law and Conflict of Laws – Part II’ (1943) 29 Transactions of the Grotius Society 51, 68.

¹¹⁴ Again, a uniform approach was missing, Schätzel (n 12) 378, 426–430; Lipstein (n 113) 51, 67–69.

¹¹⁵ Schätzel (n 12) 378, 424; Kurt Lipstein, ‘Conflict of Laws before International Tribunals. A Study in the Relation between International Law and Conflict of Laws – Part 1’ (1941) 27 Transactions of the Grotius Society 142 ff.

¹¹⁶ Lipstein (n 115) 142, 160 ff.

¹¹⁷ Schätzel (n 12) 378, 429; Lipstein (n 113) 51, 69 – some MAT applied the incorporation, others the control theory.

¹¹⁸ French-German MAT, 30 June 1921 until 19 August 1921, *Veuve Heim v État allemand*, Recueil MAT vol 1, 381; French-German MAT, 23 June 1921 until 25 August 1921, *Chamant v État allemand*, Recueil MAT vol 1, 361.

¹¹⁹ Schätzel (n 12) 378, 425 ff. This phenomenon can be seen as a precursor of the current practice of “ambulance chasing”.

4.2. The Application of Conflict of Law Rules by the MAT

One of the most interesting questions about the disputes allocated to the MAT relates to the determination of the applicable law. The issue came up frequently before the MATs: on the one hand, there was almost no explicit provision in this regard, thus for many questions the MATs did not find a direct response in the Peace Treaties.¹²⁰ On the other hand, MATs did not belong to the judicial systems of the contracting states, and therefore had no *lex fori*: The determination of the applicable law could not be made by reference to the conflict of law rules of such legal system.¹²¹

4.2.1. The Debate among Scholars

Many contemporary authors of diverse nationalities addressed the issue of the law to be applied by the MATs, either in general terms, or in their comments on specific decisions. The reading of the scholar texts of the time allows identifying two perspectives: a merely narrative one, limited to describing the treatment that the conflict of laws problem received on the part of the MATs; and a normative one, which focus critically on what the MATs should do or have done in this point. Seen from a distance, the latter is the interesting one: the very question about private international law and the MATs, the lack of response thereto or, when there was one, the lack of uniformity, spurred the doctrine to develop different theories, in the framework of which essential issues of the discipline were addressed.

Interestingly, many contemporary scholars proposed that the conflict of law rules should be common to all countries; great hopes had been placed on the MATs in this regard¹²² - leading, as we will see, to equally great disappointments.¹²³ Another group of authors favoured instead the application of national conflict of rules, albeit without consensus on which ones these should be. The point of departure for each opinion was the corresponding view on the nature national or international, of the MATs.¹²⁴ The partisans of the former, in spite of sharing a common starting point, disagreed as to which national law should be applied. A first, not very successful proposal, advocated for the application of a national system to the exclusion of its PIL rules: arguing that the

¹²⁰ The VPT referred to the applicable law only exceptionally: It is worth mentioning article 296, Annex no. 4, where the laws on prescription in force in the country of domicile of the debtor were mentioned in relation to the bar of a debt. The situation was entirely different for the Reparations Commission. Here, article 244 Annex II no. 11 VPT stated: "The Commission shall not be bound by any particular code or rules of law or by any particular rule of evidence or of procedure, but shall be guided by justice, equity and good faith. Its decisions must follow the same principles and rules in all cases where they are applicable (...)".

¹²¹ The *lex fori* solution was nevertheless supported by some scholars, see below.

¹²² Niboyet (n 48) 97, 104: "les tribunaux arbitraux mixtes (...) ont la mission de dire le droit et se trouvent dans la situation enviable où l'on peut choisir la solution qui paraît la meilleur sans être lié par aucun texte. Comme tels ils peuvent être des véritables fondateurs du droit international privé. Ils bâtissent à neuf et leur jurisprudence pourrait devenir une source importante pour l'avenir s'ils le voulaient ». Similarly, Calamandrei (n 52) 293, 337, MATs are called to "resolvere la questione secondo i criteri che esso Tribunale adotterebbe ove fosse chiamato come legislatore internazionale a formulare un sistema de principii relativi alla competenza legislativa e giudiziaria dei vari Stati ».

¹²³ Jean Paulin Niboyet, 'Le rôle de la justice internationale en droit international privé - conflit des lois' (1932) 40 Recueil des cours 153, 230 f.; Lipstein (n 113) 51, 67 f.

¹²⁴ The "bilateral" nature of the MAT supported this approach.

VPT always favours the national of the Allied or associated powers, the representatives of this view concluded that German law would never be applied, but always that of the other party.¹²⁵

The idea of a *lex fori*, firmly rejected by some scholars, was still supported by others who in turn differed as to the prevailing criterion to identify it: the nationality of the arbitrators of the two countries involved, provided the designated legal systems coincide contents-wise;¹²⁶ or the law that the competent judge would have applied, had he been seized of the dispute.¹²⁷ The cumulative application of the legal systems of the States represented in a given MAT was defended by those who believed the MATs were State bodies through which the States exercised their jurisdiction, having thus the expectation (even the right) to have their own private international law rules applied by the Mixed Arbitral Tribunals.¹²⁸

Scholars who claimed that the jurisdiction of the MATs does not have national but international roots derived thereof different solutions in terms of applicable law. For some the MATs were not subject to specific, predetermined conflict of law rules. Rather, they should try to identify common substantive answers in the legal systems in presence, which added to general principles, would sustain an "internationales Weltprivatrecht" for international trade.¹²⁹ Other scholars, who believed as well that MATs are free from a specific PIL system, defended that in case of divergence between the conflict of law rules in presence MATs should look for "einem überstaatlichen internationalen Privatrecht irgendwelcher Art",¹³⁰ to be derived from public international law and the principles of personal and territorial sovereignty.¹³¹

In a similar vein, in the light of the Treaty silence, these scholars preferred a "völkerrechtsgemäße" solution: MATs decisions should be based on the minimum requirements imposed by public international law relating to private law, referred to as "überstaatliche Internationalprivatrechtssätze",¹³² such as: the recognition of vested rights; connecting points which are generally accepted and can be qualified as customary, such as the *lex rei sitae* for real estate rights; with more doubts, the closest connection, meaning the national legal system to which the

¹²⁵ Sipsom, 'Mémoire', quoted by Romanian-German MAT, 16 June 1925, *P. Negreanu v Meyer*, Recueil MAT vol 5, 200, 207, 211, which explicitly rejects it. See as well British-German MAT, 27 March 1922, *S. Hardt & Co v M.B. Stern*, Recueil MAT vol 3, 14, 17, on the equal treatment of allies and German nationals.

¹²⁶ It was proposed, but finally rejected, by Albrecht Mendelssohn-Bartholdy, 'Die Vorkriegsverträge (Art. 299 des FV) und das internationale Privatrecht' [1921] *Juristische Wochenschrift* 133, 134. Geier (n 90) 20, with further references. Niboyet (n 48) 97, 104, who criticizes the solution for its pragmatic - as opposed to dogmatic - character, nevertheless accepts it as "comfortable and legitimate".

¹²⁷ Schauer, 'Zur Frage der Anwendung des internationalen Privatrechts durch die Ausgleichsämter und die gemischten Schiedsgerichtshöfe' [1920] *Deutsche Juristen-Zeitung* 425, 427. For Blühdorn (n 14) 141, 194, in cases where the MATs acted as equivalent to national courts, the applicable law had to be the one a German court would have applied, for the MATs were set up to take over their role.

¹²⁸ Geier (n 90) 47-59.

¹²⁹ Walter Grau, 'Versailler Frieden (Privatrechliche Bestimmungen)' in Karl Strupp (ed), *Wörterbuch des Völkerrechts und der Diplomatie* (3rd vol, 1st edn, Walter De Gruyter & Co. 1929) 48, 65.

¹³⁰ Ernst Zitelmann, *Internationales Privatrecht* (1st edn, vol 1, Duncker & Humboldt 1897) 77.

¹³¹ The contemporary debate was thoroughly analysed by Lipstein (n 115) 34, 37-38.

¹³² Franz Kahn, 'Abhandlungen zum internationalen Privatrecht I' (1928) 284-287.

circumstances of the case point preponderantly. These rules were deemed not only relevant per se, but because they should also inspire the MATs when addressing further remaining issues¹³³

4.2.2. The Case Law of the MAT

The questions about the applicable law arose frequently before the MATs: it could not be otherwise taking into account that all controversies submitted to them necessarily presented a cross-border element. The attitudes were very diverse, evolving over time, and changing from MAT to MAT. It is possible to detect an evolution that goes from seeking support in good faith, or in equity,¹³⁴ to the application of the positive rules in force in the national legal systems. However, a common approach in that sense did not exist: neither from the perspective of the method nor of the concrete solutions; as a rule disputes were solved on a case by case basis, and most often pragmatically. Without pretending to systematize an incomprehensible casuistic, one can ascertain the following trends: avoiding the issue (ad ex, when the systems of the two States involved present, or are assumed to do so, an identical material solution);¹³⁵ absence of any pronouncement on the method accounting for the solution adopted (the MAT proceeds to the immediate application of a substantive solution, replacing those provided in all potentially applicable legal systems);¹³⁶ resort without further justification to connecting points (especially to more than one, when either of them would lead to the same final outcome;¹³⁷ or to an alleged choice of the parties to the controversy).¹³⁸ Finally, some decisions were based on (assumed) general principles of law: respect for vested rights,¹³⁹ the application of the personal law of the deceased in succession matters,¹⁴⁰ the law of the place where the contract is concluded for contractual obligations,¹⁴¹ and others whose "universal" character today would certainly be disputed (such as applying the law of the nationality of each of the parties to determine the content of their respective obligations).¹⁴²

From a modern perspective, one must assume that the MAT did not develop a comprehensive jurisprudence on conflict of laws. They addressed outstanding issues on a case by case approach. Often, conflict of law issues remained undecided because the MAT came to the

¹³³ Especially Gutzwiller (n 48) 123, 126 ff.

¹³⁴ In some regulations, the principles of justice and equity were referred to as grounding both the procedural and the material solutions: see for instance French-German MAT, 2 April 1920, art 99, Recueil MAT vol 1, 57.

¹³⁵ French-German MAT, 26 July 1922, *Rumeau v Schmidt*, Recueil MAT vol 2, 325, 327; French-German MAT, 24 November 1922, *Munzing et Cie v Still*, Recueil MAT vol 2, 747, 749. Jean Paulin Niboyet, 'Quelques considérations sur la justice internationale et le droit international privé' [1929] *Mélanges Antoine Pillet* 163. See critic by Romanian-German MAT 16 June 1925, *P. Negreanu v Meyer*, Recueil MAT vol 5, 200, 210, "(...) car dans bien des cas, l'étude approfondie des deux droits révèle des divergences, qui n'apparaissent pas à première vue".

¹³⁶ Niboyet (n 135) 105; Geier (n 90) 30, would nevertheless support a less critical reading, according to which the MAT were simply not disclosing the connecting point.

¹³⁷ Romanian-German MAT, 25 July 1927, *S. Landes v W. Schuster*, Recueil MAT vol 7, 747, 750; Romanian-German MAT, 24 July 1926, *Société Phoenix v Deutsches Reich*, Recueil MAT vol 7, 103, 110.

¹³⁸ Czechoslovakian-German MAT, 24 October 1923, *Gellert v Kolker*, Recueil MAT vol 4, 515, 520; Czechoslovakian-German MAT, 30 November 1923, *Goldschmiedt v Heesch Hinrichsen et Cie*, Recueil MAT vol 4, 530, 534; Czechoslovakian-German MAT, 22 April 1925, *Loy et Markus v État allemand et Deutsch Ostafrikanische Bank A. G. défenderesse*, Recueil MAT vol 5, 551, 563.

¹³⁹ Romanian-Hungarian MAT, 10 January 1927, *Emeric Kulin père v Rum. Staat*, Recueil MAT vol 7, 138-150.

¹⁴⁰ French-German MAT, 30 March 1926, *Zeppenfeld v Deutsches Reich*, Recueil MAT vol 6, 243, 247.

¹⁴¹ Belgian-German MAT, 9 January 1924, *Medts v Graff*, Recueil MAT vol 3, 798, 800.

¹⁴² Romanian-German MAT, 16 June 1925, *P. Negreanu v Meyer*, Recueil MAT vol 5, 200, 211.

conclusion that potentially applicable substantive laws of the two states involved were identical. This solution was criticized by the legal doctrine¹⁴³ but appears understandable against the background of the huge case load the MAT had to decide. As a result, the case-law of the MAT appeared to be scattered and fragmented. Finally, there are only few decisions where the MATs developed general principles of conflicts of law which might serve as a general reference.¹⁴⁴

5. Assessment

5.1. A Preferred Way of Dispute Settlement in the 1920s

After the First World War, the settlement of private disputes arising out of the war by international arbitral tribunals was considered as a positive step. This attitude even applied to the defeated countries although the one-sided approach of the peace treaties triggered considerable resistance and frustration. However, within the small group of arbitrators, state agents and the ministries involved, a more cooperative spirit grew over the years although political crises like the occupation of the Ruhr Region between 1923 and 1925 created considerable tension within the MAT. Nevertheless, the regime of the MAT did not always work to the detriment of German parties (and Germany's former allies): The competence of the German-Polish MAT operated in favour of the expropriated German owners of factories and (large scale) farms. In this context, it was reported that the German-Polish MAT were not less unpopular in Poland than the MAT with the Allied powers in Germany.¹⁴⁵ The abrupt termination of most of the MAT by the Young Agreements in 1930 was the main reason why the experiment of the MAT was quickly forgotten – although their case law was largely discussed in the 1930s.

5.2. A Practical Drawback: The Fragmentation of the Case Law

One feature of the MAT decisions was the lack of uniformity of the case law. MATs addressed disputes on a case by case basis, and not through decisions of principle.¹⁴⁶ They were not bound by their previous decisions or by those of others (although cross-references may be identified); it is not surprising that they did not create a true body of jurisprudence. Like the Clearing Offices, which developed a spontaneous practice to hold regular conferences which allowed solving problems uniformly,¹⁴⁷ some attempts were made to unify the case law - for instance, of the four sections of the Franco-German TAM, by way of creating a collegiate body composed by the four presidents, plus one arbitrator of each State -, but this attempt did not come to fruition.¹⁴⁸ Finally, and decisively, the state parties were not interested in establishing a self-standing judiciary competent to interpret the peace treaties. In this respect, the "bilateralisation" of the individual MAT is telling. On the other hand, the PCIJ was asked to decide on particular aspects of the peace treaties but there was no intention of the state parties to entrust the PCIJ to become the last arbiter with regard to the peace

¹⁴³ Niboyet (n 123) 153, 221 ff.; Gutzwiller (n 48) 123, 137.

¹⁴⁴ As highlighted by Lipstein (n 113) 51, 68 ff.

¹⁴⁵ Schätzel (n 12) 378, 391.

¹⁴⁶ Lipstein (n 115) 142, 150; Gutzwiller (n 48) 123, 128 f.; Niboyet (n 123) 153, 222.

¹⁴⁷ Gidel & Barrault (n 94) xxiv.

¹⁴⁸ Walter Schätzel, *Das deutsch-französische Gemischte Schiedsgericht, seine Geschichte, Rechtsprechung und Ergebnisse* (Stilke 1930) 16.

treaties.¹⁴⁹ In the political tensions of 1930s, the idea of a peaceful settlement of political disputes quickly got lost.¹⁵⁰

5.3. Are there Lessons to be Learned?

After 1945, the Mixed Arbitral Tribunals were more or less forgotten in international practice. The peace treaties after the World War II did not foresee MATs but provided for some mixed commissions.¹⁵¹ Obviously, the lacking interest was due to the bad perception of the work of the MATs in the contemporary practice: They had been disregarded because of the fragmentation of the case law, the politicization of the disputes and also because their dissolution operated so quickly in the 1930s.

On the other hand, regional international courts were established in the Western (democratic) post-war societies: the ECHR as well as the CJEU are powerful examples of an international judiciary with far-reaching competences to set a level playing field where human rights and fundamental values are respected and implemented. Here, the role of the individual as a party at the international plan has been recognized.¹⁵²

From a modern point of view, the work of the MATs should be appreciated differently: The MATs worked in a very difficult political and one-sided environment but the tribunals were able to handle a multitude of claims – in modern words mass claims – overall in an efficient and fair way. In this regard, the modernity of the procedures applied is impressive: They were able to process claims via standard forms and under the control of state agents, to accelerate the proceedings by time limits, by standard claim forms and by concentrating the proceedings in one hearing. Finally, the design of the proceedings permitted the settlement of important parts of the cases. On the other hand, the fragmentation of the case law of the individual adjudicative bodies is a phenomenon which is equally found in modern dispute resolution, especially in investment dispute settlement. The main reason was (and still is) the lack of a superior instance which might be able to establish a “jurisprudence constante”. This problem is still found in modern dispute resolution and it remains to be seen whether the efforts of the European Union to establish a permanent investment court might change the situation in this regard. All in all, it seems to be high time to appreciate the work and the achievements of the Mixed Arbitral Tribunals in a more comprehensive and more positive perspective.

¹⁴⁹ See supra at n 105. One should not forget that the PCIJ had been set up by article 14 of the VPT.

¹⁵⁰ In this respect, it is telling that most doctrinal articles on the MAT were published in the early 1930s.

¹⁵¹ Dolzer Rudolf, ‘Mixed Claims Commissions’ in Wolfrum Rüdiger (ed) Max Planck Encyclopedia of Public International Law MPEPIL (2011).

¹⁵² It should be noted that many jurists who had been involved in the work of the MAT were later involved as well in the establishment of the European Court of Justice, cf Erpelding, chapter in this volume.



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