Chapter 11 International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922

Marta Requejo Isidro[*] / *Burkhard Hess*[**]

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 to that point in history, 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 enemy nationals was generally prohibited, and any property of these nationals located in the belligerent state was strictly controlled and—often—seized. Measures of sequestration were 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 judg-

* Professor of Private International Law, Universidade de Santiago de Compostela; Senior Research Fellow, Max Planck Institute Luxembourg for Procedural Law.
** Director, Max Planck Institute Luxembourg for Procedural Law.

1 Christian Dominicé, *La notion du caractère ennemi des biens privés dans la guerre sur terre* (E Droz/Minard 1961) 14–15; Michael Bazyler, '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 art 310 VPT.

ments 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, arts 264–312 VPT) which firstly addressed inter-state commercial relations in general (arts 264–270 VPT)[5] and imposed the (most favourable) treatment of nationals of the Allied and Associated Powers in Germany—without any reciprocity (arts 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 (art 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 reads as follows:

> 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

3 The German legislation related to enemy property is described by Dominicé (n 1) 132–36; the French legislation at 113–23; the English legislation at 51–63.

4 This paper mainly addresses the Versailles Peace Treaty (with Germany) of 28 June 2019 (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 with 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 (arts 271–73 VPT), unfair competition (arts 274–75 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* (LGDJ 2018) 379, 383.

> 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 its owners (arts 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 Powers[8] and used for the full compensation of their own nationals (art 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 put forward their defence, and the respective judgments were reversed (art 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 foreseen in Articles 231ff VPT.[10] However, the legal regime of private rights was conceptually and formally clearly separated from the reparation regime.[11]

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7 Art 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 Art 297 (b) 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 corning 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.'

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 the implementation of the substantive provisions[12] of the peace treaties[13] as they mistrusted the willingness of these courts to fully implement the one-sided regimes of the peace treaties.[14] Under the applicable national jurisdictional rules, these courts had the competence 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

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10 At the 1919 Peace Conference 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)*, Series A no 3; on the reparation regime cf Pierre d'Argent, *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.

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 (29 December 1920) 1 Recueil MAT 132, 134; Cour d'appel de Bruxelles (20 March 1922) 1 Recueil MAT 959, 961. In a similar vein, Romanian–German MAT, *Mr Kirschen senior v Sobotka, ZEG et Empire allemand* (3 January 1925) 4 Recueil MAT 858, 863–64: '*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 influer 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) 108 Entscheidungen des Reichsgerichts in Zivilsachen 5052.

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.

> 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 arbitrators were nominated by the respective governments, and a presiding judge who was a national of a neutral state was chosen by agreement between the two governments. 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 MATs

The Mixed Arbitral Tribunals (MATs) had the competence 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 (art 296 and Annex no 16 VPT[17]).
> (2) The MATs were competent to reverse judgments of Austrian, German and Hungarian courts which were given against allied nationals during the war and to award compensation (art 302(2) VPT[18]).

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

17 See text of art 296 (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 Art 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 defence, the Allied and Associated national who has suffered prejudice thereby

(3) They decided on restitution and compensation claims concerning property rights and interests located in the enemy countries (art 297 VPT[19]).

(4) With regard to the Associated Powers Poland and Czechoslovakia, the MATs 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 (art 297(h) VPT[20]).

(5) The Mixed Arbitral Tribunals were competent to review judgments of national courts[21] regarding their conformity with the VPT (art 305 VPT). In these constellations, the MAT acted functionally as a kind of second instance court.[22]

(6) Apart from these main competences, the MATs acted in additional settings, especially in the granting of new licenses for IP rights (art 310 VPT). The German Polish MAT and the MAT for Upper Silesia played

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shall be entitled to recover compensation, to be fixed by the Mixed Arbitral Tribunal provided for in Section VI.'

19 Especially art 297(e) and (f) VPT. Art 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 Vl 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 Art 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, art 300 (b) VPT.

22 Blühdorn (n 14) 141 ff.

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 States[24] as the Peace Treaty of the United States and Germany of 10 August 1922 provided for the establishment of a Mixed Commission which dealt with the individual claims of American nationals against Germany and German nationals. It also decided on the reparation of war damages. However, these proceedings were different from the ones before the Mixed Arbitral Tribunals, as individuals had no standing in the Mixed Commission; their losses were taken up and claimed before the Commission by state agents.[25]

2. The Organization 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. There had been, in the 19th century, a couple of international mixed commissions competent to decide on the legal consequences of war affecting private property. However, in these bodies, individuals were not granted any standing,[26] but were represented by their home state under the traditional rules of diplomatic protec-

23 It must be noted that the statute of the MAT for Upper Silesia was different although it borrowed from the structure of the MAT. Cf Erpelding (ch 12).

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 AJIL (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.

26 Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 52 ff.

tion.[27] A first attempt of establishing an international tribunal competent to hear claims brought by individuals was founded in the 1907 Hague Convention on the International Prize Court. Shortly before the war, comprehensive rules of procedures had been established.[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 with 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 their own claims against allied parties[31]—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

There is not much reliable information available about the case law addressed by the Mixed Arbitral Tribunals. The most reliable source of empir-

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 (Michael Laßleben 1977) 143, 149 ff.

29 Carl Friedrich Ophüls, 'Gemischte Schiedsgerichte' in Karl Strupp and Hans Jürgen Schlochauer (eds), *Wörterbuch des Völkerrechts* (vol 3, 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 art 304 VPT and Annex.

31 The only exception was art 297 (h) VPT with regard to the liquidation of (mainly) German assets in Poland, text above (n 20).

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

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

ical information is an article written by Walter Schätzel.[34] According to this author, there were 36 Mixed Arbitral Tribunals, which 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 via the Treaty of Lausanne (1922) with Belgium, France, Greece, Italy, Romania and the United Kingdom.[36] These MATs had their seat in Istanbul.

As already mentioned, the number of cases processed by the arbitral tribunals was remarkable: According to Göppert, the French–German Mixed Arbitral Tribunal heard 23,996 cases, while the Polish–German Mixed Arbitral Tribunal dealt with 28,670 cases[37]. The UK–German Mixed Arbitral Tribunal heard almost 10,000 claims, while the Belgian–German Mixed Arbitral Tribunal decided 2,200 cases.[38] The Italian–German MAT was seized by thousands of small claims brought by Italian workers who had to leave Germany after the outbreak of the war.[39] All other arbitral tribunals decided less than 1,000 cases; the Siamese–German MAT only 3 cases.[40] The Mixed Arbitral Tribunals between Austria and the Allied Powers heard 2,845 cases in total, most of them (2,142) related to Italy.[41] The Mixed Arbitral Tribunals of Hungary decided almost 5,000 claims, and the Bulgarian

34 Schätzel (n 12) 378, 449 ff. Additional information is found in an unpublished memorandum by Otto Göppert, *Zur Geschichte der auf Grund des Versailler Vertrages eingesetzten Schiedsgerichte*, (typoscript March 1931, on file with the authors).

35 Hess (n 16) 49, para 89.

36 Schätzel (n 12) 378, 389.

37 Göppert (n 34) 90, 194.

38 Göppert (n 34) 91.

39 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. The MAT received 3,860 claims, almost all were settled, the MAT gave only 49 contradictory judgments, Göppert (n 34), 152–153.

40 Schätzel (n 12) 378, 450; Ophüls (n 29) vol 3, 173, 175. According to Göppert (n 34), 90, the French–German MAT received 23,996 claims; by December 1930, 21,093 cases were closed.

41 Schätzel (n 12) 378, 450 (footnote 2).

Mixed Arbitral Tribunal heard more than 1,000 cases. Most of these claims were processed within less than 10 years.[42]

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 agents[43]) were able to develop the first techniques for the processing and settlement of mass claims. The work of the Mixed Arbitral Tribunals is documented in a series of decisions published between 1921 and 1930.[44] These *Recueils* also contain 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 in collaboration with all presidents of the MATs and the state agents of all state parties involved.[45] However, it must be noted that this collection is in fact not comprehensive and includes only the most important decisions of the MATs and some important decisions of national courts.[46]

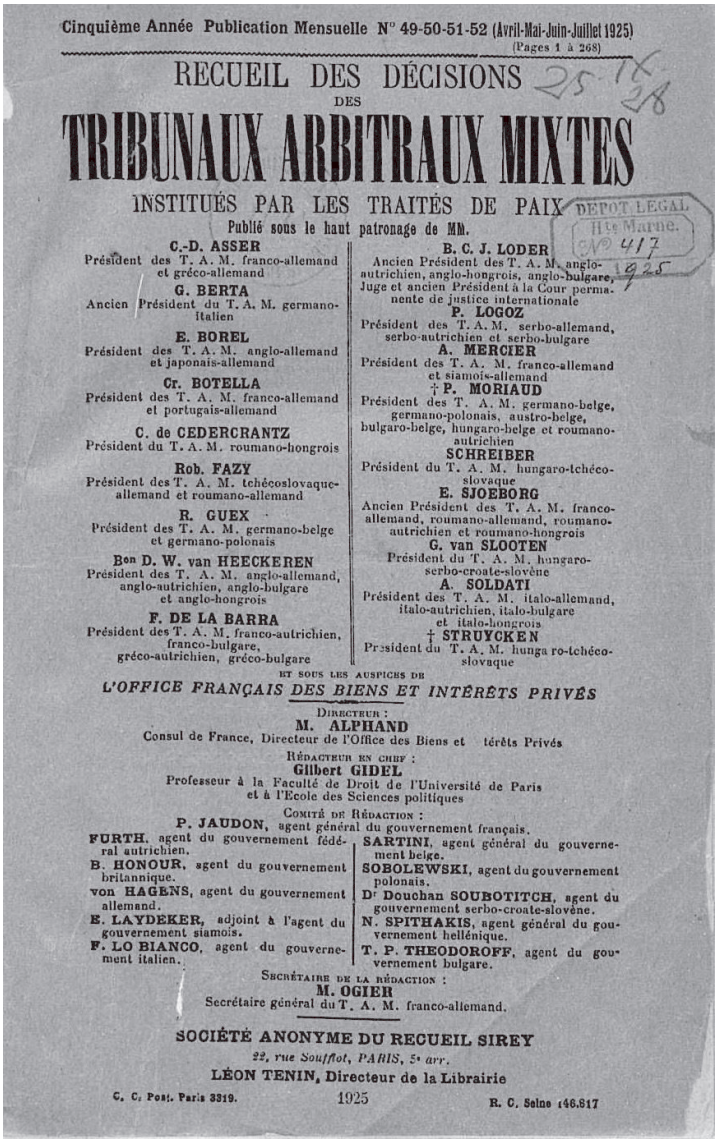
42 The Mixed Commission under the American–German Treaty of 10 August 1922 decided altogether 20,434 claims which were submitted to it: Department of State (ed) *The Treaty* of *Versailles and After: Annotations of the Text of the Treaty* (US Government Printing Office 1947) 629 f (providing for statistical information).

43 See infra text at n 51.

44 Office français des biens et intérêts privés (ed), *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Librairie de la Société du Recueil Sirey, 1922–1930), hereafter Recueil MAT.

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

46 Schätzel (n 12) 378, 424.



Cinquième Année Publication Mensuelle N° 49-50-51-52 (Avril-Mai-Juin-Juillet 1925)
(Pages 1 à 268)

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The 10-volume Recueil des décisions des Tribunaux arbitraux mixtes institués par les Traités de Paix *contains a selection of decisions made by various MATs. The collection was edited by the presidents of the MATs and demonstrated the effort to provide for a coherent set of case-law. Pictured here is volume 4, published in 1925. Source: gallica.bnf.fr / Bibliothèque nationale de France.*

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, which also appointed the presiding judge by common agreement. In case of failure to reach agreement, the Council of the League of Nations would appoint the MAT's president (art 304(a) VPT).[47] Once nominated, all judges of the MATs were independent.[48] Often, the presidents and the judges of the MATs were prominent international lawyers and law professors of the 1920s and 1930s: CD Asser acted as president of the French–German MAT; Ernst Rabel acted as a member of the Italian–German MAT, Victor Bruns was a member of the Polish–German MAT, Albert de Geouffre de Lapradelle usually acted as a party representative. In the 1920s and 1930s, the case law of the MATs was regularly documented and commented on in international journals.[49]

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-general were usually jurists with language skills covering both contracting states. In some MATs, the presidents were supported by personal secretaries.[50]

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47 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 no longer participated in the Belgian and French MATs. 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.

48 According to the case law of the German Supreme Court for civil and criminal matters, the *Reichsgericht*, the German Government could not unilaterally terminate the appointment of the judges: Reichsgericht (9 June 1925) 111 Entscheidungen des Reichsgerichts in Zivilsachen 115.

49 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 (footnotes 1 and 2 with numerous references).

50 Schätzel (n 12) 378, 398–99.

2.2.2. The State Agents

One of the salient features of the MATs was the involvement of 'state agents' before the tribunals.[51] The agents were formally representatives of the contracting states (especially in cases directly involving the states as parties), but they often acted as intermediaries between the individual parties and the MAT. They were not independent, receiving orders from their respective governments.[52] 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.[53] Their activities eventually amounted to a kind of filtering of claims.[54] This empowerment was based on their right to oversee the conduct of private parties.[55] Furthermore, the state agents were also able to directly settle many claims between the states involved.[56] The most important function related to their right to intervene directly in 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.[57] Sometimes, state agents even contradicted the legal or factual allegations of individual plaintiffs of their nationality.[58]

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51 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 MATs (*Otto Göppert*, 1872–1943). In 1924, there were 4 sub-divisions monitoring the proceedings in the different MATs, 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; Göppert (n 34), 25–40.

52 Zollmann (n 6) 379, 385.

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

54 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 French–German MAT.

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

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

57 Obviously, the old '*leitmotif*' of diplomatic protection reinforced the role of the state agents.

58 Schätzel (n 12) 378, 400.

2.2.3. *The Position of the Individual Claimants*

The most innovative feature of the dispute resolution mechanism was the standing of private individuals before 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, participation was not limited to private parties; state agents also 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 individuals before the Mixed Tribunals as a positive experience. Some authors clearly preferred individuals to be represented by state agents as foreseen in the German–American Mixed Claims Commission.[59] According to this opinion, the direct involvement of 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, thus qualifying the individual plaintiffs as a kind of representative of their home states. However, several MATs clearly stated that the economic rights of the VPT were the subjective rights of individuals.[60]

The strong position of the states in the proceedings became evident when the activities of most of the MATs[61] with Germany were terminated by international agreements related to the so-called Young plan in 1930: The state parties terminated the activities of the tribunals (including pending cases) by waiving the claims of individuals. Eventually, the special regime of the MATs was terminated by an international settlement based on diplomatic protection and the power of the states to espouse and to set-

59 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.

60 French–German MAT, *Sigwald v Germany* (27 August 1926) 6 Recueil MAT 888, 890; British–German MAT, *Exors of F Lederer v Germany* (13 December 1923) 3 Recueil MAT 762, 768. Same opinion: PCIJ, *Certain German Interests in Upper Silesia* (25 May 1926) Rep ser A no 7, 33.

61 With the exception of the MAT for Upper Silesia, cf Erpelding (ch 12).

tle the claims of their nationals.[62] It seems that the latter were (partially) compensated at the domestic level.[63]

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 1930[64] augmented the number of 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 whereby the states took up the cases of their nationals and presented them before the PCIJ.[65] 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 develop its own procedure. They did so in such detail that the outcome was described as 'miniature civil procedure codes'.[66] The MAT regulations addressed the internal organization of the tribunals (for instance where the 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).[67]

There were many similarities between the regulations as earlier drafts acted as templates for later drafts. Nevertheless, the procedures were not

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62 Hess (n 16) 49, para 91. The prerogative of the states to espouse the claims of their nationals was clearly stated by the French–German MAT *Sigwald v Germany* (27 August 1926) 6 Recueil MAT 888, 891. Example: the Polish–German MAT Bilateral Agreement of 31 October 1929, Reichsgesetzblatt 1930 II, art III: mutual waiver of all pending claims in the MAT.

63 Göppert (n 34), 208–209 on the dissolution of the Polish–German MAT.

64 121 LNTS 80.

65 Eventually, the PCIJ, *Pazman University (Hungary) v Czechoslovakia* (15 December 1933) Rep ser AB 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.'

66 Calamandrei (n 53) 293.

67 Schätzel (n 12) 378, 402–18.

identical. The contemporary legal literature even identified three different 'model' regulations: 1. the French–German MAT's rules of procedure, which would later inspire those of the Italian–German MAT; 2. the Anglo–German MAT's rules, which borrowed many of their original features from English civil procedural law, and would later serve as a model for the regulations of the Japanese–German MAT; 3. the Belgian–German MAT's regulations, which differed from those used by the French–German MAT and would serve as a reference for the MAT regulations with Yugoslavia, Czechoslovakia and Poland. Despite these common origins, there were also relevant divergences among the MAT regulations based on the same model.[68] Moreover, identical rules were not always identically implemented.[69] Decisions were also drafted in very different styles (and in different languages), closely following the typical formulations of the local decisions of the country where the MAT involved had its headquarters. In this respect, there was no uniformity at all in the manner the awards/judgments were drafted.[70] As a consequence, cross fertilization among the different courts (or, even more challenging, the development of a '*jurisprudence constante*') was difficult.[71]

68 Blühdorn (n 59) 488 490, highlights the peculiarities of the Anglo–German MAT's regulations; Calamandrei (n 53) 293, *passim*, those of the Italian–German MAT's regulations.

69 Such as for instance the more or less lenient attitude towards accepting time-barred claims: Blühdorn (n 59) 488, 493.

70 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.

71 It must be noted that the '*Recueil des décisions*' (supra n 44) 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.

Differences of style between the different MATs were also of a vestimentary nature. Whereas the members of the British–German MAT sat in lounge suits, the members of the Belgian–German MAT, pictured here in 1924 (from left to right: the German arbitrator, Richard Hoene, the MAT's neutral president, Paul Moriaud from Switzerland, and the Belgian arbitrator, Louis Fauquel), wore robes in the Franco–Belgian tradition. Press photograph by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

The procedures followed a similar pattern: The claims had to be filed within a limited period (generally 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.[72] Usually, documentary proof prevailed—in large part because the state agents encouraged parties to provide for witness testimonies protocolled by the domestic

72 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.

courts.[73] Representation by lawyers was not mandatory. Often, the state agents assisted the claimants in formulating the claims, even preparing their forms.[74] However, there were also specialized lawyers involved who 'collected' similar claims (on the basis of forms) and brought them collectively before the MAT.[75]

The procedures of the MATs 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 MATs tended to avoid several hearings, which would have been a time-consuming and costly burden on 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.[76] However, these provisions were seldom applied in practice.[77] Nevertheless, from a contemporary perspective, these procedural provisions appear to be progressive and modern.[78]

Among the elements common to all MATs, it is worth mentioning those which provoked criticism from contemporary scholars, who pointed to elements which are essential to any court and all processes, such as impartiality of the arbitrators and equality of arms between the parties. The allegation that arbitrators favoured the nationals of the Allied or Associated Powers or were imbued with the general idea of retaliation against or punishment of Germany is found in some authors with regard to specific MATs: Calamandrei made this observation about the regulations of the Italian–German MAT,[79] while Zitelmann cited examples from the practice of Franco–German MAT, whose tendentious character was commented on by oth-

73 Blühdorn (n 58) 488, 496–97. In the British–German MAT, German parties were confronted with cross-examinations by English barristers and had considerable difficulties to understand and to cope with the unknown procedural technique, Göppert (n 34), 143.

74 Blühdorn (n 58) 488, 495.

75 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 arts 72 and 73 VPT provided standing to these groups: *Heim et Chamant v Germany* (7 August and 25 September 1922) 3 Recueil MAT 50.

76 Calamandrei (n 53) 293, 313, regarding the Italian–German MAT Regulation.

77 Schätzel (n 12) 378, 404.

78 Cf Peter Gottwald, *Zivilprozessrecht* (18th edn, CH Beck 2018), § 1, paras 39 ff.

79 Calamandrei (n 53) 293, 339.

er authors as well.[80] The complaints, nevertheless, seem to be general, although it is usually added, in defence of the MATs, that partiality was not the result of bad faith but rather the natural consequence of the origin and training of the arbitrators, who were more easily convinced by arguments presented from a familiar point of view—the one corresponding to their nationality or to their national law.[81] Besides, it could not reasonably be expected from the arbitrators that in cases involving strong interests of their respective states they would act to the detriment of their own country.[82]

Another fact which was usually pointed to as an explanation for the partiality was the selection of London[83] and, in particular, of Paris[84] as the headquarters of the arbitrations. An anti-German feeling was palpable in those environments.[85] Finally, the question of the language of the process was considered key to 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.[86] In practice, the regulations chose the language of the Allied Power, or, in the case of Greece and Romania, French; only in some cases was German also admit-

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80 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.

81 In addition, the provisions of the peace treaties were one-sided and discriminated against 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.

82 Blühdorn (n 14) 141, 165.

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

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

85 Blühdorn (n 14) 141, 179; Zitelmann (n 80) 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.

86 Annex to Article 304 VPT s 8, Göppert (n 34), 9–10 stressing the 'considerable advantage' of the allied parties because of the language.

ted (Czech Republic and Yugoslavia). Apart from the greater difficulties that this generated for the German members of the MATs,[87] the authors acknowledged that this fact translated *de facto* into an advantage for the allied litigant who simply used his mother tongue.[88] 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 (art 302 (1) VPT).[89]

2.4. The Interfaces with Domestic Procedures

2.4.1. The Basic Regime

The relationship between any given MAT and the domestic courts largely depended on the provisions on the different competences of the MAT. Sometimes, these provisions allocated disputes under the VPT either to the national courts or to the MAT.[90] Consequently, Article 304(b) VPT generally defined the jurisdiction of the MATs by referring to the economic clauses of the provisions of the VPT.[91] As a result, the relationship of the MATs to national courts was differently delineated in the individual constellations.[92] These crucial interfaces were defined by the (limited) competences of the MATs:

(1) The first major competence of the MATs related to debts arising out of ongoing legal relationships at the outbreak of the war. Here, the VPT addressed several categories:
   (a) With regard to outstanding debts all private parties were treated equally.[93] As a matter of principle, all claims had to be filed

87 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.

88 Blühdorn (n 14) 141, 178; Schätzel (n 12) 378, 405; Isay (n 85) 425, Zitelmann (n 80) 303, 321–322.

89 See below (n 114).

90 The most prominent examples were Section 16 of the Annex to Article 296 VPT, Article 300(b) and Article 304(b), 2.

91 Article 304(b), para 1 VPT, see text above (n 15).

92 Attempts by German scholars to restrict the competences of the MATs by referring to their *Ausnahmecharakter* (extraordinary nature) were not taken up by the MATs, cf Strupp (n 6) 661, 664 ff.

93 Art 296 VPT, see text above (n 6).

through the Clearing offices. When a clearing (by mutual agreement between the offices) was impossible, the private parties could pursue their claims either before the MAT or bring them before an arbitral tribunal. Alternatively, with the permission of the clearing office of the creditor, the claim could also be brought before the civil court at the debtor's domicile.[94]

(b) Regarding judgments which the courts of the defeated states had rendered against allied defendants during wartime, the MATs were competent to revise these judgments and to award compensation to the allied parties (Article 302(2) VPT). The same legal regime applied to enforcement measures (Article 300(b) VPT).

The revision of war-time judgments under Article 302(2) to (4) VPT generated much case law. A typical example was the sale of the furniture of a tenant who was a national of an enemy country and had fled Germany after the outbreak of the war, leaving the rent unpaid for months.[95] The defendant's absence and the lack of representation in court constituted a recurrent case of a judgment by default,[96] although situations were also accepted in which the defence could not be carried out effectively.[97] There were different positions on whether 'damage' had been caused: only when the Ger-

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94 Art 296 (2) VPT stated that 'At the request of the Creditor Clearing Office the dispute may, however, be submitted to the jurisdiction of the Courts of the place of domicile of the debtor.' A lawsuit at the creditors domicile (based on art 14 Code Civil) was not admissible: Cour de Cassation, *Schwartzmann v Société Disconto Gesellschaft* (13 March 1929) 8 Recueil MAT 1013 f.

95 In these cases Article 300(b) VPT applied although no judicial decision preceded the enforcement measure —a consequence of the right of pledge that the German civil law gave to the lessor on the furniture of the lessee in case of non-payment of rent.

96 The defendant was outside of Germany as a result of an expulsion order: French–German MAT, *Wilhem v Germany* (21 July 1922) 2 Recueil MAT 426, 427; or he was out of the country at the beginning of the war and could not go back: French–German MAT, *Burtin v Germany and Magdeburger Bank* (15 September 1922) 2 Recueil MAT 450, 453. The presence of a lawyer made it difficult to consider the requirement had been met: Belgian–German MAT, *Ch Petit et Co v Gewerkschaft Glueckaufsegen* (7 October 1922) 2 Recueil MAT 539.

97 The existence of a defence did not automatically exclude art 302(2) VPT. On the other hand, had it been possible it would not have been enough, for art 302 VPT to apply, to claim that it had been a difficult endeavour: British–German MAT, *F L Cook v Germany* (17 and 29 June 1925) 5 Recueil MAT 299–303. The material impossibility of providing evidence was accepted as a case of Article 302, provided it was a consequence of the war, and not of negligence: Italian–German MAT, *Del Favero v Ditta Bassermann e C* (12 January 1925) 5 Recueil MAT 190–200, 197.

man decision was incurred in error[98] or if the situation involved the impossibility of voluntarily satisfying the judgment, exposing the defendant to the consequences of a forced execution.[99] Another practical problem related to the revision of German wartime judgments by the MATs: It was not clear against whom the claim had to be filed—whether against the original claimant or against Germany.[100]

(c) A similar solution applied to contractual claims (outside of Article 296, Article 299 VPT). Here, the competence of the MATs was modified in favour of the nationals of the Allied and Associated Powers: According to Article 304(b)(2) VPT they could either bring their claims before the competent courts in their home states or in Germany.[101] Alternatively, they could sue directly before the MATs. However, Austrian, German and Hungarian nationals could only bring these claims before the MATs.

(2) The second major competence of the MATs related to individual claims of nationals of the allied or associated powers for restitution and compensation of loss of property resulting from extraordinary war measures by Germany and its allies (Article 297(e) and (f) VPT). In this constellation, claims were brought before the MATs against the defeated state represented by its state agent. Here, the main task of the MATs was the assessment of the (individual) losses and the determination of

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There was an involuntary default when the defendant had not been able to file an appeal because of the shortness of the deadlines: Belgian–German MAT, *Ville d'Anvers v Germany* (19 October 1925) 5 Recueil MAT 712–719, 718.

98 Isay (n 85) 404–405; Belgian–German MAT, *Charles Petit et Cie v Sauer* (1 August 1923) 3 Recueil MAT 545–549: the damage requirement had not been met because '*même habilement défendus, en effet, ils* [the claimants] *eussent dû être condamnés*'.

99 Yugoslav–German MAT *Alexandra et Spasenije Pritza v dame Kathi Fahry* (3 October 1922) 2 Recueil MAT 668–675.

100 For the former Ernst Wolff, *Privatrechtliche Beziehungen zwischen früheren Feinden nach dem Friedensvertrag* (Vahlen 1921) 37, as well as French–German MAT, *Schmidt v Plath* (9 January 1923) 2 Recueil MAT 906, 910. For the latter Isay (n 85) 406, as well as French–German MAT, *Burtin v Germany and Magdeburger Bank* (15 September 1922) 2 Recueil MAT 450, 453; Belgian–German MAT, *Ch Petit et Co c Gewerkschaft Glueckaufsegen* (7 October 1922) 2 Recueil MAT 539; Yugoslavian–German MAT, *Alexandra et Spasenije Pritza v dame Kathi Fahry* (3 October 1922) 2 Recueil MAT 668, 673.

101 Examples: Reichsgericht (16 April 1924) 108 Entscheidungen des Reichsgerichts in Zivilsachen 50, 53; Reichsgericht (15 June 1923) 107 Entscheidungen des Reichsgerichts in Zivilsachen' 76; Reichsgericht (18 October 1926) 114 Entscheidungen des Reichsgerichts in Zivilsachen 421.

the compensation to be paid. The MATs replaced the competent courts in Germany and its former allies.[102]

(3) The third major competence of the MATs related to claims of Austrian, German or Hungarian nationals whose property within the new (associated) states (ie Poland, Czechoslovakia) had been liquidated after the war. The former owners could challenge the compensation provided by those states directly before the MAT under Article 297(h)(2) VPT.[103] Here, the MATs replaced the competent courts of the newly created states.[104]

2.4.2. *Concurrent Pending Jurisdiction in National Courts*

Although the VPT determined the competences of the MAT and delineated them from the jurisdiction of national courts, it did not address the constellation of pending claims at domestic courts when the peace treaty entered into force. In practice, this constellation was resolved with the termination of the national processes. According to Belgian courts, Article 296 VPT '*fait obstacle, pour les dettes visées par lui, à la poursuite de toute procédure entamée comme à l'introduction de toute nouvelle procédure*'.[105] Under Article 304(b) VPT, the wording 'all questions, whatsoever their nature' was interpreted in the sense that it covered ongoing processes, regardless of the procedural state of the pending case.[106] Later, the MATs endorsed the same opinion.[107]

A similar situation of concurring claims arose when the VPT itself opened up more than one forum for the same claim (as provided for by Article 304(b)(2) VPT).[108] Here, the examples we are aware of do not relate

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102 Direct conflicts with national courts did not arise as those claims were exclusively filed before the MAT.

103 Ophüls (n 29) vol 3, 173, 175.

104 For additional competences of the MATs, see above (n 20–23).

105 Tribunal de commerce d'Anvers (24 January 1921) 1 Recueil MAT 139, 143.

106 Tribunal supérieur de Colmar (18 January 1922) 2 Recueil MAT 176–77; Cour d'appel de Paris (23 October 1920) 1 Recueil MAT 77; Tribunal supérieur de Colmar (1 March 1922) 2 Recueil MAT 503, 504. Jean Paulin Niboyet, 'Les tribunaux arbitraux mixtes organisés en exécution des traités de paix' [1922] Bulletin de l'Institut Intermédiaire International 215, 234, confirmed that the French courts '*se sont dessaisis d'office*'.

107 French–German MAT, *Héritiers Appel and Germany v Chemin de fer PLM and Office Français* (30 December 1923) 3 Recueil MAT 918–23, 921–22.

108 See above (n 16).

to simultaneous proceedings, but to consecutive ones: Creditors tried to reproduce the dispute before an MAT only after the national court had already delivered an unfavourable decision to them. The (correct) reaction of the MAT was to bar the subsequent proceedings.[109] The question about the admissibility of a *lis pendens* or *res judicata* exception was raised in some cases, albeit only theoretically.[110] The *Reichsgericht* did not permit an action before the German courts (for the repayment of a pre-war debt) once the period for bringing the claim before the MAT had expired.[111]

2.4.3. Finality and Enforceability

According to Article 304(g) VPT, the decisions of the MATs were final and the contracting parties agreed to render them binding upon their nationals. As a rule, there was no appeal opened against them.[112] The judgments of the MATs were directly enforceable in Germany, without any exequatur procedure, Article 302(1) VPT. This was implemented in Germany through the Law of 10 August 1920 conferring on the Landgericht Berlin competence for all enforcement.[113] The same favourable treatment applied to all judgments given by courts of Allied or Associated Powers related to the Peace Treaty.[114]

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109 French–German MAT, *Banque Meyer v Well Gebrueder* (19 July 1923) 3 Recueil MAT 639, 642; Belgian–German MAT, *Nicaise v Germany and Hoopmann* (21 December 1925) 6 Recueil MAT 93, 94; Belgian–German MAT, *Kairis v Erckens and Germany* (27 June 1928) 8 Recueil MAT 183, 185.

110 Bulgarian-Belgian MAT, *Héritiers de Backer v Municipalité de Philippoli* (27 January 1927) 6 Recueil MAT 144, 146: *Lis pendens* between national courts and an MAT was rejected because it was only possible between courts of the same system and acting on the same degree.

111 Reichsgericht (18 October 1926) 114 Entscheidungen des Reichsgerichts in Zivilsachen 421, 423 f.

112 The parallel provision of the Treaty of Trianon was modified in 1930 by a multilateral convention concluded between Hungary and Czechoslovakia. According to this convention, the PCIJ was the competent appellate instance against the decisions of the MAT, see PCIJ, *Pazman University (Hungary) v Czechoslovakia* (15 December 1933) Rep ser AB no 61, 222.

113 Nevertheless, the enforcement itself was entrusted to the state agents of the MATs, and carried out in accordance with the pertinent national provisions, under the condition that they did not frustrate the objective of the VPT rule. *Landgericht* (regional tribunal) Stettin (15 March 1924) 4 Recueil MAT 140–42.

114 The full suppression of exequatur proceedings and of grounds for non-recognition went further than the present situation in European procedural law (cf art

An additional empowerment of the MATs related to the cassation of the judgments of Austrian, German and Hungarian courts. Whereas Article 305, first sentence VPT gave the MATs the general power to review national judgments with regard to their conformity with the peace treaty, they were empowered to directly set aside German judgments in favour of allied or associated creditors, Article 305, second sentence VPT.

Yet, German creditors (and creditors of the (former) allies of Germany) were not entitled to any preferential treatment if they won their case before the MAT. Recognition and enforcement of these judgments were based on the general rules regarding the recognition and enforcement of foreign civil judgments.[115]

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 latter, had a significant impact 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. Based on origin, MATs were indisputably international bodies.[116] However, a functional approach led to further distinctions following the taxonomy of the controver-

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45 of the Regulation (EU) 1215/2012). Contemporary observers, however, considered the MATs as *Sondergerichte* (special national courts). Consequently, exequatur proceedings were not required, Reichsgericht, 15 June 1923, 'Entscheidungen des Reichsgerichts in Zivilsachen' vol 107, 76, 77.

115 Schätzel (n 12) 378, 418.

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

sies 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 was done 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 one of the allied or associated Power. [117]

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.[118] 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 the conclusion that MATs were internal bodies as well.[119] Finally, the greatest controversy that arose regarding Article 297 VPT was the nature of the right to claim of the individual; the question about whether he acted in his own name, on behalf of the state or even as an organ of the state remained unclear.[120] In opposition to Blühdorn, Geier argued that the right conferred by Article 297 VPT found its root in the German legal system. According to him, 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 also considered as internal jurisdictional bodies of the states. [121]

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117 Blühdorn (n 14) 144–146.

118 Georg Geier, *Das internationale Privatrecht der Gemischten Schiedsgerichte des Versailles Vertrages* (1930) 7; Calamendrei (n 53) 293, 333, called them '*tribunali anfibi*'.

119 Geier (n 118) 10–11, with further references.

120 See supra n 60 on the position of the MAT.

121 Geier (n 118) 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.

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 MATs, as well as before the national courts, the idea of an exceptional jurisdiction prevailed. As a consequence, the prevailing view was that the competences of the MATs had to be interpreted narrowly. However, 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 and common for the claims opposing an individual and the enemy state.[122]

The lack of agreement extended to practice. An early decision of the French–German MAT, *Société vinicole de Champagne v Mumm*,[123] defended the broadest interpretation: the MATs' 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.[124] However, the decision was soon contested: the Polish–German MAT's decision in *Leo von Tiedemann v Poland*, of 21 May 1923, was frequently quoted as the leading case in this regard;[125] others followed where the jurisdiction of the MATs was literally confined to the cases where it clearly[126] resorted from the peace provisions that the contracting states '*ont entendu distraire le*

122 Calamandrei (n 53) 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 representatives of the second view. For the third opinion Hermann Isay, 'Die Zuständigkeit der Gemischten Schiedsgerichte' [1924] Juristische Wochenschrift 596, 597. All opinions were strongly influenced by the respective nationality of the authors.

123 French–German MAT, *Société vinicole de Champagne v Mumm* (5 March 1921) 1 Recueil MAT 22–27, for a critique Strupp (n 6) 661, 663. The economic and political background of the case was explained by Göppert (n 34), 60–62.

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

125 Polish–German MAT, *Leo von Tiedemann v Poland* (21 May 1923) 3 Recueil MAT 596, 601–606; Belgian–German MAT *Joseph Zurstrassen et Cie v Germany* (22 May 1924) 4 Recueil MAT 326, 338.

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

défendeur de son juge naturel pour le soumettre à la juridiction exceptionnelle des TAM.'[127]

The idea of a restricted jurisdiction was echoed by national courts. Although the were willing to give up their own jurisdiction—even by closing on-going procedures upon the VPT entering into force—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 an MAT decision 'can only be conclusive within the limits assigned to it by the Treaty. It cannot ... assume jurisdiction in matters outside its province.'[128] 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.[129]

The specific nature of the MATs was also highlighted by several decisions of the PCIJ. Repeatedly, the PCIJ was asked to interpret the peace treaties, especially to delineate the part on reparations (Article 231ff VPT) from the economic provisions.[130] Another dispute related to the issue of whether liquidated assets in Upper Silesia had been in the ownership/possession of the German State or of German nationals, who would be entitled to compensation under Article 297(h) VPT.[131] In *Certain German Interests in Upper Silesia*, the PCIJ clearly stated that there was no pendency between the MATs and the PCIJ because the MATs were only competent to decide about the restitution of a company whereas the PCIJ was asked to interpret the peace treaty (as a whole).[132] Eventually, the PCIJ considered

127 Serb–Austrian MAT, *Wapa v Austria and others* (23 March 1923) 3 Recueil MAT 720, 728; Serb–Bulgarian MAT, *Raffinerie et Sucrerie serbo-tchèque Tchoupria v Bulgaria* (3 April 1923) 3 Recueil MAT 185, 191; Czechoslovakian–German MAT, *Paalen v Germany* (27 April 1923) 3 Recueil MAT 993, 997.

128 Decision of the English Controller and Registrar of Patents (5 and 8 May 1922) 2 Recueil MAT 164, 172.

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

130 PCIJ, *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation)* (12 September 1924) Rep ser A no 3.

131 PCIJ, *Certain German Interests in Upper Silesia* (25 May 1926) Rep ser A no 7, 33.

132 PCIJ, *Certain German Interests in Upper Silesia* (Admissibility) (25 August 1925) Rep ser 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.

itself as a court of general jurisdiction (competent for the interpretation of international law) and the peace treaties being a part of it.[133]

3.2. Modern Parallels

The debate about the legal nature of the MATs recalls the debate about the legal nature of other modern international courts and tribunals deciding on claims of individuals against states and international organizations such as the Iran–US Claims Tribunal,[134] the United Nations Compensation Commission[135] or the Eritrea–Ethiopia Claims Commission.[136] The most interesting parallelism relates to investment arbitration.[137] Although both areas of law are different and the current structure of investment arbitration does not correspond to the institutionalized dispute resolution by arbitral tribunals, there are some similarities to be mentioned here.

First of all, there is a basic resemblance. In a non-technical way, the MATs protected private investments (especially in the case of Article 297(e) VPT) in the belligerent states which had been affected by economic warfare.[138] The procedural standing of the individuals before the bodies corresponds to the position of individual investors before modern arbitral tribunals. The similarities might even increase if permanent investment courts were to be established.[139] Today, the relationship between domestic courts and investment arbitral tribunals is sometimes described as that of jurisdictions belonging to two different spheres, ie domestic and international law. In this context, some authors refer to the case law of the PCIJ

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133 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).

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

135 Hess (n 16) 49, para 95 ff.

136 Van Houtte (n 134) 517, 526 ff.

137 Hess (n 16) 49, para 104 f.

138 Eg, factories owned by enemy nationals had been put under trusteeship, see above (n 3).

139 Cf the proposals of the EU Commission concerning a multilateral investment court. See the negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes (20 March 2018) <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 29 November 2018.

regarding the MATs as belonging to a different order. However, in the case law of the PCIJ, the MATs were (somewhat) more 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 each MAT (and the admissibility of the claim) depended on the nationality of the claimant, disputes about nationality played a pivotal role in the case law of the MATs. As a starting point, each plaintiff had to bring a claim to the MAT established by his 'home state'.[140] This rule also applied to claims brought by a variety of plaintiffs.[141] The crucial moment for this requirement was the filing of the claim.[142] 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).[143] Against this background, it is no surprise that considerable case law of the MATs related to the nationality of the parties—especially to the control of moral persons by shareholders.[144] However, the principles applied in this context were specific to the extraordinary war measures. As a result, the case law regarding corporations was contradictory.[145]

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140 Belgian–German MAT, *Charles Petit et Cie v Thun* (29 October 1922) 2 Recueil MAT 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.

141 British–German MAT, *Koch v Landauer Nachfolger* (7 and 17 December 1923) 3 Recueil MAT 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.

142 Again, a uniform approach was missing, Schätzel (n 12) 378, 426–430; Lipstein (n 141) 51, 67–69.

143 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.

144 Lipstein (n 143) 142, 160 ff.

145 Schätzel (n 12) 378, 429; Lipstein (n 141) 51, 69. Some MATs applied the incorporation theory, others the control theory.

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.[146] As a result, more than 20,000 additional claims from Alsace-Lorraine were filed with the MAT; German observers criticized this, arguing that these claims had been systematically collected by 'French agents'.[147]

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

One of the most interesting questions about the disputes allocated to the MATs relates to the determination of the applicable law, an issue that 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.[148] 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 these legal systems.[149]

4.2.1. The Debate Among Scholars

Many contemporary authors of diverse nationalities addressed the issue of which law was to be applied by the MATs, either in general terms, or in

146 French–German MAT, *Veuve Heim v Germany* (30 June 1921 until 19 August 1921) 1 Recueil MAT, 381; French–German MAT, *Chamant v Germany* (23 June–25 August 1921) 1 Recueil MAT 361.

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

148 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, art 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 …'

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

their comments on specific decisions. A reading of the scholarly texts of the time reveals 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 focuses critically on what the MATs should do or should have done on this point. Seen from a distance, the latter is more interesting. 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 regard,[150] leading, as we will see, to equally great disappointments.[151] 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.[152] The proponents 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 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.[153]

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150 Niboyet (n 49) 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 meilleure 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 53) 293, 337, MATs are called to '*risolvere la questione secondo i criteri che esso Tribunale adotterebbe ove fosse chiamato come legislatore internazionale a formulare un sistema di principi relativi alla competenza legislativa e giudiziaria dei vari Stati*'.

151 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 141) 51, 67 f.

152 The 'bilateral' nature of the MAT supported this approach.

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

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 coincided contents-wise;[154] or the law that the competent judge would have applied had he been seized of the dispute.[155] 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.[156]

Scholars who claimed that the jurisdiction of the MATs did not have national but international roots derived 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 present, which, when added to general principles, would sustain an '*internationales Weltprivatrecht*' for international trade.[157] Other scholars who believed, in addition, that MATs were free from a specific PIL system argued that for any divergence between the conflict of law rules between the different legal systems MATs should look for '*einem überstaatlichen internationalen Privatrecht irgendwelcher Art*',[158] to be derived from public international law and the principles of personal and territorial sovereignty.[159]

In a similar vein, in the light of the Treaty's silence, these scholars preferred a '*völkerrechtsgemäße*' solution (ie a solution in accordance with inter-

154 It was proposed, but finally rejected, by Albrecht Mendelssohn-Bartholdy, 'Die Vorkriegsvertraege (Art. 299 des FV) und das internationale Privatrecht' [1921] Juristische Wochenschrift 133, 134. Geier (n 118) 20, with further references. Niboyet (n 49) 97, 104, who criticizes the solution for its pragmatic—as opposed to dogmatic—character, nevertheless accepts it as 'comfortable and legitimate'.

155 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.

156 Geier (n 118) 47–59.

157 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.

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

159 The contemporary debate was thoroughly analysed by Lipstein (n 143) 34, 37–38.

national law). Accordingly, MAT decisions should be based on the minimum requirements imposed by public international law relating to private law, referred to as '*überstaatliche Internationalprivatrechtssätze*',[160] 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 reservations, the closest connection, meaning the national legal system to which the circumstances of the case pointed preponderantly. These rules were deemed not only relevant per se, but because they should also inspire the MATs when addressing remaining issues.[161]

4.2.2. The Case Law of the MATs

Questions about the applicable law arose frequently before the MATs as it could not be assumed 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,[162] to the application of the positive rules in force in the national legal systems. However, a common approach in that sense did not exist, either from the perspective of the method or in terms of concrete solutions. As a rule, disputes were solved on a case by case basis, and most often pragmatically. Without pretending to systematize an incomprehensible casuistry, one can ascertain the following trends: avoiding the issue (eg when the systems of the two states involved present, or are assumed to do so, an identical material solution);[163] 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

160 Franz Kahn, 'Abhandlungen zum internationalen Privatrecht I' (1928) 284–87.

161 Especially Gutzwiller (n 49) 123, 126 ff.

162 In some regulations, the principles of justice and equity were referred to as grounding both the procedural and the material solutions: see for instance Rules of Procedure of the French–German MAT (2 April 1920) 1 Recueil MAT 57, art 99.

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

legal systems); [164] resort without further justification to connecting points (especially to more than one, when either of them would lead to the same final outcome;[165] or to an alleged choice of the parties to the controversy).[166] Finally, some decisions were based on (assumed) general principles of law: respect for vested rights,[167] the application of the personal law of the deceased in succession matters,[168] the law of the place where the contract is concluded for contractual obligations,[169] 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).[170]

From a modern perspective, one must assume that the MATs did not develop a comprehensive jurisprudence on conflict of laws. They addressed outstanding issues on a case-by-case approach. Generally, their perspective was influenced by the specific bilateral situation of the case at hand. Often, conflict of law issues remained undecided because the MAT came to the conclusion that potentially applicable substantive laws of the two states involved were identical.[171] This solution was criticized by the legal doctrine[172] but appears understandable against the background of the huge case load on which the MAT had to decide. As a result, the case law of the MATs appeared to be scattered and fragmented. Finally, there are only a

164 Niboyet (n 163) 105; Geier (n 118) 30, would nevertheless support a less critical reading, according to which the MATs were simply not disclosing the connecting point.

165 Romanian–German MAT, *S Landes v W Schuster* (25 July 1927) 7 Recueil MAT 747, 750; Romanian–German MAT, *Société Phoenix v Germany* (24 July 1926) 7 Recueil MAT 103, 110.

166 Czechoslovakian–German MAT, *Gellert v Kolker* (24 October 1923) 4 Recueil MAT 515, 520; Czechoslovakian–German MAT, *Goldschmiedt v Heesch Hinrichsen et Cie* (30 November 1923) 4 Recueil MAT 530, 534; Czechoslovakian–German MAT, *Loy and Markus v Germany and Deutsch Ostafrikanische Bank AG* (22 April 1925) 5 Recueil MAT 551, 563.

167 Romanian–Hungarian MAT, *Emeric Kulin père v Romania* (10 January 1927) 7 Recueil MAT 138–150.

168 French–German MAT, *Zeppenfeld v Germany* (30 March 1926) 6 Recueil MAT 243, 247.

169 Belgian–German MAT, *Medts v Graff* (9 January 1924) 3 Recueil MAT 798, 800.

170 Romanian–German MAT, *P Negreanu v Meyer* (16 June 1925) 5 Recueil MAT 200, 211.

171 In this respect, the composition of the tribunal was helpful as familiarity with the two applicable legal systems was represented at the bench.

172 Niboyet (n 151) 153, 221 ff; Gutzwiller (n 49) 123, 137.

few decisions where the MATs developed general principles of conflicts of law which could serve as a general reference.[173]

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 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, except for when political crises like the occupation of the Ruhr Region between 1923 and 1925 created considerable tension within the MATs. Nevertheless, the regime of the MATs did not always work to the detriment of German parties (and Germany's former allies). For instance, the competence of the Polish–German MAT operated in favour of the expropriated German owners of factories and (large scale) farms. In this context, it was reported that the Polish–German MAT was not less unpopular in Poland than the MATs with the Allied powers in Germany.[174] The abrupt termination of most of the MATs by the Young Agreements in 1930 was the main reason why the experiment of the MATs was quickly forgotten—despite their case law being widely 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.[175] They were not bound by their previous decisions or by those of others (although cross-references may be identified); thus, 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 regu-

173 As highlighted by Lipstein (n 141) 51, 68 ff.
174 Schätzel (n 12) 378, 391.
175 Lipstein (n 143) 142, 150; Gutzwiller (n 49) 123, 128 f; Niboyet (n 151) 153, 222.

lar conferences which allowed for solving problems uniformly,[176] some attempts were made to unify the case law—for instance, the four sections of the French–German MAT created a collegiate body composed of the four presidents plus one arbitrator of each state—but this attempt did not come to fruition.[177] 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 'bilateralization' of the individual MATs is telling. On the other hand, the PCIJ was asked to decide on precise aspects of the peace treaties, but there was no intention of the state parties to entrust the PCIJ with the task of being the last arbiter with regard to the peace treaties.[178] In the political tensions of 1930s, the idea of a peaceful settlement of political disputes was quickly lost.[179]

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 World War II did not foresee MATs but did provide for some mixed commissions.[180] Obviously, the lack of interest was due to the negative perception of the work of the MATs in contemporary practice. They were disregarded because of the fragmentation of the case law, the politicization of the disputes and also because their dissolution occurred so quickly in the 1930s.[181]

On the other hand, regional international courts were established in the Western (democratic) post-war societies. The ECtHR and the CJEU are powerful examples of international judiciaries with far-reaching competences to set a level playing field where human rights and fundamental val-

176 Gidel & Barrault (n 122) xxiv.

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

178 See above (n 133). One should not forget that the PCIJ had been set up by art 14 VPT.

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

180 Dolzer Rudolf, 'Mixed Claims Commissions' in Wolfrum Rüdiger (ed) *Max Planck Encyclopedia of Public International Law* (OUP 2011).

181 Ernst Rabel, 'International Tribunals for Private Matters' (1948) 3 Arbitration Journal 209: 'International tribunals ought to be established totally different from the Mixed Arbitral Tribunals of the Versailles Treaty'. No further explanation was given regarding this bold statement.

ues are respected and implemented. Here, the role of the individual as a party on the international plane has been recognized.[182]

From a modern point of view, the work of the MATs should be reassessed. 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 terms, mass claims—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 standardizing 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. 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.

182 It should be noted that many jurists who had been involved in the work of the MATs were later involved in the establishment of the European Court of Justice as well. Cf Erpelding (ch 12).